TWO SIDES OF THE SAME COIN: A REPUBLICAN ARGUMENT FOR READING THE
NINTH AND TENTH AMENDMENTS AS ONE

by

MICHAEL TODD SKEEN

(Under the Direction of ALEXANDER KAUFMAN)

ABSTRACT

To better understand the relationship between power and liberty, this study draws on
principles of republican political thought, a combination of primary documents and historical
analysis, as well as an assemblage of landmark cases and concepts in American constitutional
law to craft a republican argument for reading the Ninth and Tenth Amendments as one. The
interplay between these two capstone Amendments to the Bill of Rights is deeply rooted in the
framers’ perception of the inextricable relationship between rights and powers. Indeed, they
largely thought of rights and powers as the obverse of each other—to put it differently, as
opposite sides of the same coin. Moreover, when taken together, these two Amendments
represent a microcosm of the often-intersecting theme of structure, power and liberty that
permeates the Constitution’s text, as well as the political philosophy of the American founding
generation.

INDEX WORDS: American Political Thought, Power, Liberty, Republicanism.
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MICHAEL TODD SKEEN

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by

MICHAEL TODD SKEEN

Major Professor: ALEXANDER KAUFMAN
Committee: JOHN MALTESE
           SEAN INGHAM

Electronic Version Approved:

Suzanne Barbour
Dean of the Graduate School
The University of Georgia
August 2015
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>LIST OF FIGURES</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>vi</td>
</tr>
</tbody>
</table>

## SECTION

1. **INTRODUCTION: MOTIVATION OF THE STUDY** .............................................1
   1.1 The Point of Departure: *Griswold v. Connecticut* ................................2
   1.2 The Argument Ahead .............................................................................10

2. **A BRIEF OVERVIEW OF ECUMENICAL REPUBLICANISM** ...........................17
   2.1 Popular Sovereignty ........................................................................ 19
   2.2 The Common Good ........................................................................... 23
   2.3 Deliberation .................................................................................... 27
   2.4 Liberty as Nondomination ............................................................... 30
   2.5 Participation ................................................................................... 34

3. **POWER, LIBERTY AND THE BILL OF RIGHTS: THE FEDERALIST POSITION** ....39
   3.1 Antifederalist Concerns .................................................................... 44
   3.2 James Wilson’s Rejoinder .................................................................. 47
   3.3 Hoist by their own Petard .................................................................. 52
   3.4 The First Congress ............................................................................ 55
   3.5 Summation and Discussion ............................................................... 57

4. **THE SPIRIT AND PRINCIPLE OF THE TENTH AMENDMENT** ....................62
LIST OF FIGURES

Page

Figure 1: A COUNTERACTING CONTINUUM OF CONSTITUTIONAL AUTHORITY.......87
SECTION 1

INTRODUCTION: MOTIVATION

OF THE STUDY

After lying dormant for more than a century and a half, the U.S. Supreme Court’s decision in *Griswold v. Connecticut* roused the Ninth Amendment from its peaceful sleep.\(^1\) Although prior to 1965 the High Court never openly embraced such a view, the *Griswold* majority accepted the Ninth as textual justification for the judicial enforcement of a wide array of unenumerated individual rights. The dissenting Justices strongly objected. They claimed the Ninth simply mirrored the Tenth as a broad statement of rather narrow federal power. At first blush, however, this is somewhat puzzling because the Ninth Amendment refers only to *rights* while it is the *Tenth* that refers to powers.\(^2\) As such, the two Amendments seem to be responding to different concerns. Yet under the dissenters’ reading, the text of the former looks to have no independent meaning from the latter. So as a matter of mere linguistic interpretation, the conflation of the two Amendments seems to be so obviously flawed that perhaps it should simply be ignored. This offhand dismissal, however, may be somewhat premature. Whatever we may think of them as juridical, political, or even social figures, the dissenting Justices in *Griswold* were capable of reading critically and comparing passages of constitutional text—perhaps we may be missing something. Furthermore, was the majority’s interpretation so

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\(^1\) 381 U.S. 479 (1965). Also see U.S. Constitution, Amendment IX: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

\(^2\) See U.S. Constitution, Amendment X: “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.”
unmistakably correct? Given the rather muddled nature of judicial review circa 1787, it certainly is not obvious that the Ninth Amendment was intended to invite the judicial enforcement of non-textual rights. Now it may have been, but why should we foreclose on other likely alternatives? For the sake of argument, then, if little else, let us accept the notion that the *Griswold* dissenters had something important to offer and let us see where this takes us within the realm of American republican government.

1.1 **The Point of Departure: Griswold v. Connecticut**

In 1953 when Estelle Griswold took over the daily operation of the Planned Parenthood League of Connecticut’s newly established women’s clinic in the town of New Haven, home to both Yale University and a rather large Catholic population, she had little idea what the future had in store.³ Unbeknownst to her, a state statute originally enacted in 1879 amidst the fervor of the post-Civil War social purity crusade of Anthony Comstock, a diehard Victorian moralist, criminalized the use of “any drug, medical article or instrument for the purpose of preventing conception.”⁴ In conjunction, Connecticut’s general statute on criminal accountability prohibited the actions of anyone who “assists, abets, counsels, causes, hires, or commands

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⁴ Conn. Gen. Stat. Rev. §§ 53-32 (1958). The 1879 statute was codified in the 1958 revision of the General Statutes of Connecticut as sections 53-32: “Any person who uses any drug, medicinal article or instrument for the purposes of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.”
another” to commit an offense.\textsuperscript{5} In short, operating a family planning clinic in Connecticut circa 1960 was simply taboo—at least in the eyes of the law.

Although no one had ever actually been prosecuted under the state’s anti-contraception statute, when the New Haven city prosecutor’s office received a citizen complaint from an incensed James G. Morris, a devout Catholic father of five who read about the clinic’s opening in local newspapers, officials felt duty-bound to pursue the matter. Keeping with the age-old teachings of the Catholic Church, Morris firmly believed that contraception was a clear violation of God’s law regarding procreation. So he demanded that the anti-contraception statute be enforced to the letter.

After a cursory investigation, Griswold and Dr. Thomas Buxton, a Yale medical professor and licensed physician in obstetrics and gynecology, were both arrested, charged, tried, found guilty, and fined $100 each for abetting violation of the state’s anti-contraception statute by married couples. The Supreme Court of Errors of Connecticut affirmed their conviction, outright rejecting the argument that the defendants could not be punished as accessories because any prosecution of the underlying principles in the case would be unconstitutional.\textsuperscript{6} The Court of Errors further commented that courts

\textsuperscript{5} Conn. Gen. Stat. Rev. §§ 54-196 (1958). The act of counseling women on the use of birth control (particularly, what was then the most commonly prescribed form, the diaphragm) even if performed by a licensed medical professional, was proscribed by an “accessory statute,” sections 54-196 of the 1958 revision of the General Statutes: “Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.”

…may not interfere with the exercise by a state of the police power to conserve the public safety and welfare, including health and morals, if the law has a real and substantial relation to the accomplishment of those objects. The legislature is primarily the judge of the regulations required to that end, and its police statutes may be declared unconstitutional only when they are arbitrary or unreasonable attempts to exercise its authority in the public interest.\(^7\)

Griswold and Buxton appealed their conviction to the U.S. Supreme Court. In so doing, the factual circumstances and legal questions involved in the now landmark case of *Griswold v. Connecticut* helped to set the stage for much of the contemporary debate about the proper meaning of the Ninth Amendment and its appropriate role in judicial review.

In this seminal ‘right to privacy’ case, by a margin of seven to two, the Justices of the U.S. High Court held that the Connecticut statute was most certainly unconstitutional. In writing the majority opinion, Justice William O. Douglas dismissed the idea that the judiciary is bound to enforce only those rights strictly enumerated within the text of the Constitution:

“…specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give life and substance. Various guarantees create zones of privacy.”\(^8\)

Specifically, the Connecticut statute violated the right of marital privacy created by penumbras emanating from constitutional guarantees contained in the First, Third, Fourth, Fifth and Ninth Amendments:

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\(^7\) 151 Conn. 544, 546-47.

\(^8\) 381 U.S. 479, 484.
The right of association contained in the penumbra of the *First Amendment*...the *Third Amendment* in its prohibition against the quartering of soldiers ‘in any house’ in time of peace without the consent of the owner is another facet of privacy. The *Fourth Amendment* explicitly affirms the ‘right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.’ The *Fifth Amendment* in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The *Ninth Amendment* provides: ‘The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.’

While mentioned only in passing in Justice Douglas’ majority opinion, the Ninth was the centerpiece of Justice Arthur J. Goldberg’s concurring opinion, which was joined by Chief Justice Earl Warren and Justice William Brennan:

The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments… To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and give it no effect whatsoever. Moreover, a judicial construction that this

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9 381 U.S. 479, 482-86. (Emphasis added).
fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment…the Ninth Amendment shows a belief of the Constitution’s authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive.¹⁰

Justice Goldberg concluded that the language of the Ninth Amendment protects the right of marital privacy even though that particular right is *not expressly listed* in the Constitution. It should be noted, however, that he is *not* asserting that a right of marital privacy is fundamental *because* of the Ninth—the right existed antecedent to the Constitution; therefore, the Constitution cannot be its source, only its guardian. Indeed, he was careful not to treat the Amendment as an independent source of judicially enforceable rights, but as more of a ‘rule of construction’ that invites the judiciary to construe already enumerated rights rather broadly, including the many aspects of liberty protected by the Due Process Clause of the Fourteenth Amendment.¹¹ Thus, the basic premise of his opinion is that the Ninth Amendment is a (limited) rights-oriented vehicle through which the judiciary can indeed discover and enforce non-textual rights.

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¹⁰ 381 U.S. 479, 488.

¹¹ See U.S. Constitution, Amendment XIV, § 1, Cl. 3. Directed to the states, their officials and local governments, the Due Process Clause reads: “…nor shall any State deprive any person of life, liberty, or property, without due process of law.”
To most contemporary Americans, Justice Goldberg’s opinion has an almost intuitive appeal, for it seems to track well with our modern conception of rights as “trumping” governmental powers.\footnote{The metaphor “rights as trumps” is indebted to Ronald Dworkin. See for example, Ronald Dworkin, “Rights as Trumps” in Theories of Rights (Oxford: Oxford University Press, 1984) 153-67.} Recall that the Ninth Amendment provides:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.\footnote{See U.S. Constitution, Amendment IX.}

In other words, by listing specific rights it will not usurp ‘other rights’ that are not listed. These unenumerated rights will not be ridiculed or rejected simply because they are not written into the text of the document. There may well be other reasons to deny them, but a failure to list them in the Constitution is not one. Indeed, the Ninth’s reference to rights not enumerated suggests—perhaps even promises is not too strong of a word—that these non-textual rights have a constitutional status on par with others found elsewhere in the Bill of Rights and the Constitution itself.

On one reading, then, Justice Goldberg may not actually have gone far enough when he treated the Ninth Amendment as a simple rule of judicial construction that aims for a deeper understanding of already enumerated rights—that is to say, for the unpacking and protecting, so to speak, of any relevant concepts that might be entailed in previously listed rights. Indeed, the language of the Ninth could easily be construed to embrace a rather large body of completely unenumerated substantive rights. These juridically tailored rights could be cut from whole cloth and then enforced with the same vigor as their enumerated brethren.
That broader possibility aside, remarks made in the First Congress by James Madison—the founder who is typically credited as being the principal author of the Ninth Amendment as well as the Father of the Constitution—when he read into the Congressional Record a final listing of proposed amendments for a bill of rights gathered from the various state ratifying conventions, seem to confirm Justice Goldberg’s basic premise. Madison’s comments suggest that the Ninth Amendment creates a constitutional ‘guarantee’ that even though they may not be strictly enumerated within the text of the document there are other rights that nonetheless exist and should be protected from governmental encroachment:

It has been objected also against a bill of rights that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution [the provision that would eventually become the Ninth Amendment].

It should be noted, however, to the extent that Madison’s proposed safety measure could invite a type of freewheeling judicial activism—left or right leaning—it might foster legitimate concerns about the proper scope and role of judicial review within the American system of

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republican government—specifically, about the desire to restrain the judiciary from substituting its ‘judicial judgment’ for the ‘political judgment’ of duly elected representatives. We have already seen this unease expressed by the judges of the Connecticut Court of Errors. The circumscribed approach of the dissenting Justices in *Griswold*—Hugo Black and Potter Stewart—also seems to derive from just such worries.

Justices Black and Stewart strongly object to the majority opinion.15 According to them, the Ninth Amendment should be read in conjunction with the Tenth as reflecting *nothing* more than an underlying bedrock principle of American federalism: the federal government can exercise only those *powers* that it has been “granted expressly or by necessary implication.”16 The Ninth, therefore, does *not* afford the judiciary a license to create and enforce individual rights. The dissenters’ interpretation, however, seems to downplay some noticeable differences between the two Amendments that look to be important.

The Tenth Amendment certainly expresses the ‘reserved powers principle’ which they properly attribute to it:

> 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.17

The Ninth, on the other hand, refers only to *rights*, not powers. As we saw, Madison himself notes that the Amendment responds to a very different concern, namely, the fear that a

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15 381 U.S. 479, 507 and 520 (Black, J., dissenting, joined by Stewart, J.); *Ibid* at 527, 529-30 (Stewart, J., dissenting, joined by Black, J.).

16 381 U.S. 479, 519.

17 U.S. Constitution, Amendment X.
specification of rights might be understood to “deny or disparage” other rights left unmentioned. As such, the Ninth certainly seems to convey something notably different from the Tenth. Under the reading of Justices Black and Stewart, however, the text of the former appears to have no standalone meaning from the latter. Indeed, they seem to intentionally conflate the substance of the two Amendments into a single notion. Apparently, for them, the Ninth does no more than establish the same republican principle of American federalism that is implicit in the text and structure of the Constitution and explicitly articulated in the words of the Tenth Amendment—the federal government is a government of limited powers. Or so it might seem.

1.2 The Argument Ahead

In the balance of this study, by using a collection of basic principles gathered from the overall body of republican political thought, a combination of primary documents and historical analysis, as well as an assemblage of landmark cases and concepts in American constitutional law, we will explicate the Black and Stewart thesis. At the outset, however, it should be noted this study is not exclusively aimed at Griswold. Rather, Griswold is the point of departure and provides an interesting conceptual framework for much of what follows—this study is more of an exploration of the viability of the constitutional world created by a careful unpacking of the dissenting perspective.

To this end, in order to better understand the relationship between rights and powers, we will craft a republican argument for reading the Ninth and Tenth Amendments as one, that is, as two sides of the same coin. We argue that the separate Amendments create a matched response to the Antifederalists’ fear that the Constitution of 1787 established an overarching federal government with virtually unlimited power that might be used to dominate the several states and their respective citizens. The two Amendments are complementary. They are not redundant.
Initially, they were both directed only toward the federal government, which was the source of the fear motivating their adoption. They have a strong familial resemblance because they were conceived as twin guardians of our innovative system of divided government. The Amendments are designed to work in harmony to ensure the federal government would stay within its respective sphere of authority and competence. The interplay between these two Amendments is deeply rooted in the framers’ perception of the inextricable relationship between rights and powers. Indeed, the Constitution’s framers typically thought of rights and powers as being the obverse of each other—in other words, as different sides of the same coin. Moreover, when taken together, these two Amendments represent a microcosm of the often-intersecting theme of structure, power, and liberty that permeates the Constitution’s text, as well as the political philosophy of the founding generation.

To begin substantiating the above, Section 2 provides us with an overview of some key concepts drawn from the general body of republican political thought—these are the root tones that will be sounded at various volumes throughout the remainder of this study. We characterize this overview as ecumenical because it does not seek to differentiate critically between the various strands in republican thinking. Instead, this study takes a more thematic and inclusive approach. The reason for this is to avoid becoming bogged down in conceptual quicksand concerning the fine points of any particular thinker’s understanding of republicanism versus that of another. To this end, five interrelated and overlapping republican themes are highlighted: ‘popular sovereignty’ and ‘the common good’ as absolutely indispensable conditions of political

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legitimacy; ‘deliberation’ and ‘participation’ as vital political activities that serve to bind popular sovereignty to the pursuit (and the acquisition) of the common good; and ‘liberty as nondomination,’ which is understood as an exceptionally important aspect of the common good.

