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Federalism, Individual Rights and Judicial Engagement

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FEDERALISM, INDIVIDUAL RIGHTS, AND JUDICIAL ENGAGEMENT

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> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.
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> U.S. CONST. amend. IX (1791)

> When the people have formed a Constitution, they retain those rights which they have not expressly delegated.
>
> James Madison (1794)[1]

> It appears to me a self-evident proposition, that the several State Legislatures *retain* all the powers of *legislation*, delegated to them by the State Constitutions; which are not EXPRESSLY taken away by the Constitution of the *United States*.
>
> Justice Samuel Chase, *Calder v. Bull* (1798)[2]

> The sum of [the Ninth and Tenth Amendments] appears to be, that the powers delegated to the federal government, are, in all cases, to receive the most strict construction that the instrument will bear, where the rights of a state or of the people, either collectively, or individually, may be drawn in question.
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> St. George Tucker, *View of the Constitution of the United States* (1803)[3]

INTRODUCTION

Contemporary "rights talk" under the American Constitution tends to focus on individual rights or those rights that can be perfected in the case of a single individual.[4] This would include, for example, the rights to free expression, free exercise of religion, sexual autonomy, or the right to equal treatment. Under the broad umbrella of individual-rights talk, theoretical discussions generally involve whether courts ought to recognize a particular

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1 4 ANNALS OF CONG. 934 (1794) (statement of James Madison).

2 Calder v. Bull, 3 U.S. (3 Dall.) 386, 387 (1798).

3 St. George Tucker, *View of the Constitution of the United States*, *in* VIEW OF THE CONSTITUTION OF THE UNITED STATES 91, 105 (Liberty Fund 1999) (1803).

4 *See generally* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 47-75 (1991).

individual right[5] or what level of scrutiny (or engagement) ought to apply to judicially identified individual rights.[6]

From the beginning of our history as a nation, however, the concept of legally cognizable rights has included far more than just individual rights. At the time of the founding, legal and political commentators viewed the liberties of the people as including individual, majoritarian, and collective rights.[7] The cry of "no taxation without representation,"[8] for example, is a demand for the right of majoritarian political representation. The revolutionary "Right of the People to alter or to abolish" an oppressive government, as announced in the Declaration of Independence,[9] is a collective right that can only be perfected as part of a broad cultural movement.

All of the rights mentioned above are held by individual citizens. But where a single individual may exercise an individual right, majoritarian and collective rights are *participatory*; they can be successfully exercised only as part of a larger group effort of which the individual is but a member.[10] In the case of democratic elections and legal revolutions, the individual participates with others in the exercise of majoritarian and collective rights, both involving the exercise of rights appertaining to idea of self government. Our Constitution enshrines these majoritarian and collective rights of self government in a variety of ways, from the procedures by which majorities elect members of the political branches of government,[11] to the manner by which the Constitution itself may be "altered or abolished."[12]

Despite their historical pedigree, the majoritarian and collective rights of self government tend to remain on the sidelines in discussions of judicially cognizable rights and liberties. In fact, some scholars question whether such rights are judicially cognizable at all. For example, the Supreme Court has shied away from playing any significant role in determining the

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[5] *See, e.g.*, Randy E. Barnett, *Justice Kennedy's Libertarian Revolution:* Lawrence v. Texas, 2003 CATO SUP. CT. REV. 21, 31-32.

[6] *See, e.g.*, Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 689-92 (2007).

[7] For a discussion of these various rights and the implications for a proper interpretation of the Ninth Amendment, see Kurt T. Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 895 (2008).

[8] *See* JOURNAL OF THE STAMP ACT CONGRESS, *reprinted in* C. A. WESLAGER, THE STAMP ACT CONGRESS 181, 200-01 (Univ. of Del. Press 1976) (1765) (preamble, third, and eighth resolutions).

