

# Texas Law Review

Volume 83, Number 2, December 2004

## Articles

### The Lost Original Meaning of the Ninth Amendment

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*This Article presents previously missed or unrecognized evidence regarding the original meaning of the Ninth Amendment. Obscured by the contemporary assumption that the Ninth Amendment is about rights while the Tenth Amendment is about powers, the historical roots of the Ninth Amendment can be found in the state ratification convention demands for a constitutional amendment prohibiting the constructive enlargement of federal power. James Madison's initial draft of the Ninth Amendment expressly adopted language suggested by the state conventions, and he insisted that the final draft expressed the same rule of construction desired by the states. The altered language of the final draft, however, prompted former Virginia Governor Edmund Randolph to halt his state's efforts to ratify the Bill of Rights due to his concern that the Ninth no longer reflected the demands of the state convention. Antifederalists used Randolph's concerns to delay Virginia's, and thus the country's, ratification of the Bill of Rights for two years. While ratification remained pending in Virginia, Madison delivered a major speech in the House of Representatives explaining that the origin and meaning of the Ninth Amendment in fact were rooted in the proposals of the state conventions and that the Ninth guarded against a "latitude of interpretation" to the injury of the states. Although the Ninth's rule of construction distinguishes it from the Tenth Amendment's declaration of principle, Madison and other legal writers at the time of the Founding viewed the Ninth and Tenth Amendments as twin guardians of our federalist structure of government. Over time, the Tenth Amendment also came to be understood as expressing a federalist rule of construction. The original federalist view of the Ninth Amendment, however, remained constant and was repeated by bench and bar for more than one hundred years.*

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## I. Introduction

In the fall of 1789, former Virginia Governor Edmund Randolph brought to a halt the Virginia Assembly's efforts to ratify the Bill of Rights due to his concerns about the Ninth Amendment.<sup>1</sup> State conventions considering the ratification of the Constitution, including the convention in Virginia, had insisted that an amendment be added to the document controlling the "constructive enlargement" of federal power.<sup>2</sup> Madison's original draft of the Ninth Amendment expressly echoed these concerns.<sup>3</sup> The final version of the Ninth, however, looked nothing like the version proposed by Virginia and the other state conventions,<sup>4</sup> and concerns about the alteration led Randolph to oppose the ratification of both the Ninth and Tenth Amendments.<sup>5</sup> Because these two amendments were critical to gaining support for the rest of the Bill, the entire Virginia ratification process ground to a halt. Letters flew to James Madison telling him about the trouble in Virginia, and Madison dutifully reported the events to President Washington.<sup>6</sup> Madison was baffled: The final draft of the Ninth accomplished exactly what Virginia desired.<sup>7</sup> Unconvinced, the Virginia Assembly remained stalled, and the Antifederalists managed to exploit Randolph's concerns about the Ninth and delay Virginia's (and thus the country's) ratification of the Bill of Rights for two years.<sup>8</sup> During that time, Madison gave a major speech before the House of Representatives opposing

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1. See Letter from Edward Carrington to James Madison (Dec. 20, 1789), in 5 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786–1870, at 228 (F. B. Rothman 1998) (1901) [hereinafter 5 DOCUMENTARY HISTORY] (indicating that Randolph objected to both the Ninth and Tenth Amendments); see also Letter from Edmund Randolph to George Washington (Nov. 26, 1789), in 5 DOCUMENTARY HISTORY, *supra*, at 216 (discussing his support of the rejection of both the Ninth and Tenth Amendments).

2. Amendments Proposed by the Virginia Convention (June 27, 1788), in CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 21 (Helen E. Veit et al. eds., 1991) [hereinafter CREATING THE BILL OF RIGHTS].

3. James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), in JAMES MADISON, WRITINGS 443 (Jack N. Rakove ed., 1999) [hereinafter JAMES MADISON, WRITINGS].

4. See *infra* notes 171–80 and accompanying text.

5. See Letter from Hardin Burnley to James Madison (Nov. 28, 1789), in 5 DOCUMENTARY HISTORY, *supra* note 1, at 219 (noting the rejection of the Ninth and Tenth Amendments (referred to as the Eleventh and Twelfth) by Randolph and predicting that the rejection will jeopardize the adoption of the remaining amendments).

6. Letter from Hardin Burnley to James Madison (Nov. 5, 1789), in 5 DOCUMENTARY HISTORY, *supra* note 1, at 214; Letter from James Madison to The President of the United States (Nov. 20, 1789), in 5 DOCUMENTARY HISTORY, *supra* note 1, at 215.

7. See Letter from James Madison to George Washington (Dec. 5, 1789), in 5 DOCUMENTARY HISTORY, *supra* note 1, at 221–22 (arguing that any distinction between retaining rights and granting powers is "altogether fanciful").

8. See LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 42–43 (1999) (describing the struggle and ultimate ratification of the Bill of Rights in the Virginia Senate).

the creation of the Bank of the United States.<sup>9</sup> In that speech, Madison explained the meaning of the Ninth Amendment and its roots in the declarations and proposals of state ratifying conventions.<sup>10</sup> A few months later, Virginia voted in favor of ratification, and the Bill of Rights was added to the Constitution.<sup>11</sup>

This account cannot be found in any history of the Ninth Amendment.<sup>12</sup> The events themselves are easily verified by consulting the original sources. Those sources, however, are missing in major compilations of the documentary history of the Ninth Amendment.<sup>13</sup> The precursors to the Ninth Amendment—the proposals submitted by the state ratification conventions upon which Madison based his draft—are either not discussed,<sup>14</sup> missing,<sup>15</sup>

9. James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791), in JAMES MADISON, WRITINGS, *supra* note 3, at 480.

10. *Id.* at 88–90.

11. See Letter from George Washington to the Senate and House of Representatives (Dec. 30, 1791), in 5 DOCUMENTARY HISTORY, *supra* note 1, at 245 (sending confirmation of Virginia's vote to ratify the Bill of Rights).

12. The following are major scholarly discussions of the Ninth Amendment. Although some aspects of this history can be found in these works, none of them discusses the concerns of the Virginia Assembly or recognizes that Virginia's concerns about the Ninth Amendment delayed the ratification of the Bill of Rights. See RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004) [hereinafter BARNETT, RESTORING THE LOST CONSTITUTION]; ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990); EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY (1957); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); CALVIN R. MASSEY, SILENT RIGHTS: THE NINTH AMENDMENT AND THE CONSTITUTION'S UNENUMERATED RIGHTS (1995); THOMAS B. MCAFFEE, INHERENT RIGHTS, THE WRITTEN CONSTITUTION, AND POPULAR SOVEREIGNTY: THE FOUNDERS' UNDERSTANDING (2000); BENNETT B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT (1955); Eric M. Axler, *The Power of the Preamble and the Ninth Amendment: The Restoration of the People's Unenumerated Rights*, 24 SETON HALL LEGIS. J. 431 (2000); Raoul Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1 (1980) [hereinafter Berger, *The Ninth Amendment*]; Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223 (1983); Knowlton H. Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L.J. 309 (1936); Mark C. Niles, *Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights*, 48 UCLA L. REV. 85 (2000); Norman Redlich, *Are There Certain Rights . . . Retained by the People?*, 37 N.Y.U. L. REV. 787 (1962); Chase J. Sanders, *Ninth Life: An Interpretive Theory of the Ninth Amendment*, 69 IND. L.J. 759 (1994); Suzanne Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987) [hereinafter Sherry, *The Founders' Unwritten Constitution*]; Eugene M. Van Loan III, *Natural Rights and the Ninth Amendment*, 48 B.U. L. REV. 1 (1968).

13. For example, the Virginia debate is missing from two of the most relied upon compilations of historical documents relating to the adoption of the Bill of Rights. See THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987); THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES AND ORIGINS (Neil H. Cogan ed., 1997) [hereinafter THE COMPLETE BILL OF RIGHTS]. For a discussion of Ninth Amendment omissions in these works, see *infra* notes 300, 448, 453–56 and accompanying text.

14. In his most recent book, *Restoring the Lost Constitution*, Ninth Amendment scholar Randy Barnett points out the importance of considering amendments proposed by the states in determining the original meaning of the Constitution. BARNETT, RESTORING THE LOST CONSTITUTION, *supra* note 12, at 68–69. Barnett does not, however, discuss any version of the Ninth Amendment proposed by the states. *Id.* at 246–47. In his earlier two-volume collection of essays on the Ninth Amendment, *The Rights Retained by the People*, Professor Barnett provided an appendix listing all

or mislabeled<sup>16</sup> throughout contemporary scholarship. Although letters triggered by the debate in the Virginia Assembly have been discussed,<sup>17</sup> no work on the Ninth Amendment has investigated the debate itself.<sup>18</sup> Madison's speech before the House of Representatives on the Bank of the United States remains missing from major compilations of original sources regarding the Ninth Amendment.<sup>19</sup> Although some scholars have addressed portions of this speech,<sup>20</sup> Madison's discussion of the Ninth Amendment's roots in the state convention proposals has been completely missed. Other

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of the proposed amendments to the Constitution submitted by the state ratifying conventions. See 1 RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 353 (Randy Barnett ed., 1989) [hereinafter RIGHTS RETAINED BY THE PEOPLE]. However, neither the appendix nor Barnett's own essays in the collection identify which (if any) of the state proposals relate to the Ninth Amendment.

15. Kurland and Lerner's *The Founders' Constitution* lists state convention proposals regarding other provisions of the Bill of Rights, such as the First Amendment's Religion and Speech Clauses. See, e.g., Debate in the North Carolina Ratifying Convention (July 30, 1788), in 5 THE FOUNDERS' CONSTITUTION, *supra* note 13, at 89. No such proposals are listed for the Ninth Amendment. See *id.* at 388 (listing the documents contained in the Ninth Amendment section).

16. Works that do link certain proposals to the Ninth Amendment often mislabel them, erroneously treating provisions which refer to limited federal power as relating to the Tenth Amendment, while labeling declarations of natural rights as relating to the Ninth. See *infra* Part VI.

17. Clues to the Virginia debate can be found in James Madison's correspondence with George Washington and Virginia delegate Hardin Burnley. See *infra* section IV(C)(1). Most major works on the Ninth Amendment acknowledge this correspondence, but they uniformly fail to investigate the actual debate in the Virginia Assembly. E.g., BARNETT, RESTORING THE LOST CONSTITUTION, *supra* note 12, at 269–71; LEVY, *supra* note 8, at 256–59; MCAFFEE, *supra* note 12, at 145–47.

18. In his book, *Origins of the Bill of Rights*, Leonard Levy notes Virginia's concerns about the Ninth and Tenth Amendments, as well as Madison's puzzlement. LEVY, *supra* note 8, at 256–59. However, Levy does not investigate the actual nature of Virginia's concerns, instead characterizing their reasoning as “confused.” *Id.* at 257. Levy appears to have based his analysis, as do the authors cited previously, solely on the letters of James Madison and Hardin Burnley.

19. Neither Neil Cogan's *The Complete Bill of Rights* nor Kurland and Lerner's *The Founders' Constitution* includes Madison's speech on the Bank of the United States in their sections dealing with the Ninth Amendment. Cogan does not include the speech in any of his materials, while Kurland and Lerner place portions of the speech in their section on the Necessary and Proper Clause with Madison's specific reference to the Ninth Amendment edited out. See James Madison, The Bank Bill, House of Representatives (Feb. 2, 1791), in 3 THE FOUNDERS' CONSTITUTION, *supra* note 13, at 244–45. See generally THE COMPLETE BILL OF RIGHTS, *supra* note 13.

20. In his early work, Professor Randy Barnett argued that Madison's speech supports an individual natural rights reading of the Ninth Amendment. His argument focuses on a single sentence in Madison's speech where Madison stated that the bank monopoly “affects the *equal rights* of every citizen.” See 2 RIGHTS RETAINED BY THE PEOPLE, *supra* note 14, at 15. David Mayer has essentially echoed Barnett's argument. See David N. Mayer, *The Natural Rights Basis of the Ninth Amendment: A Reply to Professor McAfee*, 16 S. ILL. U. L.J. 313, 318–19 (1992) (analyzing Madison's use of the Ninth and Tenth Amendments in the debate over the national bank bill). In his most recent work, Randy Barnett does not expressly repeat the “equal rights” argument, but nevertheless still appears to believe that Madison's speech supports an unenumerated individual natural rights reading of the Ninth Amendment. See BARNETT, RESTORING THE LOST CONSTITUTION, *supra* note 12, at 240. The evidence discussed in this Article, however, calls into question this reading of Madison's speech. See *infra* section IV(B)(1).

scholarly works place Madison's speech in a context having nothing to do with the Ninth Amendment, editing out his specific mention of the Ninth.<sup>21</sup>

The history of the Ninth Amendment has not been completely missed, but it has been broken apart and scattered. Once the pieces of this historical puzzle are properly labeled and brought together, a picture emerges which suggests that it was no accident that the Ninth Amendment was placed alongside the Tenth. Both provisions originally guarded the federalist structure of the Constitution. The Tenth's declaration that all nondelegated and nonprohibited powers are reserved to the states assures that the federal government exercises only enumerated delegated powers. This declaration, however, does not prevent expansive *interpretations* of enumerated federal powers—interpretations which, if broad enough, would render meaningless the Tenth's reservation of powers to the states (state power having been supplanted by federal action). The danger of expansive interpretations of federal power did not escape the members of the state ratifying conventions who considered the original Constitution, and they insisted on adding a rule of construction that limited the interpretation of enumerated federal power. James Madison complied by drafting the Ninth Amendment. According to Madison, the purpose of the Ninth Amendment was to “[guard] against a latitude of interpretation” while the Tenth Amendment “exclud[ed] every source of power not within the constitution itself.”<sup>22</sup>

The first of two articles on the lost history of the Ninth Amendment, *The Lost Original Meaning*, starts at the beginning. Part II considers the text of the Ninth Amendment and the two general theories which have emerged regarding its original meaning. Part III revisits the historical record and focuses on the unique text of the Ninth Amendment that controls judicial interpretation, or “construction,” of the Constitution. The roots of this provision are found in the writings of the Antifederalists who raised concerns about federal courts engaging in “latitudinarian interpretations” of federal power. These concerns were picked up by the state ratifying conventions, many of which submitted proposed amendments to the Constitution expressly prohibiting the constructive enlargement of federal power.

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21. Kurland and Lerner in *The Founders' Constitution* place a large excerpt from Madison's speech on the Bank Bill in materials relating to the Necessary and Proper Clause. 3 THE FOUNDERS' CONSTITUTION, *supra* note 13, at 244–45. The excerpt does not include Madison's reference to the Ninth Amendment. Compare *id.*, with JAMES MADISON, WRITINGS, *supra* note 3, at 489. The one constitutional law textbook to include substantial portions of Madison's speech on the Bank Bill also omits Madison's reference to the Ninth Amendment. See PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 8–11 (4th ed. 2000). Gerald Gunther and Kathleen Sullivan include a fairly extensive discussion of the bank controversy and excerpts from the Jefferson-Hamilton debate, but make no mention of Madison's speech. See GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 97 (14th ed. 2001). Laurence Tribe follows the same approach, citing the Jefferson-Hamilton debate, but failing to mention Madison's speech or his reference to the Ninth Amendment. 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 799 (3d ed. 2000).

22. JAMES MADISON, WRITINGS, *supra* note 3, at 489.

Part IV focuses on James Madison and the drafting of the Ninth Amendment. Fulfilling a promise to his own state convention, Madison's draft of the Ninth Amendment contained a rule of interpretation expressly limiting the constructive enlargement of federal power and preserving the retained rights of the people. When the language regarding the construction of federal power was removed from the final draft, this triggered concerns in the Virginia Assembly that Congress had ignored the demands of the states. Receiving word about the delay in Virginia's ratification, Madison wrote to fellow Virginian George Washington and declared that Virginia's concerns were fanciful—the final draft continued to express the same rule of construction desired by Virginia and the other states. Prohibiting constructions that disparaged retained rights amounted to the same thing as prohibiting constructions that enlarged federal powers. Although Edmund Randolph and the Virginia House soon withdrew their objections, the Antifederalists in the Virginia Senate seized upon Randolph's concerns and managed to delay ratification for two years. The Report of the Virginia Senate, missing from all previous accounts of the Ninth Amendment, explains the Senate's objections to the Ninth and sheds important light on Randolph's concerns and the responses of Hardin Burnley and James Madison.

While the Bill of Rights remained pending in Virginia, James Madison delivered an important speech on the constitutionality of the proposed Bank of the United States. In his speech before the House of Representatives, Madison argued that federal power could not legitimately be construed to include the power to charter the bank. Recounting the concerns of the state conventions regarding expansive interpretations of federal power at the expense of the states, Madison argued that the Constitution had been ratified with the understanding that constructive enlargement of federal power was prohibited. Madison concluded by noting that the Ninth and Tenth Amendments were added specifically to address these concerns, with the Ninth guarding against “a latitude of interpretation” and the Tenth declaring the principle of delegated power. Madison's speech removed any ambiguity regarding his understanding of the Ninth Amendment, and the Virginia Assembly was entitled to rely on Madison's description of the Ninth when, only a few months later, it ratified the Bill of Rights.

Having restored key pieces of the history of the Ninth Amendment, Part V traces a theory of the Ninth Amendment as it likely would have been understood by the Founders. This Part concludes by considering the relationship between the federalism-based Ninth Amendment and the Founders' widespread belief in natural rights. Although the Founding generation believed in natural rights “retained by the people,” the identification and protection of such rights were a matter of local concern. The Ninth and Tenth Amendments declare that *all* nondelegated powers and

rights are retained by the people who may delegate them to their respective state governments as they see fit. The Ninth Amendment prevents the *nationalization* of these powers and rights through expansive readings of the Constitution. Early natural rights opinions by the Supreme Court follow this approach, with the Court discussing natural rights as a matter of state law when hearing diversity appeals from lower federal courts, but avoiding natural rights holdings when hearing federal question appeals under section 25 of the original Judiciary Act.

Part V also considers the rise of the Tenth Amendment as a rule of construction analogous to the Ninth. Having taken center stage in the controversy over the Alien and Sedition Acts, the Tenth Amendment also came to be understood as limiting the construction of federal power. By the time of *McCulloch v. Maryland*,<sup>23</sup> arguments denying federal power to charter a bank focused on the Tenth instead of the Ninth Amendment as a limiting rule of construction and, perhaps for that reason, were easily dismissed by John Marshall in his opinion upholding the national bank.

Finally, Part VI explores how key elements of the historical roots of the Ninth Amendment are missing, mislabeled, or misconstrued in major works of constitutional history.

In a second Article, *The Lost Jurisprudence of the Ninth Amendment*,<sup>24</sup> I reveal the extensive and, until now, mostly unknown case law dealing with the Ninth Amendment. That Article follows the interpretation and application of the Ninth as a federalist rule of construction from the earliest opinions of the Supreme Court, through antebellum America, the Progressive Era, and into the era of the New Deal. In addition to revealing the lost jurisprudence of the Ninth, the second Article addresses the historical relationship between the Ninth and Fourteenth Amendments.

The lost history presented in these two Articles includes both newly discovered historical material and a re-evaluation of materials long known and discussed. In particular, the debate in the Virginia Assembly regarding the Ninth Amendment, including the Virginia Senate's Majority and Minority Report, have gone unnoticed despite the fact that they specifically involve public debates regarding the Ninth Amendment during the critical period of ratification. Also newly presented is James Madison's draft veto of the Bank Bill and references to the historical roots of the Ninth Amendment in his bank speech, which, until now, have gone unnoticed. Other material discussed in this Article is not new and has been available for some time, but has been often ignored or mislabeled. The state convention declarations and proposed amendments fall into this category. Finally, in light of this new and newly appreciated evidence, it is possible to take a new look at historical

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23. 17 U.S. (4 Wheat.) 316 (1819).

24. Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEXAS L. REV. (forthcoming Feb. 2005) [hereinafter Lash, *The Lost Jurisprudence*].



materials that have been both known and discussed, but under the erroneous assumption that all Founding-era discussions of rights go to the Ninth Amendment while all discussions of power go to the Tenth. A clearer understanding of evidence long known, then, also constitutes part of the lost history of the Ninth Amendment.

In the end, given the work done by so many, particularly in regard to the Bill of Rights, no presentation of the original meaning of the Constitution can be completely new. This Article and its companion build upon important scholarship undertaken by legal historians, many of whose early insights are supported by the evidence now brought to light. Nevertheless, these two Articles bring together lost and scattered pieces of history in order to bring into better focus an Amendment that, from an historical perspective, has had remarkably bad luck for over two hundred years.

## II. The Text and General Theories of the Ninth Amendment

As an effort to uncover original meaning, the approach of this Article will mirror the general approach of contemporary originalist scholarship. The search for the original meaning of the Constitution plays a crucial role in much of the Supreme Court's jurisprudence, and despite decades of controversy in academia, originalism remains an influential area of constitutional scholarship.<sup>25</sup> Out of the scholarly debates of the last few decades has emerged a more sophisticated form of originalism that seeks to identify not the "original intent" of the Framers, but the "original meaning" of the Constitution as it was understood by those who debated and ratified the text.<sup>26</sup> This approach draws upon theories of popular sovereignty developed by constitutional theorists such as Akhil Amar,<sup>27</sup> Bruce Ackerman,<sup>28</sup> and Keith Whittington.<sup>29</sup> An originalism based on the theory of popular sovereignty seeks to recover, to the degree possible, the likely public understanding of texts intended to represent the people's fundamental law.<sup>30</sup> There is no pretense here of recovering a single uniform understanding of the Ninth Amendment. Instead, historical evidence may allow us to conclude

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25. For a fine discussion of contemporary originalism, see generally KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999).

26. See Randy E. Barnett, *An Originalism for NonOriginalists*, 45 *LOY. L. REV.* 611, 620–29 (1999) (describing "New Originalism" as the shift in originalist arguments from original intention to original meaning).

27. See generally AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998).

28. See generally BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991) [hereinafter ACKERMAN, *WE THE PEOPLE I*]; BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1991) [hereinafter ACKERMAN, *WE THE PEOPLE II*].

29. See generally WHITTINGTON, *supra* note 25.

30. For an excellent presentation of the historic roots of popular sovereignty and the role the theory played in the adoption of the federal Constitution, see generally GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787* (1998).

that some core meanings were more likely shared by the general public than others. Historical evidence also may allow us to conclude that some understandings of the Ninth Amendment were most likely *not* the original understanding of the majority of those who ratified the Ninth Amendment.

Popular sovereignty-based theories of originalism must be distinguished from interpretive theories that equate *modern* constitutional meaning with *original* meaning. A sovereign people retain the right to alter or abolish their form of government as they see fit.<sup>31</sup> Thus, whatever may have been the original understanding of the Ninth Amendment, the people may have altered or abolished that understanding in the years which followed its original adoption. For example, although the Bill of Rights originally bound only the federal government, later provisions such as the Fourteenth Amendment added critical restrictions on state governments. An originalist theory of interpretation based on popular sovereignty therefore must consider the potential impact of later amendments on the scope and application of the Ninth Amendment.<sup>32</sup> Whatever its original meaning, that meaning may have been altered by the People themselves through later amendments. Accordingly, this Article looks at the original meaning of the Ninth Amendment, while the second of these two Articles will address the potential impact of the Fourteenth.

#### A. *The Text*

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.<sup>33</sup>

The Ninth Amendment is solely concerned with constitutional interpretation.<sup>34</sup> It is neither a grant of power nor a source of rights.<sup>35</sup> It

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31. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government . . .”); see also AMAR, *supra* note 27, at 119–22 (arguing that the references to the “people” in the Preamble of the Constitution and the Bill of Rights reflect the fundamental rights of the people to alter or abolish their constitution).

32. See AMAR, *supra* note 27, at 163–80 (reconciling the original meaning of the Bill of Rights with the original meaning of the Fourteenth Amendment); see also Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of Non-Establishment Principle*, 27 ARIZ. ST. L.J. 1085 (1995) [hereinafter Lash, *The Second Adoption of the Establishment Clause*]; Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemption under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106 (1994) [hereinafter Lash, *The Second Adoption of the Free Exercise Clause*] (considering the impact of the Fourteenth Amendment on the original meaning of the religion clauses). See generally ACKERMAN, WE THE PEOPLE I, *supra* note 28, at 41; ACKERMAN, WE THE PEOPLE II, *supra* note 28 (reconciling what Ackerman refers to as three “Constitutional moments,” the Founding, Reconstruction, and the New Deal).

33. U.S. CONST. amend. IX.

34. The Ninth is one of only two provisions in the Constitution solely concerned with issues of interpretation. The other is the Eleventh Amendment. Although it is possible to view the Necessary and Proper Clause as a rule of interpretation, the clause is phrased in terms of power, not interpretation, as are the Ninth and Eleventh Amendments. See U.S. CONST. art. I, § 8, cl. 18 (“The

merely forbids a particular “construction” of the Constitution: The enumeration of certain rights may not be construed in a manner disparaging other retained rights. Note that the “enumerated rights” referred to go beyond those enumerated in the Bill of Rights. When the Ninth Amendment was ratified in 1791, rights enumerated in the Constitution included those listed in Article I, Sections 9 and 10, such as the right to the great Writ of Habeas Corpus<sup>36</sup> and the right against the impairment of contracts.<sup>37</sup> Neither these nor any other rights enumerated in the Constitution are to be construed in the forbidden manner.

Debates over the meaning of the Ninth Amendment generally focus on the “other rights” retained by the people. Although this Article will address those rights as we proceed, it is helpful first to consider the phrase that closes the Ninth Amendment. The Ninth prevents a construction that denies or disparages other rights “*retained by the people*.”<sup>38</sup> This language echoes language that closes the Tenth Amendment, whereby certain powers are reserved “to the people.”<sup>39</sup> Scholars have identified the term “the people,” as used in the Bill of Rights and in the Preamble of the Constitution, as an expression of popular sovereignty—the idea that ultimate authority is retained by the people who may alter or abolish their system of government as they see fit.<sup>40</sup> The fact that the Ninth and Tenth Amendments close with the same expression of popular sovereignty suggests a degree of kinship between the two amendments.

The Tenth Amendment states that “[t]he 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.”<sup>41</sup> By reserving power to the “States respectively or to the people,” the Tenth Amendment expresses the idea that the people have the authority to delegate reserved powers to their respective state governments or reserve such power to themselves, thus denying it to either federal or state governments. As James Wilson put it in the Pennsylvania ratifying convention:

When the principle is once settled that *the people* are the source of authority, the consequence is, that they may take from the subordinate

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Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into execution the foregoing powers . . .”).

35. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 776 n.14 (2d ed. 1988) (“It is a common error, but an error nonetheless, to talk of ‘ninth amendment rights.’ The ninth amendment is *not* a source of rights as such; it is simply a rule about how to read the Constitution.”).

36. U.S. CONST. art. I, § 9.

37. U.S. CONST. art. I, § 10.

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

39. U.S. CONST. amend. X.

40. See, e.g., AMAR, *supra* note 27, at 119–22.

41. U.S. CONST. amend. X.

governments powers with which they have hitherto trusted them, and place those powers in the general government, if it is thought that there they will be productive of more good. They can distribute one portion of power to the more contracted circle, called *state governments*; they can also furnish another proportion to the government of the United States.<sup>42</sup>

In his *Commentaries on the Constitution*, Joseph Story echoes Wilson's reading of Tenth Amendment popular sovereignty:

Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities, if invested by their constitutions of government respectively in them; and if not so invested, it is retained BY THE PEOPLE as a part of their residuary sovereignty.<sup>43</sup>

Under the Tenth Amendment, powers are reserved to *either* the states respectively *or* to the people. The Ninth Amendment, on the other hand, does not speak of the retained rights of states or the people. It speaks only of other rights retained by the *people*. This could be read to suggest that retained rights are those which are assigned to *neither* the federal or state governments. For example, other rights could include so-called "natural rights" which many Founders believed were beyond the legitimate reach of any government, state or federal.<sup>44</sup> On the other hand, retained rights may have been subject to being assigned to the people's respective state governments, just as reserved powers were subject to such assignment. For example, the original Establishment Clause prohibited any federal establishment of religion, but the people of each state remained free to establish religion if they wished to do so (and many did for years following the adoption of the First Amendment).<sup>45</sup> The retained rights of the Ninth Amendment also may have been understood as being subject to the collective action of the people on a state-by-state basis.

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42. James Wilson, Speech in Pennsylvania Convention (Dec. 1, 1787), in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION IN PHILADELPHIA, IN 1787, at 443–44 (Jonathan Elliot ed., 2d ed. 1891) [hereinafter ELLIOT'S DEBATES].

43. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 712 (Carolina Academic Press 1987) (1833) (capitalization in original).

44. See, e.g., BARNETT, RESTORING THE LOST CONSTITUTION, *supra* note 12, at 44, 54–60 (explaining the historical understanding of natural rights as "rights persons have independent of those they are granted by government and by which the justice or propriety of governmental commands are to be judged").

45. See AMAR, *supra* note 27, at 32–33 (discussing the Establishment Clause's prohibition of a nationally established church and noting that in 1789 at least six states had government-supported churches).

### B. *Theories of the Ninth Amendment*

Different theories have emerged which seek to answer the questions left open by the text of the Ninth Amendment. These theories fall into two general categories. One approach reads the Ninth as focused on the protection of unenumerated individual rights.<sup>46</sup> The other approach links the Ninth with the Tenth Amendment and views it as expressing the limited powers of the federal government.<sup>47</sup> The former, Libertarian reading of the Ninth views it as supporting judicial enforcement of unenumerated rights, while the latter, federalist reading views the Ninth as a passive expression of limited government power.

Libertarian theories of the Ninth Amendment read the text as justifying judicial enforcement of other rights beyond those enumerated in the Constitution.<sup>48</sup> In support of this reading, Libertarian scholars point out that

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46. See Massey, *supra* note 12, at 213 (“The Ninth Amendment provides the best textual justification for recognition of unenumerated rights.”); Randy E. Barnett, *James Madison’s Ninth Amendment*, in 1 RIGHTS RETAINED BY THE PEOPLE, *supra* note 14, at 41 (“[T]he Ninth Amendment can be viewed as establishing a general constitutional presumption in favor of individual liberty. . . . [T]he unenumerated rights of the Ninth Amendment that protect individual liberty operate identically to enumerated rights.”); Thomas C. Grey, *The Original Understanding and the Unwritten Constitution*, in TOWARD A MORE PERFECT UNION: SIX ESSAYS ON THE CONSTITUTION 145, 162–67 (Neil L. York ed., 1988); John Kaminski, *Restoring the Declaration of Independence: Natural Rights and the Ninth Amendment*, in THE BILL OF RIGHTS 150 (John Kukla ed., 1987) (“[T]he Ninth Amendment stands as a silent sentinel guarding liberties not otherwise named in the Constitution.”); Niles, *supra* note 12, at 119 (“One express goal of the Ninth Amendment, therefore, was to ensure that the listing of a limited set of rights would not undermine any rights that also deserved protection but were not listed for whatever reason.”); Lawrence G. Sager, *You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth. But What on Earth Can You Do with the Ninth Amendment?*, 64 CHI.-KENT L. REV. 239, 240 (1988) (“[T]he amendment announces that there are valid claims of constitutional right which are not explicitly manifest in the liberty-bearing provisions of the Constitution but which enjoy the same status as do those made explicit in the text.”); Sherry, *The Founders’ Unwritten Constitution*, *supra* note 12, at 1166 (“[B]oth the ninth amendment itself and the debates over other amendments confirm that the founding generation envisioned natural rights beyond those protected by the first eight amendments. . . . [T]he framers of the Bill of Rights did not expect the Constitution to be read as the sole source of fundamental law.”).

47. See, e.g., Raoul Berger, *The Ninth Amendment as Perceived by Randy Barnett*, 88 NW. U. L. REV. 1508, 1534 (1994) (“To retain is to keep; hence the retained unenumerated rights were not embodied in the Constitution and are therefore outside the federal jurisdiction altogether.”); Charles J. Cooper, *Limited Government and Individual Liberty: The Ninth Amendment’s Forgotten Lessons*, 4 J.L. & POL. 63, 64 (1987) (“The ninth amendment is a rule of constitutional construction designed to protect ‘residual’ rights that exist by virtue of the fact that the federal government has only limited powers.”); Thomas B. McAfee, *The Bill of Rights, Social Contract Theory, and the Rights “Retained” by the People*, 16 S. ILL. U. L.J. 267, 268 (1992) (“[H]istorical evidence shows that the other rights ‘retained’ by the people are those which the framers of the proposed Constitution sought to secure by the granting of specified and limited powers to the national government.”); see also Caplan, *supra* note 12, at 228 (“[The Ninth Amendment] simply provides that the individual rights contained in state law are to continue in force under the Constitution until modified or eliminated by state enactment, by federal preemption, or by a judicial determination of unconstitutionality.”).

48. See *Griswold v. Connecticut*, 381 U.S. 479, 492 (1965) (Goldberg, J., concurring) (“[T]he Ninth Amendment shows a belief of the Constitution’s authors that fundamental rights exist that are

the Founders' conception of rights went well beyond those few listed in the first eight amendments to the Constitution.<sup>49</sup> Such rights, declared James Iredell in the North Carolina ratifying convention, were incapable of exhaustive enumeration:

[I]t would be not only 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 any one make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it.<sup>50</sup>

Members of Congress who participated in the drafting of the Ninth Amendment also declared their belief in natural rights retained by the people. James Madison's notes for his speech introducing the Bill of Rights refer to "natural rights retained as speech."<sup>51</sup> Roger Sherman, who served with Madison on the House drafting committee, suggested an amendment declaring that "[t]he people have certain natural rights which are retained by them when they enter into Society."<sup>52</sup> Relying on such evidence, prominent Ninth Amendment theorists, including Randy Barnett and Calvin Massey, conclude that the retained rights of the Ninth refer to unenumerated individual natural rights.<sup>53</sup>

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not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive.").

49. See Edward Corwin, *The Higher Law Background of American Constitutional Law*, 42 HARV. L. REV. 149, 152 (1928) (observing that the Ninth Amendment illustrates well the theory of law that "[t]here are . . . certain principles of right and justice which are entitled to prevail of their own intrinsic excellence"); John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967, 969 (1993) ("As historical evidence shows, the Framers of the Fourteenth Amendment saw the Ninth as a clause that could affirmatively protect unenumerated rights from government interference."); Jeff Rosen, Note, *Was the Flag Burning Amendment Constitutional?*, 100 YALE L.J. 1073, 1075 (1991) (commenting that the phrase "retained by the people" in the Ninth Amendment was "used repeatedly in the ratification period to refer to natural rights 'retained' during the transition from the state of nature to civil society").

50. Statement of James Iredell (July 29, 1788), in 4 ELLIOT'S DEBATES, *supra* note 42, at 167.

51. James Madison, *Notes for Amendments Speech (June 8, 1789)*, in 1 RIGHTS RETAINED BY THE PEOPLE, *supra* note 14, at 64.

52. Roger Sherman's Draft of the Bill of Rights (July 1789), in 1 RIGHTS RETAINED BY THE PEOPLE, *supra* note 14, at 351. Sherman's draft and its implications for the Ninth Amendment are discussed *infra* notes 137–39 and accompanying text.

53. 1 THE RIGHTS RETAINED BY THE PEOPLE, *supra* note 14, at 13; MASSEY, *supra* note 12, at 213 ("The Ninth Amendment provides the best textual justification for recognition of unenumerated rights."); see also CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM 39 (1997) (tying together the Declaration of Independence, the Ninth Amendment, and the Fourteenth Amendment's Privileges and Immunities Clause). There are variations on each of these theories. For example, Calvin Massey argues that the original Ninth Amendment had "dual" functions: One to cabin the constructive enlargement of federal power, the other to insure that the "catalog of constitutional rights did not stop with the enumerated rights." MASSEY, *supra* note 12, at 93–94. Massey believes the former is more associated with the purposes of the Tenth and that the latter purpose became a

Libertarian readings of the Ninth Amendment generally are “active” in that they view the Ninth as justifying active judicial enforcement of unenumerated rights.<sup>54</sup> Professor Randy Barnett, for example, argues that the Ninth Amendment creates an enforceable presumption of liberty that limits the interpretation of federal power in order to protect unenumerated natural rights.<sup>55</sup> Although Ninth Amendment scholars concede that the Ninth Amendment itself applies only against the federal government, they argue that the same rights apply against the states by way of the Fourteenth Amendment’s Privileges and Immunities Clause.<sup>56</sup>

Federalist interpretations of the Ninth Amendment generally read the Ninth *in pari materia* with the Tenth, with both Clauses understood as maintaining a balance of state and federal power.<sup>57</sup> As with the Libertarian approach, there is evidence to support the federalist reading. The drive to adopt a Bill of Rights, for example, was fueled by concerns about federal power overwhelming the states.<sup>58</sup> The Ninth Amendment itself seems particularly responsive to concerns that the enumeration of certain rights might undermine the theory of limited enumerated authority. Early drafts of the Ninth contain language that not only speaks of retained rights, but also of limiting the construction of federal power.<sup>59</sup> Madison himself described the

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“lost function,” at least until the Court’s decisions in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Roe v. Wade*, 410 U.S. 113 (1973). MASSEY, *supra* note 12, at 93–94.

54. See, e.g., Niles, *supra* note 12, at 90 (“Ninth Amendment adjudication would fill a critical void in our personal autonomy jurisprudence by providing courts with a more appropriate and effective means of resolving some of the major individual rights disputes of this century.”); Christopher J. Schmidt, *Revitalizing the Quiet Ninth Amendment: Determining Unenumerated Rights and Eliminating Substantive Due Process*, 32 U. BALT. L. REV. 169, 233 (2003) (arguing that we must “allow the judiciary to determine when an unenumerated right has been unconstitutionally abridged”).

55. BARNETT, RESTORING THE LOST CONSTITUTION, *supra* note 12, at 241.

56. See *id.* at 320 (arguing that the Privileges and Immunities Clause prohibits states from abridging “the background natural rights of the people along with the other rights and privileges of citizenship expressly created by the Constitution”); see also *Griswold*, 381 U.S. at 493 (Goldberg, J., concurring) (noting that the Ninth itself does not apply against the states, but that the Fourteenth protects the same set of retained rights).