In Section 3, we turn to the specific context of the American founding, particularly to the debates over the ratification of the Constitution of 1787 and the subsequent adoption of the Bill of Rights. As the capstone to the Bill of Rights, the substance of the Ninth and Tenth Amendments features prominently in the discussion. We will start by looking at the Federalist position concerning the role of the proposed Constitution as well as their reluctance to include a bill of rights in the original document. On the whole, the Federalists sought to secure the bounty of benefits that more effective, energetic government could bring to the American people, especially within the form of a constitutional republic. Yet they were adamant that a bill of rights appended to the Constitution would be both unnecessary and perhaps even dangerous to the cause of liberty. Despite Federalist persistence, the Antifederalists were not convinced. Indeed, they typically took the omission of a bill of rights to foreshadow the possibility of a tyrannical federal government that could tread heavily on the hard-won liberties of the people. Eventually, in one of the most meaningful compromises in American political history, the Federalists relented. In exchange for ratification support from the Antifederalists, the Federalists agreed to add a bill of rights to the Constitution at the first opportunity. True to their word, at the First Congress—shepherded by James Madison—a bill of rights was added to the Constitution of 1787. In the ebb and flow of the arguments for and against the adoption of the Bill of Rights, we will begin to gain critical insights into just how the framers perceived the inextricable relationship between the liberty of citizens and the power of government.
In Section 4, we will follow the power, which necessitates a discussion of the language, spirit and principle of the Tenth Amendment. As we will see in Section 3, for the many of the Constitution’s framers the key to preserving liberty is found in controlling power. So here in Section 4, we will start to sketch the source and flow of American political power. We will begin to examine just how ‘retained rights’ might operate within a constitutional system in which political power is both shared and withheld. In so doing, we will begin to develop the fundamental notion that the primary purpose of the Tenth Amendment’s reservation of the ‘unenumerated powers’ is to ensure the retention of the Ninth Amendment’s ‘unenumerated rights.’

In Section 5, we turn our attention to contemporary political life and begin to examine a hypothetical—the medical use of marijuana—that will allow us to start comparing what this study refers to as ‘the standard model’ (i.e., the approach of the Griswold majority) and ‘the matched model’ (i.e., reading the Ninth and Tenth Amendments as one) to see if there is any benefit to be gained by pursuing the later. For our purposes, the topic of medical marijuana is particularly salient. Congress has forbidden all marijuana use. Moreover, categorized in the Controlled Substances Act of 1970 as a Schedule I narcotic—the most severe classification available—Congress recognizes no legitimate therapeutic or medicinal value for the plant. Furthermore, in the California-based case, Gonzales v. Raich, the High Court affirmed Congressional power to enact the proscription. In fact, the Court suggested that the federal

19 545 U.S. 1 (2005). In 1996 the people of California approved a ballot initiative, The Compassionate Use Act, California Health and Safety Code § 11362.5, which legalized marijuana for medicinal purposes as recommended by the patient’s physician. So Diane Monson, one of the respondents, an accountant, suffering from a degenerative spine disease, was rather surprised when the
commerce power to regulate and consequently to proscribe medical marijuana—among many other things—was almost unlimited. The decision caused many Court watchers to declare that

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federal Drug Enforcement Administration (DEA) seized the six doctor-prescribed marijuana plants growing in her backyard as illegal contraband under the auspices of the federal Controlled Substances Act. Monson and fellow marijuana patient, Angel Raich, who has brain cancer, sought a preliminary injunction to block the DEA from enforcing the ban. Their attorneys argued that local cultivation and consumption of marijuana is lacking the important ‘commercial’ and ‘interstate’ character seemingly required by the Court’s recent Commerce Clause decisions in United States v. Lopez, 514 U.S. 549 (1995) (striking down the federal Gun Free School Zones Act as outside the commerce power) and United States v. Morrison, 529 U.S. 598 (2000) (striking down a portion of the federal Violence Against Women Act as outside of the commerce power). The federal district court ruled against the patients. The Ninth Circuit Court of Appeals, however, reversed the lower court’s decision and ruled the Controlled Substances Act an unconstitutional overreach as applied to the intrastate cultivation and possession of marijuana for medicinal purposes. The federal government appealed the ruling to the U.S. Supreme Court. In a six to three decision, delivered by Justice John Paul Stevens, the Court held that the Commerce Clause grants Congress the authority to prohibit the local cultivation and use of marijuana, despite any contrary state law. Justice Stevens noted that precedent “firmly established” Congress’ commerce power to regulate purely local activities that are part of a “class of activities” that have a substantial effect on interstate commerce (545 U.S. 1, 17). Congress can legitimately ban local marijuana use (medical or otherwise) because it is part of just such a class of activities, namely, the national market for marijuana. Local use substantially affects supply and demand in the national marijuana market, therefore, making the regulation of intrastate use “essential” to regulating the plant’s national market (Ibid).
the so-called war over medical marijuana was finished and the states clearly lost. As long as Congress has the political will to eradicate marijuana usage, it would seem that there is virtually nothing that the states can do to stop it. But this does not seem to be the case. For in practice, *Raich* did not stop, or even slow, state-level legalization campaigns. An aim of this study, therefore, is to provide some of the philosophical and theoretical underpinnings for the refusal of the states—and the people—to kowtow to what they largely perceive as trespassing federal power.

In Section 6, given that there is some merit to pursuing the matched model, the proverbial elephant in the room must be addressed: the issue of federal supremacy. For the matched model seems to give the people of each state a potential trump on the exercise of federal power. Indeed, the proposed regime of ‘reserved powers and retained rights’ appears possibly to place the states over the federal government; thus, creating a kind of topsy-turvy constitutional world in which state law trumps the exercise of federal power. Most certainly this is different from what has come to be the orthodox view of federal supremacy. Is such a regime even possible? Or at this point have we simply fallen through the constitutional looking glass?

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In Section 7, we begin to develop a working definition or at least a somewhat more technical understanding of a retained right; because, in Section 8, we will start to consider the potential factors that go into determining exactly when the assertion of a retained right should (or at the very least might) prevail over contrary federal law. To this end, we will construct a simple qualitative conceptual tool—a sliding continuum that can be used to evaluate claims of counteracting constitutional authority—that will help us to shed some critical light on how to think about conflicts between federal power and retained rights.
SECTION 2

A BRIEF OVERVIEW

OF

ECUMENICAL REPUBLICANISM

The historical and conceptual landscape of ‘republicanism’ runs far and wide. A clear and concise definition, therefore, can be somewhat challenging to frame properly. By no means, for example, have all of the writers who are regarded as republicans been in total opposition to monarchy. Even amongst those who have, many of these have not understood this opposition as being all that there is to republicanism or as necessarily being the most important plank in their particular conception. Thus, if we try to identify a simple straightforward path in republicanism’s opposition to kingdoms—among a variety of other topics—the issue can become somewhat thorny rather quickly. Indeed, the sometimes misleading or confusing nature of the term ‘republicanism’ is what, at least in part, led Quentin Skinner—a principal founder in the Cambridge School movement in intellectual and political history and prominent


23 For a helpful discussion of some of the various republican traditions, and why for example Jean-Jacques Rousseau is considered by some to be a controversial republican figure, see Phillip Pettit’s, “Two Republican Traditions,” in Republican Democracy: Liberty, Law and Politics (Edinburgh: Edinburgh University Press, 2013).
figure in the neo-republican revival—to adopt in his later work usage of the term ‘neo-Roman,’ whereas previously he referred to “the republican theory of liberty.”  

There is, nevertheless, a litany of past writers, philosophers, theorists and thinkers who are often regarded as being members (to varying degrees) of the republican tradition. For example, prominent figures such as Aristotle, Cicero, Machiavelli, Sydney, Harrington, Milton, Jean-Jacques Rousseau, Thomas Paine, Jefferson, Madison, Tocqueville, Mary Wollstonecraft and Hannah Arendt, among a host of others. Of course, this rather diverse group is not all saying, or even emphasizing the same things. Nor do more contemporary theorists and philosophers who either sympathize with or perhaps even self-describe as republican—such as Maurizio Viroli, Philip Pettit, and the aforementioned Quentin Skinner—necessarily mean the same things when they employ the term. Its use, however, does not seem to be wholly subjective. There is a discernible substantive core of ideas or principles—whether they be from the ancient Greek or Roman context, the city-states of Renaissance Italy, the Enlightenment philosophy of continental Europe, the Anglo-Atlantic tradition, or the contemporary neo-republican revival—which incline a thinker and his or her work to be categorized as being a member of the longstanding republican tradition. Of course, these thinkers might understand these fundamental principles in different ways and tie them together in different fashions. Yet the more central these notions are to their writing the more defensible it becomes to regard that writing as being more or less republican in nature.


25 For an informative overview of the particulars concerning each of these thinkers approach to republicanism, see generally Part One, Iseult Honohan, Civic Republicanism (London: Routledge, 2002).
So what then are some of these fundamental core notions? To answer this question, this study uses an ecumenical conception of ‘republicanism’ that seeks to avoid much of the ongoing debate between the various entrenched historiographical camps in republican political thought.\^26 Although not wholly exhaustive of republican thinking, this working definition is based on five overlapping and mutually reinforcing main themes: popular sovereignty, the common good, deliberation, liberty as nondomination, and participation. These key themes represent the root notes and color tones that will be played at various volumes throughout the remainder of this study’s argument for reading the Ninth and Tenth Amendments as one, that is, as two sides of the same coin.

2.1 Popular Sovereignty

Most political thinkers who are characterized as republican favor a significant degree of popular involvement in collective decision-making because the legitimate commonwealth is one in which rule is exercised inclusively. This inclusivity is seen as an essential way of encouraging decisions that promote the common good, instead of merely catering to private interests. Now this is not to say that all republicans have been pure democrats. Indeed, classical republican thinkers, following the lead of Aristotle, tended to propose some form of ‘mixed regime’ or ‘mixed constitution’ that combines, blends, or balances elements of democracy, aristocracy, and possibly even monarchy, as being the best form of government for

promoting the common good. Support for this kind of classical mixture, for instance, can be found in the republican writings of the great Florentine, Niccolò Machiavelli:

I say thus that all the said modes are pestiferous because of the brevity of life in the three good ones and because of the malignity in the three bad. So those who prudently order laws having recognized this defect, avoiding each of these modes by itself, chose one that shared in all, judging it firmer and more stable; for the one guards the other, since in one and the same city there are the principality, the aristocrats, and the popular government.

A mixed regime seeks to balance the forces of society against one another in order to prevent the domination of the commonwealth by any one particular interest, and thus to realize the common good.

By contrast, contemporary republicans have become emphatically more democratic in their thinking and orientation. For them, legitimate political authority resides in the overall body of ‘We, the People’—the ultimate lawmakers, the ultimate bearers of responsibility for the laws and well-being of the commonwealth, should be the people themselves. For instance, in the American context *The Federalist Papers*, when read as a whole, paint a picture of republicanism that is far more democratic than is often thought, particularly by those who reside on the ideological right. Indeed, throughout the collection of essays, Publius repeatedly links

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29 Many modern day Americans have been taught that the Constitution of 1787 established a ‘republican’ form of government that stands in contrast to a ‘democratic’ one—that is to say, the framers
the idea of republican government with various aspects of popular sovereignty—\textit{republican government animated by a democratic impulse}.\textsuperscript{30} For instance, in the now much revered \textit{Federalist No. 10}, a few paragraphs before his unfortunately stilted explanation, Publius (in this case Madison) clearly links ‘republicanism’ with ‘majority rule,’ that is, with what he refers to as “the republican principle.”\textsuperscript{31} Moreover, when writing about the most basic characteristics of republican government, Publius frequently links the idea of “the capacity of mankind for self-government” with “the right of the people to alter or abolish the established Constitution,

\begin{quotation}
understood the idea of a republic as being filtered, purely representative government, as opposed to government that involves more direct modes of popular participation. A paradigmatic example of this line of thought can be found in Charles Beard’s influential yet controversial work, \textit{An Economic Interpretation of the Constitution of the United States} (New York: MacMillan, 1956), originally published in 1913.
\end{quotation}

\textsuperscript{30} In recognition of Publius Valerius Publicola, a Roman aristocrat who helped to overthrow the monarchy of Tarquin the Proud and usher in the First Roman Republic, ‘Publius’ is the shared penname used by the authors of \textit{The Federalist Papers}, either Alexander Hamilton, James Madison, or John Jay. When needed, the name of the specific author will be cited.

\textsuperscript{31} Modern-day misinterpretations of the role of popular involvement in American republican government tend to begin with the following from the now well-read \textit{Federalist No. 10} (New York: Mentor Books, 1999): “A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking. Let us examine the points in which it varies from pure democracy…[a] great point […] of difference between a democracy and a republic [is] the delegation of the government, in the latter, to a small number of citizens elected by the rest.”
whenever they find it inconsistent with their happiness.”  

Furthermore, legitimate republican government “derives all of its powers directly or indirectly from the great body of the people.” Indeed, the “genius of republican liberty…demand[s]…that all power should be derived from the people.” So with these few examples, we can begin to see that Publius took many pains to remind his readers that the Constitution of 1787 was being founded on “republican principles,” that is to say, “on the assent and ratification of the people of America, given by deputies elected for special purposes.”

Although contemporary expressions of republicanism tend to be more democratic leaning than we find in classical accounts, this is not to say that elements of the classical idea of the mixed constitution are not still prominently featured today. In a modern elaboration of mixed government, the excessive accumulation of power is still contested by seeking to balance power against power and interest against interest. To help secure the freedoms of the people, the American system of government, for example, is constituted on the basis of a horizontal ‘separation of powers’ that runs across three co-equal branches—between legislature (Congress), executive (President), and judiciary (Supreme and Federal Courts). Also, there is a further

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32 Publius. Federalist Nos. 39 and 78.


34 Ibid, No. 37. (Emphasis added).


36 The idea of separation of powers, influenced by Baron de Montesquieu’s interpretation of the British Constitution, provides not so much for a clear-cut separation of functions, as it does for a balance across the three branches of government whose functions sometimes overlap. Thus, the idea provides for a system of ‘checks and balances’ that is parallel to the balance between the factions in society afforded
separation of power that occurs within the widely dispersed federal system. These elements, however, must be understood as being ultimately subordinate to the sovereign will of the people. Furthermore, these elements should serve as functional ways of encouraging the people’s ‘deliberation,’ with an eye toward realizing ‘the common good.’

2.2 The Common Good

The notion that the people must be concerned with the ‘public’ or ‘common good’ and that they should take some personal responsibility for realizing it is among the most enduring themes in all of republican literature. This belief flows from the understanding of the people as living in largely unsought interdependence as equals within a shared political community, trying to build on this mutual reliance. For republicans the legitimacy of the commonwealth is not only a matter of who exercises political authority, but also of the ends to which that authority is exercised. Thus, the legitimate commonwealth is one in which political rule is reliably oriented toward the common good of the people subject to this rule. Indeed, the exercise of political


37 Jean-Jacques Rousseau, for example, draws a critical distinction between ‘the sovereign’ and ‘the government’ and allows for the latter to take aristocratic or even monarchical form. He also allows that the power to propose legislation might be reserved to the government, which could make his proposed commonwealth a form of a mixed constitution. Joshua Cohen argues that this can be understood as an institutional arrangement for checking overly hasty legislation and helping to invigorate popular deliberation about law-making by the sovereign people, see Rousseau: A Free Community of Equals (Oxford: Oxford University Press, 2010) 172-175.
authority over the members of the commonwealth is legitimate only when it reliably serves their common good, of which they play an essential role in creating and maintaining.

At one level, the idea of the common good stands in opposition to the ‘private’ good of a small section of the community, which is promoted at the expense of the whole. This notion is entailed in the Latin definition of ‘republic’ as a political system which serves the ‘res publica’—the public concern—rather than the whims, will, or wishes of a small part of the community.

More generally, however, the opposite of the common good is called ‘corruption’ and it is understood quite broadly. Indeed, from the republican perspective, corruption is the political problem because all political systems are fragile and require care and maintenance. Moreover, they need continuous infusions of public virtue and energy to sustain them, lest they degenerate into their debased, corrupted forms. As Madison warns:

Is there no virtue among us? If there be not, we are in a wretched situation.

