

The Argument for Using the Census Bureau's ACS to Enumerate a Woman's Right to Choose

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"I would rather create precedent than find one."

William O. Douglas, SCOTUS Justice 1939-1975

Historical Context

Inalienable Rights

Since the seventeenth century, moral rights have been known as "natural" or "inalienable" rights. These rights are explicitly distinguished from legal or contractual rights, such as those specifically enumerated in our Constitution. Natural rights do not rely on governments to enforce the law or contracts. Locke, Jefferson, and the Founders believed natural rights predated governments altogether and are found among people without government, the so-called state of nature. Natural rights then were taken to be universal in the same way that human rights are conceived of today.

We the People

The Declaration of Independence states, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness -- That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed." Jefferson believed that his "truths" were "self-evident" (meaning that they were obvious and hard to disagree with) to educated, enlightened men like himself who had studied the works of John Locke, Jean Jacques Rousseau, Voltaire, and others who disagreed with Monarchists.

Monarchists (Tories) believed kings and queens had the right to rule over people because the kings and queens were chosen by God. Kings, queens, and other rulers had been in charge of countries for hundreds of years. They often used religion to justify their power. If the kings and queens were chosen by God, then it would be hard for ordinary people to disagree with them. It is noteworthy that White Evangelicals and ChristoFascists are making an identical argument today.

The Constitutional as an Enumeration of Principles

The Constitution is essentially a contract. It has five parties: the federal 1) congressional, 2) executive, and 3) judicial branches, 4) the States, and 5) the People. It declares the People are sovereign and delegate specific enumerated powers in the Constitution to each federal branch and the States. Some of the People's rights are listed in the first eight Amendments. The 9th and 10th Amendments limit the delegation of powers and the enumeration of rights to PROTECT those that are not delegated or unenumerated. These are powers that have not been delegated by the people to either the federal or state governments. As importantly, there is NO provision ANYWHERE in the Constitution that delegates or grants any entity the power to revoke any right. That is because, enumerated or not, the right is presumed to be inalienable.

The Bill of Rights

It is essential to understand that the enumerated rights in the Bill of Rights aren't "granted" rights. They are the original set of constitutionally recognized and protected ones. The Bill of Rights was codified to protect each specific right from government abuses. So do the subsequent anti-slavery and women's suffrage amendments. Nowhere in the Constitution is there a delegated power or process that empowers any State or a branch of the Federal government to grant or revoke a right.

Nor is it inferred.

The Constitution and Sovereignty

It was understood when the Constitution was written, as it is now, that "We the People" are human persons who inhabit the individual States, and we are distinct from the state we inhabit because 1) we have retained sovereign powers, and 2) we are free to move to and from other states any time we choose. We the People can also exercise our retained power to enumerate an inalienable right, like an abortion or child safety, as the inhabitants of a state, and do so as an independent Constitutional party with the power and right. We can do so in any way we choose. This is derived from the fact that our elected state representatives are able to make laws, but not grant or deny any retained right. The same applied to Congress, the President, or the Courts. It's what the 9th and 10th Amendments guarantee.

The Powers and Rights Amendments

The 9th Amendment

The 9th Amendment affirms, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." It declares that the rights spelled out in the Bill of Rights aren't the only inalienable rights with which we are endowed and the government does not have the power to abridge them. This is, in part, because the wording of the 9th Amendment has only two parties; the Constitutional government and the People. *Griswold v. Connecticut* opened up the possibility of using the Amendment to expand the rights of the people beyond what the Constitution lists.

The 10th Amendment

Historians credit Anti-Federalists with the inclusion of the 10th amendment in the Constitution. Anti-Federalists were worried about a concentration of power in the national government and the 10th Amendment states that federal power is limited. The 10th Amendment affirms the Sovereignty of the People of the Several States. In the system of the Founders, the powers of both the "general government and the state governments" are "emanations of power from the people." At the time, the 10th Amendment was widely understood to reaffirm this revolutionary principle. It declares the People have powers not delegated to, or within the jurisdiction of, the Federal or State Constitutions. The 10th Amendment ensures the People are the enabling party who retain the sovereign power to codify or deny any and all rights.

The 9th and 10th Amendments Taken Together

The 9th and 10th Amendments establish that only some of our inalienable rights were enumerated in the Constitution. The 9th guarantees 1) the American people have retained rights that the government cannot deny or disparage, and the 10th Amendment guarantees 2) *the American People have the retained sovereign power to enumerate any of those retained rights any way we choose.* This is established in the wording of the 9th Amendment. It has only two parties; the federal government and the People (not the states). The 10th Amendment identifies the People as separate and distinct from the federal government and any of the states. Furthermore, the Constitution identifies the People as the sovereign enabling party that

establishes it and therein delegates some of their specific powers to the government and enumerates some of their rights. At the same time, the 10th Amendment established the People retain the power to enumerate or deny any retained rights protected by the 9th Amendment.