57. See, e.g., Raoul Berger, *The Ninth Amendment: The Beckoning Mirage*, 42 RUTGERS L. REV. 951, 953–60 (1990) [hereinafter Berger, *The Beckoning Mirage*] (arguing that a historical and textual examination of the Ninth and Tenth Amendments reveals that these amendments were intended to limit the powers of the federal government and that they should not be read as allowing the federal government to aggressively protect citizens from state governments); Berger, *The Ninth Amendment*, *supra* note 12, at 1–14 (contending that reading the Ninth Amendment in conjunction with the Tenth and scrutinizing the history of the amendments demonstrates why the Libertarian desire to use the Ninth Amendment as a way to legitimize judicial activism is inconsistent with the governmental power structure envisioned by the Founders); Caplan, *supra* note 12, at 262–64 (arguing that both amendments were aimed at quelling fears of federal encroachment on state prerogatives in different ways, as the Ninth Amendment preserves rights already existing under state law in addition to those which the states would thereafter see fit to enact, while the Tenth permits states to continue to exercise their allocated functions).

58. See generally HERBERT J. STORING, *THE COMPLETE ANTI-FEDERALIST* (1981) [hereinafter STORING, *THE COMPLETE ANTI-FEDERALIST*].

59. See *infra* notes 128, 167 and accompanying text.

Ninth's language regarding the disparagement of rights as amounting to the *same thing* as a rule preventing the enlargement of federal power.<sup>60</sup> In light of this evidence, Professor Thomas McAfee concludes that the Ninth Amendment was not intended to recognize natural rights as additional restrictions beyond those rights listed in the Bill.<sup>61</sup> To McAfee, the Ninth was simply a "hold harmless" provision forbidding the expansion of federal power by implication.<sup>62</sup>

To date, federalist theories of the Ninth Amendment have been "passive" in that they do not view the Ninth as justifying judicial intervention. This approach reads the Ninth as a mere declaration that enumerated rights do not imply otherwise unenumerated federal power.<sup>63</sup> In essence, a passive, federalist reading limits the Ninth to preserving the principle declared in the Tenth Amendment—all powers not delegated are reserved. For example, in his *Griswold* dissent, Justice Potter Stewart claimed that "[t]he Ninth Amendment, like its companion the Tenth, . . . 'states but a truism that all is retained which has not been surrendered.'"<sup>64</sup> Professor McAfee advocates a similar approach to the Ninth Amendment, arguing that the Ninth is not a limitation on federal power, but works in conjunction with the Tenth to preserve the concept of enumerated power.<sup>65</sup>

It is possible to take an *active* federalist approach to the Ninth Amendment. This would view the Ninth as a judicially enforceable rule of construction limiting the power of the federal government to interfere with the retained right of the people to local self-government. Under this reading, the rule of construction announced by the Ninth holds back the encroaching tide of federal regulation. As Justice Hugo Black put it in his *Griswold* dissent, the Ninth Amendment was "enacted to protect state powers against federal invasion."<sup>66</sup> Just as the active Libertarian reading creates a presumption in favor of unenumerated individual rights, so the active

60. See Letter from James Madison to George Washington (Dec. 5, 1789), in THE COMPLETE BILL OF RIGHTS, *supra* note 13, at 662 ("If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing whether the latter be secured by declaring that they shall not be abridged, or that the former shall not be extended."). For a discussion of this letter, see *infra* notes 202–03 and accompanying text.

61. MCAFFEE, *supra* note 12, at 169–73.

62. McAfee, *supra* note 47, at 301.

63. Justice Reed, writing for the Court, recognized this principle:

[W]hen 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. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail.

United Pub. Workers of Am. (C.I.O.) v. Mitchell, 330 U.S. 75, 96 (1947).

64. *Griswold v. Connecticut*, 381 U.S. 479, 529 (1965) (Stewart, J., dissenting) (quoting *United States v. Darby*, 312 U.S. 100, 124 (1941)).

65. MCAFFEE, *supra* note 12, at 169–73.

66. *Griswold*, 381 U.S. at 520 (Black, J., dissenting).



federalist reading creates a presumption in favor of the collective right of the people to state or local self-government.

The Libertarian and federalist readings of the Ninth Amendment have each received their share of criticism, both in terms of original understanding and contemporary application. Libertarian readings have been criticized for failing to fully appreciate the role federalism played in the enactment of the Bill of Rights,<sup>67</sup> and federalist theories have been criticized for failing to fully appreciate the Founders' belief in natural rights.<sup>68</sup> The passive versions of both Libertarian and federalist theories can be criticized as rendering the Ninth Amendment without effect,<sup>69</sup> with the passive, federalist reading of the Ninth in particular seeming to render the Ninth Amendment redundant with the Tenth.<sup>70</sup>

I will address Libertarian and federalist theories of the Ninth Amendment, both active and passive, when appropriate as we move through the historical record. In addition to recovering missing pages in the historical record, this Article will address whether that recovered history supports either a Libertarian or federalist reading of the Ninth Amendment, or whether it suggests another reading altogether. Finally, whatever conclusions may be drawn from the history of the Founding, there remains the difficult question of how the Ninth Amendment should be read in light of the addition of the Fourteenth Amendment to the Constitution.<sup>71</sup> This question is addressed in the second of these two Articles, *The Lost Jurisprudence of the Ninth Amendment*. My effort here is to focus on the Ninth Amendment and bring to light those aspects of its origins that until now have been lost or unrecognized and to consider how these materials shed light on the historic understanding of the Clause.

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67. See AMAR, *supra* note 27, at 123–24 (arguing that Ninth and Tenth Amendments' integration of "popular sovereignty with federalism" reflects a thematic emphasis in the Bill of Rights on federalism).

68. See, e.g., Suzanna Sherry, *Textualism and Judgment*, 66 GEO. WASH. L. REV. 1148, 1149–51 (1998) [hereinafter Sherry, *Textualism and Judgment*] (asserting that "Madison's own statements strongly suggest that the Ninth Amendment was designed to protect individual rights, not state prerogatives").

69. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect.").

70. See, e.g., MASSEY, *supra* note 12, at 73.

71. For example, consider how the Ninth Amendment should be read in light of the Privileges and Immunities Clause. For a discussion of unenumerated rights and the Privileges and Immunities Clause of the Fourteenth Amendment, see Kurt T. Lash, *Two Movements of a Constitutional Symphony*, 33 U. RICH. L. REV. 485, 498–99 (1999).

### III. The Drafting of the Ninth Amendment

#### A. *The Traditional Story*

As one of the original ten amendments to the Constitution, the Ninth Amendment shares its origin with that of the Bill of Rights. When the Philadelphia Convention circulated its proposed draft of the Constitution, criticism quickly arose regarding the document's lack of specifically listed freedoms, such as were common in state constitutions. The omission was seized upon by antifederalist pamphleteers with names like "Federal Farmer" and "Brutus" who circulated flyers throughout the states demanding the addition of a Bill of Rights.<sup>72</sup>

Madison and the Federalists defended the document's lack of such a Bill on two grounds. First, the principle of enumerated powers would sufficiently protect the people from federal invasion of their rights.<sup>73</sup> Second, adding a Bill of Rights might be construed in a manner that would undermine the principle of limited enumerated power.<sup>74</sup> As "Publius" wrote in *The Federalist Papers*:

I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution but would even be dangerous. They would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?<sup>75</sup>

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72. See 2 STORING, *THE COMPLETE ANTI-FEDERALIST*, *supra* note 58, at 214–452 (setting out the works of "Federal Farmer" and "Brutus").

73. As James Madison wrote in *The Federalist Papers*:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The 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 and the internal order, improvement, and prosperity of the State.

THE FEDERALIST NO. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961).

74. According to James Jackson of Georgia:

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 right from the grant of power, those omitted are inferred to be resigned to the discretion of the government.

See Remarks of Mr. James Jackson, Congressional Register (June 8, 1789), *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra* note 13, at 642.

75. THE FEDERALIST NO. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961). According to James Wilson in the Pennsylvania Convention:

[I]n a government consisting of enumerated powers, such as is proposed for the United States, a bill of rights would not only be unnecessary, but in my humble judgment,

The Antifederalists had a stinging response: If the principle of enumerated power was sufficient in itself to control the actions of the federal government, why then did the Framers of the Constitution add Article I, Section Nine, which contains a number of specific restrictions on federal power?<sup>76</sup> Hoist by their own petard and threatened with calls for a second constitutional convention to redraft the entire document,<sup>77</sup> James Madison and the Federalists ultimately agreed to propose a Bill of Rights in the first Congress.

In his speech introducing draft amendments to the House of Representatives, Madison repeated his original concerns regarding the addition of a Bill of Rights, but now he proposed adding an amendment to answer those concerns:

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 4th resolution.<sup>78</sup>

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highly imprudent. In all societies there are many powers and rights which cannot be particularly enumerated. A bill of rights annexed to a constitution is an enumeration of the powers reserved. If we attempt an enumeration, every thing that is not enumerated is presumed to be given.

Remarks of James Wilson, Pennsylvania Convention (Oct. 28, 1787), in *THE COMPLETE BILL OF RIGHTS*, *supra* note 13, at 648; *see also* Remarks of James Madison, Virginia Convention (June 14, 1788), in *THE COMPLETE BILL OF RIGHTS*, *supra* note 13, at 655 (“If an enumeration be made of our rights, will it not be implied that everything omitted is given to the general government?”). James Iredell echoed these concerns during the North Carolina Convention:

But when it is evident that the exercise of any power not given up would be a usurpation, it would be not only 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.

Remarks of James Iredell, North Carolina Convention (July 29, 1788), in *THE COMPLETE BILL OF RIGHTS*, *supra* note 13, at 649.

76. *See* LEVY, *supra* note 8, at 28–30.

77. *See* Kurt T. Lash, *Rejecting Conventional Wisdom: Federalist Ambivalence in the Framing and Implementation of Article V*, 38 AM. J. LEGAL HIST. 197, 215–21 (1994) [hereinafter Lash, *Rejecting Conventional Wisdom*] (detailing the arguments used by Antifederalists to demonstrate the need for a second constitutional convention).

78. James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), in JAMES MADISON, WRITINGS, *supra* note 3, at 448–49. The “last clause of the 4th resolution” referred to by Madison was an early draft of the Ninth:

As Supreme Court Justice and influential treatise writer Joseph Story later would write, “This clause [the Ninth] was manifestly introduced to prevent any perverse, or ingenious misapplication of the well known maxim, that an affirmation in particular cases implies a negation in all others.”<sup>79</sup>

The above represents the most common account of the Ninth Amendment. The Antifederalists rejected the claims that adding a Bill of Rights was too dangerous and insisted that such a Bill be added as a condition of their voting to ratify the proposed Constitution.<sup>80</sup> Seeing that the issue threatened ratification of the Constitution, the Federalists ultimately agreed to propose a Bill of Rights. But Madison, still concerned about the potential misconstruction of such a Bill, added the Ninth Amendment in order to avoid the implication that enumeration of some rights suggested the assignment into the hands of the federal government all unenumerated rights.<sup>81</sup>

This common account makes James Madison the source of the Ninth Amendment. It implies that the Ninth was not proposed *by* the states, but that its principles originally were deployed *against* state calls for a Bill of Rights. No wonder, then, that so many scholars ignore the importance of the states in the adoption of the Ninth Amendment: Apparently, the states had little, if any, role.

This account, however, is critically incomplete. As originally drafted by James Madison, the Ninth Amendment expressly adopted language and principles demanded by several states as a condition to their ratifying the Constitution.<sup>82</sup> Concerns in the states about this particular clause ran so high that questions about its specific wording held up the adoption of the entire Bill of Rights.<sup>83</sup> The Ninth Amendment is not rooted in an excuse offered to the states. The Ninth is rooted in the demands submitted by the states.

### *B. The Call for a Rule of Interpretation*

The current debate over the meaning of the Ninth Amendment is inextricably caught up in the broader debate over unenumerated rights and the general concept of substantive due process.<sup>84</sup> As such, the debate has

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The exceptions, here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people; or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.

*Id.* at 443.

79. STORY, *supra* note 43, at 711.

80. LEVY, *supra* note 8, at 28–32.

81. *Id.* at 247–48.

82. *See infra* subpart IV(A).

83. *See infra* subpart IV(C).

84. *See* BARNETT, RESTORING THE LOST CONSTITUTION, *supra* note 12, at 259, 334 (arguing that the Ninth and Fourteenth Amendments together establish a “presumption of liberty” that, among other things, protects the right to sexual autonomy recognized by the Supreme Court in

tended to focus on individual rights versus the power of a state to enact policies on contraception,<sup>85</sup> abortion,<sup>86</sup> and other matters affecting personal autonomy.<sup>87</sup> This focus on individual rights might explain why the most unique aspect of the Ninth Amendment has received relatively little attention. The Ninth Amendment is the only provision in the Bill of Rights which addresses proper interpretation of the Constitution.<sup>88</sup> In fact, every proposed draft of the Ninth Amendment which emerged from the states, as well as every draft considered by Congress, included a provision controlling the “interpretation” or “construction” of the Constitution.<sup>89</sup> Yet, despite this unique thread running through the earliest history of the Ninth Amendment, Founding-era concerns regarding the methods of constitutional interpretation are almost totally absent from scholarly discussions of the Ninth.<sup>90</sup> The lost history of the Ninth Amendment thus begins with the first debate over how best to interpret the Constitution.

*1. Antifederalist Concerns about Constitutional Interpretation.*—Antifederalist fears regarding the potential scope of federal power under provisions such as the Necessary and Proper Clause are well known.<sup>91</sup> Less

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*Lawrence v. Texas*, 539 U.S. 558 (2003)); MCAFFEE, *supra* note 12, at 169 (presenting his theory as a challenge to readings of the Ninth Amendment such as those presented in *Griswold v. Connecticut*, 381 U.S. 479 (1965)); Caplan, *supra* note 12, at 226–28 (objecting to the use of the Ninth Amendment in support of a substantive due process right of privacy).

85. See *Planned Parenthood v. Casey*, 505 U.S. 833, 848 (1992) (citing the Ninth Amendment in support of a right to procure an abortion under the Fourteenth Amendment).

86. See *Roe v. Wade*, 410 U.S. 113, 152 (1973) (citing the Ninth Amendment in support of a woman’s unenumerated due process right to obtain an abortion).

87. See Appellant’s Opening Brief, 2003 WL 22716416, at \*38, *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003) (No. 03-15481) (citing the Ninth Amendment in support of the right to use marijuana for medical purposes).

88. See Bruce Ackerman, *Robert Bork’s Grand Inquisition*, 99 YALE L.J. 1419, 1431–32 (“The seriousness with which the Founding generation took these words may be inferred from the fact that the Ninth is the *only* constitutional amendment aimed at proscribing an interpretive technique; all the other parts of the Bill of Rights are concerned with substantive or institutional matters.”). The first clause added after the Bill of Rights, the Eleventh Amendment, also addresses proper constitutional interpretation—the only other amendment to do so in the history of the document. See U.S. CONST. amend. XI.

89. For a discussion of these state proposals, see *infra* subpart III(C).

90. Although there are a number of outstanding discussions of general interpretive positions at the time of the Founding, none of them focus on the Ninth Amendment. See, e.g., Caleb Nelson, *Originalism and Interpretive Conventions*, 17 U. CHI. L. REV. 519, 521 (2003) (discussing the Founders’ view of “fixing” the meaning of constitutional provisions); see also WHITTINGTON, *supra* note 25, at 181 (“Although it is easy to imagine an amendment directing the Court to adopt some specific interpretive method, and thus converting an interpretive intent into a substantive directive, no such clause exists in the Constitution.”).

91. According to the antifederalist writer Brutus:

How far the clause in the 8th section of the 1st article may operate to do away all idea of confederated states, and to effect an entire consolidation of the whole into one general government, it is impossible to say. The powers given by this article are very general and comprehensive, and it may receive a construction to justify the passing

recognized are antifederalist fears regarding the potentially destructive power of the proposed federal courts.<sup>92</sup> Federalists claimed that the proposed Constitution granted only certain powers to the federal government, with all other powers remaining under the authority of the states.<sup>93</sup> Antifederalists were not convinced. Once the Constitution was adopted, Antifederalists argued, the federal government naturally would seek to exercise its powers to the utmost.<sup>94</sup> Because the federal legislature would be bound by the decisions of the federal courts,<sup>95</sup> this meant that the true arbiter of federal power would be the judicial branch. Rejecting federalist assertions that the federal judiciary was the “least dangerous” branch,<sup>96</sup> antifederalists pamphleteers like Brutus argued that courts “will not confine themselves to

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almost any law. A power to make all laws, which shall be *necessary and proper*, for carrying into execution, all powers vested by the constitution in the government of the United States, or any department or officer thereof, is a power very comprehensive and definite [indefinite?], and may, for ought I know, be exercised in a such manner as entirely to abolish the state legislatures.

Brutus No. 1 (Oct. 18, 1787), in 2 STORING, *THE COMPLETE ANTI-FEDERALIST*, *supra* note 58, at 367.

92. Some scholars have noted the widespread suspicion of judicial interpretation during this period. *See, e.g.*, Berger, *The Beckoning Mirage*, *supra* note 57, at 959–60 (describing the distrust of the proposed federal courts by the ratifiers of the Constitution and Hamilton’s efforts to assure them that the judiciary was “next to nothing” when compared to the other branches of government); H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513, 1537 (1987). For an excellent discussion of antifederalist concerns regarding the judiciary, see JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 186 (1996).

93. *See* THE FEDERALIST NO. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961).

94. According to antifederalist Federal Farmer, “[M]en usually take either side of the argument, as will best answer their purposes: But the general presumption being, that men who govern, will, in doubtful cases, construe laws and constitutions most favorably for increasing their own powers.” Federal Farmer No. 4 (Oct. 12, 1787), in 2 STORING, *THE COMPLETE ANTI-FEDERALIST*, *supra* note 58, at 247–48.

95. Brutus No. 11 (Jan. 31, 1788), in 2 STORING, *THE COMPLETE ANTI-FEDERALIST*, *supra* note 58, at 420 (“And I conceive the legislature themselves, cannot set aside a judgment of [the Supreme Court], because they are authorized by the constitution to decide in the last resort.”); *see also* Brutus No. 12 (Feb. 7, 1788), in 2 STORING, *THE COMPLETE ANTI-FEDERALIST*, *supra* note 58, at 424 (“[T]he judgment of the judicial, on the constitution, will become the rule to guide the legislature in their construction of their powers.”).

96. As Hamilton wrote:

Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

any fixed or established rules,”<sup>97</sup> but instead would adopt “certain principles, which being received by the legislature, will enlarge the sphere of their power beyond all bounds.”<sup>98</sup> However carefully one might fix the limits of power, “we must leave a vast deal to the discretion and interpretation” of the courts.<sup>99</sup> Accordingly, “[W]e are more in danger of sowing the seeds of arbitrary government in this department than in any other.”<sup>100</sup> Unrestricted by any fixed rule of interpretation, the courts’ latitudinarian constructions of federal power inevitably would intrude upon matters belonging in the hands of the states:

The judicial power will operate to effect . . . an entire subversion of the legislative, executive and judicial powers of the individual states. Every adjudication of the supreme court, 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 former enlarge the exercise of their powers, will that of the latter be restricted. . . .