No theoretical checks, no form of government can render us secure. To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea...

Aristotle’s well-known typology of constitutional forms (which in its most rudimentary expression can be found in Plato’s *Statesman*) differentiates between constitutions on the basis of

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38 Although he offers no systematic construction of the notion, for the classical development of the concept of ‘corruption’ the definitive author to consult is Machiavelli, particularly *The Discourses*.

who rules—the one, the few, or the many—and on the basis of whether or not that rule is
directed toward realizing the common good. For Aristotle, it is evident
that those constitutions that look to the common benefit turn out, according
to what is unqualifiedly just, to be correct, whereas those which look only
to the benefit of the rulers are mistaken and are deviations from the correct
constitutions. For they are like rule by a master, whereas a city-
commonwealth is a community of free people.

Within more modern expressions of republicanism, such as that of controversial
republican figure, Jean-Jacques Rousseau, the idea of the common good necessitates that the
people share certain basic interests, for example, in life, liberty, and meaningful economic
opportunity. Moreover, ‘the people’ share a deep commitment to the normative notion that as
‘the sovereign,’ they ought to use their political power to enact laws which reliably serve these
interests. In so doing, the people should treat the interests of any one citizen with a weight that
is equal to that of any other.

The preeminent 18th-century German philosopher (and another controversial republican
figure), Immanuel Kant, effectively captures this Rousseauvian notion within his system of
‘equal freedom for all’ and his formulation of the Universal Principle of Right:

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41 Aristotle. *Politics*, III.

Any action is *right* if it can coexist with everyone’s freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone’s freedom in accordance with universal law.\(^{43}\)

This Kantian principle requires that each person exercise his or her choices in ways that are consistent with the freedom of all others to exercise *their* free choices.

Although it has become somewhat commonplace in contemporary political thought to try and juxtapose liberalism and republicanism as competing or even conflicting political philosophies, the liberal effort to think deeply about questions of social justice—a task which resides so close to the heart of much contemporary liberal political thought—can reasonably be understood as an effort to articulate an egalitarian conception of the idea of the common good for modern pluralistic democratic societies. Indeed, it is an effort to give meaningful substance to what some, such as arguably the leading democratic theorist of the first half of the twentieth-century, Joseph Schumpeter, describe as being a kind of metaphysical mystery or an abstract impossibility.\(^{44}\) As such, this important liberal undertaking can sensibly be seen as making a valuable contribution to the core of republican political thinking.\(^{45}\)

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\(^{45}\) For example, Joshua Cohen argues that John Rawls’ well-known ‘theory of justice as fairness’ can be reasonably seen as an attempt to give meaningful content to Rousseau’s notion of ‘the general will’ in the circumstances of a modern pluralistic democratic society (and he comments that Rawls also
2.3 Deliberation

So what mechanism links ‘popular sovereignty’ and the process of democratic decision-making with substantive outcomes that can reliably approximate ‘the common good?’ For republicans, a large part of the answer is ‘deliberation.’ Indeed, to identify the common good it will require the input of many voices. Moreover, to be truly inclusive, instead of being strictly limited to formal or official channels, the deliberative process must be understood rather broadly and allow for many forms of expression—there should be no arbitrary barriers to the claims and demands of the people. As equal members of the commonwealth, all individuals and groups are entitled to make proposals, advance their opinions, and offer their most persuasive arguments.

Of course, these arguments are not to be taken at face value. They should be carefully unpacked and subjected to critical evaluation by others. Indeed, when advancing their claims, the people are expected to offer a meaningful account or justification of ‘where they are coming from,’ so to speak. In so doing, however, they do not have to leave behind their individual experiences. This involves reflecting on, instead of trying to separate or bracket out, their personal beliefs that may (or may not) be grounded in deep moral conviction. Indeed, an aim of viewed his theory in just these terms). See “For a Democratic Society,” in Cambridge Companion to Rawls (Cambridge: Cambridge University Press, 2003)100-03, 129; Rousseau: A Free Community of Equals, 2, and 39-42. In this modern sense, the idea of the common good is understood as an ensemble of conditions for human flourishing and fulfillment; it refers to goods from which everyone benefits. As Rawls himself comments: “The common good I think of as certain general conditions that are in an appropriate sense equally to everyone’s advantage.” See A Theory of Justice, Revised Edition (Cambridge, Mass.: Harvard University Press, 1999) 217.
this reflective process of deliberation is to develop ‘considered judgments’ that are based, in Hannah Arendt’s adoption of a Kantian idea, on an ‘enlarged mentality.’ That is to say,

[c]ritical thinking is possible only where the standpoints of all others are open to inspection. Hence, critical thinking, while still a solitary business, does not cut itself off from ‘all others.’ To be sure, it still goes on in isolation, but by the force of imagination it makes the others present and thus moves in a space that is potentially public, open to all sides; in other words, it adopts the position of Kant’s world citizen. To think with an **enlarged mentality** means that one trains one’s imagination to go visiting.\(^{46}\)

In the republican politics of deliberation, the overall goal is for the laws and policies of the commonwealth to emerge from a genuinely inclusive process of reasoned justification that is conducted in an open format with a reciprocal exchange of ideas and arguments. This process aims to determine the best available solution to the interests, issues, and concerns that will inevitably arise among the people, who live mainly in unsought interdependence, but who may collectively recognize and then try to build upon this mutual reliance. So deliberation is the mechanism that allows for the transformation of purely private interests into legitimate public concerns.

\(^{46}\) **Arendt, Hannah.** *Lectures on Kant’s Political Philosophy* (Chicago: University of Chicago Press, 1982) 43. (Emphasis added). Although she died before she was able to elaborate further, Arendt claimed the key to Kant’s political philosophy is contained in his *Third Critique*, or *Critique of Judgement*. Thus, she set out to rework Kant’s concept of ‘enlarged thought’ from the aesthetic to the political.
Ideally, this process involves the people’s good-faith arguments about what exactly it is that constitutes their common good. There is no predetermined imposition of the common good; it has to be defined and defended in open deliberation. While some theorists might assume a consensus on the common good, perhaps derived from ethnic identity or some kind of shared pre-political understanding, for republicans the common good must be politically determined—a pre-political bases of fidelity cannot be taken for granted. This is precisely because the people tend to have differing answers to questions of common concern. It should be emphasized, however, that this characterization of the aim of the deliberative process places limits on what exactly might count as a persuasive argument—that is to say, a good argument must be one that can reasonably be appealed to as pertaining to the common good.

Although modern republicans tend to be democratic leaning, there is typically still a recognition of the dangers from ‘tyranny of the majority,’ emphasized by Madison or Tocqueville, for instance. To help address this concern, as mentioned in Section 2.1, modern republicans have adopted the idea of ‘checks and balances’ from the notion of the ‘mixed constitution.’ The people remain sovereign. Yet proper deliberation requires that discursive power at any one location in the political system is always going to be checked or met by a resisting force from another. Within the ebb and flow of the system of discursive political power, then, these kinds of institutionalized or structured deliberative procedures are not only going to help block the hasty adoption of bad laws and troubling public policies, but help to stimulate the people to reassess what exactly it is that they are trying to accomplish—thus thickening deliberation. As Phillip Pettit notes, in order to be truly deliberative, a democracy

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must be “contestatory.” As we will see in later sections of this study, this notion of ‘contestation’ is a key ingredient in Madison’s conception of the American federal system and his idea of the extended republic.

2.4 Liberty as Nondomination

In practice, the content of the common good can be rather difficult to capture fully. At its crux, however, is the shared innate interest—many might argue inviolable right—that each and every person has in being a free individual. Of course, Aristotle would not agree with us on this point. For Kant, however, “there is only one innate right” that all human beings possess, namely

Freedom (independence from being constrained by another’s choice),
insofar as it can coexist with the freedom of every other in accordance with
a universal law, is the only original right belonging to every man by virtue
of his humanity.

Indeed, Rousseau tells us in On the Origins of Inequality that “the worst thing that can happen to one in the relations between man and man is to find oneself at the mercy of another.” Along these lines, both Pettit and Skinner have argued that there is a distinctly republican (or, in

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49 For example, Aristotle’s theory of slavery is found in Book I.3-7 of the Politics and Book VII of the Nicomachean Ethics (Indianapolis: Hackett Publishing, 1999).
Skinner’s preferred terminology, a “neo-Roman”) conception of liberty according to which liberty consists precisely in a person not living dependent upon or at the mercy of another. Pettit specifically refers to this republican conception as ‘liberty as nondomination.’

By the way of contrast, within liberal political theory, liberty consists in the absence of coercive impediments or interference. This idea received its classic formulation in the writing of Thomas Hobbes in his 17th-century masterwork, Leviathan. For Hobbes, the liberty of a person consists in nothing more than the fact that a person’s physical body is not hindered or obstructed from acting according to its power and will:

A free-man, is he, that is those things, which by his strength and wit he is able to do, is not hindered to doe what he has a will to.

When we say, then, of someone that she acted freely, quite simply, what we are saying is that she had a will to act and that she had no external hindrance to the action’s performance—no more, no less.

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52 See generally Pettit, Republicanism and On the People’s Terms (Cambridge: Cambridge University Press, 2012); and Skinner, Liberty before Liberalism.


54 In contemporary parlance, Hobbes’s conception of ‘liberty as non-interference’ is a clear statement of what Isaiah Berlin famously termed ‘negative liberty,’ which is the absence of obstacles, barriers, or constraints to one’s action. A person, then, has negative liberty to the extent that her actions are available in this negative sense. On the other hand, ‘positive liberty,’ which is polemically derided by Berlin, is acting to take control or to manage one’s life in order to realize one’s basic aims and purposes. Of course, this is only a quick thumbnail reference to an iconic essay that has considerably
From the republican perspective, however, this formulation of liberty is problematic. This is because ‘the absence of actual force or coercion’ is completely consistent with one having the status of an unfree person. The evocative counterexample typically used by republicans to make this point is a slave who has a benevolent or perhaps just a lazy master who does not actually exert any kind of coercion or force over the life of the slave. If this is the case, then according to the liberal view of ‘freedom as non-interference,’ the liberal would be in the paradoxical position of having to say with a straight-face: the slave is actually free. For the republican, however, the slave remains unfree precisely because the master—at any time, for any reason—could opt to exert her power or influence and arbitrarily intervene in the slave’s life. Thus, merely to live one’s life subject to this power of arbitrary intervention, to live “at the mercy of another” to revisit Rousseau’s phrase, makes one unfree.

Within the context of the run-up to the American Revolution, this notion of liberty as nondomination is nicely captured by Stephen Hopkins, Governor of the Colony of Rhode Island and signatory to the Declaration of Independence, in his widely read pamphlet, “The Rights of Colonies Examined:”

[O]ne who is bound to obey the will of another, is really a slave, though he may have a good master, as if he had a bad one; and this is stronger in politic bodies than in natural ones, as the former have perpetual

succession, and remain the same; and although they may have a very good master at one time, they may have a very bad one at another.\textsuperscript{55}

Whatever the historical importance of a specific republican conception of freedom (an issue that is certainly contested by scholars of political thought) there is little doubt that Pettit and Skinner have brought to light something of great \textit{moral} significance.\textsuperscript{56} Namely, to secure their liberty, the people must deny the government of the commonwealth arbitrary power; they must deny it the power to interfere in their lives at \textit{its} discretion, without fitting constraints.\textsuperscript{57} Indeed, it is arbitrary power—not law—that is incompatible with liberty. Laws provide guarantees against arbitrary interference, so that the people may live and act independently. So within the realm of republican political thought, the government of the commonwealth \textit{must} be structured so that it has a nondominating relationship with the citizens. At the same time, to reliably inform a genuine, meaningful sense of the common good, the people must also use their

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\textsuperscript{56} Whether or not nondomination is substantively different from the idea of ‘negative liberty’ is a contested issue, for example, see Matthew Kramer, “Liberty and Domination,” in \textit{Republicanism and Political Theory}, (Oxford: Blackwell Publishing, 2008) 31-57.

\textsuperscript{57} As an interesting aside, regardless of what one may think of his actions, the language (whether he is aware of it or not) that computer analyst Edward Snowden uses to justify his leaking of classified documents obtained from the National Security Agency, detailing its domestic spying program, is largely republican. See the Academy Award winning documentary, \textit{Citizen Four} (Dir. Laura Poitras. Praxis Films, 2015).
\end{flushleft}
sovereign power to make laws and design socio-political and economic institutions that prevent domination *between* citizens.

### 2.5 Participation

Since the eighteenth century there has been a slow but steady influx of people admitted into the public sphere in the name of political equality, with the extension of citizenship and all of its concomitant rights to adult males, women, and other formerly excluded minorities and marginal groups. In republican political thought, however, a citizen is *not* simply a person who has a specific legal status—it is much more than this. A citizen is someone who participates in the commonwealth’s political decision-making with a watchful eye toward securing the common good. Indeed, the care and maintenance of the commonwealth and its republican institutions *requires* a citizenry that is *both* able and willing to partake in collective decision-making in a public-spirited fashion.

The potentially arbitrary power of government, the ever-present dangers of corruption, and the inherent limits of institutional safeguards all support more active participation in the political decision-making process by a vigilant citizenry. This active citizenship can take a variety of forms. For some republicans, such as Aristotle, political participation is *inherently valuable*; it is an essential part of what the ancient Greeks referred to as *eudaimonia*, which is typically translated as ‘human flourishing’ or ‘living well’—that is to say, ‘happiness.’

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58 Aristotle. *Politics*, see Bks. III-V (but also other places, such as the *Nicomachean Ethics*). For Aristotle ‘happiness’ is *not* the same thing as ‘pleasure,’ although he allows that the two may regularly coexist. This can be confusing because in contemporary parlance ‘happiness’ (especially in modern America) is often thought of as a subjective state of mind, as when one says that she is ‘happy’ when she is ‘enjoying a cool drink on a hot day,’ or ‘is out having fun with her friends.’ For Aristotle, however,
these republicans, liberty is understood as necessarily entailing an active participation in the political process of collective self-determination. In the language of Hannah Arendt, the commonwealth is “a kind of theater where freedom could appear” and the political domain “is the realm where freedom is a worldly reality.”

That is to say, to enjoy freedom is to have a share in the good life, understood as active and engaged citizenship and the personal cultivation of civic virtue. Through their active participation as citizens, the people express and realize themselves; they gain a sense of political efficacy or empowerment; and they possibly achieve social recognition for their personal values. For these republicans, the commonwealth is a kind of arena for self-development and expression, which allows the people to realize ends that would otherwise be unavailable to them: “I am not fully taking charge of my life and what I am doing until I join my fellow citizens in political action.”


In *Framed for Posterity* (Lawrence: University Press of Kansas, 1993) Ralph Ketchum, characterizes this notion as an expression of ‘positive liberty.’ He reads this positive dimension into his understanding of the American founding. For example, see pp. 38-45.

For other republicans, participation is certainly an important political value, but in a much more direct or instrumental fashion. For them, participation makes it more likely that the political system will reliably serve the common good, by preserving liberty as nondomination, for example. Indeed, the widespread enjoyment of liberty as nondomination is most likely to occur in a commonwealth where the people are committed to that ideal, and each person is both willing and able to do his or her part to actualize it. Through participatory action, for example, a citizen (or a group of citizens) can do their part in preserving the integrity of republican institutions; they can bring to light instances of domination; and they can support laws and policies that would protect and expand liberty as nondomination. Thus, participation is instrumental in both bringing about and preserving the right sorts of republican laws and institutions.