[9] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[10] Individual rights may also shade into participatory rights, as where the right to free expression is viewed as including rights of group association, see *Boy Scouts of America v. Dale*, 530 U.S. 640, 647-49 (2000) and *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 579-81 (1995), and where the right to free exercise of religion is viewed as including rights of church or religious associational autonomy. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 705-07 (2012).

[11] U.S. CONST. art. I, § 2; *id.* amend. XII; *id.* amend. XVII.

[12] *See id.* art. V.

validity of congressionally accepted amendments to the Constitution.[13] More controversially, the Supreme Court has, at times, suggested that the rights of local self government (so-called "state rights") recognized by the Tenth Amendment are not subject to judicial enforcement but are, instead, adequately protected through the ordinary structural mechanisms of the political process.[14] Such an approach seems to contradict longstanding judicial proclamations that the purpose of having a Bill of Rights in the first place "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."[15] Indeed, placing the retained rights of local self government beyond the reach of judicial enforcement suggests that such rights have little, if anything, to do with American constitutional liberty.

More recent decisions by the Supreme Court suggest a more protective, or more judicially engaged, approach to the rights to local self government.[16] In *Bond v. United States*,[17] for example, Justice Kennedy pointed out that

> The federal system rests on what might at first seem a counterintuitive insight, that "freedom is enhanced by the creation of two governments, not one." The Framers concluded that allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived.[18]

According to Kennedy, "[f]ederalism is more than an exercise in setting the boundary between different institutions of government for their own integrity. . . . '[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power.'"[19] Finally, just to drive home the

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[13] *See* Coleman v. Miller, 307 U.S. 433, 450 (1939) ("[T]he efficacy of [constitutional amendment] ratifications by state legislatures . . . should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment.").

[14] *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552-54 (1985).

[15] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

[16] *See* United States v. Morrison, 529 U.S. 598, 617-19 (2000) ("We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."); Printz v. United States, 521 U.S. 898, 933-35 (1997) (finding federal legislation imposing an obligation on local law enforcement officers "to perform background checks on prospective handgun purchasers" to be unconstitutional); United States v. Lopez, 514 U.S. 549, 567 (1995) ("The possession of a gun in a local school zone is in no sense an economic activity that might . . . substantially affect any sort of interstate commerce."); New York v. United States, 505 U.S. 144, 188 (1992) ("Whatever the outer limits of [state] sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program.").

[17] 131 S. Ct. 2355 (2011).

[18] *Id.* at 2364 (citation omitted) (quoting Alden v. Maine, 527 U.S. 706, 758 (1999)).

[19] *Id.* (quoting *New York*, 505 U.S. at 181).

link between local self government and national liberty, Kennedy declared, "[b]y denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake."[20] Kennedy's entire opinion, in fact, is a paean to federalism as an individual right.

Despite Justice Kennedy's strong stand on the individual right to divided government, *Bond* itself lies in tension with other recent decisions by the Supreme Court that take a broadly deferential approach to congressional regulation of matters traditionally regulated by the states.[21] Indeed, the current Supreme Court seems unsure whether they should be engaged in any significant way in the enforcement of a line between matters local and matters national.[22] In other words, the Court seems unsure whether federalism is simply a good idea that Congress *ought* to respect, or whether federalism is in fact a constitutional right of the people that Congress *must* respect. Only the latter calls for an engaged Court imposing the same justificatory burdens on Congress when its action abridge the people's right to local self government as they do when congressional action abridges individual rights such as those protecting freedom of speech.

To the extent that the Court cares about the original understanding of the Constitution, there is good reason to follow Justice Kennedy's suggestion in *Bond* and treat federalism as not just a good idea, but as a constitutional and judicially enforceable right. This Essay explores how federalism became a textually identified right of the people through the adoption of the Ninth and Tenth Amendments. The Founders understood that the judiciary would enforce the people's retained right to local self government along with every other right listed in the first eight amendments. Having established the historical roots of federalism as a judicially enforceable individual right, the Essay concludes by explaining how these rights survived the adoption of the Reconstruction Amendments and remain proper subjects of judicial engagement to this day.