Not only will the constitution justify the courts in inclining to this mode of explaining it, but they will be interested in using this latitude of interpretation.<sup>101</sup>

The provision in the proposed Constitution which seemed most subject to latitudinarian interpretations was the Necessary and Proper Clause. More than any other provision in the proposed Constitution, this clause threatened to justify the extension of federal power “to almost every thing about which any legislative power can be employed. . . . [N]othing can stand before it.”<sup>102</sup>

Such destructive expansions of federal power might be avoided if the Constitution itself laid down rules of constitutional interpretation. Federal Farmer suggested that “we might advantageously enumerate the powers given, and then in general words, according to the mode adopted in the 2d art. of the confederation, declare all powers, rights and privileges, are reserved, which are not explicitly and expressly given up.”<sup>103</sup> In the Virginia

97. Brutus No. 11 (Jan. 31, 1788), in 2 STORING, THE COMPLETE ANTI-FEDERALIST, *supra* note 58, at 420.

98. Brutus No. 12 (Feb. 7, 1788), in 2 STORING, THE COMPLETE ANTI-FEDERALIST, *supra* note 58, at 423. According to Herbert Storing, the discussion of judicial power by Brutus was “the best in the Anti-Federalist literature.” 3 STORING, THE COMPLETE ANTI-FEDERALIST, *supra* note 58, at 358.

99. Federal Farmer No. 15 (Jan. 18, 1788), in 2 STORING, THE COMPLETE ANTI-FEDERALIST, *supra* note 58, at 315.

100. *Id.* at 316.

101. Brutus No. 11 (Jan. 31, 1788), in 2 STORING, THE COMPLETE ANTI-FEDERALIST, *supra* note 58, at 420–21.

102. Brutus No. 12 (Feb. 7, 1788), in 2 STORING, THE COMPLETE ANTI-FEDERALIST, *supra* note 58, at 425.

103. Federal Farmer No. 16 (Jan. 20, 1788), in 2 STORING, THE COMPLETE ANTI-FEDERALIST, *supra* note 58, at 324.

ratifying convention, Patrick Henry demanded that “a general positive provision should be inserted in the new system, securing to the states and the people every right which was not conceded to the general government . . . .”<sup>104</sup> George Mason, who had refused to sign the Constitution, agreed that the Constitution needed “some express declaration . . . asserting that rights not given to the general government were retained by the states.”<sup>105</sup> According to Mason, “We wish only our rights to be secured. We must have such amendments as will secure the liberties and happiness of the people on a plain, simple construction, not on a doubtful ground.”<sup>106</sup> Although the Federalists denied that the Constitution would authorize unduly expansive interpretations of federal power,<sup>107</sup> Federalists conceded that there needed to be limits to the interpretive methods of the courts. According to Alexander Hamilton in *The Federalist Papers*, “To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents . . . .”<sup>108</sup>

The Constitution as it stood, however, had no “strict rules.” It had no express rules of interpretation at all. In exchange for their vote to ratify the Constitution, the state ratifying conventions insisted that this deficiency be remedied. Madison and the Federalists ultimately promised to add a Bill of Rights to the ratified Constitution as soon as was practicable.<sup>109</sup> On the understanding that amendments would be forthcoming, several states submitted proposed amendments along with their vote to ratify the Constitution.<sup>110</sup> In addition to calling for the recognition of certain rights,

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104. Patrick Henry, Virginia Ratifying Convention (June 9, 1788), in 3 ELLIOT’S DEBATES, *supra* note 42, at 150.

105. George Mason, Virginia Ratifying Convention (June 14, 1788), in 3 ELLIOT’S DEBATES, *supra* note 42, at 444.

106. *Id.* at 271.

107. According to Hamilton in *The Federalist Papers*:

In the first place, there is not a syllable in the plan under consideration which *directly* empowers the national courts to construe the laws according to the spirit of the Constitution, or which gives them any greater latitude in this respect than may be claimed by the courts of every State. I admit however, that the Constitution ought to be the standard of construction for the laws, and that wherever there is an evident opposition, the laws ought to give place to the Constitution. But this doctrine is not deducible from any circumstance peculiar to the plan of convention; but from the general theory of a limited Constitution; and as far as it is true is equally applicable to most if not to all the State governments. There can be no objection, therefore, on this account to the federal judicature which will not lie against the local judicatures in general, and which will not serve to condemn every constitution that attempts to set bounds to the legislative discretion.

THE FEDERALIST NO. 81, at 482 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

108. THE FEDERALIST NO. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

109. James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), in JAMES MADISON, WRITINGS, *supra* note 3, at 452.

110. LEVY, *supra* note 8, at 31–32.



these proposals included rules of construction limiting the interpreted scope of federal power.<sup>111</sup>

2. *The Declarations and Proposals of the State Ratifying Conventions.*—The proposed amendments submitted by the states are important for a number of reasons. James Madison expressly based his draft of the Bill of Rights on the concerns emanating from the state ratifying conventions.<sup>112</sup> Understanding the state proposals, therefore, helps us understand the drafts ultimately proposed by Madison. The determination of the original meaning of provisions like the Ninth and Tenth Amendments is also benefited by considering how those who ratified the Constitution understood and used terms like “powers” and “rights.” The proposed amendments from the states used these terms repeatedly<sup>113</sup> and in a manner that sheds light on Madison’s efforts to distill the state proposals into the Ninth and Tenth Amendments. Finally, the state proposals provide critical insight into the concerns that led to the adoption of the Bill of Rights in general and the Ninth Amendment in particular.

As the last section discussed, critics of the proposed Constitution were especially concerned with controlling the reach of federal power. The Federalists had argued that the principle of enumerated power would limit the expansion of federal authority. Provisions like the Necessary and Proper Clause, however, were ambiguous enough to allow for unduly broad interpretations of enumerated powers. The state conventions responded to this threatened encroachment upon state autonomy in two different ways. Some conventions submitted explanatory declarations along with their ratification vote. These declarations announced the state’s understanding of the proper interpretation of federal power. Other conventions, unwilling to rely on an assumed understanding, submitted proposed amendments that would expressly reserve nondelegated power to the states and control the interpretation of federal power.

The New York convention, for example, submitted declarations that announced the convention’s understanding that a proper reading of the proposed Constitution conformed to federalist principles:

[T]hat 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;

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111. See *infra* subpart III(C) (discussing various state proposals that featured rules of construction).

112. Letter from Edward Carrington to James Madison (Dec. 20, 1789), in 5 DOCUMENTARY HISTORY, *supra* note 1, at 228.

113. Amendments Proposed by the States (June 8, 1789), in CREATING THE BILL OF RIGHTS, *supra* note 2, at 14–28.

And that those Clauses in the said Constitution, which declare, that Congress shall not have or exercise certain Powers, do not imply that Congress is entitled to any Powers not given by the said Constitution; but such Clauses are to be construed either as exceptions to certain specified Powers, or as inserted merely for greater Caution.<sup>114</sup>

The first half of New York's explanatory declaration declares the principle of delegated "Power[s], Jurisdiction and Right[s]." This principle, originally contained in the Articles of Confederation,<sup>115</sup> distinguished the limited enumerated powers of the federal government from the unenumerated police powers of the states. Thus, all powers and rights not delegated to Congress were reserved to the people of the several states. The people of the states, in turn, may delegate those retained powers and rights to their own state government. In addition to expressly declaring the principle of enumerated federal power, this principle would prevent any attempt to use the Necessary and Proper Clause as justification for a federal government of general unenumerated power.

The second half of New York's declaration reflects the concerns raised by both Federalists and Antifederalists regarding the potential dangers of construction of the Constitution. Federalists claimed that a Bill of Rights might be construed to imply that the only limits to federal power were the express prohibitions contained in the Bill.<sup>116</sup> The second provision prohibits this kind of implied expansion of federal power. Other states echoed New York's declaration of assumed constitutional principles. Rhode Island submitted a declaration almost identical to New York's.<sup>117</sup> South Carolina's convention similarly declared that "no section or paragraph of the said constitution warrants a construction that the states do not retain every power not expressly relinquished by them, and vested in the general government of the union."<sup>118</sup>

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114. Amendments Proposed by the New York Convention (July 26, 1788), in *CREATING THE BILL OF RIGHTS*, *supra* note 2, at 21–22. In ratifying the Constitution, the New York delegates stated:

Under these impressions, and declaring that the rights aforesaid cannot be abridged or violated, and that the explanations aforesaid are consistent with the said Constitution, and in confidence that the amendments which shall have been proposed to the said Constitution will receive an early and mature consideration—We the said delegates, in the name and in the behalf of the people of the state of New York, do, by these presents, assent to and ratify the said Constitution.

1 *ELLIOT'S DEBATES*, *supra* note 42, at 329.

115. See *ARTICLES OF CONFEDERATION* art. II ("Each state retains . . . every power, jurisdiction, and right, which is not . . . expressly delegated.").

116. See James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), in *JAMES MADISON, WRITINGS*, *supra* note 3, at 448–49.

117. Ratification of the Constitution by the Convention of the State of Rhode Island and Providence Plantations (May 29, 1790), in *1 ELLIOT'S DEBATES*, *supra* note 42, at 334.

118. Ratification of the Constitution by the Convention of the State of South Carolina (May 23, 1788), in *4 ELLIOT'S DEBATES*, *supra* note 42, at 325.

Other conventions, however, were not content to simply declare their assumed understanding of the proposed Constitution. These conventions demanded the addition of specific amendments “for greater caution.” These proposed amendments echoed the principles declared by the New York and Rhode Island conventions that federal power was both enumerated and limited in scope. North Carolina, for example, proposed:

1. That each state in the union shall, respectively, retain every power, jurisdiction and right, which is not by this constitution delegated to the Congress of the United States, or to the departments of the Federal Government.

. . . .

18. That those clauses which declare that Congress shall not exercise certain powers, be not interpreted in any manner whatsoever to extend the powers of Congress; but that they be construed either as making exceptions to the specified powers where this shall be the case, or otherwise, as inserted merely for greater caution.<sup>119</sup>

North Carolina’s proposals are even more specific than New York’s declarations in their focus on the implied expansion of federal power. In addition to preserving the principle of enumerated federal power, the enumeration of rights must not suggest any *extension* of enumerated powers. This goes beyond preserving the principle of enumerated power and prevents the implied extension of those powers which are enumerated.

Pennsylvania’s proposals declared the principle of enumerated power, followed by a provision explicitly prohibiting the courts from assuming “any authority, power, or jurisdiction . . . under color or pretense of construction or fiction.”<sup>120</sup>

In Virginia, the convention appointed a committee to draft proposed amendments to the Constitution. That committee, whose members included James Madison and Edmund Randolph, produced the following:<sup>121</sup>

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119. Amendments Proposed by the North Carolina Convention (Aug. 1, 1788), *in* THE COMPLETE BILL OF RIGHTS, *supra* note 13, at 674–75.

120. The full text of the Pennsylvania provision reads:

That Congress shall not exercise any powers whatever, but such as are expressly given to that body by the Constitution of the United States: nor shall any authority, power, or jurisdiction, be assumed or exercised by the executive or judiciary departments of the Union, under color or pretence of construction or fiction; but all the rights of sovereignty, which are not by the said Constitution expressly and plainly vested in the Congress, shall be deemed to remain with, and shall be exercised by, the several states in the Union, according to their respective constitutions; and that every reserve of the rights of individuals, made by the several constitutions of the states in the Union, to the citizens and inhabitants of each state respectively, shall remain inviolate, except so far as they are expressly and manifestly yielded or narrowed by the national Constitution.

2 ELLIOT’S DEBATES, *supra* note 42, at 545.

121. 3 ELLIOT’S DEBATES, *supra* note 42, at 656.

First, That each State in the Union shall respectively retain every power, jurisdiction and right which is not by this Constitution delegated to the Congress of the United States or to the departments of the Foederal Government.

. . . .

Seventeenth, That those clauses which declare that Congress shall not exercise certain powers be not interpreted in any manner whatsoever to extend the powers of Congress. But that they may be construed either as making exceptions to the specified powers where this shall be the case, or otherwise as inserted merely for greater caution.<sup>122</sup>

Following the example of other states, particularly that of North Carolina, Virginia's first provision declares a principle of delegated power by which states retained nondelegated powers and rights, followed by the seventeenth provision that prevents the constructive *extension* of these delegated powers.

All of these declarations and proposals share a common dual approach to controlling federal power. First, a declaration must be added that expressly declares the federal government has limited enumerated powers. All powers, jurisdiction, and rights not delegated to the federal government were to be retained by the states. Second, the enumeration of certain rights was not to be construed in any manner that expanded the scope of enumerated federal power. Both the declarations and the rules of construction focused on controlling the expansion of federal power and reserving all nondelegated powers *and rights* to the states.

3. *Preventing the Constructive Extension of Federal Power.*—These explanatory declarations and proposed amendments reflect dual strategies for controlling the expansion of federal power. The primary strategy was to declare the *principle* of enumerated federal power. A secondary strategy was to control the *interpretation* of enumerated federal power. New York's declarations reflect the primary strategy: The enumeration of rights must not suggest a government of unenumerated power. Proposals like those submitted by North Carolina and Virginia highlight the second, complementary strategy of controlling the interpreted scope of enumerated power. North Carolina, for example, proposed:

That those clauses which declare that Congress shall not exercise certain powers, be not interpreted in any manner whatsoever to extend the powers of Congress; but that they be construed either as making

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122. Amendments Proposed by the Virginia Convention (June 27, 1788), in THE COMPLETE BILL OF RIGHTS, *supra* note 13, at 675. James Madison was a member of the committee that drafted the Virginia proposal, and he later noted the role the Virginia proposals played in his proposed draft of the Bill of Rights. Letter from James Madison to George Washington (Nov. 20, 1789), in 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1185 (Bernard Schwartz ed., 1971) [hereinafter THE BILL OF RIGHTS: A DOCUMENTARY HISTORY].

exceptions to the specified powers where this shall be the case, or otherwise, as inserted merely for greater caution.<sup>123</sup>

Likewise, Virginia's seventeenth proposal stated, "That those clauses which declare that Congress shall not exercise certain powers be not interpreted in any manner whatsoever to extend the powers of Congress."<sup>124</sup> These proposals were made in addition to declarations that the federal government had only limited enumerated power.

Concerns about extending the enumerated powers of Congress are related to, but distinct from, preserving the principle of enumerated power. By limiting the federal government to enumerated powers, the states intended to retain to themselves all nondelegated powers, jurisdiction, and rights. Under this approach, states did not have to list the powers and rights they retained, for they retained *everything* not assigned to federal control. The problem was, as the Antifederalists pointed out, merely declaring the principle of enumerated powers by itself did not control the interpreted scope of federal power. There being no fixed rules of interpretation for the courts to follow, judicial construction of enumerated powers had no limit. Worse, adding a Bill of Rights might imply that the only limits to broad readings of federal power were those specific limits listed in Article I and the Bill of Rights. In such a situation, states still would retain all nondelegated powers, but those powers would be few (if any), with the federal government having occupied the field. Preventing this from coming to pass required the adoption of *two* provisions. One declaring the principle of enumerated power; the second denying the implied expansion of federal power due to the addition of specific rights.

This dual approach is most clearly seen in the proposals of North Carolina and Virginia. Other state conventions, however, also recognized the need to control the construction of federal power. Pennsylvania suggested a provision that prohibited the courts from assuming any "authority, power, or jurisdiction" under any "pretense of construction or fiction."<sup>125</sup> South Carolina declared that "no section or paragraph of the said Constitution warrants a construction that the states do not retain every power not expressly relinquished . . . ."<sup>126</sup> These provisions, along with those of North Carolina and Virginia, all seek to limit the interpretation of federal power.

In sum, the declarations and proposed amendments by the states followed a two-track approach to limiting federal power. First, they declared

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123. Amendments Proposed by the North Carolina Convention (Aug. 1, 1788), in *THE COMPLETE BILL OF RIGHTS*, *supra* note 13, at 675.

124. Amendments Proposed by the Virginia Convention (June 27, 1788), in *THE COMPLETE BILL OF RIGHTS*, *supra* note 13, at 675.

125. Amendments Proposed by the Pennsylvania Convention (Sept. 3, 1788), in *THE COMPLETE BILL OF RIGHTS*, *supra* note 13, at 648.

126. Ratification of the Constitution by the Convention of the State of South Carolina (May 23, 1788), in *1 ELLIOT'S DEBATES*, *supra* note 42, at 325.

that the federal government had limited enumerated powers, with all nondelegated power, jurisdiction, and rights retained by the states. Second, the states proposed a rule of construction that preserved the retained powers of the states by preventing the constructive expansion of federal power. When James Madison drafted the Bill of Rights, he referred to and relied upon these proposals.

#### IV. The Drafting of the Ninth Amendment

##### A. *Madison's Initial Draft*

Fulfilling his promise to his constituents in Virginia,<sup>127</sup> Madison drafted and presented to the House of Representatives a list of proposed amendments to the Constitution. Following the example of the state convention proposals, Madison included both a provision declaring the principle of enumerated federal power and a rule of construction:

The exceptions, here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.

. . . .

The powers not delegated by this Constitution, nor prohibited by it to the states, are reserved to the States respectively.<sup>128</sup>

In his speech introducing his draft Bill of Rights to the House of Representatives, Madison stated his belief that the proposed Tenth Amendment probably was not necessary, but that expressly declaring the principle was considered important to the state conventions:

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

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127. Madison explained his obligation to introduce amendments in a letter to Richard Peters: In many States the Const. was adopted under a tacit compact in favr. of some subsequent provisions on this head. In Virg[inia]. It would have been *certainly* rejected, had no assurances been given by its advocates that such provisions would be pursued. As an honest man *I feel* my self bound by this consideration.

Letter from James Madison to Richard Peters (Aug. 19, 1789), in *CREATING THE BILL OF RIGHTS*, *supra* note 2, at 282.

128. House of Representatives, Amendments to the Constitution (June 8, 1789), in *5 THE FOUNDERS' CONSTITUTION*, *supra* note 13, at 25–26.

gentlemen will allow that the fact is as stated. I am sure I understand it so, and do therefore propose it.<sup>129</sup>

Madison's proposed draft of the Ninth Amendment, on the other hand, answered concerns shared by both Madison and the state conventions:

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 may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the 4th resolution.<sup>130</sup>

Madison's Ninth Amendment is concerned with the implications arising from the enumeration of certain rights. Having already secured the principle of enumerated powers through his draft of the Tenth Amendment, Madison's Ninth seeks to prevent both the implied diminishment of other rights and the implied enlargement of enumerated federal power. As Madison wrote in his notes for this part of his speech, enumerating certain rights might "disparage other rights—or constructively enlarge" delegated federal power.<sup>131</sup> Again, the concern was not that enumerating rights would imply *new* enumerated powers. The concern was that enumerated rights might imply the *constructive enlargement* of enumerated powers. Listing certain rights could imply that the only limits to the interpreted scope of federal power were those particular limits listed in the Constitution. Such a constructive enlargement of federal power would have the result of diminishing the scope of nondelegated powers, jurisdiction, and rights. Madison's draft Ninth Amendment avoided such an implication by following the lead of the North Carolina and Virginia conventions and by calling for a rule of construction that prevented such constructive enlargement of enumerated federal power.

As had the state conventions, Madison proposed dual provisions, one declaring the principle of enumerated power and the other establishing a rule of construction limiting the constructive enlargement of those powers. Madison's Ninth Amendment addressed the need to prevent the enlargement of federal power *and* to protect the people's retained rights. In the end, however, Congress discarded the reference to enlarged powers and preserved

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129. *Id.* at 28.

130. James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), in JAMES MADISON, WRITINGS, *supra* note 3, at 448–49.

131. See James Madison, Notes for Amendments Speech (1789), in 1 RIGHTS RETAINED BY THE PEOPLE, *supra* note 14, at 65 (listing objections to the Bill of Rights).

the language of retained rights.<sup>132</sup> That fateful choice and its implications for the understood meaning of the Ninth Amendment are the focus of the next subpart.