Making this argument in the 1947 *Mitchell* ruling, Supreme Court Justice Stanley Reed wrote, "The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people. Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken."

In his *Griswold v. Connecticut* (1965) concurring opinion, Justice Arthur Goldberg argued that, "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 ... It was proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights, and that the specific mention of certain rights would be interpreted as a denial that others were protected ... The Ninth Amendment to the Constitution may be regarded by some as a recent discovery, and may be forgotten by others, but, since 1791, it has been a basic part of the Constitution which we are sworn to uphold. 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 to give it no effect whatsoever."

We the People did not, and cannot, grant the power retained in the 10th Amendment to federal or state government jurisdictions enabling either to infringe on ANY of our 9th Amendment "retained rights."

The People's Exercise of Retained Powers and Unenumerated Rights

There is nothing in the Constitution that prohibits, or in any way constrains, the People from exercising their *a priori* retained sovereign power (acting as people residing within states, but not as so-called independent sovereign

citizens.) The People can do so outside of the Constitution if they so choose. They can do so in lieu of their elected representatives. They can enumerate rights directly (i.e., a national referendum, censuses, e.g.) if they so choose.

SCOTUS Usurpation of Power in *Dobbs v. Jackson*

SCOTUS and Our Constitutional Government

Not the Congress, the President, the Supreme Court, or any of the States can "grant" a right. It comes before and lies outside the Constitution. The People retain all their unenumerated rights. Protecting these natural Creator-endowed individual Rights the 9th Amendment acts as a bulwark on the frontier of American democracy. It declares **the Supreme Court may recognize a retained Right, and to rule on its meaning, enforcement, etc., but it has NO Constitutional jurisdiction or power to grant, deny or disparage one.** Once a right has been enumerated, SCOTUS has the power and jurisdiction to ensure that right is afforded the same Constitutional protections as any other enumerated right. We the People did not, and cannot, delegate that power to the government.

Marbury v. Madison did not and does not change the fact.

SCOTUS and the 9th and 10th Amendments

The Courts have ignored and trivialized the 9th and 10th Amendments, only occasionally referencing them respectively in their opinions and rulings as supplemental to other Constitutional provisions. Notably, Judge Bork once referred to the 9th Amendment as an "inkblot." It is not. Bork, along with other jurists, has claimed to not know what the 9th Amendment means.

That is an obscurification.

Like a Truth the 9th and 10th Amendments are Self-Evident

Like other "self-evident" truths, the meaning of the 9th Amendment's single sentence is clear, concise, irrevocable, and unimpeachable. It does not need judicial interpretation nor does the Supreme Court have either the power or jurisdiction to nullify it. It cannot usurp that power. The majority Supreme Court justices, like Monarchists and Papists, would have us believe their supreme judicial power is absolute. It is not. The 9th Amendment guarantees that the People's retained Rights are not privileges. SCOTUS cannot deny a right simply because it is *not yet explicitly codified* in the Constitution.

The 10th Amendment is equally clear and concise. It states, "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."

"We the People" are Sovereign

We the People are free to exercise our retained sovereign power to enumerate through our elected representatives or directly ourselves if we choose to do so. If a right is enumerated by a majority of the people in the majority of the states, that right is afforded the same Constitutional protections and SCOTUS jurisdiction as any other enumerated right. Why? It is because the sovereign American people say so. The People did not, and have not, delegated that power.

***Dobbs v. Jackson Women's Health* SCOTUS Ruling**

The majority ruling in *Dobbs v. Jackson Women's Health* "returns" a woman's right to choose back to the individual States to decide. It does not have the power or Constitutional merit to do so. Grounded in the historical cherry-picking and the 14th Amendment, the ruling is silent on and ignores the prohibition established in the 9th Amendment. To support the *Dobbs v. Jackson* ruling, the 9th Amendment would have to include the same enabling language present in the 10th Amendment that declares "...powers not delegated... are reserved to the States respectively, or to the people." The word "States" prominent in the 10th Amendment is conspicuously absent from the preceding 9th Amendment. This is not an oversight or accident. The Framers were explicit. The federal government doesn't "grant" the rights that are not listed in the Constitution. They belong to the People.

Alito also infers in his opinion that all retained rights that have been "granted" (interracial marriage, travel between States, innocent until proven guilty, etc.) do not exist. He reasons that is because they have not yet been enumerated by the People through their respective State legislatures. For Alito's argument to have merit, the 9th Amendment would have delegated the power to enumerate a retained right to the States (thru their legislatures.) If that was what the Framers intended, the 9th Amendment would read, "The granting of certain enumerated rights in the Constitution does not prohibit the granting of retained rights by the people through their state legislatures." It does not.

Thomas Paine observed, "A body of men holding themselves accountable to nobody ought not to be trusted by anybody."