It is often thought that the more opinions that are brought to bear on a decision, then the better the decision may be. As applied to participation, this ‘epistemic’ argument suggests that, all things being equal, wider participation should produce better results. As such, republicans argue for more participation because of the wide range of common goods which may thus be


63 Here, again, the Edward Snowden example is particularly illustrative.

64 See e.g. Estlund, David. Democratic Authority: A Philosophical Framework (Princeton: Princeton University Press, 2008) Estlund claims that democracy exercises legitimate authority in virtue of its having epistemic power—its decisions are the product of procedures that tend to produce just laws at a better than average rate, and certainly better than any other type of government that is justifiable within the terms of public reason and participation.
realized (or common bads avoided), by people who live in largely unsought interconnectedness, but who can nevertheless come together to deliberate about their collective future through an open and inclusive political process. By participating in this process, however, the people not only gain a ‘political education’ and become more aware of the conditions under which the commonwealth functions, but they also gain a better understanding of ‘the true depth’ of their relationship to their fellow citizens. As the rather perceptive analyst of mid-nineteenth century American political life Alexis de Tocqueville has noted, participation in collective decision-making expands a person’s awareness of being a small part of a much larger socio-political community. Also, participation increases a person’s sense of empathy toward the interests and concerns of others. Thus, it is not only an expression of public-spiritedness, but participation is also an important means of cultivating and nurturing that spirit.

In conclusion, this study operates with a working definition of republicanism that is framed in terms of these five key ideas, each of which are drawn from the overall corpus of republican political thought: ‘popular sovereignty,’ ‘the common good,’ ‘deliberation,’ ‘participation,’ and ‘liberty as nondomination.’ Different republicans understand these concepts in different ways and tie them together in somewhat dissimilar fashions. Yet the more central


Tocqueville is perhaps typically regarded as a classical liberal, whose thoughts focused above all on individual freedom and the threats from arbitrary governmental power. But he also sought to promote active participation and civic virtue against apathy and political passivity, which he understood to be significant drawbacks in modern democratic commercial societies. Also, note that there are interesting parallels between Tocqueville’s observations and Arendt’s conception of an ‘enlarged mentality’ that was discussed in Section 2.3.
these notions are to their writing, the more defensible that it becomes to characterize their work as being republican. The motivation for this study adopting this thematic approach to understanding republicanism is a desire to avoid being trapped in a historiographical debate over the fine points of any particular thinker’s conception of republicanism. Instead, this study is more concerned with exposing underlying substantive republican commitments in American political thought and government than it is with parsing the consistency of a particular thinker’s ideological statements and positions.\textsuperscript{66}

These five key republican notions can be sewn together in the following fashion: ‘popular sovereignty’ and ‘the common good’ are essential conditions of political legitimacy; proper ‘deliberation’ and active ‘participation’ function to reliably bind popular sovereignty to the common good; and ‘liberty as nondomination’ is a particularly important aspect of the common good.

Next, in Section 3, we will turn our attention to the American political experience circa 1787. In this historical epoch, we will begin to see how these republican notions were brought to bear in the creation of the American republic—particularly in the many public debates and dialogs over the ratification of the federal Constitution of 1787 and the subsequent adoption of the Bill of Rights. In these exchanges, we will begin to gain a better insight into just how the framers thought of the specific relationship between rights and powers—the subject matter of the Ninth and Tenth Amendments.

\textsuperscript{66} For an example of what this study seeks to avoid, see Robert Dahl, “James Madison: Republican or Democrat?” in \textit{Perspectives on Politics}, Vol. 3, No. 3, 439-448.
It is no mystery of history that the Philadelphia Constitutional Convention of 1787 occurred amid a crisis of confidence in the fledgling nation. Under the ‘Articles of Confederation’ government in the United States, although certainly closer to being more ‘fully republican’ than any other government in the 18th-century world, had often been weak, ineffectual, unsteady, and at times simply foolish. Petty squabbles among the states, domestic insurrection, numerous problems with trade and commerce, foreign intrigue and mischief, looming bankruptcy, and the threat of dissolution all plagued the new nation. In the learned opinion of leading Federalists such as James Madison (Virginia), Alexander Hamilton (New York), and many others, a new constitution was necessary. The ‘Articles of Confederation and Perpetual Union’ created the first formal charter of national government for the 13 former British colonies, now considered American states. Drafted by the Continental Congress in 1776-77, the Articles were not formally ratified by all 13 states until 1781. Efforts to amend the Articles, however, began almost as soon as they were ratified. These efforts ultimately culminated in the Constitutional Convention of 1787. See Jack Rakove, “The Articles of Confederation, 1775-1783” in Blackwell Encyclopedia of the American Revolution (Cambridge: Basil Blackwell, 1991) 289-95. Also, it is important to remember that even though government in the early days of the United States was closer to being more fully republican than anywhere else, nonetheless, it still fell short in a variety of important ways. As obvious instances, for example, in its treatment of women, African Americans, and Native American Indians.

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68 See e.g., Federalist Papers, Nos. 2-8.
York), and James Wilson (Pennsylvania) these perils could only be avoided by the creation of a more resolute, powerful union of the states.  

The Federalists insisted, however, that the desire to consolidate power should not give the people any cause for concern. “If the new Constitution be examined with accuracy and candor,” writes Madison, “it will be found that the change which it proposes consists much less in the addition of NEW POWERS to the Union than in the invigoration of its ORIGINAL POWERS.”  

A stronger federal government, it was believed, would be better able to protect the liberty of the people when properly controlled by them, as much as it could do them harm when antagonistic to their interests. In keeping with Federalist constitutional theory, ‘rule by the people’ required not the distrust of a federal government, but its proper utilization.

“[Federalists] were confident,” Ralph Ketchum tells us, “that human ingenuity could devise

69 The terms “Federalist” and “Antifederalist” are merely a shorthand form of expression. Roughly, a Federalist is someone who supported ratification of the Constitution of 1787. While an Antifederalist is someone who, for any number of reasons, opposed the system of government embodied in the Constitution. For an informative discussion of the overall Antifederalist position and its value to the ratification debates, see generally, Herbert J. Storing, What the Antifederalists Were For (Chicago: University of Chicago Press, 1981) (E.g.: “The legacy of the Anti-Federalists was the Bill of Rights.” At p. 65).

70 Madison, James. Federalist No. 45. (Emphasis original). This notion of “invigoration” is expressed in the Constitution’s preamble: “We the People of the United States, in Order to form a more perfect Union…” (Emphasis added). The overall aim of the Constitution of 1787 was to “perfect” the pre-existing Union established under the Articles.
mechanisms that would at once protect liberty, allow effective government, and rest on the consent of the people.”

One such method was Madison’s path-breaking idea of the ‘extended republic’ as a device to check the ever-present dangers of ‘factionalism’ and ‘majoritarianism.’ On this point, Madison’s political thinking was in blunt contrast to many of his predecessors, such as the much respected Baron de Montesquieu, who believed that republics could only survive in territorially small, homogeneous societies. In a stroke of quick genius, Madison simply reversed the proposition. He argued that a ‘large nation’ with a ‘diverse society’ (at least by 18th-century standards) was actually better suited to controlling the woes of factionalism. By housing multiple competing factions under a large, common roof, Madison believed that it would make it much more difficult for any particular group to coalesce and dominate the levers of political machinery.

In Federalist No. 10, now generally regarded as the cornerstone of American political thought, Madison begins to explore the means of controlling self-interested (i.e. corrupt) factions that, when constituting a majority of the commonwealth, threaten “to sacrifice to its ruling passion or interest both the public good and the rights of other citizens.” He argues that in


72 See Federalist No. 10; but also see Madison’s working paper, “The Vices of the Political System of the United States,” (Founders’ Constitution, Volume I: 166-69) where he begins to develop the ideas that ultimately take shape in No. 10.

73 Montesquieu. The Spirit of the Laws, Bk. VIII, Ch. 16.

74 Madison, James. Federalist No. 10. (Emphasis added).
small political communities the dangers of faction are heightened because “[a] common passion or interest will…be felt by a majority of the whole…[leaving] nothing to check the inducements to sacrifice the [minority].” Conversely, in a large and diverse community—the extended republic—the dangers of faction would be greatly diminished “by reason of the greater variety of parties and interests…[which] make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens.”

Of equal importance to ‘extending the republic,’ however, was the preservation of the several states—but not the continuation of their role as severely self-interested political actors. As Jack Rakove notes, “the framers could not reconstitute the federal Union without attempting to reconceive the nature of statehood… [i]f the persistence of the states was a given, their status was not.” To be sure, a major task of the delegates to the Philadelphia Convention was to try and free the Union from its debilitating dependence on the “uniform and punctual obedience of 13 independent bodies.” After the close of the Revolution, almost a decade of governance under the Articles had made it rather clear that neither the state representatives nor their respective constituents could reliably be counted on to support ‘the common good’ of the new Union. Indeed, the Federalists felt that the “fatal omission” of the Articles was its failure to give Congress any power of “coercion” over intractable states—this omission was the point of departure for virtually everything that the Philadelphia Convention undertook.

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75 Ibid.
76 Ibid.
78 Madison, James. Quoted in ibid at 47.
79 Ibid at 167.
Any power of coercion, however, was a highly contentious subject, at least to the Antifederalists. Therefore, to help assuage their deep-seated fears of a powerful overarching federal government that would either “annihilate” or displace the previous role of the states, Madison contended that an advantage of the new Constitution—which was partly national and partly federal—was the contestatory relationship of reciprocity created by the new constitutional structure. “The federal and state government,” Madison writes, “[would possess] the disposition and the faculty…to resist and frustrate the measures of each other.” 80 From the perspective of the states, this was thought necessary to restrain “…ambitious encroachments of the federal government on the authority of the State governments…” 81 From the standpoint of the federal government, this was thought necessary to overcome the parochialism and obstructive tendencies that had been so frustrating to realizing any sense of a ‘national common good’ under the Articles. 82 In short, power must be made to check power.

Therefore, to facilitate the continued, but albeit redefined independence of the several states, the framers sought to vest the federal government with only a “few and defined” powers—enough to accomplish its truly national objectives—while reserving to the states “all objects, which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people.” 83 The expectation was that the states, not the federal government would be the ones to conduct the everyday business of the people. This meant that the protection of the people’s liberty was primarily, if not exclusively, to be a matter overseen by state constitutional law. It is

81 Ibid. (Emphasis added).
83 Madison, James. *Federalist No. 45*. 
important to keep in mind that among the founding generation ‘sovereignty’ ultimately rests with the people of each state. So they are to be the ones ultimately responsible for defending their liberties by effectively using their state constitutions to secure their various rights from the broader zone of authority, which absent a pronouncement asserting otherwise, would be ceded to the control of their respective state governments. So an extended republic consisting of a federal, as well as the several state governments, would be achievable because ‘the people’—as the ultimate sovereign authority—were superior to each of these levels of government. As such, they could determine for themselves the precise amount of power that should be delegated to each level. As a result, in good conscience, Madison could claim that the federal and state governments are “different agents and trustees of the people, instituted with different powers, and designated for different purposes.” Therefore, it was simply unnecessary to attach a specific, enumerated bill of rights to the federal Constitution of 1787. As the ultimate sovereign authority, the people of each state had made an explicit—and rather narrow—delegation of power to the federal government in the form of the proposed Constitution.

3.1 Antifederalist Concerns

The Antifederalists had good reasons to think otherwise. At the Constitutional Convention, Colonel George Mason, a leading Antifederalist from Northern Virginia, offered the observation that the Constitution’s “Supremacy Clause” would render all federal laws

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84 Madison, James. *Federalist No. 46.*

85 See U.S. Constitution, Article VI, Cl. 2: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof…shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”
“paramount to State Bills of Rights.” To appease this concern, in the waning days of the Convention attempts were made by Mason, Charles Pinckney (South Carolina) and Elbridge Gerry (Massachusetts) to persuade the other delegates to attach a bill of rights to the proposed Constitution. Typical of the thinking that led to the rejection of these proposals was that of the Federalist Roger Sherman (Connecticut), who argued that a guarantee of freedom of the press was “unnecessary” because “the power of Congress does not extend to the Press.” That is to say, since Congress has been delegated no ‘power over the press’ there is simply no need to protect it from Congressional interference. The Federalist position prevailed at the Convention and the Constitution was transmitted to the several states for ratification absent a bill of rights, which is a surprising fact to most contemporary Americans.

Much to the chagrin of the Federalists, however, the omission of a bill of rights soon became one of the proposed Constitution’s most objectionable features. For example, in the

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87 Ibid.

88 See Farrand’s Records, Volume II, 618.

89 Given the almost sacrosanct way that modern Americans tend to view the Bill of Rights, they are indeed somewhat surprised to learn that the Constitution of 1787 did not contain the Bill. Indeed, it was not even officially proposed until September 1789, and it was not adopted by three-quarters of the states until December 1791. Thus, during the interregnum, at least in regard to the national government, all rights (other than the handful already contained in the Constitution itself) would have been unenumerated rights.
Virginia ratifying convention a well-known Revolutionary War figure and leading Antifederalist Patrick Henry—of “Give Me Liberty or Give Me Death” fame—spoke out against ratification:

I trust that gentleman, on this occasion, will see the great objects of religion, liberty of the press, trial by jury, interdiction of cruel punishments, and every other sacred right, secured before they agree to that paper [i.e. the Constitution]…My mind will not be quilted till I see something substantial come forth in the shape of a bill of rights.\(^{90}\)

Similar criticisms echoed throughout all of the state ratifying conventions, as well as in the many public deliberations that were occurring throughout the nation. Indeed, the lack of a bill of rights seemed to captivate the political attention of the great mass of so-called ‘common folk’ in each of the states.

Many Antifederalists had begun to charge that the omission of a bill of rights foreshadowed a tyrannical federal government that would tread heavily on the recently hard-won liberties of the people. So they adamantly supported the inclusion of a bill as an additional bulwark against the possible tyranny of a strong and aggressive federal government. Since in the overwhelming powers of government, they recognized a familiar threat—fresh in their minds, was the memory of the British violation of their liberties before and during the Revolutionary period.\(^{91}\)


\(^{91}\) For example, see *Declaration of Independence*: “The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States.”
“To [the Antifederalists], the victory in the American Revolution,” Ketchum writes, “meant the opportunity to achieve a genuinely republican polity, far from the greed, lust for power, and tyranny that had generally characterized human society.”92 To accomplish this, the Antifederalists argued that as much power as possible should be retained at the local level where “rulers and ruled could see, know and understand each other.”93 Instead of looking to the future and any speculative benefits that might be derived from an energetic, centralized government—as the Federalist were prone to do—the Antifederalists “looked to the Classical idealization of the small, pastoral republics where virtuous, self-reliant citizens managed their own affairs and shunned the power and glory of empire.”94 Accordingly, they believed that a latitudinarian grant of power to a physically distant federal government was an argument for a bill of rights, not against it. “The powers, rights, and authority, granted to the general government,” writes the Antifederalist pamphleteer Brutus, “…reach to everything which concerns human happiness—Life, liberty, and property are under its control.”95 The Antifederalists, therefore, felt it only prudent to place meaningful limits on such widespread and potentially all-consuming power.

3.2 James Wilson’s Rejoinder

Initially, the Federalists were unmoved; they continued to toe the party line. For example, in his widely circulated “State House Yard Speech” of October 6, 1787, James Wilson

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93 Ibid.
94 Ibid.
95 Brutus. Reprinted in Herbert Storing, What the Antifederalists Were For. 66.
attempted to forestall the rapidly emerging Antifederalist clamor.\textsuperscript{96} As Rakove tells us, this speech marked “the first notable effort by any framer to move beyond broad generalities and consider the Constitution on substantive grounds.”\textsuperscript{97} In fact, Wilson was thought to have done his job so well that fellow Federalists throughout the states became eager to enlist his aid in their ratification efforts. For instance, in personal correspondence with a friend, George Washington (Virginia), fastened a copy of the speech, noting that

\begin{quote}
[t]he enclosed Advertiser contains a speech of Mr. Wilson, as able, candid, and honest member as was in the convention, which will place most of Colonel [George] Mason’s objections in their true point of light, I send it to you. The republication of it, if you can get it done, will be serviceable at this juncture.\textsuperscript{98}
\end{quote}

In his speech, Wilson sought to explain to the masses why the proposed Constitution \textit{did not} have a bill of rights while several of the state constitutions \textit{did}. The explanation, he said, was that the proposed federal Constitution worked in new and different ways from the state constitutions. The then accepted theory of state-level constitutions held that the governments so established received “every right and authority which [the people] did not in explicit terms reserve.”\textsuperscript{99} On this point, Wilson agreed with conventional thinking that “upon every question,

\textsuperscript{96} Wilson, James. “State House Yard Speech,” (October 6, 1787). Full text of the speech is available at http://context.montpelier.org/document/887.