*B. The Select Committee*

On July 21, 1789, soon after Madison's speech introducing his draft of the Bill of Rights, the House appointed a Select Committee to "consider the subject of amendments."<sup>133</sup> The Committee consisted of eleven members, one from each state that had ratified the Constitution,<sup>134</sup> and included James Madison of Virginia and Roger Sherman of Connecticut.<sup>135</sup> The work of that Committee, including a draft Bill of Rights written by Roger Sherman, has played important roles in Ninth Amendment scholarship. As we shall see, recognizing the roots of the Ninth Amendment as a rule of construction sheds significant new light on Sherman's draft and the Committee's final choice of language for the Ninth Amendment.

*1. Sherman's Draft Bill of Rights.*—One of the principle issues left open by the text of the Ninth Amendment involves the "other rights" protected by the Ninth's rule of construction. Federalist theories emphasize the collective rights of the people of the several states—the right to local self-government on all matters not assigned to the federal government.<sup>136</sup> Libertarian scholars, on the other hand, emphasize the Founders' belief in individual natural rights and read the Ninth Amendment as an acknowledgment of such rights.<sup>137</sup> In support, Libertarian scholars cite the draft Bill of Rights penned by Roger Sherman as evidence that the retained other rights of the Ninth refer to individual natural rights.<sup>138</sup> A close look at Sherman's draft, however, suggests that this is not the case.

Roger Sherman originally opposed the adoption of a Bill of Rights.<sup>139</sup> When it became clear that a Bill would be proposed despite his objections, Sherman suggested that it be added at the end of the document, rather than incorporated into Article I, Section 9, as Madison proposed.<sup>140</sup> A draft Bill

132. U.S. CONST. amend. IX.

133. 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY, *supra* note 122, at 1050.

134. North Carolina and Rhode Island at this point had not yet ratified the Constitution. *Id.*

135. CREATING THE BILL OF RIGHTS, *supra* note 2, at 5–6 (indicating that Sherman and Madison were among those appointed to the Select Committee on July 21, 1789).

136. *See supra* note 57 and accompanying text.

137. *See supra* note 49 and accompanying text.

138. *E.g.*, Yoo, *supra* note 49, at 984–85; *see also* Rosen, *supra* note 49, at 1076.

139. LEVY, *supra* note 8, at 103.

140. Letter from Roger Sherman to Henry Gibbs (Aug. 4, 1789), in CREATING THE BILL OF RIGHTS, *supra* note 2, at 271; *see also* LEVY, *supra* note 8, at 145–46 (relating that Sherman "opposed interspersing [the amendments] within the main body of the Constitution because that would leave the mistaken impression that the Framers had signed a document that included provisions not of their composition").



of Rights penned by Sherman,<sup>141</sup> possibly representing his vision of how the Bill might appear if appended as a separate Bill of Rights,<sup>142</sup> includes a provision declaring that “[t]he people have certain natural rights which are retained by them when they enter into society.”<sup>143</sup> Libertarian scholars have characterized this provision as either an early draft of the Ninth Amendment<sup>144</sup> or as “reflect[ing] the sentiment that came to be expressed in the Ninth,”<sup>145</sup> thus establishing a link between the Ninth Amendment and the Founders’ intention to protect unenumerated individual natural rights.<sup>146</sup>

Finding an example of natural rights language in conjunction with the Ninth Amendment would provide significant support for the Libertarian rights position. Although all Ninth Amendment scholars agree that there was widespread belief in natural rights at the time of the Founding, this alone does not establish that protecting individual natural rights was the purpose of the Ninth. At the time of the Founding, it was possible to embrace both natural rights and a strong belief in the collective right of the people to local self-government. A simple illustration of this can be seen in the proposals of the North Carolina ratifying convention. The convention began by declaring:

That there are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity, among which are the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety.<sup>147</sup>

As we saw previously,<sup>148</sup> however, North Carolina also proposed an amendment which declared “that each *state* in the Union shall respectively *retain every* power, jurisdiction, and *right*, which is not by this Constitution delegated to the Congress of the United States.”<sup>149</sup>

The North Carolina convention obviously believed in natural rights, but they also believed that the states retained every right not delegated to the federal government. Similarly, Virginia’s proposal insisted “[t]hat each *State* in the Union shall respectively *retain every* power, jurisdiction and *right*

141. There is some question regarding whether this draft reflects the views of Sherman himself or stands only as the report of a congressional committee of which Sherman was secretary. See Christopher Collier, *The Common Law and Individual Rights in Connecticut Before the Federal Bill of Rights*, 76 CONN. B. J. 1, 63 (2002).

142. See Roger Sherman, Proposed Committee Report (July 21–28, 1789), in *CREATING THE BILL OF RIGHTS*, *supra* note 2, at 266–68.

143. *Id.* at 267.

144. See Yoo, *supra* note 49, at 993 (assuming that the provision was Sherman’s notes on what would become the Ninth Amendment).

145. 1 RIGHTS RETAINED BY THE PEOPLE, *supra* note 14, at 7 n.16.

146. See, e.g., BARNETT, *RESTORING THE LOST CONSTITUTION*, *supra* note 12, at 55.

147. Amendment Proposed by the North Carolina Convention (Aug. 1, 1788), in 1 RIGHTS RETAINED BY THE PEOPLE, *supra* note 14, at 364.

148. See *supra* note 119 and accompanying text.

149. Amendment Proposed by the North Carolina Convention (Aug. 2, 1788), in 1 RIGHTS RETAINED BY THE PEOPLE, *supra* note 14, at 366–67, 369 (emphasis added).

which is not by this Constitution delegated to the congress of the United States.”<sup>150</sup> This approach conceives of retained rights in a collective manner, rather than an individual Libertarian sense. Rights and powers not delegated to the federal government remain under the collective control of the people of the individual states. New York’s proposed amendments expressly adopted this approach and spoke of “Power, Jurisdiction and Right[s]” retained by “the People of the several States, or to their respective State Governments to whom they may have granted the same.”<sup>151</sup> As these examples illustrate, the fact that the Ninth Amendment speaks of the people’s retained rights does not establish the character (collective or individual) of the rights so retained. Nor does the fact that many Founders believed in natural rights conflict with a federalist reading of the rights retained under the Ninth.<sup>152</sup> Thomas Jefferson, after all, believed in the natural rights of the states.<sup>153</sup> Similarly, when Congress violated the natural right of free speech in passing the Alien and Sedition Acts, Madison argued that the Acts violated the rights of the states.<sup>154</sup> In sum, the rights of the Ninth Amendment remain ambiguous if all we have is the text of the Ninth itself and a general Founding belief in natural rights.

Libertarian theorists believe that Sherman’s draft resolves the ambiguity and establishes a link between the phrase “natural rights” and the Ninth Amendment’s phrase “other rights retained by the people.”<sup>155</sup> According to

150. Amendments Proposed by the Virginia Convention (June 27, 1788), in *THE COMPLETE BILL OF RIGHTS*, *supra* note 13, at 675 (emphasis added).

151. Amendments Proposed by the New York Convention (July 26, 1788), in *CREATING THE BILL OF RIGHTS*, *supra* note 2, at 21–22.

152. For this reason alone, the copious amount of time spent by unenumerated individual rights theorists regarding a widespread Founding belief in natural rights has limited relevance to the question of whether protecting individual rights was the purpose of the Ninth Amendment. Madison, for example, drafted the First Amendment to protect natural rights such as speech, but he clearly understood that withholding the power from the federal government left the issue under state control. Accordingly, he unsuccessfully proposed a separate amendment to protect liberty of speech and conscience in the states. *See* 1 *ANNALS OF CONG.* 783 (Joseph Gales ed., 1789) (stating that “no State shall infringe the equal rights of conscience, nor the freedom of speech or of the press, nor of the right of trial by jury in criminal cases”).

153. Thomas Jefferson, Draft of Kentucky Resolutions (Nov. 10, 1798), in 5 *THE FOUNDERS’ CONSTITUTION*, *supra* note 13, at 134 (“[E]very State has a natural right in cases not within the compact . . . to nullify of their own authority all assumptions of power by others within their limits . . .”); *see also* JOHN TAYLOR, *CONSTRUCTIONS CONSTRUED AND CONSTITUTIONS VINDICATED* 172 (De Capo Press 1970) (1820) (“The states have a natural right to make all necessary and proper laws within their national powers reserved.”).

154. *See* JAMES MADISON, *WRITINGS*, *supra* note 3, at 608–62 (arguing against the Alien and Sedition Acts).

155. *See* Randy E. Barnett, *James Madison’s Ninth Amendment*, in 1 *RIGHTS RETAINED BY THE PEOPLE*, *supra* note 14, at 7 n.16 (claiming that Sherman’s use of the phrase “Such are” indicates enumerated rights as mere examples); Calvin R. Massey, *The Natural Law Component of the Ninth Amendment*, 61 *U. CINN. L. REV.* 49, 94 (1992) (citing Sherman’s draft as evidence that “it is difficult to dismiss the influence of natural law on the creation of the Ninth Amendment”); Yoo, *supra* note 49, at 993 (“Sherman’s draft, like the Ninth Amendment in its final form, employed the important ‘people-rights’ terminology whose core meaning emphasizes majoritarian, popular

Randy Barnett, the following passage from Sherman's draft Bill of Rights "reflects the sentiment that came to be expressed in the Ninth":<sup>156</sup>

The people have certain natural rights which are retained by them when they enter into Society, Such are the rights of Conscience in matters of religion; of acquiring property and of pursuing happiness & Safety; of Speaking, writing and publishing their Sentiments with decency and freedom; of peaceably assembling to consult their common good, and of applying to Government by petition or remonstrance for redress of grievances.

Of these rights therefore they Shall not be deprived by the Government of the united States.<sup>157</sup>

At first glance, Barnett's proposition seems plausible. Both the Ninth Amendment and Sherman's proposal speak of rights retained by the people. That Sherman's draft specifically referred to natural rights arguably suggests that at least one member of the Select Committee responsible for drafting the Bill of Rights believed that the rights of the Ninth Amendment referred to the natural rights retained by the people. Before testing Barnett's reading, however, consider another provision in Sherman's draft Bill of Rights, which Professor Barnett believes "closely resembles what came to be the Tenth":<sup>158</sup>

And the powers not delegated to the government of the united States by the Constitution, nor prohibited by it to the particular States, are retained by the states respectively. [N]or Shall any [limitations on]<sup>159</sup> the exercise of power by the government of the united States the particular instances here in enumerated by way of caution be construed to imply the contrary.<sup>160</sup>

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rights."); see also Rosen, *supra* note 49, at 1075–76 (asserting that Sherman's draft demonstrates that rights "retained by the people" referred to natural rights).

156. Barnett, *James Madison's Ninth Amendment*, *supra* note 155, at 7 n.16. In his most recent work, Professor Barnett continues to link this quote to the Ninth Amendment. BARNETT, *RESTORING THE LOST CONSTITUTION*, *supra* note 12, at 54–55.

157. 1 RIGHTS RETAINED BY THE PEOPLE, *supra* note 14, at app. a at 351.

158. *Id.* at 7 n.16. Professor Yoo similarly notes:

The predecessor to the Tenth spoke openly about limiting the federal government to its enumerated powers: "And the powers not delegated to the Government of the united states by the Constitution, nor prohibited by it to the particular States, are retained by the States respectively, nor shall the exercise of power by the Government of the united states particular instances here in enumerated by way of caution be construed to imply the contrary."

Yoo, *supra* note 49, at 993 (quoting Roger Sherman's Draft of the Bill of Rights (1789), in 2 RIGHTS RETAINED BY THE PEOPLE, *supra* note 12, at 351–52).

159. Sherman's draft "Eleventh" provision contained gaps which scholars fill in different ways. I have reproduced what I believe to be a "neutral" draft from *Creating the Bill of Rights*. See *infra* text accompanying note 160; see also McAfee, *supra* note 47, at 302 n.98. How the gaps are filled, however, has no effect on the significance of the text described above.

160. Roger Sherman's Proposed Committee Report (July 21–28, 1789), in *CREATING THE BILL OF RIGHTS*, *supra* note 2, at 268.

Having kept our focus on the Ninth Amendment as a rule of construction, the reader can probably recognize the above provision as a *combination* of the two principles expressed by the Ninth and Tenth Amendments.<sup>161</sup> Sherman's "Eleventh Amendment" contains two separate provisions: the first, a declaration of enumerated power; the second, a rule of construction preserving that principle.<sup>162</sup> The first portion repeats Madison's draft Tenth Amendment almost verbatim. The second portion follows the general approach of every draft of the Ninth Amendment, from the state convention proposals to James Madison's, by announcing a rule of construction controlling the interpretation of federal power.

Given the common tendency to read "rights" language as referring to the Ninth and "powers" language as referring to the Tenth, it is easy to see how the last portion of Sherman's draft might be misconstrued. Having traced the roots of the Ninth Amendment as a rule of construction, however, it is clear that Sherman's draft followed the same approach as the state conventions. In fact, Sherman's Bill echoes the approach of North Carolina by beginning with a general declaration of natural rights, followed by a specific declaration of enumerated power and a rule of construction preserving the principle of state autonomy. Because Sherman's draft links the rule of the Ninth Amendment with the retained powers of the states, despite the draft's opening declaration of retained natural rights, this rebuts the interpretive presumption that just because a Founder declared the existence of natural rights, he would have understood (much less intended) the Ninth to protect individual as opposed to collective or "states" rights.

If all of this is not enough to break the link between Sherman's reference to individual natural rights and the Ninth Amendment, there is the shattering context in which Sherman's draft was written. Madison's initial draft of the Ninth Amendment was presented to the House on June 8,

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161. In this way, Sherman's draft echoes South Carolina's proposal, which also combined both the rule of construction and the principle of enumerated power in a single phrase: "that no Section or paragraph of the said Constitution *warrants a construction* that the states do not retain every power not expressly relinquished by them and vested in the General Government of the Union." THE COMPLETE BILL OF RIGHTS, *supra* note 13, at 675 (erroneously referring to this as only involving the Tenth) (emphasis added).

162. In footnotes contained in his earlier work, Thomas McAfee recognizes Sherman's eleventh provision as a combination of the Ninth and Tenth Amendments. See Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1303 n.333 (1990) [hereinafter McAfee, *The Original Meaning*] (identifying the Ninth and Tenth Amendment aspects in Sherman's draft); Thomas B. McAfee, *The Role of Legal Scholars in the Confirmation Hearings*, 7 ST. JOHN'S J. OF LEGAL COMM. 211, 227 n.51 (1991) [hereinafter McAfee, *The Role of Legal Scholars*] (noting that "[h]ere the Ninth Amendment is drafted as an express guard against a construction that would undercut the effect of the Tenth Amendment"). McAfee's current position on the Ninth Amendment is that it is a "hold harmless" provision that "says nothing about how to construe the powers of Congress." McAfee, *The Original Meaning*, *supra*, at 1300 n.325.

1789.<sup>163</sup> Both Sherman and Madison were members of the House Select Committee appointed to review Madison's draft. Once again, here are Madison's original drafts of the Ninth and Tenth Amendments:

The exceptions, here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.<sup>164</sup>

The powers not delegated by this constitution, nor prohibited by it to the States, are reserved to the States respectively.<sup>165</sup>

Sherman drafted his provision the next month and presented it either in July or early August.<sup>166</sup> Again, here is Sherman's actual draft of the Ninth and Tenth Amendments:

And the powers not delegated to the government of the united States by the Constitution, nor prohibited by it to the particular States, are retained by the States respectively. nor Shall any [limitations on] the exercise of power by the government of the united States particular instances here in enumerated by way of caution be construed to imply the contrary.<sup>167</sup>

Sherman's draft *deletes* Madison's reference to "other rights retained by the people" and replaces it with language that expressly grounds the Ninth as a rule preserving the autonomy of the states.<sup>168</sup> Sherman's draft is significant, but for a very different reason than Professor Barnett supposes. Instead of providing a link between individual natural rights and the Ninth Amendment, the draft suggests that at least one member of the Select Committee preferred a version of the Ninth that removed the language regarding retained rights altogether and, instead, simply stated a rule of construction preserving the retained powers of the states.<sup>169</sup>

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163. Amendment Proposed by James Madison (June 8, 1789), in *THE COMPLETE BILL OF RIGHTS*, *supra* note 13, at 627.

164. James Madison, Speech to the House of Representatives (June 8, 1789), in *1 RIGHTS RETAINED BY THE PEOPLE*, *supra* note 14, at 55.

165. *Id.* at 56.

166. See Roger Sherman, Proposed Committee Report (July 21–28, 1789), in *CREATING THE BILL OF RIGHTS*, *supra* note 2, at 266–67.

167. *Id.* at 268.

168. In this manner, Sherman's draft apparently reflects the same preference voiced by Edmund Randolph for a Ninth closer to the letter and spirit of Virginia's first and seventeenth amendments. See *infra* note 200. Sherman apparently did not believe he was changing the substantive meaning of the provision, as his draft was presented for stylistic purposes. His draft thus indirectly supports Madison's argument that securing rights amounted to the same thing as limiting the constructive enlargement of power. See *infra* note 202.

169. The House Committee reported its draft of the Bill of Rights on July 28, 1789, with the Ninth having attained its final form. *CREATING THE BILL OF RIGHTS*, *supra* note 2, at 29. On August 4, Roger Sherman wrote that the amendments as drafted by the Committee "will probably

2. *The Altered Draft of the Select Committee.*—The Select Committee was appointed on July 21, 1789. One week later, on July 28, the Committee reported back to the House a streamlined version of Madison’s proposals.<sup>170</sup> The new draft of the Ninth Amendment no longer contained Madison’s reference to constructive enlargement of federal power, but his draft of the Tenth remained unchanged:<sup>171</sup>

The enumeration in this constitution of certain rights shall not be construed to deny or disparage others retained by the people.

The powers not delegated by this Constitution, nor prohibited by it to the States, are reserved to the States respectively.<sup>172</sup>

Because the Select Committee’s version of the Ninth speaks only of rights, while the Tenth speaks of powers, some scholars have suggested that the committee “unpacked” Madison’s early draft of the Ninth and moved the “enlargement of powers” language to the Tenth.<sup>173</sup> This is another example of scholars categorizing historical materials relating to the Ninth and Tenth Amendments under the assumption that rights go to the Ninth while powers go to the Tenth.<sup>174</sup>

As before, applying the assumption to Madison’s initial draft distorts the evidence. To begin with, at the same time Madison offered his “enlarged powers” draft of the Ninth, he also offered his draft of the Tenth.<sup>175</sup> Madison obviously believed his versions of the Ninth and Tenth each covered

be harmless & Satisfactory to those who are fond of Bills of rights.” Letter from Roger Sherman to Henry Gibbs (Aug. 4, 1789), in *CREATING THE BILL OF RIGHTS*, *supra* note 2, at 271. Sherman had no objection to the Committee’s draft of the Ninth, despite his preference for a draft that expressly retained the rights of the states. Because his version was submitted for stylistic purposes and was not intended to substantively alter the amendments, Sherman, like Hardin Burnley, probably read the final version of the Ninth as expressing the same states rights principle he expressed in his own draft. *See infra* note 201 and accompanying text.

170. According to Bernard Schwartz, “[T]he Committee version was a virtual restatement of the amendments proposed by Madison.” *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY*, *supra* note 122, at 1050.