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20 *Id.*

21 *See, e.g.*, United States v. Comstock, 130 S. Ct. 1949, 1954 (2010) (upholding a federal civil-commitment statute authorizing extended detainment of "mentally ill, sexually dangerous federal prisoner[s]"); Gonzales v. Raich, 545 U.S. 1, 17-33 (2005) (upholding federal regulation of marijuana use "for personal medical purposes on the advice of a physician" (internal quotation marks omitted)).

22 This uncertainty is reflected in the shift from the early pro-federalism decisions of the Rehnquist Court, such as *Lopez* and *New York*, and those decisions handed down in the waning days of the Rehnquist Court, such as *Raich*. Nor does the Roberts Court seem altogether sure whether its approach will be one of engagement (as in *Bond*) or deference (as in *Comstock*).

I. FEDERALISM AS A RIGHT UNDER THE ORIGINAL CONSTITUTION

When James Madison stood before the House of Representatives in 1791 and declared that the Framers never intended to grant federal power to incorporate a bank,[23] he knew what he was talking about. In the latter days of the Philadelphia Convention, Madison *himself* had proposed granting Congress such power, only to rebuffed by his fellows, who acknowledged that the Constitution did not grant such power but who also insisted that granting the federal government such power was neither necessary nor proper.[24]

Despite his inside knowledge about what transpired at the Convention, Madison did not rest his opposition to the Bank on the Framers' intentions. Instead, Madison pointed to the recent ratifying conventions in the states, which adopted the Constitution with an understanding that national power would be narrowly construed in order to avoid interfering with the retained rights of the people in the several states.[25] According to Madison, the original objection to a Bill of Rights involved a fear that Congress would "extend[]" federal power "by remote implications."[26] State conventions had been assured that the Necessary and Proper Clause would not be interpreted to give "additional powers to those enumerated."[27] Madison "read sundry passages from the debates" of the state conventions in which "the constitution had been vindicated by its principal advocates, against a dangerous latitude of its powers, charged on it by its opponents."[28] He also reminded the assembly about the proposals the state conventions had submitted, which sought to prevent overly broad constructions of federal power: "The explanatory declarations and amendments accompanying the ratifications of the several states formed a striking evidence, wearing the same complexion. He referred those who might doubt on the subject, to the several acts of ratification."[29] In sum, Madison was insisting that the broad interpretation of federal power put forward to justify the incorporation of the bank contradicted the principle of limited enumerated power reflected in the text and promised to the state conventions.

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23 2 ANNALS OF CONG. 1944-52 (1791).

24 *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 615-16 (Max Farrand ed., 1911). For a discussion of the convention debate over the incorporation power, see Kurt T. Lash, *"Resolution VI": National Authority to Resolve Collective Action Problems Under Article I, Section 8*, 87 NOTRE DAME L. REV. (forthcoming 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1894737.

25 James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791), *reprinted in* JAMES MADISON: WRITINGS 480, 489 (Jack N. Rakove ed., 1999).

26 *Id.* at 488.

27 *Id.* at 489.

28 *Id.*

29 *Id.*

Some of Madison's colleagues objected to the nature of his claims. It would be one thing, they said, to argue that it was unnecessary to charter a Bank of the States, or even to warn of potential problems that might arise with the creation of the Bank.[30] But these were questions of "*expediency*" or policy, with which men of good faith could disagree.[31] Madison, however, was not making a mere policy argument; he was insisting that the choice to charter banks was a matter retained by the states as a matter of *right*.[32] Surely, his colleagues objected, this went too far?