\textsuperscript{97} Rakove. \textit{Original Meanings}. 143.


\textsuperscript{99} Wilson, James. “State House Yard Speech.”
respecting the jurisdiction of the house of assembly, if the frame of government is silent, the
jurisdiction is efficient and complete.”

As to the federal government, however, he claimed that “the reverse of the proposition prevails, and everything which is not given, is reserved.” This reservation occurs because the federal government is delegated only ‘carefully defined’ and ‘limited powers’ in order to accomplish only its truly national objectives. Indeed, the federal government could only exercise those powers delegated to it by a “positive grant expressed in the instrument of union.” Since it was delegated no power to trespass into the peoples’ sphere of liberty, a bill of rights was simply unnecessary. Indeed, since there was no grant of power for the federal government to infringe the people’s liberty, there was no need to enumerate any of those liberties in an effort to protect them. It would have been superfluous and absurd to have stipulated with a federal body of our own creation, that we should enjoy those privileges, of which we are not divested either by the intention or the act, that has brought that body into existence.

100 Ibid.

101 Ibid. (Emphasis added).

102 Wilson, James. “State House Yard Speech.” It should be noted that Wilson believed the federal government would in practice possess ‘implied powers’ that were not explicitly enumerated. However, he argued, for example, the “necessary and proper” clause should not be taken as a latitudinarian grant of power. Instead, the clause merely affords Congress the ability to “carry into effect the laws which they shall make under the powers vested in them by this constitution.” See The Founders’ Constitution, Volume III, 241.

103 Wilson, James. “State House Yard Speech.”
What is more, Wilson continued, there is an implicit *danger* to adding a bill of rights to the Constitution. The “very declaration” that any given right existed might be “construed to imply that some degree of power was given [that could invade that right] since we undertook to define its extent.”\(^{104}\) In other words, an enumeration of rights could be used to justify by *implication* an unwarranted *expansion* of federal power; it could imply a power to act over those rights, presumably to the extent that the scope of the reservation was somehow incomplete. As Hamilton explained, “[enumerated rights] would contain various exceptions to powers which are not granted; and, in this very account, would afford a colorable pretext to claim more [powers] than were granted.”\(^{105}\)

The danger, however, was even greater than this. A bill of rights might also give rise to the false impression that the *only* rights of the people were those that were listed. Yet a catalog of rights *could never be perfectly comprehensive*. Any enumeration could, therefore, create the

\(^{104}\) *Ibid.*

\(^{105}\) Hamilton, Alexander. *Federalist No. 84.* In *Federalist No. 37*, Madison refers to the general problem created by the inadequacy of words to convey the precise meaning of a complex idea: “Besides the obscurity arising from the complexity of objects, and the imperfection of the human faculties, the medium through which the conceptions of men are conveyed to each other adds a fresh embarrassment… it must happen, that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered. And this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined.” Something like this is probably what Hamilton had in mind when he expressed his fears about the danger involved in enumerating a reservation of rights and the mistaken inferences that would most certainly follow.
dangerous belief that any rights missing from the list were, in fact, *not rights at all.* Indeed, many of the framers were preoccupied with what was then a well-known rule of statutory interpretation: *Inclusio unius est exclusio alterius*—the inclusion of one thing necessarily excludes all others. Rising to speak shortly after Madison first introduced to the House the proposed amendments for a bill of rights, Representative James Jackson (Georgia) was quick to note:

> There is a maxim in law, and it will apply to bills of rights, that when you enumerate exceptions, the exceptions operate to the exclusion of all circumstances that are omitted; consequently, unless you except every

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106 Following Wilson’s lead, future Supreme Court Justice James Iredell of North Carolina, saw the totality of the problem with particular clarity: “[I]t would not only be useless, but dangerous, to enumerate a number of rights which are not intended to be given up; because it would be implying, in the strongest manner, that every right not included in the exception might be impaired by the government without usurpation; and it would be impossible to enumerate every one. Let anyone make what collection of enumeration of rights he pleases, I will immediately mention twenty of thirty more rights not contained within it.” See “Remarks of Mr. James Iredell” (July 29, 1788) in *Elliot’s Debates,* Volume IV, 167.

107 See *Black’s Law Dictionary, Seventh Edition* (St. Paul, Minn.: West Group, 1999) at 766 and also at 602 for an alternate phrasing of this idea: “Expressio unis est exclusio alterius.” A cannon of legal construction or interpretation holding that ‘to express or include one thing implies the exclusion of the other, or of the alternative.’ For instance, the rule that ‘each citizen is entitled to vote’ implies that noncitizens are not entitled to vote.
right from the grant of power, those omitted are inferred to be resigned to
the discretion of government.\textsuperscript{108}

Thus, enumerating any rights might mistakenly suggest to later interpreters of the Constitution
and Bill of Rights that rights not specified had indeed been surrendered, or that the only rights
that existed were the ones that were enumerated. At the Pennsylvania ratifying convention,
Wilson offered the following:

If we attempt an enumeration [of rights], everything that is not enumerated
is presumed to be given. The consequence is that an imperfect
enumeration would throw all implied power into the scale of the
government; and the rights of the people would be rendered incomplete.\textsuperscript{109}

To Wilson and the other Federalists, then, it would have been better to imperfectly
enumerate the powers of the federal government (with the safer implication that any powers not enumerated were reserved to the people), rather than to attempt what could only be an imperfect enumeration of the rights reserved to the people (with the much more dangerous implication that rights not so reserved were impliedly delegated to the federal government).

3.3 Hoist by their own Petard

Wilson’s arguments were widely circulated and often repeated—most notably by Alexander Hamilton in Federalist No. 84—for Wilson was a well-respected lawyer, judge, and legal scholar who ranked high among the most influential of the Federalists. Nonetheless, as

\begin{itemize}
  \item \textsuperscript{108} See ‘Remarks of Mr. James Jackson” (June 8, 1789) in Annals of Congress, House of Representatives, First Congress, First Session at 459-69. (Washington: Gales and Seaton, 1834-1856).
\end{itemize}
Leonard Levy tells us, Wilson’s arguments quickly “boomeranged.” Indeed, historians of the founding era have often noted how the Federalists’ justifications for omitting a bill of rights summarily backfired.

Toward achieving their objective—either the inclusion of a bill of rights or the outright rejection of ratification—the Antifederalists sought to turn the logic of Wilson’s argument against itself: if an incomplete enumeration of rights is dangerous, then certainly the trimmed list already noted in the proposed Constitution is dangerous; if, however, this handful of rights can be listed without endangering other unenumerated rights, should it not follow that other rights could also be secured in a bill? For example, Article I, Section 9 enumerates some of the fundamental rights of the people, such as protections against ex post facto laws, as well as bills of attainder; and Article III, Section 2 guarantees the right to a trial by jury in all criminal cases. Furthermore, if the doctrine of enumerated and limited powers is sufficient in itself to control the encroachment of the federal government—as the Federalists so often argued—then why did the framers feel the need to add Article I, Section 9, which contains a number of restrictions on federal power? As Hamilton himself once professed, “Why declare that things shall not be done which there is no power to do?” Why is there, for instance, a need to curb the suspension of habeas corpus if no power of suspension is granted? Where does the proposed Constitution grant the power to confer a title of nobility? So why declare that no titles of nobility may be granted? Moreover, if the Constitution grants Congress only those limited and

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112 Hamilton, Alexander. Federalist No. 84.
carefully defined powers that it needs to achieve its national goals, then why, like the Articles of Confederation, does the proposed Constitution not have a provision announcing that the states retain “…every power, jurisdiction, and right which is not by this Confederation expressly delegated to the United States in Congress Assembled?”\textsuperscript{113} What is more, despite Wilson and the other Federalists assertions to the contrary, the Antifederalists persisted in arguing that the “Necessary and Proper Clause”\textsuperscript{114} afforded Congress such an open-ended grant of power that it was in effect meaningless to claim that federal power was carefully defined and limited—after all, how could the people overcome the political posturing of a powerful Congress that its actions were necessary and proper? Moreover, with the mass of popular opinion behind it, and its own rule-making authority to exploit, any future representative assembly that so desired could rather easily manufacture an “infinitude of legislative expedients”\textsuperscript{115} to accomplish its self-serving agenda.

The Federalists were trapped by the logic of their argument. They now had two basic choices. They could run the risk of having the proposed Constitution rejected and another Constitutional Convention called, an outcome which they desperately wanted to avoid. Or they would have to promise that upon ratification, the Constitution would be amended to include a bill

\textsuperscript{113} Articles of Confederation, Article II. (1781).

\textsuperscript{114} Under Article I, Section 8, Clause 18 of the Constitution, “Congress shall have the power…to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof.”

\textsuperscript{115} Madison, James to Thomas Jefferson, “Personal Correspondence,” (October 24, 1787). Reprinted in The Founders’ Constitution, Volume I, 646.
of rights that would seek to secure the people’s liberties and help to clarify the operation of the enumerated powers doctrine. Hoist by their own petard, the Federalists relented and opted for the latter. The compromise worked. On good faith, many of the crucial state ratifying conventions accepted the Federalists’ assurances and submitted proposed amendments to the Constitution along with their official notice of ratification.

3.4 The First Congress

True to their word, in the First Congress, the Federalists, led by a somewhat reluctant Madison, debated and approved a set of proposed amendments, including the two that would eventually become the Ninth and Tenth Amendments:

Ninth: The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.\textsuperscript{116}

Tenth: 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.\textsuperscript{117}

The Ninth Amendment may reasonably be understood as anodyne for the Federalist anxiety that a listing of rights might incorrectly be seen as an acknowledgement of the existence of implied governmental powers; it prevents the enumeration of rights from impliedly undermining the doctrine of enumerated powers. In his speech to the House of Representatives in which he introduced the proposed amendments, Madison repeated his original reservations about the addition of a bill of rights. However, he now suggested an amendment to assuage those concerns:

\begin{itemize}
\item \textsuperscript{116} U.S. Constitution, Amendment IX.
\item \textsuperscript{117} U.S. Constitution, Amendment X.
\end{itemize}
It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution [i.e. the original draft of Ninth Amendment].

The Tenth Amendment also confirms that the Constitution contains only a partial delegation of power to the federal government; it may reasonably be seen as chiefly responding to the Antifederalist fears that the federal government might mistakenly be presumed to possess all powers not specifically retained by the states or the people. Not only does the Tenth refer to a set of powers not granted to the federal government, but it also declares that all non-delegated powers are reserved to the states or the people—a critical acknowledgement of the sovereign authority of the people in each of the respective states. Indeed, the Tenth Amendment confirms the strategy of enumerated powers already evident in the structure of the Constitution. As Madison explained:

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I find, from looking into the amendments proposed by the state conventions, that several are particularly anxious that it should be declared in the constitution, that the powers not therein delegated, should be reserved to the several states. Perhaps words which may define this more precisely, than the whole of the instrument now does, may be considered as superfluous. I admit they may be deemed unnecessary; but there can be no harm in making such a declaration, if gentlemen will allow that the fact is as stated. I am sure I understand it so, and do therefore propose it.¹²⁰

The Ninth and Tenth Amendments make clear that the Constitution grants the federal government only a limited portion of power—despite the enumeration of certain rights—and preserves the non-delegated powers and rights to the state governments or the sovereign people of the several states.

3.5 Summation and Discussion

As we have seen, the omission of a bill of rights was a fundamental aspect of the constitutional design of many of the framers, particularly among the leading Federalists. It is important to remember, however, that no framer was opposed to the kinds of rights that would be protected by a specific bill. As George Washington wrote to the Marquis de La Fayette during the controversy over ratification: “There was not a member of the Convention, I believe, who had the least objection to what is contended by the advocates of a Bill of Rights.”¹²¹


the most part, the framers were what today we might call ‘civil libertarians.’ The Federalists, nonetheless, thought the addition of a bill of rights would be unnecessary and perhaps even dangerous. In their minds, the doctrine of ‘enumerated powers’ would be sufficient to the task of protecting the people’s liberty.

As Bernard Bailyn has shown in his landmark work of early-American political history, *The Ideological Origins of the American Revolution*, this protection scheme was thought satisfactory largely because the framers tended to regard the political world as being divided into two distinct spheres: the sphere of power and the sphere of liberty, or right. The former is relentless and brutally assertive and should always be opposed, while the latter is more passive, delicate and requires constant attention in order to be protected. Hence, by carefully limiting the accumulation of federal power, the Federalists thought they would be sufficiently able to secure the sphere of liberty from trespass.

One way to do this—the method adopted in Article I, Section 8—is to think of federal power not as a kind of plenary authority (as James Wilson claims it was typically regarded in state constitutions), but as the aggregate sum of limited, delegated powers. The sphere of liberty could not lawfully be invaded by a federal government that lacked the power to do so, or so the framers thought. Indeed, it seemed somewhat obvious to them that rights began where powers ended and vice versa. As Madison observed in a letter to George Washington, “it would seem

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the same thing, whether the latter [rights] be secured by declaring that they shall not be abridged, or the former [powers] shall not be extended.”

At least in principle, then, rights and powers could never be in conflict because each could exist only in the absence of the other—only a single side of the rights-power coin could ever be visible at any one time. Furthermore, when rights are viewed as the correlative of powers, the substantive content of unenumerated rights can be more easily recognized by fixing on the provisions in the Constitution where power is granted. This approach, albeit somewhat simplistic, has the merit of avoiding the need to address directly the substance of unenumerated rights. Moreover, it also supplies the judiciary—and the people—with a workable way of interpreting the otherwise open-ended provisions in the Constitution, such as the seemingly enigmatic Ninth Amendment.

Today, however, we are unlikely to converse using the same kind of conceptual tools or philosophical language. We tend to think of rights as ‘trumps’ to governmental powers that disable the power and provide us with an immunity from governmental action. For instance, pursuant to its “Commerce Clause” authority, the federal Congress has the power to enact a

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126 For example, see Wesley Newcomb Hohfeld’s classic article, “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning,” Yale Law Journal 23 (1913) and a second article with the same name in Yale Law Journal 26 (1917). In an effort to bring clarity to what he believed was a muddled and imprecise use of the term ‘rights’ in legal discourse, Hohfeld argues that the juridical correlative of a right is a duty. The correlative of a power is a liability; a liability is the opposite of an immunity. In short, the concept of ‘rights and powers’ is uncoupled.
prohibition on the interstate shipment of religious texts, such as Bibles, Korans, or what have you. Its actual ability to effectively enact this law, however, is outplayed by at least two First Amendment constitutional ‘trumps’ or rights: free exercise of religion and freedom of speech. So for contemporary Americans, the spheres of power and liberty can and in practice often do overlap. In this particular example, however, at the place where the two spheres intersect, our First Amendment constitutional guarantees create an enforceable ‘zone of immunity’ that trumps the exercise of the government’s power. Yet the power to regulate interstate commerce remains in full-operation outside of the zone. The government may indeed possess a legitimate power, but our rights can effectively trump that power and provide a conceptual sword to combat its trespassing actions.

For the framers the issue was much simpler: a right existed because there was no power. Thus, it would be reasonable for the framers to understand Congress as ‘lacking the power’ to enact such a law against the interstate commerce of religious texts. The framers would associate that lack of power with the same First Amendment rights that modern Americans tend to think of as creating an area of immunity within the sphere of power that Congress continues to enjoy. For the framers, then, the Bill of Rights technically says nothing of a ‘right to free speech’ or to the ‘free exercise of religion.’ The people have such rights against the federal government in the sense (and only in the sense) that “Congress shall make no law….”127 That is to say, Congress has no power—the rights are equivalent to the absence of the power.

Limiting the accrual of governmental powers, as the framers sought to do, may indeed preserve liberty in an indirect sense. However, as the Griswold majority would have us believe allowing the judiciary to create enforceable rights is a much more direct way of thwarting the

127 See U.S. Constitution, Amendment I (emphasis added).
government’s abuse of liberty—particularly given our modern conception of rights as trumps that can cut across or through the field of governmental powers. In the remainder of this study, we will compare these two approaches.