171. Madison himself was ambivalent about the committee’s draft: “The proposed amendments of which I sent you a copy have since been in the hands of a committee composed of a member from each State . . . [some] of the changes are perhaps for the better, others for the worse.” Letter from James Madison to Wilson Cary Nicholas (Aug. 2, 1789), in *CREATING THE BILL OF RIGHTS*, *supra* note 2, at 271.

172. House Committee Report (July 28, 1789), in *CREATING THE BILL OF RIGHTS*, *supra* note 2, at 31, 33.

173. *See* Randy Barnett, *Introduction: James Madison’s Ninth Amendment*, in 1 *RIGHTS RETAINED BY THE PEOPLE*, *supra* note 14, at 13; MASSEY, *supra* note 12, at 75 (“[T]he House Select Committee used Madison’s fourth resolution, in part, as the raw material for the Tenth Amendment as well as the Ninth.”).

174. *See, e.g.*, MASSEY, *supra* note 12, at 11 (“[T]he Ninth Amendment is pretty clearly concerned with ‘rights retained by the people’ while the Tenth is equally explicit that its focus is on governmental ‘powers’”).

175. James Madison, Amendments to the Constitution (June 8, 1789), in 2 *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY*, *supra* note 122, at 1016, 1027–28.

different subjects, despite the amendments sharing a common reference to government powers. In fact, there is no evidence that language was taken from the Ninth and placed in the Tenth. When the “enlargement of powers” language was removed from Madison’s Ninth, it was not placed in the Tenth—it simply disappeared. The Select Committee left Madison’s Tenth unchanged.<sup>176</sup>

There appear to be three possible reasons for removing the “enlargement of power” language from the final version of the Ninth Amendment. First, the Select Committee might have decided to abandon the attempt to limit the constructive enlargement of federal power. Second, the Committee may have concluded that the constructive enlargement of powers principle was redundant with language already contained in the Tenth. Third, the Committee could have concluded that the constructive enlargement of power language was redundant with language already contained in the Ninth. There are reasons why the first two choices are unlikely,<sup>177</sup> but fortunately we do not have to guess.<sup>178</sup> Madison himself claimed the third explanation was the case, and he defended the Committee’s draft on those grounds.<sup>179</sup> A defense was needed, too. Concerns over the Committee’s draft of the Ninth Amendment played a role in holding up ratification of the entire Bill.<sup>180</sup>

3. *Popular Sovereignty and the Tenth Amendment.*—There is one final change in the last two amendments that deserves mention before we proceed. At the last minute, the phrase “or to the people” was added to the Tenth Amendment.<sup>181</sup> The final version read:

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176. After the Select Committee referred the amendments back to the House, the Tenth was altered at the last minute to include the words “or to the people.” See House of Representatives Journal (Aug. 18, 1789), in 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY, *supra* note 122, at 1114, 1118; MASSEY, *supra* note 12, at 78.

177. As to the first, given the repeated call by the states for a provision limiting the constructive expansion of federal power and Madison’s original decision that such a provision was appropriate, it does not seem likely that the idea would be lightly abandoned. As to the second possibility, it was clear that the states did not read declarations of enumerated power as controlling the constructive enlargement of that power, which is why almost all the states called for two separate provisions. Madison’s own initial draft echoed this idea.

178. In rereading Calvin Massey’s *Silent Rights*, I noticed that my manner of presenting this issue closely mirrors his. See Massey, *supra* note 12, at 72–73 (setting up three possible reasons for the Committee’s alteration and stating “[f]ortunately, we are not confined to speculation”). Professor Massey and I offer very different resolutions of the issue, but our approaches are similar enough in style that I believe Massey should be credited with the prior stylistic approach.

179. See *infra* notes 202–03 and accompanying text.

180. Kaminski, *supra* note 46, at 146.

181. See *supra* note 176.

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.<sup>182</sup>

The state convention proposals and Madison's draft of the Tenth clearly indicate that the Tenth was meant to declare the principle that all nondelegated powers were reserved to the States. No historian disputes this. Why then did the Committee add the phrase "or to the people?" The answer lies in the Founders' conception of popular sovereignty. A theory of popular government developed in the period between the Revolution and the adoption of the Constitution,<sup>183</sup> popular sovereignty maintained that sovereign power remains with the people, not with their government.<sup>184</sup> The people delegated powers to their government, but could "alter or abolish" those powers as they saw fit.<sup>185</sup> The delegation of power, however, could occur at either of two levels. For example, powers not delegated to the federal government could be delegated by the people to their own state government. As New York's suggested amendment put it:

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.<sup>186</sup>

The final version of the Tenth Amendment expresses this idea that the people retain the right to delegate reserved powers to their respective state governments or not to delegate them to either level of government. Grounding the Tenth in the theory of popular sovereignty linked it to the Ninth. Together, the two amendments reserve to the people all retained rights and powers.<sup>187</sup>

182. U.S. CONST. amend. X.

183. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 345 (1969) (arguing that the idea of popular sovereignty "was at the heart of the Anglo-American argument that led to the Revolution").

184. For a discussion of the popular sovereignty roots of the phrase "the people" in the Ninth and Tenth Amendments, see AMAR, *supra* note 27, at 64.

185. *Id.* at 119–22.

186. Amendment Proposed by the New York Convention (July 26, 1788), in *THE COMPLETE BILL OF RIGHTS*, *supra* note 13, at 635.

187. *Id.* According to antifederalist Federal Farmer:

It is said, that when the people make a constitution, and delegate powers that all powers not delegated by them to those who govern is [sic] reserved in the people; and that the people, in the present case, have reserved in themselves, and in their state governments, every right and power not expressly given by the federal constitution to those who shall administer the national government.

Letters From Federal Farmer (Oct. 12, 1787), in 2 STORING, *THE COMPLETE ANTI-FEDERALIST*, *supra* note 58, at 247.



C. *The Missing Virginia Ratification Debate*

[The eleventh amendment] is exceptionable to me, in giving a handle to say, that congress have endeavoured to administer an opiate, by an alteration, which is merely plausible.<sup>188</sup>

Almost every state proposing amendments to the Constitution suggested the addition of two separate provisions: one declaring delegated powers, the other forbidding the constructive enlargement of those powers.<sup>189</sup> Madison's original draft of the Ninth and Tenth Amendments followed this same approach. His draft of the Tenth contained the declaration of enumerated power, and his draft of the Ninth prohibited the constructive enlargement of federal power.<sup>190</sup> However, when the Select Committee removed the constructive "enlargement of powers" language from the Ninth, this resulted in an amendment that, stylistically, bore little resemblance to the rule of construction provisions suggested by the states. True, the Select Committee's version still contained a rule of construction. That rule, however, no longer expressly controlled the constructive enlargement of federal power as called for by the state conventions. Not surprisingly, the Committee's modification of Madison's Ninth triggered concern, particularly in Virginia. There, in an episode previously unexplored by Ninth Amendment scholars, objections to the altered draft of the Ninth Amendment brought to a halt the Federalists' efforts to ratify the Bill of Rights.

1. *The Letters of Hardin Burnley and James Madison.*—On August 21, 1789, James Madison wrote to Edmund Randolph reporting on Congress's efforts to finalize a draft of the proposed Bill of Rights.<sup>191</sup> After noting the ongoing efforts by the Antifederalists to delay the process (and thus keep hope alive for a second national convention), Madison apologized for not proposing all of Virginia's suggested amendments. "It has been absolutely necessary in order to effect any thing," Madison explained, "to abbreviate debate, and exclude every proposition of a doubtful & unimportant nature."<sup>192</sup> There is no indication in his letter that Madison believed Randolph would be troubled by those amendments which *had* made it through the process of drafting.

On August 24, Congress settled on the final version of the Bill of Rights and submitted the same to the states for ratification.<sup>193</sup> On November 5,

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188. Letter from Edmund Randolph to George Washington (Dec. 6, 1789), in 5 DOCUMENTARY HISTORY, *supra* note 1, at 223.

189. See *supra* notes 116–26 and accompanying text.

190. MASSEY, *supra* note 12, at 78.

191. Letter from James Madison to Edmund Randolph (Aug. 21, 1789), in 5 DOCUMENTARY HISTORY, *supra* note 1, at 191–92.

192. *Id.*

193. Report from the House of Representatives (Aug. 24, 1789), in 5 DOCUMENTARY HISTORY, *supra* note 1, at 193.

Virginia Assembly member Hardin Burnley wrote to James Madison informing him that, although the assembly committee had voted to ratify the first ten proposed amendments, the “11th & 12th” (our Ninth and Tenth Amendments) had been rejected.<sup>194</sup> Opposition to these two amendments came from former governor Edmund Randolph.<sup>195</sup> A few weeks later, a frustrated Madison wrote to President Washington that the consideration of the proposed amendments likely would be postponed until the next session.<sup>196</sup> Madison grumbled that the postponement would have made more sense “if the amendments did not so much correspond as far as they go with the propositions of the State Convention, which were before the public long before the last election.”<sup>197</sup> From Madison’s perspective, the amendments sent to Virginia were not different in any significant way from their counterparts proposed by the Virginia convention, provisions which he himself had helped draft and which had long been open to public comment.

On November 28, Burnley wrote to Madison again, warning that “the fate of the amendments proposed by Congress to the General Government is still in suspense.”<sup>198</sup> According to Burnley, Randolph’s objections to the Ninth and Tenth Amendments threatened to derail the ratification of the entire Bill:

If the house should agree to the resolution for rejecting the two last I am of opinion that it will bring the whole into hazard again, as some who have been decided friends to the ten first think it would be unwise to adopt them without the 11th & 12th.<sup>199</sup>

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194. Letter from Hardin Burnley to James Madison (Nov. 5, 1789), in 5 DOCUMENTARY HISTORY, *supra* note 1, at 214. Opposition had been brewing in Virginia from the start. In their letter on Sept. 28, 1789 to Governor Randolph notifying him of the proposed amendments, Richard Henry Lee and William Grayson declared their “grief that we now send forward propositions inadequate to the purpose of real and substantial Amendments.” See CREATING THE BILL OF RIGHTS, *supra* note 2, at 300 n.1; see also Letter from William Grayson to Patrick Henry (Sept. 29, 1789), in CREATING THE BILL OF RIGHTS, *supra* note 2, at 300 (“[The proposed amendments] are so mutilated & gutted that in fact they are good for nothing, & I believe as many others do, that they will do more harm than benefit . . .”).

195. See Letter from Edward Carrington to James Madison (Dec. 20, 1789), in 5 DOCUMENTARY HISTORY, *supra* note 1, at 228 (“[O]n the eleventh and twelfth some difficulty arose, from Mr. E. Randolph[] objecting to them as unsatisfactory . . .”); see also Letter from Edmund Randolph to George Washington (Nov. 26, 1789), in 5 DOCUMENTARY HISTORY, *supra* note 1, at 216 (“The eleventh and twelfth were rejected 64 against 58. I confess, that I see no propriety in adopting the two last.”).

196. Letter from James Madison to The President of the United States (Nov. 20, 1789), in 5 DOCUMENTARY HISTORY, *supra* note 1, at 215.

197. *Id.*

198. Letter from Hardin Burnley to James Madison (Nov. 28, 1789), in 5 DOCUMENTARY HISTORY, *supra* note 1, at 219.

199. *Id.* at 219–20. Burnley was right. The dispute over the Eleventh and Twelfth Amendments (our Ninth and Tenth) ballooned into questions regarding the First, Sixth, Ninth, and Tenth Amendments. LEVY, *supra* note 8, at 42.

In this letter, Burnley attempted to describe in greater detail Randolph's leading role in opposing the ratification of the Ninth and Tenth Amendments:

On the two last [the Ninth and Tenth] a debate of some length took place, which ended in rejection. Mr. E. Randolph who advocated all the others [amendments] stood in this contest in the front of opposition. His principal objection was pointed against the word *retained* in the eleventh proposed amendment, and his argument if I understood it was applied in this manner, that as the rights declared in the first ten of the proposed amendments were not all that a free people would require the exercise of; and that as there was no criterion by which it could be determined whither any other particular right was retained or not, it would be more safe, & more consistent with the spirit of the 1st & 17th amendments proposed by Virginia, that this reservation against constructive power, should operate rather as a provision against extending the powers of Congress by their own authority, than as a protection to rights reducible to no definitive certainty.<sup>200</sup>

Burnley, however, disagreed with Randolph's objections. He saw no difference between Randolph's preferred language and the language used in the Ninth's final draft:

But others among whom I am one see not the force of the distinction, for by preventing an extension of power in that body from which danger is apprehended safety will be insured if its powers are not too extensive already, & so by protecting the rights of the people & of the States, an improper extension of power will be prevented & safety made equally certain.<sup>201</sup>

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200. Letter from Hardin Burnley to James Madison (Nov. 28, 1789), in 5 DOCUMENTARY HISTORY, *supra* note 1, at 219. There is an intriguing possibility that Burnley did not fully grasp Randolph's objections. For example, it seems rather curious that, if Randolph was worried about protecting unenumerated rights, he would prefer the language of Virginia's seventeenth proposal, a provision which said nothing at all about the retained rights of the people. Burnley himself seemed unsure that he had accurately grasped Randolph's objections and he was careful to caution that his report was based on Randolph's objection "if I understood it." In fact, there is some indirect evidence that Burnley collapsed what actually were two separate criticisms of the Ninth Amendment, one involving the failure to expressly address constructive enlargement of federal power and the other referring to the ineffectiveness of the Ninth if it was intended to protect unenumerated rights. See *infra* notes 226–35 and accompanying text (discussing the Senate Report).

201. Letter from Hardin Burnley to James Madison (Nov. 28, 1789), in 5 DOCUMENTARY HISTORY, *supra* note 1, at 219. Notice that Burnley read the final language of the Ninth as protecting the rights of the people and of the states. So would have others. Retaining rights to the people included the understanding that these rights could be granted back to the respective state governments. See *supra* notes 114–18 and accompanying text (discussing New York's proposals). Under this view, preserving the retained rights of the people is the same thing as preserving the retained "powers, jurisdiction and rights" of the states. See *id.* The final draft of the Ninth thus would have been understood to preserve the rights of local government every bit as much as the

James Madison agreed with Burnley's reasoning and appended his language in a letter to George Washington. In that letter, Madison lamented the bad luck that had arisen in Virginia:

My last information from Richmond is contained in the following extract: [Here Madison quotes Burnley's description of Randolph's objection]. The difficulty started [against] the amendments is really unlucky, and the more to be regretted as it springs from a friend to the Constitution. It is a still greater cause of regret, if the distinction be, as it appears to me, altogether fanciful. If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing whether the latter be secured by declaring that they shall not be abridged, or that the former shall not be extended.<sup>202</sup>

This letter illuminates why the Select Committee, of which Madison was a member, ultimately omitted Madison's language regarding the constructive enlargement of federal power. If securing rights and limiting the extension of powers amount to the same thing, then this means that the original draft of the Ninth Amendment contained redundant provisions. Either provision by itself would equally limit the construction of enumerated powers while securing retained rights. Thus, according to Madison, the rule of construction prohibiting the constructive enlargement of powers remained alive and well in the final version of the Ninth Amendment. This is the plain meaning of his letter to Washington, and it fits with the general view of rights and powers held by many in the Founding generation.<sup>203</sup>

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proposals submitted by the States. Madison's views on this matter were express, as the next section shows.

202. Letter from James Madison to George Washington (Dec. 5, 1789), in 5 DOCUMENTARY HISTORY, *supra* note 1, at 221–22.

203. Some scholars object to viewing rights and powers as two sides of the same coin. *See, e.g.*, BARNETT, RESTORING THE LOST CONSTITUTION, *supra* note 12, at 3. However much it might make sense to us to treat powers and rights as independent, it appears the Founders broadly shared the view that rights and powers were directly dependent. For example, one of the most important constitutional theorists of his generation, James Wilson, declared in the Pennsylvania Convention, "In all societies, there are many powers and rights which cannot be particularly enumerated. A bill of rights annexed to a constitution is *an enumeration of the powers reserved*. If we attempt an enumeration, everything that is not enumerated is presumed to be given." James Wilson, Pennsylvania Convention (Oct. 28, 1787), in THE COMPLETE BILL OF RIGHTS, *supra* note 13, at 648; *see also* Remarks of James Madison, Virginia Convention (June 24, 1788), in THE COMPLETE BILL OF RIGHTS, *supra* note 13, at 656 ("If an enumeration be made of our rights, will it not be implied that every thing omitted is given to the general government?"). James Iredell made a similar point at the North Carolina Convention:

But when it is evident that the exercise of any power not given up would be a usurpation, it would be not only 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.

James Iredell, North Carolina Convention (July 29, 1788), in THE COMPLETE BILL OF RIGHTS, *supra* note 13, at 649. Even some unenumerated individual rights advocates concede that the

There is a rather vigorous debate over the meaning of the correspondence between Madison and Burnley.<sup>204</sup> Passive, federalist scholars see this letter as a straightforward statement that the Ninth is simply another way of expressing the doctrine of limited federal power.<sup>205</sup> Some Libertarian scholars have suggested alternate ways to read the letter,<sup>206</sup> while others have dismissed Madison's treatment of powers and rights as incorrect and have asserted that "[he] knew better."<sup>207</sup> Surprisingly, given the focus of Madison's letter, relatively little attention has been paid to Randolph's particular concern and why he might have preferred Virginia's first and seventeenth proposals over the final draft of the Ninth and Tenth Amendments.<sup>208</sup> Understanding Randolph's concerns illuminates the significance of Burnley's letter and Madison's response. It also explains the reaction of the Virginia Assembly to the final version of the Ninth Amendment.

2. *Edmund Randolph's Complaint.*—As a delegate at the Philadelphia Convention, Edmund Randolph had refused to sign the document.<sup>209</sup> Ultimately, however, he became convinced that the Constitution was worth supporting despite his continued concerns, and in the Virginia ratification convention, Randolph defended the Constitution against claims that it created a government of unlimited power:

If it would not fatigue the house too far, I would go back to the question of reserved rights. The gentleman supposes that complete and unlimited legislation is vested in the Congress of the United States. This supposition is founded on false reasoning. . . . [I]n the general Constitution, its powers are enumerated. Is it not, then, fairly

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Founding generation had a different perspective regarding rights and powers than courts generally do today. See, e.g., MASSEY, *supra* note 12, at 67 ("To many of the Founding generation it seemed axiomatic that rights began where powers ended, and powers began where rights ended.").

204. For discussions of the correspondence between Madison and Burnley, see MCAFFEE, *supra* note 12, at 145–47; LEVY, *supra* note 8, at 257–59; and BARNETT, *RESTORING THE LOST CONSTITUTION*, *supra* note 12, at 249–52.

205. E.g., McAfee, *The Original Meaning*, *supra* note 162, at 1291; Berger, *The Beckoning Mirage*, *supra* note 57, at 966.

206. See BARNETT, *RESTORING THE LOST CONSTITUTION*, *supra* note 12, at 250–52. Thomas McAfee analyzes Randolph's concerns as described by Burnley, but also fails to explore Randolph's view beyond Burnley's letter. See MCAFFEE, *supra* note 12, at 145–47; see also MASSEY, *supra* note 12, at 76–79. None of these authors examine the debate in the Virginia Assembly.

207. Leslie W. Dunbar, *James Madison and the Ninth Amendment*, 42 VA. L. REV. 627, 633–34 (1956).

208. In his most recent work on the Ninth Amendment, Randy Barnett discusses the correspondence between Madison and Burnley, but never addresses Randolph's concern itself beyond that which he infers from the correspondence. See BARNETT, *RESTORING THE LOST CONSTITUTION*, *supra* note 12, at 250–52. Thomas McAfee analyzes Randolph's concerns as described by Burnley, but also fails to explore Randolph's view beyond Burnley's letter. See MCAFFEE, *supra* note 12, at 145–47; see also MASSEY, *supra* note 12, at 76–79. None of these authors examine the debate in the Virginia Assembly.