Not to Madison. The man who played a key role in the shaping and ratification of the Constitution knew the underlying principle of the document was one of delegated power—and powers are not delegated from the ether. They had been delegated from the sovereign people in the several states who, as a matter of *right*, retained all powers not given away. Nor was this merely a matter of unstated principle: even as he spoke, amendments that would textually declare the principle of federalism as a retained right of the people were wending their way through the state ratification process.[33] In case his colleagues had forgotten the condition upon which most states had ratified the Constitution, Madison reminded the House members that *they themselves* had drafted a Bill of Rights in order to make good on promises made during the ratification debates. Here, Madison pointed specifically to what would become our Ninth and Tenth Amendments:

> The explanatory amendments *proposed by Congress themselves*, at least, would be good authority with [the amendments suggested by the state conventions]; all these renunciations of power proceeded on a rule of construction, excluding the latitude now contended for. These explanations were the more to be respected, as they had not only been proposed by Congress, but ratified by nearly three-fourths of the states. He read several of the articles proposed, remarking particularly on the 11th. and 12th. [our Ninth and Tenth Amendments] the former, as guarding against a latitude of interpretation—the latter, as excluding every source of power not within the constitution itself.[34]

Madison concluded his argument by insisting that the purpose of the Ninth and Tenth Amendments was to secure the retained rights of the people and their governments in the several states:

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30 *See, e.g.*, Memorandum from Roger Sherman to James Madison (Feb. 4, 1791), *reprinted in* 13 THE PAPERS OF JAMES MADISON 382 (Charles F. Hobson & Robert A. Rutland eds., 1981) (questioning Madison's approach and asking whether the debate about the National Bank involved "a question of *expediency* rather than of rights?" (emphasis added)).

31 *See id.*

32 *See* Madison, *supra* note 25, at 488-89 ("[T]he powers not given [to Congress] were retained [by the states]; and . . . those given were not to be extend by remote implications.").

33 *See, e.g.*, James Iredell, Proposed Amendment, North Carolina Ratifying Convention (Aug. 1, 1788), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 403 (Philip B. Kurland & Ralph Lerner eds., 1987).

34 Madison, *supra* note 25, at 489 (emphasis added).

> In fine, if the power were in the constitution, the immediate exercise of it cannot be essential—if not there, the exercise of it involves the guilt of usurpation, and establishes a precedent of interpretation, levelling [sic] all the barriers which limit the powers of the general government, and protect those of the state governments.[35]

Today, we think of retained rights as involving matters of individual rights, for example those listed in the first eight amendments to the Constitution and, perhaps, those implied by the Ninth Amendment and its reference to "other[] [rights] retained by the people."[36] Matters left to the states are generally thought of as matter of "reserved *powers*" protected (if at all) by the Tenth Amendment. Rights belong to individuals (people), while powers are viewed as belonging to institutions of government (states).[37] There is a tendency, in other words, to distinguish the "retained rights of the people" from the "reserved powers of the states," thus driving an analytical wedge between the Ninth and Tenth Amendments, and between the Tenth Amendment and the rest of the Bill of Rights.

This division between retained rights of the people and the reserved powers of the states is facially denied by the document itself. It may seem an obvious point, but an important one nonetheless, to point out that the Tenth Amendment is part of the Bill of *Rights*. But even if we just focus on the Tenth Amendment, it is impossible to create a rule of construction where "rights go to people," but "powers go to governments." The Tenth Amendment, after all, declares that all powers neither granted to the federal government nor denied to the states are "reserved to the States respectively, *or to the people*."[38] For more than two hundred years, scholars have understood this Amendment as leaving all nondelegated, nondenied powers to the people of the several states, who were then free to delegate them to their own state governments or to place such powers beyond the reach of their own government by listing them in a state bill of rights.[39] The "people," as the term is used in the Tenth Amendment, is a reference to the collective people in the several states who reserve the majoritarian right to participate in acts of self government in all matters not delegated away (for example, the right of state-level majorities to vote on matters of public education).[40]

These are the same collective "people" Madison spoke of in *Federalist No. 39*, where he explained that the sovereign people of the several states

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35 *Id.* at 489-90.