In the next section, we will start to follow the power. As we have seen, for many of the framers the key to preserving liberty is found in controlling power. So in Section 4, we will sketch the source and flow of political power. In so doing, we will begin to examine just how ‘retained rights’ might operate within a constitutional system in which that power is both shared and withheld. Moreover, we will start to develop the basic premise that the purpose of the Tenth Amendment’s reservation of the ‘unenumerated powers’ is to ensure the retention of the Ninth Amendment’s ‘unenumerated rights.’
SECTION 4
THE SPIRIT AND PRINCIPLE
OF THE
TENTH AMENDMENT

In Federalist No. 33, Hamilton asks rhetorically: “What is a power, but the ability or faculty of doing a thing?”128 Within the American constitutional system, this ‘ability to do a thing’ is divided into two broad categories. On the one hand, the powers delegated to the federal government. On the other, those reserved under the auspices of the Tenth Amendment. The people—as the ultimate authoritative source for both of these categories—remain sovereign over the federal and state governments.129 It follows, then, that the reserved powers, just like the delegated powers, find their definitive authority in the sovereign will of the people. “In America,” Alexis de Tocqueville reminds us, “the sovereignty of the people is not … a hidden or barren notion; it is acknowledged in custom, celebrated in law.”130 Indeed, the words of the Tenth Amendment celebrate this fundamental principle of republican government and its expression in both American federalism and constitutionalism.

James Madison’s original draft of the Tenth clearly shows that it was meant to affirm this bedrock principle of federalism, originally found in the second article of the Articles of

129 For an informative exploration of this notion see Justice James Wilson’s often overlooked opinion in Chisolm v. Georgia, 2 U.S. 419 (1793), the controversial case that would directly lead to the adoption of Amendment XI. Wilson’s opinion in Chisolm is as complete a statement of his conception of ‘popular sovereignty’ as can be found anywhere in his speeches or writings.
130 Tocqueville, Alexis. Democracy in America, 68.
Confederation, that all non-granted powers are reserved to the states.  

His original proposal reads:

The powers not delegated by this constitution, nor prohibited by it to the States, are reserved to the States respectively.

Note that this initial proposal makes no mention of a reservation of power to the people themselves. As a last minute correction to this apparent oversight, the House of Representatives voted to revise Madison’s original offering by adding the critically important closing phrase: “…or to the people.”

Thus, the new order of the words—“States respectively, or to the people.”

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131 “Article II: Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.” Articles of Confederation and Perpetual Union (March 1, 1781). Notice the use of the term “expressly.” As we saw in Section 3, inspired in part by many in the founding generation’s fear of an overarching centralized government, this textual limitation on the powers of the federal government inadvertently helped to cripple the effectiveness of the Union under the Articles. So given that the Constitution of 1787 was designed to create a more energetic federal government that would be capable of effectively dealing with problems that were truly national in scope, when Thomas Tucker (South Carolina) sought to introduce the same term-of-limitation into the language of the new Tenth Amendment, it was met with immediate disapproval. Madison himself objected, arguing “it was impossible to confine a government to the exercise of express powers; there must by necessity be admitted powers by implication, unless the constitution descended to recount every minutiae.” (Annals of Congress, Volume I, 790).


133 See “Remarks of Thomas Tucker and Daniel Carroll,” ibid at 790.
people”—signaling that ‘the people’ are indeed the font of all political power within the American constitutional system.

Although the record of the debate provides no definitive reason for the change, the phrase was most likely added to underscore the principle that “ultimate authority…resides in the people alone” and that “[t]he federal and state governments are in fact but different agents and trustees of the people.” Indeed, the most likely reason for the addition of the phrase resides in the founding generation’s burgeoning conception of ‘popular sovereignty.’ During the interim between the Revolution and the adoption of the Constitution of 1787, the founders became ever

134 Madison, James. Federalist No. 46. (Emphasis added). As an interesting aside, when Madison introduced the list of proposed amendments, he also included a provision that was not adopted by the House Committee of the Whole that would have explicitly recognized ‘the doctrine of popular sovereignty:’ “First, [t]hat there be prefixed to the constitution a declaration, that all power is originally vested in, and consequently derived from the people.” See Annals of Congress, Volume I, 451. This provision would have enshrined in the text of the Constitution itself, instead of only in the Declaration of Independence, the Lockean-Jeffersonian notion “[t]hat Government is instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally pursuing and obtaining happiness and safety. That the people have an indubitable, unalienable, and indefeasible right to reform or change their Government, whenever it be found adverse or inadequate to the purposes of its institution.” Ibid. The House record reflects no definitive reason for the proposal’s failure to pass.

135 For an informative discussion of the popular sovereignty roots of the phrase “the people” in both the Ninth and the Tenth Amendments, see Amar, Akhil Reed, The Bill of Rights: Creation and Reconstruction (New Haven: Yale University Press, 1998) 64.
more committed to the notion that sovereign power *always* remains with the people, *not* their government. Tocqueville writes:

> The American Revolution broke out. The doctrine of the sovereignty of the people came out from the townships and took over the government. All classes of society committed themselves to its cause. Battles were fought and victories won in its name until it became the law of laws.136

As detailed by the preeminent historian of early-American political history, Gordon Wood, the Revolutionary experience inculcated a shared belief among the founding generation that the decisive source of sovereign power is located *in the people themselves—not in their government*.137 Whereas in the colonists’ mother country of England, the government was (and still is) viewed as the highest representation of the will of the English people,138 in the early days of the former colonies, however, the most recent political institutions that represented the will of the people were the colonial assemblies that continued to convene even after being forbidden to do so by the British government. These assemblies—or conventions of the

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people—came to be viewed as the highest expression of popular sovereignty. Indeed, these conventions and not the government represented the people themselves. It was the people gathering in a convention-style format apart from or outside of the ordinary everyday institutions of government, who had the sovereign power to deliberate and establish the state’s fundamental law. In this way, the concept of popular sovereignty—the idea of ‘the People’ as sovereign—first emerged in reference to the citizens of a given state, not to the idea of the American people as a whole.

In line with this growing democratic impulse, the people choose to delegate powers to their government, but they can “alter or abolish” those powers as they see fit. Moreover, this delegation can occur at either of two levels: federal or state. Any powers not delegated to the federal government may (or may not) be delegated by the people to their respective state government. The Tenth’s reservation ‘to the states,’ then, is simply a kind of shorthand reference to the ‘retained right’ of the people in each of their respective states to ‘local self-government’—it simply recognizes that the people might have ceded a modicum of their power to their state governments. This retained right is a ‘majoritarian right’ in that it preserves the right of local majorities, within reason, to make decisions regarding local municipal law. Just as the people have defined the range of the federal government’s power, the people of each state are free to determine what portion of ‘reserved powers’ may be exercised by their respective state governments.


141 See Amar, The Bill of Rights, 119-22.
A constitutional amendment suggested by the New York state ratifying convention phrases the delegation and reservation this way:

That the Powers of Government may be reassumed by the People whenever [sic] it shall become necessary to their Happiness; that every Power, Jurisdiction and Right, which is not by the said Constitution clearly delegated to the Congress of the United States, or the departments of the Government thereof, remains to the People of the several States, or to their respective State Governments to whom they may have granted the same.142

The final form of the Tenth Amendment expresses this notion. The people keep the right to delegate the reserved powers to their respective state governments or, if they so choose, not to delegate those powers to either level of government. Seen in this light, the Tenth Amendment is not merely a “truism.”143 Nor is it only a simple reaffirmation of the republican principles of Madisonian-styled federalism. It is meaningful textual recognition of the people’s sovereign retained right to determine the proper allocation and reservation of governmental powers at both the federal and state levels—to put it differently, the Tenth Amendment is premised on the republican notion of ‘liberty as nondomination.’

142 See Elliot’s Debates, Volume I, 327.

143 In United States v. Darby, 312 U.S. 100, 123-4 (1941) Justice Harlan Stone writes: “The [Tenth] amendment states but a truism that all is retained which has not been surrendered.” Continuing to ignore its philosophical underpinnings, Justice Stone claims that “[t]here is nothing in the history of [the Tenth’s] adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment, or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.”
4.1 What About the Ninth?

As to the retained rights of the Ninth Amendment, it is evident that the people of a state can limit the exercise of the reserved powers (that is, power not delegated to the federal government) to protect their liberties against trespass by their state government. They can do this by either withholding power as suggested above or by carefully articulating specific limitations on whatever power that they choose to vest in their state government. As to the latter, a state constitution might include a ‘bill of rights’ that restricts the exercise of power entrusted to state authority. As we saw in Section 3.2, this is the procedure that James Wilson was referring to in his “State House Yard Speech.”

The retained rights mentioned in the Ninth Amendment, however, are rights held in opposition to the exercise of federal power, and ‘state constitutions’ are generally not thought of as being designed or intended to check the power of the federal government. These observations about state constitutions, therefore, do not take us very far toward understanding the federal interplay between the Ninth and Tenth Amendments. Indeed, we must still determine how the ‘retained rights’ might work in conjunction with the ‘reserved powers’ to safeguard those rights from encroachment by the federal government.

A reasonable explanation is that the ‘reserved powers’ of the Tenth Amendment entail a lawful authority to resist incursions by the federal government into the Ninth Amendment’s realm of ‘retained rights’—that is to say, to resist federal encroachment into what Bernard Bailyn refers to as the sphere of liberty. Stated in somewhat different terms, the justification behind the reservation of the ‘unenumerated powers’ is to ensure that the people retain their ‘unenumerated rights.’ As the final version of the Tenth Amendment suggests, the reason for

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the reservation of powers was not based only on an ‘abstract’ desire to preserve state sovereignty; it also entails a ‘pragmatic’ desire to protect the people’s liberty through a vertical dispersal of power. Madison suggested as much when he wrote that “[t]he powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people….” If this is so, then the rights retained by the people may well be those rights that they define through the exercise of their reserved powers—(setting aside Justice Goldberg’s solution in Griswold) how else are those rights to be given constitutional standing regarding the federal government?

When seen from this perspective, the matching of the Ninth and Tenth Amendments offers a particularly important insight into how the ultimate purpose of ‘federalism’ (as well as the Constitution’s ‘horizontal separation of powers’) is to create offsetting or counteracting forces of power and authority as a kind of “double security” for the protection of the people’s liberty. “Ambition,” Madison writes, “must be made to counteract ambition.” He goes on to say that

[i]n the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people.

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145 Madison, James. *Federalist No. 45.*

146 Madison, James. *Federalist No. 51.*

147 Ibid.
The different governments will control each other, at the same time that each will be controlled by itself.148

If the Ninth and Tenth Amendments are treated as toothless truisms or dismissed as empty platitudes, then there is nothing for the people to use to effectively counteract the forces of trespassing federal power—the double protection is lost. Likewise, one might argue that relying only on the federal courts to enforce the spirit and principle of the Ninth Amendment, as the Griswold majority’s formulation does, is to let the fox guard the hen house, so to speak. If it is to act as the ultimate arbiter of federal power, the fear is that the judiciary is likely to give that power such a generous construction that it would permit Congress to occupy zones of authority and competence that would otherwise rightfully belong to the states, or to the people.

Recall the counsel of Brutus, the well-read Anti-Federalist pamphleteer:

The judicial power will operate to effect, in the most certain, but yet silent and imperceptible manner, what is inevitably the tendency of the constitution: —I mean, an entire subversion of the legislative, executive, and judicial powers of the individual states. Every adjudication of the supreme court [sic], on any question that may arise upon the nature and extent of the general government, will affect the limits of the state jurisdiction. In proportion as the [Supreme Court] enlarge[s] the exercise of [Congressional] powers, will that of the [states] be restricted. That the judicial power of the United States, will lean strongly in favor of the general government, and will give such an explanation to the

148  Ibid. (Emphasis added).
constitution, as will favor an extension of its jurisdiction, is very evident from a variety of considerations.\textsuperscript{149}

On the other hand, treating the Ninth and Tenth Amendments as a coordinated, matched response to federal power fits squarely within the model of ‘counteracting ambitions’—or offsetting powers—endorsed by Madison and advocated by republican political thinking. Just as the incorporation of the Fourteenth Amendment affords security against the state-level abuse of liberty, the Ninth and Tenth Amendments may afford security against the federal abuse of such rights, \textit{by creating a liberty enhancing vertical tension}. So when they are taken together, these two Amendments reserve to the people \textit{all} of their ‘retained rights’ and ‘reserved powers.’

The above explanation gives the people of each state a potential trump on the exercise of federal power. Of course, this is somewhat of a departure from what has come to be the orthodox view of federal supremacy in which power is typically measured \textit{only} from the top-down. Therefore, a ‘real world’ example might help us to clarify how this proposed rethinking of the existing constitutional regime might operate. So in Section 5, we will begin to examine the legalization of medical marijuana as a kind of hypothetical. Of course, we do not have to treat the issue as such. After all, these days we have an abundance of actual examples from which we could choose a case study.\textsuperscript{150} For the purposes of this study, however, we will remain at a distance from the particulars of any state’s specific experiences and keep at a more philosophical or theoretical level of abstraction.


\textsuperscript{150} See \textit{supra} note 21 and accompanying text.
SECTION 5

COMPARING THE TWO APPROACHES:

THE STANDARD

AND THE MATCHED MODEL

Through an appropriate resort to the ballot initiative process, let us suppose that the people of a given state enact a measure that legalizes the medical use of cannabis, commonly known as marijuana, by persons for whom the plant’s pharmacologically active ingredients provide the only means of relief from the pain and suffering associated with a variety of serious medical conditions.\(^{151}\) Of course, such use is contrary to the federal Controlled Substance Act of 1970 (CSA).\(^{152}\) Enacted by Congress under the auspices of its Commerce Clause authority,

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\(^{152}\) The Controlled Substances Act, Pub. L. 91-513, October 27, 1970, Title 18, United States Code, §812 schedules all drugs based on their (i) medical utility (ii) potential for abuse (iii) and their psychological and physical effects on the body. Under the CSA, marijuana is classified in the most restrictive category, that is, as a Schedule I drug—along with, for some perspective, heroin, ecstasy, and lysergic acid diethylamide (LSD), gamma-Hydroxybutyric acid (GHB, a.k.a. “the date-rape drug”), and peyote—due to its alleged lack of any accepted medicinal use and supposed high potential for abuse. The ‘good-faith’ classification of marijuana as a Schedule I drug, however, is a controversial issue in itself. For further perspective, note that codeine, cocaine, OxyContin, and methamphetamine are all in the far less restrictive Schedule II category. See 21 C.F.R. §§ 1308.11-12 (2008).
the CSA regulates the manufacture, distribution, and possession of all drugs, including marijuana.\textsuperscript{153} The CSA categorization of Schedule I makes marijuana’s possession, use, sale, and the like, for any purpose—including medicinal—a felony, that is, a serious crime punishable by physical imprisonment for a minimum of one year, as well as bringing about a variety of rather weighty monetary fines and penalties. Now let us suppose that the federal government seeks to enforce the CSA against an individual who qualifies to use cannabis under the above-enacted, legally valid state law: what role might the Ninth and Tenth Amendments play in that individual’s defense?

5.1 The Standard Approach

If we follow the approach of the standard model, that is, the approach of the Griswold majority, then the defendant/patient would use the Ninth Amendment as textual justification for making her ‘substantive due process’ argument.\textsuperscript{154} Here, she is hoping for a generous judicial construction of the word “liberty” found in the Fifth and Fourteenth Amendments. Her argument would definitively need to establish that she has more than a mere ‘low-level interest’ in the medicinal use of cannabis for the relief of her symptoms. Rather, she would have to persuasively argue that she has a much greater ‘fundamental right’ to do so. If and only if the medicinal use of cannabis is deemed to be a fundamental right would it be affirmatively recognized as a right, and then receive any constitutional protection from infringing governmental action.