209. LEVY, *supra* note 8, at 104.

deducible, that it has no power but what is expressly given it?—for if its powers were to be general, an enumeration would be needless.<sup>210</sup>

....

I persuade myself that every exception here mentioned is an exception, not from general powers, but from the particular powers therein vested.<sup>211</sup>

According to Randolph, reserved rights would be protected because the document followed the assumed principle of limited delegated power. Despite this general defense, however, Randolph remained concerned about the Necessary and Proper Clause:

My objection is, that the [Necessary and Proper Clause] is ambiguous, and that that ambiguity may injure the states. My fear is, that it will, by gradual accessions, gather to a dangerous length. This is my apprehension, and I disdain to disown it.<sup>212</sup>

Randolph was not alone in his concerns.<sup>213</sup> It was agreed by all that the federal government was to be one of limited enumerated power, with all nondelegated powers reserved to the states. Finding some way to assure the states that their rights were indeed protected was critical to heading off a second convention.<sup>214</sup> Not surprisingly, almost every list of proposed amendments contained a declaration of limited delegated power and so did Madison's original Bill.

210. Note that Randolph's remarks are yet another example of how the Founding generation viewed rights and powers as two sides of the same coin.

211. Edmund Randolph, Speech in Virginia Convention, in 3 ELLIOT'S DEBATES, *supra* note 42, at 464.

212. *Id.* at 470.

213. A number of voices in the states suggested that a provision protecting the reserved power of the states was more important than the rest of the Bill. William R. Davie of North Carolina wrote to James Madison in June of 1789 informing him of the general sentiment of the state convention regarding proposed amendments to the Constitution. Referring to those whose complaints were "honest and serious," as opposed to the mere strategic objections being raised by the Antifederalists, Davie wrote, "Instead of a Bill of Rights attempting to enumerate the rights of the Indivi[du]al or the State Governments, they seem to prefer some general negative confining Congress to the exercise of the powers particularly granted, with some express negative restriction in some important cases." Letter from William R. Davie to James Madison (June 10, 1789), in CREATING THE BILL OF RIGHTS, *supra* note 2, at 246. Davie probably was referring to the comment made by Mr. Spencer in the North Carolina Convention: "It appears to me there ought to be such a clause in the Constitution as there was in the Confederation, expressly declaring, that every power, jurisdiction, and right, which are not given up by it, remain in the states. Such a clause would render a bill of rights unnecessary." Mr. Spencer, North Carolina State Convention (July 29, 1788), in THE COMPLETE BILL OF RIGHTS, *supra* note 13, at 647. In the Virginia Convention, Patrick Henry declared, "A bill of rights may be summed up in a few words. What do they tell us?—That our rights are reserved." Patrick Henry, Speech in Virginia Convention (June 14, 1788), in 3 ELLIOT'S DEBATES, *supra* note 42, at 448.

214. See Lash, *Rejecting Conventional Wisdom*, *supra* note 77, at 221 (discussing the threat of a second convention and the role of the Bill in heading off the same).

The problem was that without a rule of construction limiting the interpretation of enumerated federal power, a mere declaration that “all not delegated is reserved” would not be sufficient. It was still possible, as the Antifederalists were quick to point out, that courts would give delegated powers such a latitude of construction as to effectively render national power unlimited in fact, if not in theory. According to Brutus:

The courts . . . will establish this as a principle in expounding the constitution, and will give every part of it such an explanation, as will give latitude to every department under it, to take cognizance of every matter, not only that affects the general and national concerns of the union, but also of such as relate to the administration of private justice, and to regulating the internal and local affairs of the different parts.<sup>215</sup>

As Randolph expressed it, something was needed to prevent the “gradual accessions” of federal power.<sup>216</sup> Others in the Virginia Assembly shared Randolph’s concern. Although Virginia ultimately voted to ratify the Constitution, the convention recommended adding, among others, amendments that specifically declared the principle of enumerated power *and* provided a rule of construction.<sup>217</sup> Although we have read these provisions before, because of the role they play in this debate, Virginia’s first and seventeenth proposals are presented again:

First, That each State in the Union shall respectively retain every power, jurisdiction and right which is not by this Constitution delegated to the Congress of the United States, or to the departments of the Foederal Government.

. . . .

Seventeenth, That those clauses which declare that Congress shall not exercise certain powers be not interpreted in any manner whatsoever to extend the powers of Congress. But that they may be construed either as making exceptions to the specified powers where this shall be the case, or otherwise as inserted merely for greater caution.<sup>218</sup>

As explained above, these two provisions are not redundant. One declares the principle of delegated power, while the other prohibits the extension of those delegated powers beyond that intended by the delegation. As we have seen, similar clauses were suggested by other states as well. Given the perceived importance of adding a clause limiting the construction

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215. Brutus No. 12 (Feb. 7, 1788), in STORING, *THE COMPLETE ANTI-FEDERALIST*, *supra* note 58, at 422, 424.

216. *See supra* notes 210–11 and accompanying text.

217. *See supra* note 122 and accompanying text.

218. Amendments Proposed by the Virginia Convention (June 27, 1788), in *THE COMPLETE BILL OF RIGHTS*, *supra* note 13, at 675.

of delegated federal power, we now can understand why Randolph objected to the Select Committee's decision to delete the very language he deemed so important. It was not that Randolph rejected Madison's explanation that the final version continued to prevent the undue extension of federal power. The problem was that this limit on the constructive enlargement of federal power was implied rather than express. The eleventh amendment, Randolph complained to fellow Virginian George Washington, "is exceptionable to me, in giving a handle to say, that congress have endeavoured to administer an opiate, by an alteration, which is merely plausible."<sup>219</sup> Instead of this merely "plausible" alteration, Randolph preferred "a provision against extending the powers of Congress," such as the one contained in Madison's earlier draft, because it was "more safe, & more consistent with the spirit of [Virginia's] 1st and 17th amendments."<sup>220</sup>

Randolph's preference was for a provision expressly limiting the power of the federal government to interfere with the autonomy of the states. Virginia's seventeenth proposal imposed a rule of construction that prevented the federal government from extending its own power by implication. This rule of construction was combined with a declaration that "each *State* in the Union shall respectively retain *every power, jurisdiction and right* which is not by this Constitution delegated to the Congress of the United States."<sup>221</sup> Randolph was not calling for a provision protecting individual rights.<sup>222</sup> He desired a rule that clearly protected the scope of state autonomy such as Virginia's seventeenth, and it is against the language of Virginia's seventeenth that Randolph judged the final draft of the Ninth.

Although Randolph raised objections regarding both the Ninth and Tenth Amendments, his complaint was focused on the language of the Ninth. In a letter to George Washington, Randolph wrote:

The twelfth [the Tenth] amendment does not appear to me to have any real effect, unless it be to excite a dispute between the United States, and every particular state, as to what is *delegated*. It accords pretty nearly with what our convention proposed; but being once adopted, it may produce new matter for the cavils of the designing.<sup>223</sup>

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219. Letter from Edmund Randolph to George Washington (Dec. 6, 1789), in 5 DOCUMENTARY HISTORY, *supra* note 1, at 223.

220. See *supra* text accompanying note 200.

221. Amendments Proposed by the Virginia Convention (June 27, 1788), in THE COMPLETE BILL OF RIGHTS, *supra* note 13, at 675 (emphasis added).

222. Simply reading Virginia's first and seventeenth proposals closes the door on any attempt to read Madison's letter as referring to alternate strategies for protecting individual natural rights. The language preferred by Randolph had nothing to do with such rights. Instead, Randolph's preference was for tandem amendments expressly limiting the construction of federal power and reserving all remaining rights and powers to the states. Madison and Washington both knew this.

223. Letter from Edmund Randolph to George Washington (Dec. 6, 1789), in 5 DOCUMENTARY HISTORY, *supra* note 1, at 223.



This is not a serious objection, and it is not presented as one. After all, Virginia's proposed amendment also contained the term "delegated."<sup>224</sup> In fact, Randolph conceded that the language of the Tenth "accords pretty nearly" with Virginia's suggested language that states retained all nondelegated powers, jurisdiction, and rights.<sup>225</sup> Dropping the specific reference to states' "rights" does not appear to have troubled Randolph.<sup>226</sup> In fact, following its adoption, the Founders regularly cited the Tenth Amendment as guarding the reserved powers and rights of the states.<sup>227</sup>

It was not that Randolph desired different language for the Tenth but that the Tenth did not appear to have any real effect. Randolph believed that the Constitution, even without the Tenth, adopted the principle of enumerated federal power.<sup>228</sup> Adding the Tenth made this principle express, but it had no independent effect. Randolph's main concern, as he expressed in the convention and now in the Virginia Assembly, involved the need for a rule which limited the construction of those enumerated powers. Virginia had proposed such a rule, and the original draft of the Ninth expressly adopted this rule. The altered draft of the Ninth, however, obscured what had been express in the earlier draft, thus making it "exceptionable" to Randolph. His concerns were serious enough to convince him to temporarily hold up ratification of both the Ninth and Tenth Amendments.

3. *The Virginia Senate Report.*—In his December 6 letter to George Washington, Edmund Randolph reported that, despite his concerns about the Ninth Amendment, the Virginia House had agreed to ratify all twelve proposed amendments.<sup>229</sup> This left the matter in the hands of the Virginia

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224. Amendments Proposed by the Virginia Convention (June 27, 1788), in *THE COMPLETE BILL OF RIGHTS*, *supra* note 13, at 675.

225. Letter from Edmund Randolph to George Washington (Dec. 6, 1789), in *5 DOCUMENTARY HISTORY*, *supra* note 1, at 223.

226. Nor did it trouble the Virginia Senate. *See infra* note 235 and accompanying text.

227. This reading of the Tenth was regularly expressed by the Founding generation. *See, e.g.*, Thomas Jefferson, Kentucky Resolutions, in *5 THE FOUNDERS' CONSTITUTION*, *supra* note 13, at 132 (resolving that the Tenth enabled the states to reserve powers not delegated to the federal government); James Madison, Report on the Virginia Resolutions, in *JAMES MADISON, WRITINGS*, *supra* note 3, at 610 (recalling that the Tenth Amendment supported the principle "that powers not given to the [federal] government, were withheld from it"); St. George Tucker, *View of the Constitution of the United States*, in *1 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA* app. 1, at 140–43 (St. George Tucker ed., Augustus M. Kelley 1969) (1803) [hereinafter *TUCKER, BLACKSTONE'S COMMENTARIES*] (emphasizing that the Tenth meant that the federal government had limited powers while "the states, in all unenumerated cases, are left in the enjoyment of their sovereign and independent jurisdictions").

228. Edmund Randolph, Speech in Pennsylvania Convention, in *3 ELLIOT'S DEBATES*, *supra* note 42, at 464.

229. Letter from Edmund Randolph to George Washington (Dec. 6, 1789), in *5 DOCUMENTARY HISTORY*, *supra* note 1, at 222.

Senate, where Antifederalists were more prevalent than in the House.<sup>230</sup> As Madison later reported to Washington, “The House of Delegates got over the objections to the 11[th] & 12[th], but the Senate revived them with an addition of the 3[rd] & 8[th] articles, and by a vote of adherence prevented a ratification.”<sup>231</sup> Antifederalists had thus “revived” Randolph’s good faith objections to the Ninth Amendment in an attempt to derail ratification altogether.<sup>232</sup>

A majority of the Senate prepared a report explaining their reasons for objecting to the listed amendments. There is reason to take this report with a grain of salt—the Senate was dominated by Antifederalists who had an incentive to invent objections where none might actually be warranted.<sup>233</sup> But for precisely that reason, their declared objection to the Ninth Amendment is worth considering. The attempt was to use Randolph’s objections as a screen for adding more partisan objections. Thus, the Antifederalist’s attempt to use the concerns of Randolph, a “friend to the Constitution,” was likely to succeed only to the degree that his concerns were convincingly represented. Here then is how the Senate described its objections to the “11th proposed amendment”:

We do not find that the 11th article is asked for by Virginia or any other State; we therefore conceive that the people of Virginia should be consulted with respect to it, even if we did not doubt the propriety of adopting it; but it appears to us highly exceptionable.<sup>234</sup>

The Senate Report here states the truth: No state *had* proposed language such as that adopted by the Select Committee. At the very least, noted the Senate, the people of Virginia should have a chance to consider the meaning of the Clause. The Report then compared the proposed Ninth with Virginia’s seventeenth proposal:

If the 11th Article [the Ninth Amendment] is meant to guard against the extension of the powers of Congress by implication, it is greatly

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230. According to Randolph, in the Senate “a majority is unfriendly to the government.” *Id.*; see also LEVY, *supra* note 8, at 42 (discussing antifederalist power in the Virginia Senate).

231. Letter from James Madison to George Washington (Jan. 4, 1790), in 5 DOCUMENTARY HISTORY, *supra* note 1, at 230–31.

232. See LEVY, *supra* note 8, at 42 (discussing the antifederalist opposition to the Bill of Rights in the Virginia Senate).

233. Leonard Levy describes the Senate Report as “grossly misrepresenting the First Amendment (then the third).” *Id.* at 42. Curiously, Levy says nothing at all about the Senate’s characterization of the other amendments, including the Ninth and Tenth. Madison himself was not troubled by the Senate Report because he believed they had gone too far, particularly in regard to the Senate’s purported objections to the First Amendment. See Letter from James Madison to George Washington (Jan. 4, 1790), in 5 DOCUMENTARY HISTORY, *supra* note 1, at 231 (expressing his opinion that the Senate’s failure to ratify “will have the effect . . . with many of turning their distrust towards their own Legislature,” and noting that the “miscarriage” of the third article will particularly have that effect).

234. Entry of Dec. 12, 1789, in JOURNAL OF THE SENATE OF THE COMMONWEALTH OF VIRGINIA 63 (Richmond 1828) [hereinafter VIRGINIA SENATE JOURNAL].

defective, and does by no means comprehend the idea expressed in the 17th article of amendments proposed by Virginia; and as it respects personal rights, might be dangerous, because, should the rights of the people be invaded or called in question, they might be required to shew by the constitution what rights they have *retained*; and such as could not from that instrument be proved to be retained by them, they might be denied to possess. Of this there is ground to be apprehensive, when Congress are already seen denying certain rights of the people, heretofore deemed clear and unquestionable.<sup>235</sup>

The Monday after the Senate delivered its report, a minority of the Senate published their objections to the Majority Report. According to the minority, even if the “3d, 8th and 12th” amendments were “not fully up in form to those proposed” by the Virginia convention, they were nevertheless sufficiently “analogous” and secured the people’s “political and natural rights.”<sup>236</sup> As for the Eleventh, the minority weakly noted that “though not called for by any of the adopting States, we consider [it] as tending to quiet the minds of many, and in no possible instance productive of danger to the liberties of the people.”<sup>237</sup> Note that the minority read the Third, Eighth, and Twelfth, but not the *Ninth*, as securing individual rights (including natural rights).

This remarkable exchange between the Senate Majority and Minority Reports raises a host of intriguing issues regarding the original understanding of the Ninth Amendment. To begin with, we now have a clearer understanding of Edmund Randolph’s objections. We know that Randolph led the opposition to the Ninth Amendment in the Virginia House of Delegates. According to Madison, the objections raised in the House were “revived” in the Senate.<sup>238</sup> If the above Senate Report accurately “revives” the concerns that Randolph raised in the House, then this clarifies Randolph’s objection to the Ninth as reported by Hardin Burnley. According to Burnley, Randolph’s objection, as Burnley understood it, was focused on the word “retained”<sup>239</sup> and seemed to argue that because the retained rights could not be

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235. *Id.* at 63–64. The Senate’s reported objections to the Twelfth were as follows:

We conceive that the 12th article would come up to the 1st article of the Virginia amendments, were it not for the words “or to the people.” It is not declared to be the people of the respective States; but the expression applies to the people generally as citizens of the United States, and leaves it doubtful what powers are reserved to the State Legislatures. Unrestrained by the constitution or these amendments, Congress might, as the supreme rulers of the people, assume those powers which properly belong to the respective States, and thus gradually effect an entire consolidation.

*Id.* at 64.

236. Entry of Dec. 14, 1789, in VIRGINIA SENATE JOURNAL, *supra* note 234, at 66.

237. *Id.* at 66–67.

238. Letter from James Madison to George Washington (Jan. 4, 1790), in 5 DOCUMENTARY HISTORY, *supra* note 1, at 231.

239. See Letter from Hardin Burnley to James Madison (Nov. 28, 1789), in 5 DOCUMENTARY HISTORY, *supra* note 1, at 219 (emphasizing the word “retained”).

enumerated, it would have been better to use the “no extension of power” language from Virginia’s seventeenth proposal.<sup>240</sup> The Senate Report, however, separates these issues into two distinct points. The Report first argues that, if the Ninth was intended to prevent the extension of federal power, then it was defective and should have used the language of Virginia’s proposed seventeenth amendment.<sup>241</sup> We know, in fact, that this was Randolph’s preferred language for the Ninth.<sup>242</sup> The Report’s second point was that, if the Ninth was intended to protect retained personal rights (something no state asked for), then it was defective because it would not be clear exactly what rights were protected.<sup>243</sup> It is possible that Burnley had a hard time following the distinction between the two objections, and so reported them to Madison as a single complaint against the Ninth.<sup>244</sup> In any event, Burnley accurately reported Randolph’s preference: Virginia’s seventeenth amendment.

In terms of whether the Ninth was understood as guarding Libertarian natural rights, the Majority Report says nothing about natural rights and the Minority Report associates “political and natural rights” with the First, Sixth, and Tenth Amendments, but not the Ninth. The Majority Report suggests that it was possible to read the Ninth as either restricting federal power or as protecting the personal rights of the people,<sup>245</sup> but the fact that both the Majority and the Minority were uncertain about the Ninth’s meaning suggests that the Select Committee’s alteration of the text may have rendered the Clause without any clearly identifiable meaning.

Before going so far as to abandon the search for original understanding, however, a few points are in order. First, no other state besides Virginia raised objections to the language of the Ninth Amendment. Had Virginia voted in favor of ratification, the Bill of Rights, including the Ninth, would have been added to the Constitution within a matter of months. Secondly, despite Randolph’s temporary objection that the Ninth only “plausibly” contained the principles of Virginia’s seventeenth,<sup>246</sup> the Virginia House

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240. Amendments Proposed by the Virginia Convention (June 27, 1788), in *THE COMPLETE BILL OF RIGHTS*, *supra* note 13, at 675.

241. Entry of Dec. 12, 1789, in *VIRGINIA SENATE JOURNAL*, *supra* note 234, at 63 (Richmond 1828).

242. Letter from Hardin Burnley to James Madison (Nov. 28, 1789), in *5 DOCUMENTARY HISTORY*, *supra* note 1, at 219 (indicating that Randolph preferred an amendment “more safe and more consistent with the spirit of the 1st & 17th amendments proposed by Virginia”).

243. Entry of Dec. 12, 1789, in *VIRGINIA SENATE JOURNAL*, *supra* note 234, at 63–64 (Richmond 1828).

244. See *supra* note 200 (discussing Burnley’s possible misunderstanding of Randolph’s objections).

245. Whether the Majority understood the “personal rights of the people” to be individual or collective in nature (or both) is not clear. The Antifederalist position, of course, favored the protection of the collective rights of the people in the several states.