36 U.S. CONST. amend. IX.

37 *See* Seth Rokosky, Comment, *Denied and Disparaged: Applying the "Federalist" Ninth Amendment*, 159 U. PA. L. REV. 275, 295-97 (2010) (discussing scholarly support for the individual rights theory of the Ninth Amendment).

38 U.S. CONST. amend. X (emphasis added).

39 *See, e.g.*, 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 752-53 (Fred B. Rothman & Co. 1991) (1833).

40 *See* Rokosky, *supra* note 37, at 307.

would continue to enjoy independent existence even after the adoption of the Constitution.[41] According to Madison:

> [I]t appears, on one hand, that the Constitution is to be founded on the assent and ratification of the people of America, given by deputies elected for the special purpose; but, on the other, that this assent and ratification is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong. It is to be the assent and ratification of the several States, derived from the supreme authority in each State—the authority of the people themselves. The act, therefore, establishing the Constitution will not be a *national* but a *federal* act.[42]

Once we see how the collective people in the states may both delegate and reserve powers, it is easier to see why Madison believed the Ninth and Tenth Amendments worked together to protect the retained rights of the people to local self government. The Ninth Amendment declares that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[43] The rights listed in the first eight amendments act as constraints on the exercise of national power. So another way of thinking about the Ninth Amendment is that it declares that the constraints on national power listed in the Constitution are not the *only* constraints on the exercise of federal power. This ensured that the addition of a Bill of Rights would not be construed as allowing the federal government to regulate anything and everything so long as they avoided abridging a particular enumerated right. State ratifying conventions would have overwhelmingly rejected such an implied grant of national police power, which was typically viewed as belonging to local state governments. The Constitution avoids such an implied grant of unlimited power through the textual device of enumerated powers, whereby all powers are withheld except those specifically granted (or necessary and proper to their operation).[44] Although the state conventions insisted on the addition of a list of enumerated rights,[45] the Ninth Amendment ensures that the addition of such a list cannot be read as altering the fundamental principle of limited enumerated power.

In this way, the Ninth and Tenth Amendments inevitably work together as twin guardians of the people's retained right to local self government. The Ninth Amendment declares that the people have retained sovereign control over more matters than just those expressly listed in the Constitu-

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41 THE FEDERALIST NO. 39, at 239 (James Madison) (Clinton Rossiter ed., 2003).

42 *Id.*

43 U.S. CONST. amend. IX.

44 *See id.* amend. X; *id.* art. I, § 8, cl. 18 (Necessary and Proper Clause).

45 *See, e.g.*, Michael Lienesch, *North Carolina: Preserving Rights*, *in* RATIFYING THE CONSTITUTION 343, 364-65 (Michael Allen Gillespie & Michael Lienesch eds., 1989) (discussing North Carolina's ratification convention).

tion—the people have *not* created a government of general police power.[46] If this Amendment is to have any meaning at all, it means that there are certain powers beyond the reach of the national government, even in cases where the exercise of such power would not abridge a specifically enumerated right. Under the language of the Ninth Amendment, the people retained these additional constraints on national power as a matter of right.

Under the Tenth Amendment, all such remnant, nondelegated powers are reserved "to the States respectively, *or to the people*."[47] As much as scholars and courts often fail to notice the fact, the "people" of the Ninth Amendment are obviously the same "people" of the Tenth. Both are references to the people in the several states and their retained sovereign powers and rights. Put another way, both Amendments declare principles of federalism, whereby national power must not be so broadly construed as to grant federal power over everything except specifically enumerated rights, and the people in the states are protected in their sovereign right to local self government as it relates to all matters not assigned into the hands of the federal government. As Madison put it in his 1791 speech, the Ninth Amendment prevented "a latitude of interpretation" of federal power while the Tenth "exclud[ed] every source of power not within the constitution itself."[48] If the text were not clear enough, the historical testimony is clear and unequivocal: *every* court and legal commentator who discussed the Ninth Amendment in the first one hundred years of the Constitution did so in a manner that either linked the Ninth and Tenth Amendments or described the Ninth as a guardian of the retained rights of local self government.[49] As St. George Tucker wrote in his 1803 treatise, *A View of the Constitution of the United States*, when the Ninth and Tenth Amendment are combined:

> The sum . . . appears to be, that the powers delegated to the federal government, are, in all cases, to receive the most strict construction that the instrument will bear, where the rights of a state or of the people, either collectively, or individually, may be drawn in question.[50]

What seems most jarring to our ears today is the characterization of reserved powers as one of the retained rights of the people. Under the American constitutional tradition of judicial review, to speak of rights is to speak

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46 *See* U.S. CONST. amend. IX.

47 *Id.* amend. X (emphasis added).

48 Madison, *supra* note 25, at 489; *see also* James Madison, Veto Message to Congress (Mar. 3, 1817), *reprinted in* JAMES MADISON: WRITINGS, *supra* note 25, at 718, 720 ("[S]eeing that such a power is not expressly given by the Constitution, and believing that it can not [sic] be deduced from any part of it without an inadmissible latitude of construction . . . .").

49 For an exhaustive discussion of the historical materials, see generally KURT T. LASH, THE LOST HISTORY OF THE NINTH AMENDMENT (2009).

50 Tucker, *supra* note 3, at 154.

of an engaged judiciary actively policing and protecting such rights. One might think that individual rights require such active judicial policing, but not the rights of local self government. These so-called "states' rights" might be thought of as best protected by the political process, with states adequately protected through the mechanisms of political representation in the national government. Of course, one can also think of individual rights as adequately protected by the same process, and many Western-style democracies do exactly that. Under the American constitutional tradition, however, we assume that political players are subject to incentives and pressures that may deviate from both the true interests of the people and the constraints on government power laid out in the text of the Constitution.[51] This being the case, preserving the sovereign rights of the people requires an institution of government relatively immune from such pressures in order to best preserve and protect the people's rights, including their right to local self government if they so desire.

Judicial deference in matters relating to the proper construction of national power thus both undermines the principle of popular sovereignty and betrays the originally understood purpose of the federal courts. It is precisely for this reason that James Madison objected to Chief Justice John Marshall's opinion in *McCulloch v. Maryland*[52] upholding the Second Bank of the United States. In his opinion, Marshall had implied that the people of the United States existed only in a unitary form, but not in their sovereign capacity within the individual states.[53] This meant that the people in the states retained no rights that Marshall was obligated to protect. In his *Detached Memoranda*, Madison dismissed Marshall's "erroneous views" of the people and congressional power.[54] In particular, Madison rejected the Chief Justice's assertion about "the people" ratifying the Constitution, "if [by this he] meant people collectively & not by States."[55] This fundamental error had led to Marshall "expounding power of Cong[res]s—as if no other Sovereignty existed in the States supplemental to the enumerated powers of Cong[res]s."[56]

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51 *See* LASH, *supra* note 49, at 348-49.

52 17 U.S. (4 Wheat.) 316 (1819).

53 *Id.* at 402-03.

54 James Madison, Detached Memoranda, *reprinted in* JAMES MADISON: WRITINGS, *supra* note 25, at 745, 754-56.

55 *Id.* at 756.