\textsuperscript{153} See U.S. Constitution, Article I, §8: “The Congress shall have Power … To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”

\textsuperscript{154} Note that due process has two broad components: substantive and procedural.
As articulated in *Washington v. Glucksberg* (1997), a case in which the Court held that a Washington state law prohibiting anyone, including a physician, from aiding or causing another person to commit suicide is constitutional, individual rights that are not listed in the Constitution are affirmatively recognized only if they are deemed to be fundamental.\(^{155}\) This ‘all-or-nothing’ approach proceeds as follows: The Court will use either the Fifth or Fourteenth Amendments to protect the people from having their property in non-textual rights usurped without ‘due process of law.’ When someone brings a claim that her rights have been violated by governmental action, the Court will (i) carefully and narrowly define the asserted ‘liberty interest,’ (ii) look to the ‘history and traditions’ of protecting that interest, and then (iii) determine if that interest is fundamental to the concept of ‘ordered liberty.’ If the Court determines that the liberty interest does indeed rise to the level of being a fundamental right, it will require that the government narrowly tailor its law to achieve a compelling state interest—it will require that a ‘zone of autonomy’ be carved out from within the larger area of governmental power. However, if the asserted right is not determined to be fundamental, then the government must simply show that it has some rational basis for enacting the law. This ‘fundamental rights analysis’ is a key part of the Supreme Court’s post-*Griswold* ‘substantive due process test.’

As a totally separate argument that is premised on the Tenth Amendment’s reservation of powers to the states, the defendant/patient might try to claim that as a purely local activity, the regulation of ‘medical use’ is a matter beyond the reach of the federal commerce power. Any attempt at regulation, therefore, should be left to the ‘police powers’ of the respective states.\(^{156}\)

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\(^{156}\) This is similar to the main line of argumentation developed by the respondents in *Raich v. Gonzalez*. See no. 03-1454, “Brief for the Respondents,” particularly *Section One*, 12-24. Obviously, a
For most people, the term ‘police powers’ typically brings to mind flashing blue lights and wailing sirens; however, in the area of constitutional law it refers to “certain powers,” albeit largely undefined, “existing in the sovereignty of each State in the Union” that relate to the regulation of “the safety, health, morals, and general welfare of the public.”

Both of these lines of argumentation proceed in the same general direction, that is, *toward a restriction on the application of federal power*. They move, however, along different and uncoordinated paths in order to get there. Furthermore, regardless of how the conflict is resolved, the concept of ‘retained rights’ would play at best only a marginal role in the juridical process.

5.2 The Matched Model

An argument based on reading the Ninth and Tenth Amendments as one avoids many of the doctrinal difficulties of the standard approach. There is no need, for instance, for an

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majority of the High Court disagree, as the decision was 6 to 3 against them. As noted earlier, however, this decision has not stopped, or even slowed, the states from enacting medical use statutes.

157 See e.g. *Lochner v. New York*, 198 U.S. 45, 53 (1905) (striking down a New York state law as interfering with ‘freedom of contract’ and thus the Fourteenth Amendment’s ‘right to liberty’ afforded to employer and employee). Or, in a less controversial case context, see *Brecht v. Abrahamson*, 507 U. S. 619, 635 (1993): “The States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States’ sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.” Or, *Whalen v. Roe*, 429 U. S. 589, 603, n. 30 (1977): “It is, of course, well settled that the State has broad police powers in regulating the administration of drugs by the health professions.”
unelected judge to determine whether and under what standards a right may be deemed ‘fundamental.’ Or for the judge to determine whether an activity is ‘truly local’ or ‘truly national’ in character. Furthermore, the defendant/patient would not have to carry the ‘burden of proof’ by herself. Under the matched approach, the members of the political community—i.e. the citizens of the commonwealth; the people—within each of the respective states ‘deliberate’ about the substantive content of their ‘common good.’ In this case, they deliberate about the medical use of marijuana to alleviate the pain and suffering of their fellow citizens. Moreover, they ‘participate’ in a collective decision-making process. After all, the ultimate responsibility for safeguarding their liberty lies with them, not the judiciary. Under the matched model, acting in their collective capacity as ‘the ultimate sovereign authority,’ and speaking through their respective state governments, the people define which rights they choose to retain.

Now let us return to the facts of the hypothetical. With the matched approach, the people of our proposed state exercise their Tenth Amendment ‘reserved powers’ to assert their Ninth Amendment ‘retained right’ to allow for the regulated use of medicinal cannabis. There is no need to explore the vagaries of tradition, history, custom, or the concept of ordered liberty. Nor is there any need to draw a bright line indicating the appropriate scope of the commerce power. The right to use cannabis for medical relief is constitutionally protected, that is, retained, because the people of the state say it is.

At this point in our discussion, however, these observations have not established that the matched model is better than the standard approach or that we must jettison the latter. What the comparison does suggest is that the matched model seems to frame the constitutional conflict in relatively quick and certain terms. In so doing, this approach somewhat deflects the ‘cherry-picking’ critique that can be aimed at substantive due process arguments, and which is equally
applicable to Commerce Clause jurisprudence. So it seems, then, that the matched model does have at least some benefits that might be worth pursuing further. Of course, framing the issue does not necessarily lead to its resolution. Moreover, like all other constitutional rights, retained rights are not likely to be regarded as absolute. So now we must start to consider whether these initial benefits can in fact be sustained over the long run or if we will soon trip over our own feet. So in the next several sections, we will begin to offer a modest defense of the matched model. We will start in Section 6 with an explanation of why the Constitution’s ‘Supremacy Clause’ is not quite the hurdle to this approach that it might seem to be.
A system of ‘reserved powers and retained rights’ might seem to place the states in a position where they are situated above the federal government, creating a kind of upturned constitutional world, one in which state law trumps the exercise of federal power. Whereas we are all aware, in our familiar constitutional world, valid federal law seems to trump any state law to the contrary.\textsuperscript{158} Indeed, a constitutional interpretation that runs afoul of this basic principle is not likely to survive even casual scrutiny. Yet take note of the operative term—valid. To be valid, a federal law must be the legitimate product of an enumerated power.\textsuperscript{159} Moreover, it must also be consistent with all other applicable constitutional limitations—of which the Ninth and Tenth Amendments are two important, but often overlooked ones. To contend, therefore, that the matched model ipso facto violates the principle of federal supremacy begs the question that the model itself seeks to resolve; it presupposes the very point at issue—specifically,

\textsuperscript{158} As authority, see “Supremacy Clause,” U.S. Constitution, Article IV, §§ 2, 3: “This Constitution, and the Law of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

\textsuperscript{159} This is not to say that ‘implied powers’ cannot be legitimate. Indeed, the pairing of an ‘enumerated power’ with the “Necessary and Proper Clause” can give rise to legitimate facilitative powers. More will be said about this coupling in Section 8.2.
whether or not a federal legislative, judicial, or executive action trespasses against any of the retained rights of the people. If so, then the federal law is simply not valid. Any appeal to the Constitution’s Supremacy Clause, therefore, should carry no water.

Although the matched model does not technically run afoul of the Supremacy Clause, there are some who might still contend that this approach creates a kind of ‘glitch’ in the supremacy matrix, perhaps destabilizing the basic structure of our constitutional system. This objection, however, seems to assume that a certain ‘state of affairs’ is to prevail. Namely, one in which federal authority must always prevail over conflicting state law—despite what could, in fact, be legitimate spheres of overlapping power and interest between federal and state authorities. Our general comfort with what has come to be recognized as the hierarchical status quo should not foreclose on the possibility of another somewhat more dynamic or fluid approach to the supremacy matrix, one in which the resolution of such power conflicts is not always such a foregone conclusion.

In our medical use hypothetical, for instance, while the federal government may arguably have a strong interest in prohibiting the interstate commerce of cannabis, the people of each state may arguably have an equally strong interest in shielding not only their person, but their families, friends, and fellow citizens from agonizing but avoidable pain and suffering. So which of these apparently irreconcilable interests is to prevail? Does contemporary American constitutionalism somehow need to prevent the people of a state from meaningfully asserting a retained right against federal power in all circumstances? Madison’s republican notion of counteracting ambitions—or powers—would certainly seem to suggest otherwise. In fact, a lopsided rigidity does not seem to have been a feature of the federal system’s original design, at least as far as retained rights are concerned. Perhaps, then, the modern supremacy matrix does
not need to be so reflexively dogmatic. Indeed, to deny the people of a state even the possibility
of playing a ‘retained rights trump’ is to do away with a key counteracting democratic force to be
used against instances of trespassing federal power.

If, however, the people of a given state are actually to be able to play a retained rights
 trump, then as an initial matter we should begin to develop a more technical understanding of the
concept. Or, at least we should try to arrive at some kind of a working definition of what
exactly we mean by a ‘retained right.’ So in the next Section, we will offer some of our early
thoughts.
SECTION 7

THE GENERAL CONTOURS

OF A

RETAINED RIGHT

Given some legitimacy to the matched model of reading the Ninth and Tenth Amendments as one, we should begin to consider at least some of the potential factors that might go into determining when the assertion of a retained right should, or at the very least might, prevail over contrary federal law. So as an initial matter, we will begin to sketch a definition or at least try to arrive at a deeper, more technical understanding of what exactly we mean by a ‘retained right’ and the process through which it is both created and affirmed. It should be noted, however, that what follows in this section (and the next) is merely suggestive of some possibilities and directions for further inquiry. If one were actually to adopt an approach similar to the matched method a more definitive procedure would need to be developed through the incremental common-law process of case-by-case adjudication. This process would begin from the seemingly unassuming notion that whenever a constitutional power conflict arises, at least under some conceivable circumstances, it is at least possible that a retained right might actually carry the day.

Recall the basic premise of our argument: through the exercise of their reserved powers, the people create their retained rights. Since state governments are the traditional means through which the people exercise their reserved powers, one characteristic of a retained right is that it must be created through some mechanism or apparatus of ‘state law.’ Among other things, for instance, this means that a ‘private’ interest group (broadly understood) cannot use the reserved powers to take it upon itself to create a retained right. Indeed, a retained right is the
common property of all of the people of a given state. Therefore, it must be something that reliably serves the interests of their common good. Moreover, ‘the people’ must participate in its creation. Of course, private interests can and indeed should participate in the public deliberation, but they cannot be allowed to control or dominate the process.

Another characteristic is that the exercise of reserved powers is such that it is properly understood as a legitimate ‘right of the people to local self-determination.’ The exercise, therefore, is not merely a ‘structural’ or ‘procedural impediment’ to trespassing federal power. That is to say, this exercise is an ‘individual’ right to define one’s local political community, not some kind of abstract state right. Indeed, the exercise of the reserved powers is a particularly important component of liberty as nondomination, which, in turn, is a particularly important component of the common good.

Next, since we are talking about creating, or more properly, formalizing, retained rights through the exercise of the reserved powers, it would seem to follow that a retained right is something that must be affirmatively established—a retained right cannot be inferred from silence. Through a public process of inclusive participation and meaningful deliberation, the members of the commonwealth must vocally assert their sovereign will. This assertion must happen through an open and transparent process that conforms to established democratic norms and values. As mentioned in Section 5, an example of this is the ‘ballot initiative,’ whereby citizens are able to legislate directly without the intervention of the legislature. Simply put, 160

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160 For a discussion of the case history surrounding ‘initiatives’ see Abraham, Henry & Barbara Perry, Freedom and the Court, 8th Edition (Lawrence: University of Kansas Press, 2003) 444-47. There are also several non-governmental organizations that have websites that track the status of ballot initiatives throughout the country, for example, see Ballotpedia.org.
the initiative procedure calls for two basic steps: (i) securing the signatures of a required number of voters on a petition calling for the submission of the proposed law to the electorate; and (ii) submission of the proposal to the voters in a general election. If approved by a majority of those voting on the proposition, then the proposal will become law.

The ballot initiative is akin to what Pettit describes as citizens exerting a mode of ‘active influence’ over the control of government: “Think of how I may control a horse that I ride. I may actively pull on the reins, now steering the horse in this direction, now in that.”\textsuperscript{161} The initiative process is an example of the people ‘taking hold of the reins’ of their government and actively plotting its course. Moreover, it is an open democratic process that functions through the machinery of state law. As such, it is open to participation from all of the members of the commonwealth. This inclusivity encourages deliberation both for and against the creation of a specific retained right. Thus, deliberation is thickened by a contestatory citizenry. Indeed, participation and deliberation are essential ingredients in the process.

One might also demand that a retained right achieve a certain level-of-status in the hierarchy of state law. That is to say, once it is recognized, perhaps it should become embodied in the text of the state constitution or state bill of rights, something beyond or above an everyday legislative enactment; thus, removing the retained right from the ranks of the unenumerated. Or maybe a retained right should initially have to be adopted through a special process of higher lawmaking that occurs outside the everyday halls of government. The ballot initiative may indeed be sufficient for the task, or perhaps a retained right should have to be formalized through a convention or assembly of the people.

\textsuperscript{161} Pettit, Philip. \textit{On the People’s Terms}, 156-7.
Finally, given the doctrine of incorporation, and being the product of state action, a retained right cannot violate any of the provisions of the federal Constitution, such as those of the Fourteenth Amendment. Indeed, no rights are absolute and this would most certainly include retained rights. Moreover, given republicanism’s commitment to both ‘equality’ and ‘personal autonomy,’ this means that the judiciary—even within the matched method—will have an important role to play in ‘checking’ any discriminatory majoritarian impulses or preferences of the people. Again, power must be made to check power.

Along these lines, the legal theorist Ronald Dworkin distinguishes between “personal preferences” and “external preferences.” Although at times a clear boundary between the two can be somewhat difficult to ascertain, in general, a ‘personal preference’ is about what a person wants to do or about what she should get for herself. Whereas, an ‘external preference’ is about what other people should do or about what they should get. Dworkin argues that the right of individuals to ‘equal consideration and respect’ regarding the assignment of various goods and opportunities across society means that personal preferences are to be respected, but not external ones. External preferences should be ignored, in order to avoid so-called “double counting.” In a republican society in which everyone is to count for exactly one, for example, a person’s internal preference to marry the adult person of their choosing—regardless of sexual orientation—should be counted, as well as another person’s preference to do likewise. However, someone’s external preference that another should not be allowed to marry an adult person of their choosing, should not be considered. So even though the matched model seeks to empower

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163 Ibid at 235.
the citizenry in defining its own conception of freedom, there is still an important role for the judiciary to play in safeguarding ‘liberty as nondomination’ from the discriminatory external preferences of majorities—but properly understood that role is secondary to the sovereign will of the people.164

As to the inevitable clashes that will occur between federal power and the retained rights of the people, one might be tempted to adopt a kind of ad hoc ‘balancing test’ in order to compare the relative weights of the contending assertions. The main benefit of such a test is found in the ease of description: simply weigh one interest against the other and explain the result. A balancing test, however, is more likely to produce a doctrinal quagmire than a consistent body of good precedent. To begin with, the interests to be balanced are most likely incommensurate. As noted in Section 6, how does one balance a federal interest in prohibiting

164 In West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1943), Justice Robert H. Jackson writes:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. (Emphasis added).

An aim of the matched model, however, is to allow the people to “apply” these same “principles” for themselves, particularly in the area of “other fundamental rights.”
the interstate commerce in cannabis with the people’s reserved power interest in providing relief from pain and suffering? It seems that any choice between the two would have to be based on largely subjective factors or policy considerations that have no real anchor in the Constitution itself. Moreover, a balancing test aims to answer the wrong question. Although the ‘practical conflict’ may be between federal and state interests, this is not the ‘constitutional conflict.’ The constitutional conflict is between countervailing exercises of power, both of which, at least in the abstract, have meaningful claims to constitutional validity. The task, then, is to measure qualitatively these claims in the context in which they arise, so that we can determine which sphere of authority has the stronger claim to validity under the specific circumstances. In the next section, therefore, we will begin to do just this.
SECTION 8

A COUNTERACTING CONTINUUM

OF

CONSTITUTIONAL AUTHORITY

One way that we could undertake a qualitative measurement of conflicting exercises of constitutional power is to examine ‘federal power’ and ‘retained rights’ along a sliding continuum of counteracting constitutional authority. The aim of this approach is to determine at exactly what point on the scale the constitutional strength of one claim might overpower the relative constitutional weakness of another. Such an approach, albeit, is somewhat mechanistic, but working our way through the issue within this simple qualitative conceptual framework may help us to shed some critical light on how to think about the inevitable conflicts that will arise between federal power and retained rights.