When it comes to retained Rights, the Constitution is a one-way street. None of the States, or the Federal government, possesses the delegated power to nullify a retained right, especially one that has been recognized for three generations and routinely exercised. The Supreme Court does have the power to recognize a retained right. But once such a right is recognized, (i.e. like a woman's right to choose in *Roe v. Wade*), then it, like all others, can only be reaffirmed and protected. It cannot be revoked or denied.

A majority of six SCOTUS zealots, driven by Catholic religious doctrine, usurped powers not delegated to them, violated the principle of Constitutional checks-and-balances, and denied a right. All strictly prohibited by the 9th and 10th Amendments. As Linda Greenhouse, in the *New York Times* on 7/22/2022 noted, "Religious doctrine, not the Constitution, drove the *Dobbs* Decision." In the *Dobbs* ruling, SCOTUS has done the unforgivable and sullied its reputation. The SCOTUS majority has conflated church and state and begun the religious persecution of American women.

Enumerating a Retained Right

One way to enumerate a retained right is through our elected representatives in 1) state legislatures and 2) Congress. Another way is through the Supreme Court recognizing the right and exercising judicial powers to protect it. Unfortunately, polls routinely report that legislative representatives, through gerrymandering and by catering to special interests, consistently ignore the Will of the majority of the American People. For example, a current Pew poll reports that 61% of Americans polled say abortion should be legal in all or most cases. There is no national ambiguity. Yet, our Congress is unable to protect a woman's right to choose because of a doggedly recalcitrant minority. Alito's *Dobbs* majority opinion unconstitutionally leaves the abortion rights decision to fifty State legislatures - opening a Pandora's Box of conflicting laws, jurisdictional conflicts, abuses, and a plethora of as-yet-unknown unintended consequences.

So, what can We the People do to break this gridlock?

Decide for Ourselves

Like our forbearers, we don't have to be Harvard law graduates or Constitutional lawyers, to read and write English, comprehend the meaning of a sentence, and to reason. The 9th Amendment is not so obscure or opaque that it requires judicial parsing or divination. It is written in simple language everyone can easily understand. Many of our Founding Fathers weren't lawyers. They were common men who rose to greatness in uncommon times.

We must do the same.

The Opportunity

As intended, our Constitution provides another path. The Founders of our fledgling nation had a bold and ambitious plan to empower the people over their new government. The plan was to count every person living in the newly created United States of America and to use that count to determine representation in Congress. As early as 1870, the Supreme Court characterized as unquestionable the power of Congress to require both an enumeration and the collection of statistics in the census.

In 1901, a District Court said the Constitution's census clause (Art. 1, Sec. 2, Clause 3) is not limited to a headcount of the population and "does not prohibit the gathering of other statistics, if 'necessary and proper,' for the intelligent exercise of other powers enumerated in the Constitution, and in such case, there could be no objection to acquiring this information through the same machinery by which the population is enumerated."

This, and subsequent decisions, are consistent with the Supreme Court's recent description of the census as the "linchpin of the federal statistical system ... collecting data on the characteristics of individuals, households, and housing units throughout the country." (Dept. of Commerce v. U.S. House of Representatives, 525 U.S. 316, 341 (1999)).

In executing its powers to collect vital information, the Census Bureau conducts scores of surveys. They are about population, income, commerce, etc., and are used to allocate funding, and provide decision-making data to Federal, state, and local legislators, businesses, unions, appropriators, etc. The reliability and validity of these surveys have been tested over time and can be trusted. One of these surveys is the American Community Survey (ACS).

The Census ACS

"We the People" can delegate to the Census Bureau our retained power to expeditiously conduct an American Community Survey and a Post-Enumeration Survey with the question, 'Does a woman have the right to an abortion as per Roe v. Wade?' Once the ACS is completed and tabulated, we can delegate our retained power to POTUS to ensure the resulting answer is announced post-haste. If a majority affirms this right, we can declare that it becomes then is an enumerated constitutional right and the law of the land.

Using the ACS to Directly Enumerate Retained Rights

The ACS is an ongoing Census survey. It provides vital information yearly about our nation and its people. The questions are approved in a well-established protocol. We the People can utilize the ACS to directly express, delineate, and constitutionally enumerate retained rights. We can answer ACS questions that are then tabulated. The Census Bureau can count and report whether or not a majority of us want, state by state, a retained right enumerated. Moreover, the Census Bureau has the funding, staffing, and expertise to quickly implement such a census if and when directed by the President. If we use the Census Bureau, we are constitutionally able to directly express our Will to enumerate any and all of our retained Rights just as the 9th and 10th Amendments envision.

That's it. That's the whole argument. If you find it compelling, there are several actions you can take. You can read the following petition. If you agree, you can sign it. You can spread the word as far and wide as you are able. You can tweet the link to this petition to all your followers. Then you can re-tweet and retweet again. The more signatures we have, the greater our power to get that ball rolling.

Final Thoughts

Whether it is a woman's right to choose, or same-sex marriage, or contraception, or travel, or exercising any of our other retained rights, it is "We the People" who are the masters of our fate and the captains of our souls.