56 *Id.* Marshall had also implied that Madison, when President, had changed his mind about the constitutionality of the Bank as evidenced by his signing the Bill creating the Second Bank of the United States. *See McCulloch*, 17 U.S. at 402 ("The original act was permitted to expire; but a short experience of the embarrassments to which the refusal to revive it exposed the government, convinced those who were most prejudiced against the measure of its necessity, and induced the passage of the present law."). Madison insisted, however, that he had merely acquiesced to longstanding precedent, and he took umbrage at Marshall's implying otherwise. *See* Madison, *supra* note 54, at 756 (noting that Marshall was wrong to "imput[e] concurrence of those formerly opposed to change of opinion, instead of precedents

II. JUDICIALLY ENFORCEABLE RIGHTS

The link between the Ninth and Tenth Amendments as twin guardians of the retained right to local self government highlights how federalism stands as one of the *rights* of the people of the United States, one which courts of law have a duty to protect. In his speech before the House of Representatives, Madison explained that, by adding a Bill of Rights, "independent tribunals of justice will consider themselves . . . the guardians of those rights" and would "resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights."[57] Here, Madison simply repeated what had already been promised to the state ratifying conventions as they considered whether to adopt the original Constitution.

In *Federalist No. 44*, Madison explained that the judiciary would serve as one of a number of institutional checks on unduly expansive exercises of federal power:

> If it be asked what is to be the consequence, in case the Congress shall misconstrue this part of the Constitution and exercise powers not warranted by its true meaning, I answer the same as if they should misconstrue or enlarge any other power vested in them; as if the general power had been reduced to particulars, and any one of these were to be violated; the same, in short, as if the State legislatures should violate their respective constitutional authorities. In the first instance, the success of the usurpation will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts . . . .[58]

Although today we think of judicial enforcement of individual rights as pertaining only to individual rights, this was not the case at the time of the founding. Madison expressly assured the states during the ratification debates that any undue extension of federal law amounted to an intrusion into the retained *rights* of the States.[59] In fact, Madison insisted throughout his life that the courts must remain engaged in the effort to secure these rights by maintaining the line of division between state and federal power.[60]

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superseding opinion"). For a discussion of Madison's view of precedent and proper constitutional interpretation, see generally Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse* Stare Decisis, 93 VA. L. REV. 1437 (2007).

57 James Madison, Speech in Congress Proposing Constitutional Amendments, *reprinted in* JAMES MADISON: WRITINGS, *supra* note 25, at 449.

58 THE FEDERALIST NO. 44, *supra* note 41, at 282 (James Madison).

59 *Id.* ("The truth is that this ultimate redress may be more confided in against unconstitutional acts of the federal than of the State legislatures, for this plain reason that as every such act of the former will be an invasion of the rights of the latter, these will be ever ready to mark the innovation, to sound the alarm to the people, and to exert their local influence in effecting a change of federal representatives.").

60 *See, e.g.*, James Madison, To Spencer Roane (Sept. 2, 1819), *reprinted in* JAMES MADISON: WRITINGS, *supra* note 25, at 733, 734 (criticizing Marshall's opinion in *McCulloch* as relinquishing "all controul on the Legislative exercise of unconstitutional powers").

III. THE FOURTEENTH AMENDMENT

Nor did the nation abandon the concept of federalism as liberty at the time of Reconstruction and the adoption of the Fourteenth Amendment. Although today we tend to associate the Union victory over the slaveholding South as a victory of nationalism over states'-rights federalism,[61] the reality is far more complicated. It was the slaveholding states that initially rejected the concept of states' rights and sought to impose chattel slavery as a national right, which would have allowed them to carry slaves into every state in the Union.[62] The infamous *Dred Scott v. Sandford*[63] decision was a step in the direction of *nationwide* slavery. Indeed, the unduly broad, and distinctly nationalist, interpretations of national power in cases like *Dred Scott* and *Prigg v. Pennsylvania*[64] threatened to snuff out the few jurisdictions where the people exercised their rights of local self government and *rejected* slavery.

Article 4 of the 1860 Platform specifically addressed Republican fidelity to the original dualist structure of the federal Constitution:

> That the maintenance, inviolate, of the Rights of the States, and especially the rights of each State to order and control its own domestic institutions according to its own judgment exclusively, is essential to that balance of power on which the perfection and endurance of our political fabric depends . . . .[65]

In the aftermath of the Civil War, the moderate Republicans who controlled the creation of the Fourteenth Amendment believed they were restoring the proper balance of state and federal power—a balance violently

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61 *See* Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 872-73 (1986).