![Figure 1. A sliding continuum of counteracting constitutional authority.](image)

For our present purposes, then, let us assume that there are four primary points on the scale, with some overlap between them. See Figure 1. On the far left side, in the first zone, we find the absolute apex of federal power and the nadir of the reserved power. This is the zone where federal power is not only legitimate, but overwhelmingly strong. Whereas on the far right,
in zone four, we have the opposite—that is to say, the nadir of federal power and the apex of the reserved power. As we get closer to the right-hand side of the continuum, this is where we will find the strongest arguments for the people’s assertion of their reserved power and the existence of a genuine retained right, because in this zone there is a virtual absence of legitimate federal power.

8.1 The First Point: Enumerated Powers

After the Constitution’s Preamble, the first sentence of Article I, Section One declares that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States …”\(^{165}\) Therefore, when we want to evaluate if a federal assertion is, in fact, constitutional, the place to begin is with a close look at whether or not Congress has acted within the powers granted by the text of the document itself. Hence, the first point on our continuum includes those exercises of the federal power that are *premised on the literal language of an enumerated power*. For example, the regulation of commerce among the states, the coining and valuation of money, the creation of a post office or post road, and the like.\(^ {166}\)

Within this point on our scale, these examples are going to be relatively straightforward instances of legitimate uses of federal power—easy cases, if you will. Indeed, at this point, federal authority is going to be overwhelmingly predominant, if not wholly exclusive. This is because when Congress operates within the ‘unassisted language’ of an enumerated power, it is exercising *precisely that power* and *only that power* that the Constitution has unequivocally conferred.

\(^{165}\) See U.S. Constitution, Article I, §1. (Emphasis added).

\(^{166}\) See U.S. Constitution Article I, §8, cls. 3, 5, 7, and the like.
By contrast, within this first zone, the ‘reserved power’ is going to be limited at best. The reason is simple: one cannot reserve what has already been granted. So at this point on the scale there is simply no residuum of reserved power. Therefore, there is no ‘reserve power vehicle’ through which to assert a counteracting retained right against federal authority. As a result, the orthodox model of federal supremacy can be applied in this zone without any reference to harmonizing the Ninth and Tenth Amendments. Indeed, at this point on the scale, a valid federal law will always trump state law to the contrary—including any assertion of a retained right.

8.2 The Second Point: Facilitative Powers

In this zone, the exercise of federal power depends on the pairing of an ‘express grant of constitutional authority’ with the assistance of the “Necessary and Proper Clause.”167 This Clause vests Congress with the legitimate authority to undertake measures that are justifiably “for the carrying into Execution” of its enumerated powers.168 In other words, relying on the literal language of the Clause, Congress may adopt measures that are designed to assist or facilitate the federal government in executing its constitutionally enumerated powers.169 For

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167 See U.S. Constitution, Article I, § 8, cl. 18: “[The Congress shall have Power…] to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”

168 Ibid.

169 In actual practice, however, Congress does not rely on the limitations of literal language, but—in echoes of the Antifederalist pamphleteer, Brutus—on a judicially favored interpretation of the text that affords wide-ranging, expansive powers to the federal government. Of course, this is not a new
example, Congress could regulate the intrastate sale of widgets to facilitate regulation of the interstate market, or it could provide for the purchase of mines to ensure an adequate supply of a certain metal for coins, or condemn property for the construction of a post office, and so forth. However, given that these exercises of federal authority are not literally within the scope of the paired enumerated power, there may well be a greater residuum of power reserved under the Tenth Amendment that is available to draw upon for the assertion of a retained right—certainly more than exists at the first point on our scale. As Madison notes: “Whatever meaning [the

development. In the High Court’s landmark decision, McCulloch v. Maryland, 4 Wheat. 316 (1819), Chief Justice John Marshall, an ardent Federalist, upheld the constitutionality of the Bank of the United States with a broad reading of congressional power and a nationalist interpretation of our federal system of divided government. In his classic formulation:

Let the end be legitimate, let it be within the scope of the Constitution,

and all means which are appropriate, which are plainly adapted to that

end, which are not prohibited, but consistent with the letter and spirit of

the Constitution, are constitutional. (Ibid, 421).

Moreover, the Chief Justice interestingly construed the word “necessary” to mean the much more helpful “convenient” or “useful” and rejected the narrow reading of “indispensable.” (Ibid, 413). So even though the authority to establish a national banking system (the Federal Reserve) is not among the enumerated powers of Congress, Congress can do so because establishing such a system is a ‘necessary and proper’ (i.e. convenient) way of executing its power to lay and collect taxes, to borrow and collect money, regulate interstate commerce, and the such. For an informative discussion of the arguments and ambiguities involved in the interpretation of the Necessary and Proper Clause, albeit from a libertarian leaning perspective, see Randy Barnett (who is one of the lead attorneys in Gonzalez v. Raich), Restoring the Lost Constitution (Princeton: Princeton University Press, 2004) 151-190.
Necessary and Proper Clause] may have *none can be admitted, that would give an unlimited discretion to Congress.*"\(^{170}\) At a minimum, then, whenever the Necessary and Proper Clause is coupled with an enumerated power *there should be no automatic presumption of federal exclusivity.*

At this point on our scale, however, since there *is* a legitimate need to allow the federal government the room or the ability to execute its granted authority in an efficacious manner, any assertion of a counteracting retained right would be standing on relatively soft ground. Even so, because there *is* also some conceptual space for legitimate power conflicts to arise, the federal government should be expected to establish (at the very least) a ‘reasonable basis’ for characterizing its particular course of action as truly facilitative. In response, a court might find that there are varying ‘degrees of facilitation.’ These degrees could significantly alter the characterization of the federal government’s assertion. Indeed, a mere *pretext to facilitation* should be recognized and treated as such. This would have the effect of sliding the federal action towards the right-hand side of our scale where the levels of reserved power begin to increase and assertions of retained rights begin to stand on much firmer ground—that is to say, a pretext would move the assertion out of the second zone and into at least the third. If federal assertions without actual justification were sufficient to demonstrate the constitutionality of legislation, then such legislation would be deemed valid no matter how unquestionably without foundation the assertion might actually be.

8.3 **The Fulcrum Point: Proximate Powers**

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Moving to the third point on our scale—the fulcrum—any assertion of federal supremacy becomes suspect because in this zone the connection between ‘the granted power’ and ‘the activity being regulated’ is merely proximate and not truly facilitative. An instance of this kind of legislative overreach is found in the federal statute at issue in *United States v. Lopez*. Enacted by Congress under the authority of its Commerce Power, the Gun-Free School Zones Act of 1990 (the Act) made it a federal crime for an individual to knowingly possess a firearm within 1,000 feet of a public or private school. Shortly after the Act took effect Alfonso Lopez Jr., a twelfth-grade student, was arrested for carrying a .38 caliber handgun into his San Antonio, Texas high school. Initially, Lopez was charged with violating a Texas statute prohibiting firearm possession on school grounds, but these charges were dropped after federal agents charged him with violating the Act. Subsequently, a federal district court found Lopez guilty and sentenced him to six months incarceration and two years of probation. Lopez and his attorneys appealed on the grounds that the Act was unconstitutional because Congress had exceeded its authority under the Commerce Clause. The Court of Appeals for the Fifth Circuit agreed and reversed the lower court. The Federal government then appealed to the Supreme Court.

In a five to four decision, written by Chief Justice William H. Rehnquist, the High Court held that the federal regulation of gun possession in a school zone was only proximately related to various aspects of interstate commerce. The Act was not in any fashion designed to assist Congress in the regulation of anything ‘interstate’ or ‘commercial.’ The possession of a firearm in a local school zone is not an economic activity that might, through repetition elsewhere, have a substantial effect on interstate commerce. In fact, the law is a criminal statute that has nothing

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to do with commerce or any sort of economic activity. Therefore, Congress exceeded the legitimate reach of its Commerce Power. “To uphold the government’s contention here,” writes Chief Justice Rehnquist, “we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the states.”

Indeed, some fifty years earlier, the Court recognized that the scope of the Commerce Power “must be considered in light of our dual system of government” and interpreted so as not to “obliterate the distinction between what is national and what is local and create a completely centralized government.”

Authority over such proximately connected activities as the federal regulation of gun possession in a local school zone—no matter how well-meaning or good-intentioned the federal legislative effort—is not granted by the language of any enumerated federal power and not literally within the scope of the Necessary and Proper Clause. As a result, such matters fall firmly within the expected and promised (yet albeit nebulous) range of the reserved powers—in this case, the police power of the states. One might even say that the main purpose of the matched model is to prevent the undermining of the people’s liberty within this contentious third zone in our sliding scale—that is to say, to prevent the federal government from trespassing into this ungranted territory into which Congress so often willfully roams.

In her dissenting opinion in *Gonzalez v. Raich*, Justice Sandra Day O’Connor effectively captures this concern. Condemning the High Court’s refusal to grant the states—or the

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172 *Ibid* at 567.


174 See *supra* note 19 for the particulars of *Raich*.
people—any reprieve from the federal ban on marijuana, she offers a rather bleak appraisal of state and people power:

California (by ballot initiative and then by legislative codification) has come to its own conclusion about the difficult and sensitive question of whether marijuana should be available to relieve severe pain and suffering.

*Today the Court sanctions an application of the federal Controlled Substances Act that extinguishes that experiment without any proof that the personal cultivation, possession, and use of marijuana for medicinal purposes, if economic activity in the first place, has a substantial effect on interstate commerce and is therefore an appropriate subject of federal regulation.* In so doing, the Court announces a rule that gives Congress a *perverse incentive to legislate broadly* pursuant to the Commerce Clause…

To put Justice O’Connor’s concern in terms of our sliding scale of counteracting constitutional power, through an overly generous judicial interpretation of the Commerce Power, Congress has been given “a perverse incentive” to trespass into the third area of our scale; thus, throwing the balance of constitutional power *heavily* in favor of the federal government. Indeed, any meaningful bulwark between facilitative and proximate power has largely been collapsed. This is concerning because

[j]ust as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, *a healthy balance of power between the States and the*  

Federal Government will reduce the risk of tyranny and abuse from either front.  

As we have noted, however, the people of the several states simply refuse to accept Congressional overreach into this third area, at least regarding medical marijuana. Indeed, a retained right—not a federal power—created within this point on our continuum should begin to carry a presumption of constitutional legitimacy. Perhaps the federal government could rebut this presumption by establishing a tight proximate relationship between the activity regulated and some matter within the granted authority of Congress, but as Justice Connor argues this is not the case in Raich. Or the federal government could argue that the proximate connection actually does facilitate the exercise of a granted power, thereby convincing a court to reverse the presumption (which would essentially slide the conflict back to the second point on our continuum), which is a position in line with the majority decision in Raich. Otherwise, the presumption of constitutional legitimacy should most certainly favor the retained right. The outstanding conflict between federal power and the people of the states, however, leaves the people open to arbitrary intervention by the federal government. And, as we saw in Section 2.4, to have one’s life subject to arbitrary intervention by another, according to the republican understanding of liberty as nondomination, is a form of slavery.

8.4 Retained Rights

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177 Indeed, two states—Colorado and Washington—have gone further and outright de-criminalized recreational use of marijuana.

178 545 U.S. 1, 42-57.

179 Ibid at 5-32. (J. John Paul Stevens, majority opinion).
Finally, on the far right-hand side of our scale, we arrive at the nadir of federal power and the absolute apex of the reserved powers. In this area, federal power is virtually non-existent. There is no ‘enumerated’ or ‘facilitative’ power, and arguments for ‘proximate’ power carry little to no weight. Here, even in the absence of an asserted retained right federal law *must* fall. This is the zone of authority that is reserved to the people or their respective state government (if they so choose) in which the federal government simply may not trespass—as we saw in the *Lopez* decision. Just as the reserved powers have no legitimate application in the first zone of our scale, at this point on the continuum, *federal power has none*.

Thus, we can now see that the critical spot on our continuum is the area of overlap between the second and third points. This is where the presumption of constitutional legitimacy begins to shift from the legitimate exercise of federal power at point two toward the protection of a retained right at point three, or vice versa. Of course, in practice, there is no bright line of demarcation between these critical areas. For example, a loosely constructed facilitation at point two, upon closer examination, may start to look more like a proximate connection that should be placed at point three—thus weakening the federal argument. However, just as a facilitation can become more proximate, the opposite can also happen; a proximate connection can become more properly characterized as being facilitative—as the majority in *Raich* contend. Even so, the notion of the counteracting power continuum provides us with at least an initial read on the relative constitutional strengths of the counteracting ambitions of federal power and retained rights.180

180 After careful consideration, if the counteracting forces are at an impasse (that is, if they are in equipoise somewhere between the second and third points on the scale) then the only recourse may be an
So now let us briefly revisit our medical use hypothetical. The retained right for the medical use of marijuana was affirmatively recognized by the people of a given state through a proper resort to the ballot initiative process, which is a clear exercise of their reserved power. Whether the right’s status in the hierarchy of state laws is constitutionally adequate cannot be resolved here, since it is unclear whether or to what extent such status might matter for these purposes. Let us assume, however, that as a legitimate ballot initiative the status of the right to medical use is indeed satisfactory.

Next, we must consider whether this retained right violates any applicable constitutional principle aside from federal supremacy. Setting aside the majority’s argument in *Raich* (which is exactly what seems to be happening in most actual instances of state-level legalization campaigns), none come immediately to mind. Although if the retained right were limited only to state residents there could be potential Article IV, as well as equal protection issues under the Fourteenth Amendment that would have to be dealt with. Given that this is not the case, the state’s provision for the medical use of marijuana would appear to be a retained right of constitutional stature.

There is, of course, still the conflict between this newly created retained right and the Controlled Substances Act. The question now becomes—*where does this conflict fall on our appeal to Congress and a call for a statutory reconstruction that either avoids the conflict or definitively tips the balance in one direction.*

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181 See U.S. Constitution, Article IV, §2: “…The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.” See U.S. Constitution, Amendment XIV, §1, “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States…nor deny to any person within its jurisdiction the equal protection of the laws.”
But it should now start to be fairly clear what some of the baseline questions are that we need to ask in order to get an initial read on the conflict. For example: Does the federal prohibition of medical use facilitate the regulation of interstate commerce? If so, then how and to what degree? Is the prohibition a necessary means to accomplish Congress’ ‘interstate ends’ or is it merely adjacent to those ends? Would an exception—a ‘carve out’ within the field of power—that protects the retained right undermine the facilitation? Has Congress considered such an exception? Has it done so in ‘good faith,’ assessing all of the evidence and arguments? Assuming that there is not any or only a minimal amount of facilitation, then what, if any, is the ‘proximate’ connection between medical use and interstate commerce? Has Congress examined the factual basis for any claimed proximate connection? Then is there a proximate connection between medical use and interstate commerce? Has Congress considered that proximate connection? Have all of these questions been asked and answered in a good faith effort to arrive at the so-called ‘truth of the matter?’

Of course, this handful of questions is not dispositive. It should, however, be enough for us to begin to sketch the character of the kind of inquiry that a court would be called upon to make if it were ever to accommodate federal power with a legitimate retained right to use medical marijuana. Yet, perhaps more importantly, it should be enough for the people to begin to evaluate the constitutional legitimacy of the issue for themselves.

There is, however, still an important question that lingers—namely, the normative one: Ought a retained right ever be allowed to supplant what otherwise would be constitutional federal legislation? In short, the answer is yes. As we have seen throughout this study, by allowing a retained right to operate as a counteracting ambition to federal power it serves to further high principles of constitutional structure. Moreover, it helps to fulfill the substance of
the promise made in Article IV, Section Four that “the United States shall guarantee to every state in this union a republican form of government.”\textsuperscript{182} Indeed, each of the states shall have a form of government that respects the fundamental republican principles of popular sovereignty, the common good, deliberation, participation, and liberty as nondomination—\textit{retained rights are an essential ingredient in this mixture}. Now whether or not in praxis retained rights undermine other important constitutional values remains to be seen. Either way, however, a genuinely meaningful dialog and deliberation that examines the possibility should not be so quickly foreclosed—that is to say, the idea of reading the Ninth and Tenth Amendments as two sides of the same coin should not be so quickly dismissed.

\begin{quote}
It is one of the happy incidents of the federal system that a single courageous State may, if its citizens so choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country...if we would guide by the light of reason, we must let our minds be bold.

—Justice Louis Brandeis, New State Ice Co. v. Liebman (1932)
\end{quote}

\textsuperscript{182} See U.S. Constitution, Article IV, §4.
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