62 *See* Earl M. Maltz, *Slavery, Federalism, and the Structure of the Constitution*, 36 AM. J. LEGAL HIST. 467, 471 (1992).

63 60 U.S. (19 How.) 393 (1857).

64 41 U.S. (16 Pet.) 539 (1842).

65 National Republican Platform, Adopted by the Chicago Convention (May 17, 1860), *reprinted in* 2 THE AMERICAN PARTY BATTLE: ELECTION CAMPAIGN PAMPHLETS, 1828-1876, at 121, 122 (Joel H. Silbey ed., 1999); *see also* EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND THE CONGRESS, 1863-1869, at 30 (1990) (noting that the task of Reconstruction "was further complicated by the Republicans' firm attachment to the basic structure of federalism"); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT 114 (1988) ("Most Republican supporters of the [Fourteenth] Amendment, like the Democrat opponents, feared centralized power and did not want to see state and local power substantially curtailed."). The Republican Party's national platform in 1860 insisted that "the Federal Constitution, the Rights of the States, and the Union of the States, must and shall be preserved." National Republican Platform, *supra*, at 121. According to Michael Les Benedict, "most Republicans [during Reconstruction] never desired a broad, permanent extension of national legislative power." Michael Les Benedict, *Preserving the Constitution: The Conservative Basis of Radical Reconstruction*, 61 J. AM. HIST. 65, 67 (1974).

skewed by the slave power.[66] It is no surprise then that the Framers of the Fourteenth Amendment, even as they sought to enshrine new rights against state action, remained committed to preserving both federalism and local control over all matters not expressly delegated into the hands of the national government. According to Representative John Bingham of Ohio, the man who framed Section One of the Fourteenth Amendment:

> Sir, I have always so learned our dual system of Government by which our own American nationality and liberty have been established and maintained. I have always believed that the protection in time of peace within the States of all the rights of person and citizen was of the powers reserved to the States. And so I still believe.[67]

As much as the Fourteenth Amendment imposed new and important constraints on the states' authority to interfere with constitutionally protected rights, nothing in that Amendment, or in the intentions of the man who framed it, alters the fundamental principle that the people retain the rights of local self government in all matters not expressly denied to the states somewhere in the text of the federal Constitution.

CONCLUSION

In cases like *United States v. Lopez*[68] and *United States v. Morrison*,[69] the Supreme Court has attempted to draw a line between federal and state authority. In those cases, the division involved a distinction between local commercial and local noncommercial activity. As was the case for the Supreme Court's earlier distinction between direct and indirect impacts on interstate commerce,[70] the commercial/noncommercial distinction has been criticized as an unrealistic attempt to determine where effects on interstate commerce begin and end.[71] In many ways, however, this argument misses the point of making the distinction in the first place. We need not draw a line between local and national matters to conform to a theory of economics or social utility. As with all lines drawn in the Supreme Court's jurisprudence of individual rights, these distinctions are constructed in order to secure an area of local autonomy over matters never delegated into the hands of the federal government. Preserving the right to local self government is one of the retained rights of the people, one as deserving of active judicial

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66 *See* Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 GEO. L.J. 329, 345-46 (2011).

67 CONG. GLOBE, 39th Cong., 1st Sess. 1293 (1866) (remarks of Rep. Bingham).

68 514 U.S. 549 (1995).

69 529 U.S. 598 (2000).

70 *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 546-47 (1935).

71 *See, e.g.*, Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite* United States v. Lopez, 94 MICH. L. REV. 554, 564 (1995).

protection as any other constitutionally secured right. Justice Kennedy recognized as much in *Bond v. United States*. Here's hoping the Court will follow Kennedy's lead when there is more at stake than the mere recognition of party standing.