246. Letter from Edmund Randolph to George Washington (Dec. 6, 1789), in *5 DOCUMENTARY HISTORY*, *supra* note 1, at 223.

overcame whatever doubts they had about the Ninth within a few days. It was only in the Senate, where antifederalist sentiment was strongest, that objections continued to be raised regarding the Ninth. Also, it is unclear just how great an ambiguity actually had been raised by the Select Committee's choice of language. Madison believed that the Ninth continued to prevent the extension of federal power and so did Virginia Assemblyman Hardin Burnley.<sup>247</sup> This means that the majority of states were satisfied with the language of the Ninth, Madison and Burnley believed its federalist meaning was clear, and the Virginia House had but temporary concerns. Finally, we know that Randolph conceded that Madison's reading of the Ninth was "plausible."<sup>248</sup> His objection was that the final language was not as clear as Virginia's seventeenth proposed amendment. Although the Majority Report claimed the Ninth "by no means comprehend[ed] the idea expressed in the 17th Article," this is obviously an exaggeration of Randolph's own view that the proposed Ninth was no longer as clear as Virginia's seventeenth.

Perhaps it is a coincidence that Virginia ultimately decided to ratify the Bill of Rights only after Virginia Congressman James Madison gave a public speech in which he actually *used* the Ninth Amendment in the manner analogous to Virginia's seventeenth proposal.<sup>249</sup> Coincidence or not, when Virginia ratified the Ninth Amendment, it was entitled to rely on Madison's public articulation of the meaning and effect of the Ninth Amendment provided in Madison's speech opposing the Bank of the United States. As we shall see, Madison clarified that the Ninth expressed a rule of interpretation that protected the states from the constructive enlargement of federal power.

Before addressing Madison's speech, there remains a mystery that this account has not yet addressed. The above discussion suggests that the "enlargement of powers" language contained in Madison's original draft was redundant with the "disparagement of rights" provision. To Madison, removing the "power" language did not affect the meaning or effect of the clause because securing rights and limiting powers meant the same thing. But the Select Committee had a choice regarding which "redundant" provision should be removed. Why keep the language of rights and discard that of powers, especially when the amendments proposed by the states had used the language of enlarged federal power? As much as the above account links the final draft of the Ninth with the desire to limit the expansion of federal power, the fact remains that Madison and the Select Committee framed the Ninth Amendment as a matter of retained rights. As the debate

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247. According to Burnley, "others" believed the same thing. See *supra* note 201 and accompanying text.

248. Letter from Edmund Randolph to George Washington (Dec. 6, 1789), in 5 DOCUMENTARY HISTORY, *supra* note 1, at 223.

249. James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791), in JAMES MADISON, WRITINGS, *supra* note 3, at 489.

over the Bank of the United States makes clear, Madison believed that the constructive enlargement of federal power was itself a violation of the retained rights of the people. The issue was not one of constitutional policy, but one of constitutional liberty.

*D. Madison's Speech on the Constitutionality of the Bank of the United States*

Madison's speech on the Bank of the United States is significant for a number of reasons. To begin with, it presents a public explanation of the meaning of the Ninth Amendment by the primary drafter of the clause and was presented in public while ratification of the Ninth Amendment remained pending in a critical state. Moreover, it reveals how the Amendment could be applied to a specific legal controversy. Although first noticed in a 1968 law review article,<sup>250</sup> Madison's speech remained otherwise overlooked as evidence regarding Madison's views on the Ninth Amendment until 1989.<sup>251</sup>

The occasion for the speech was a proposal to incorporate a national bank. Only a few months after the ratification of the Constitution, Secretary of the Treasury Alexander Hamilton submitted a plan to Congress for chartering the Bank of the United States.<sup>252</sup> The Senate approved the plan, and the matter was debated in the House of Representatives in 1791 while ratification of the proposed Bill of Rights was still pending in Virginia.<sup>253</sup> Proponents of the bank argued that the charter was "necessary and proper" to advancing Congress's enumerated powers to tax and regulate commerce under Article I, Section 8.<sup>254</sup>

Those who opposed the bank maintained that only an unreasonably expansive reading of Congress's enumerated powers could authorize the charter. Thomas Jefferson, for example, argued that such a "latitude of construction" would destroy the principle of enumerated powers declared in the Tenth Amendment:

I consider the foundation of the Constitution as laid on this ground that "all powers not delegated to the U.S. by the Constitution, not

250. Van Loan, *supra* note 12, at 15.

251. In his 1989 collection of essays on the Ninth Amendment, Randy Barnett reprinted Van Loan's article which mentions Madison's speech and wrote his own essay discussing the importance of the speech. See 1 RIGHTS RETAINED BY THE PEOPLE, *supra* note 14, at 149; see also Randy E. Barnett, *Introduction: Implementing the Ninth Amendment*, in 2 RIGHTS RETAINED BY THE PEOPLE, *supra* note 14, at 13–17. I address Barnett's analysis of the speech *supra* note 20.

252. Alexander Hamilton, Final Version of the Second Report on the Further Provision Necessary for Establishing Public Credit (Dec. 13, 1790), in 7 THE PAPERS OF ALEXANDER HAMILTON 305 (Harold C. Syrett, ed., 1963).

253. LEVY, *supra* note 8, at 37–43.

254. See Edmund Randolph, The Constitutionality of the Bank Bill (Feb. 12, 1791), in H. JEFFERSON POWELL, THE CONSTITUTION AND THE ATTORNEYS GENERAL 7–9 (1999) (presenting arguments by those supporting the bank).

prohibited by it to the states, are reserved to the states or to the people.” . . . If such a latitude of construction be allowed to [the phrase necessary and proper] as to give any non-enumerated power, it will go to every one, for the[r]e is no one which ingenuity may not torture into a convenience in some way or other, to some one of so long a list of enumerated powers. It would swallow up all the delegated powers, and reduce the whole to one phrase as before observed. . . . The present is the case of a right remaining exclusively with the states.<sup>255</sup>

In a written opinion to President Washington, now Attorney General Edmund Randolph presented the arguments for and against the constitutionality of the Bank Bill.<sup>256</sup> Noting his agreement with the arguments opposed to the bank, Randolph proceeded to lay out that argument in full.<sup>257</sup> Randolph began by observing that, although governments without constitutions might “claim a latitude of power not always easy to . . . determine[,],” the federal government was one of enumerated power as “confessed by Congress, in the twelfth amendment.”<sup>258</sup> Addressing the proper interpretation of Congress’s enumerated powers, Randolph conceded that constitutions generally should receive a more liberal interpretation than statutes, for “[t]he one comprises a summary of matter, for the detail of which numberless laws will be necessary; the other is the very detail.”<sup>259</sup> The United States, however, was comprised of two kinds of governments, each with its own constitution. Under this kind of system, the presumption of liberal construction had to be modified, because “when we compare the modes of construing a state and the federal constitution, we are admonished to be stricter with regard to the later, because there is a greater danger of error in defining partial than general powers.”<sup>260</sup>

Canvassing the various claimed sources of power for the bank, Randolph concluded:

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255. Thomas Jefferson, Opinion on the Constitutionality of the Bill for Establishing a National Bank (Feb. 15, 1791), in 19 THE PAPERS OF THOMAS JEFFERSON, 275, 276–80 (Julian P. Boyd ed., 1974) (emphasis added).

256. Edmund Randolph, The Constitutionality of the Bank Bill (Feb. 12, 1791), in POWELL, *supra* note 254, at 3–9.

257. *Id.* at 3.

258. *Id.* at 4. Randolph described state legislatures as governments which are “presumed to be left at large as to all authority which is communicable by the people, and does not affect any of those paramount rights, which a free people cannot be supposed to confide even to their representatives.” *Id.* The federal government, on the other hand, was one in which “powers are described.” *Id.* It appears then, that Randolph subscribed to an idea of inalienable rights which not even state governments could violate. As we have seen, however, a belief in natural rights can exist alongside a belief that states retained all nondelegated powers, jurisdiction, and rights.

259. *Id.* at 4; *see also* TUCKER, BLACKSTONE’S COMMENTARIES, *supra* note 227, at 141–45 (analogizing the Constitution to a contract, which may be open to interpretation).

260. Edmund Randolph, The Constitutionality of the Bank Bill (Feb. 12, 1791), in POWELL, *supra* note 254, at 5.

[A] similar construction on every specified federal power, will stretch the arm of Congress into the whole circle of state legislation. . . . [L]et it be propounded as an eternal question to those who build new powers on this clause, whether the *latitude* of construction which they arrogate will not terminate in an unlimited power in Congress?<sup>261</sup>

We have heard Edmund Randolph's concerns about constructive enlargement of federal power before. Randolph objected to the Select Committee's removal of a provision expressly limiting the construction of federal power from the final draft of the Ninth Amendment.<sup>262</sup> He preferred instead the approach of the Virginia ratifying convention which had suggested two separate amendments, one declaring the principle of delegated power and the other declaring a rule of construction preserving that principle.<sup>263</sup> To Randolph, like Jefferson, the doctrine of enumerated power declared by the Tenth was under threat due to a "latitudinarian" construction of enumerated federal power.

On February 2, 1791, Madison delivered an extended speech on the floor of the House challenging the constitutionality of the Bank Bill.<sup>264</sup> Two days later, Roger Sherman sent Madison a memorandum on the bank controversy.<sup>265</sup> According to Sherman, Congress had general power to regulate finances and:

. . . to make such rules & regulations as they may Judge necessary & proper to effectuate these purposes. The only question that remains is—Is a Bank a proper measure for effecting these purposes? And is not this a question of expediency rather than of rights?<sup>266</sup>

In his Opinion on the Constitutionality of a National Bank, Alexander Hamilton echoed Sherman's sentiment that "with regard to the question of necessity it has been shown, that this can only constitute a question of expediency, not of right."<sup>267</sup> Hamilton and Sherman were responding to a key element of Madison's argument against the Bank of the United States. In his speech before the House, Madison declared that the Bill violated the rights of the states—rights protected against invasion by the Ninth Amendment.

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261. *Id.* at 7 (emphasis added).

262. *See supra* notes 195–200 and accompanying text.

263. *See id.*

264. For an overview of Madison's speech, see GAZETTE OF THE UNITED STATES (Philadelphia), Feb. 23, 1791, *reprinted in* 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789–1791, at 367 (William Charles DiGiacomantonio et al. eds., 1995) [hereinafter DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS].

265. Memorandum from Roger Sherman to James Madison (Feb. 4, 1791), *in* 13 THE PAPERS OF JAMES MADISON 382 (Charles F. Hobson & Robert A. Rutland eds., 1981).

266. *Id.*

267. Alexander Hamilton, Opinion on the Constitutionality of a National Bank (Feb. 23, 1791), *in* ALEXANDER HAMILTON, WRITINGS 622 (Library of America ed., 2001).



*I. Madison's Argument Regarding the Proper Rules of Constitutional Interpretation.*—As reported by the Gazette of the United States, “Mr. Madison began with a general review of the advantages and disadvantages of banks.”<sup>268</sup> Madison gave a short rendition of why the bank was not necessary and threatened to cause more problems than it solved.<sup>269</sup> This is the briefest part of his speech.

Madison then turned to his main argument: The Constitution did not grant Congress the power to establish an incorporated bank. Madison began with a review of first principles: The federal government is one of limited enumerated powers.<sup>270</sup> If Congress has the power to incorporate a bank, it must be discoverable through a proper interpretation of those powers.<sup>271</sup> Madison then listed a number of rules for arriving at a “right interpretation” of the Constitution:

An interpretation that destroys the very characteristic of the government cannot be just. . . .

In controverted cases, the meaning of the parties to the instrument, if to be collected by reasonable evidence, is a proper guide.

Contemporary and concurrent expositions are a reasonable evidence of the meaning of the parties.

In admitting or rejecting a constructive authority, not only the degree of its incidentality to an express authority, is to be regarded, but the degree of its importance also; since on this will depend the probability or improbability of its being left to construction.<sup>272</sup>

By this last rule, Madison meant that the more significant a power, the less likely it was to have escaped the attention of the framers of the Constitution.<sup>273</sup> Thus, if it is not expressly listed in the Constitution, the omission likely was intentional.

Armed with these tools for arriving at the right interpretation of the Constitution, Madison next considered the purported sources of power put forth by proponents of the bank. For example, attempting to locate power to charter a bank in the power to “provide for the common defence, [and] promote the general welfare”<sup>274</sup> violated the first rule of right interpretation. According to Madison:

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268. GAZETTE OF THE UNITED STATES (Philadelphia), Feb. 23, 1791, *reprinted in* 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 264, at 367.

269. *Id.* at 367–68.

270. *Id.* at 369.

271. *Id.*

272. *Id.*

273. *See infra* note 281 (discussing the need to enumerate “great and important” powers).

274. U.S. CONST. pmb1.

To understand these terms in any sense, that would justify the power in question, would give to Congress an unlimited power; would render nugatory the enumeration of particular powers; would supercede all the powers reserved to the state governments.<sup>275</sup>

To those who argued that Congress could act for the “general welfare” so long as it did not interfere with the powers of the States, Madison responded that chartering a bank “would directly interfere with the rights of the States, to prohibit as well as to establish banks.”<sup>276</sup> Here, Madison sounds a theme that would continue throughout his speech: Chartering the bank would violate the rights of the states. At no point did Madison argue that chartering a bank violated an individual right.<sup>277</sup> It was the collective rights of the people of the several states which were threatened by the Bill.<sup>278</sup>

Madison next considered whether chartering a bank was necessary and proper to advance Congress’s enumerated power to borrow money. Focusing now on the Necessary and Proper Clause, Madison returned to first principles:

Whatever meaning this clause may have, none can be admitted, that would give an unlimited discretion to Congress. . . . The clause is in fact merely declaratory of what would have resulted by unavoidable implication, as the appropriate, and as it were, technical means of executing those powers. In this sense it had been explained by the friends of the constitution, and ratified by the state conventions.<sup>279</sup>

Deriving the power to charter a bank as necessary and proper to borrowing money opened the door to an unlimited list of “implied powers:”

If, again, Congress by virtue of the power to borrow money, can create the ability to lend, they may by virtue of the power to levy money, create the ability to pay it. The ability to pay taxes depends on the general wealth of the society, and this, on the general prosperity of agriculture, manufactures and commerce. Congress then may give bounties and make regulations on all of these objects. . . . The doctrine of implication is always a tender one. . . . If implications, thus remote and thus multiplied, can be linked together, a chain may be formed that will reach every object of legislation, every object within the

275. GAZETTE OF THE UNITED STATES (Philadelphia), Feb. 23, 1791, *reprinted in* 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 264, at 369.

276. *Id.* at 370.

277. *But see* 2 RIGHTS RETAINED BY THE PEOPLE, *supra* note 14, at 15–17. For a discussion of Barnett’s analysis of the speech, see *supra* note 20 and accompanying text.

278. In this way, Madison’s arguments against the bank were forerunners of the arguments he would deploy in his Virginia Resolutions against the Alien and Sedition Acts: constructive enlargement of federal power entrenched upon the rights of the states. See *infra* note 371–80 and accompanying text.

279. GAZETTE OF THE UNITED STATES (Philadelphia), Feb. 23, 1791, *reprinted in* 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 264, at 371.

whole compass of political economy. The latitude of interpretation required by the bill is condemned by the rule furnished by the Constitution itself.<sup>280</sup>

The rule furnished by the Constitution that Madison refers to is not the Ninth Amendment or any other express constitutional provision. Madison instead argues that the proper rule for identifying implied powers can be derived from a study of the powers actually enumerated in the Constitution. Although Congress did have implied powers to advance enumerated ends, Madison argued that certain important powers required specific enumeration:

The examples cited, with others that might be added, sufficiently inculcate nevertheless a rule of interpretation, very different from that on which the bill rests. They condemn the exercise of any power, particularly a great and important power, which is not evidently and necessarily involved in an express power.<sup>281</sup>

Madison believed that “great and important powers” were not to be derived by implication, but instead required an express enumeration unless actually necessary to the advancement of an enumerated end.

Declaring that “it cannot be denied that the power proposed to be exercised is an important power,”<sup>282</sup> Madison then listed a number of significant aspects of the bank charter, including the fact that the Bill “gives a power to purchase and hold lands” and that “it involves a monopoly, which affects the equal rights of every citizen.”<sup>283</sup> To Madison, these effects established that the power to charter a bank was a “great and important power” which required express enumeration:

From this view of the power of incorporation exercised in the bill, it could never be deemed an accessory or subaltern power, to be deduced by implication, as a means of executing another power; it was in its nature a distinct, an independent and substantive prerogative, which not being enumerated in the constitution could never have been meant to be included in it, and not being included could never have been rightfully exercised.<sup>284</sup>

However much proponents for the bank might argue the bank was necessary and proper for the *Union*, this did not make the bank necessary and

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280. *Id.* at 371–72.

281. *Id.* at 373; see also GAZETTE OF THE UNITED STATES (Phila.), Apr. 20, 1791, reprinted in 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 264, at 473 (reporting Madison’s statements during the debates over the Bank Bill that “[t]he power of granting Charters, he observed, is a great and important power, and ought not to be exercised, without we find ourselves expressly authorized to grant them”).

282. GAZETTE OF THE UNITED STATES (Phila.), Feb. 23, 1791, reprinted in 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 264, at 373.

283. *Id.*

284. *Id.*

proper for executing an *enumerated power*.<sup>285</sup> Unless “evidently and necessarily” incident to an enumerated end,<sup>286</sup> chartering a bank could not appropriately be treated as an accessory power; if it were truly necessary for the Union, it required its own enumeration. In the end, however, not only was the bank not necessary to advance an enumerated end, “the proposed bank could not even be called necessary to the government.”<sup>287</sup>

Randy Barnett has argued that Madison believed the bank monopoly abridged individual natural rights in violation of the Ninth Amendment.<sup>288</sup> Barnett’s argument is based on Madison’s statement that the monopoly “affects the equal rights of every citizen.”<sup>289</sup> Madison, however, was not arguing that the bank charter violated individual rights. In fact, Madison expressly stated that the proposed bank charter would “directly interfere with the rights of the States.”<sup>290</sup> Madison’s reference to the effect of a monopoly on the equal rights of citizens was in support of his argument that the power to charter a bank was an important power and, thus, required enumeration. As his previously unnoticed draft veto of the proposed bill shows, Madison’s argument about the unequal treatment of citizens went to his understanding of the effects of the monopoly and were separate from his views regarding the constitutionality of the bank. Prepared at the behest of President Washington, Madison drafted the following reasons for vetoing the Bank Bill:

Feb. 21, 1791

Gentlemen of the Senate

Having carefully examined and maturely considered the Bill entitled “An Act[?]” I am compelled by the conviction of my judgment and the duty of my Station to return the Bill to the House in which it originated with the following objections:

(if to the Constitutionality)

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285. *Id.* at 374 (“Here he adverted to a distinction, which he said had not been sufficiently kept in view, between a power necessary and proper for the government or union, and a power necessary and proper for executing the enumerated powers.”).

286. *Id.* at 373.

287. *Id.* at 374.

288. See 2 RIGHTS RETAINED BY THE PEOPLE, *supra* note 14, at 15; see also BARNETT, RESTORING THE LOST CONSTITUTION, *supra* note 12, at 241.

289. 2 RIGHTS RETAINED BY THE PEOPLE, *supra* note 14, at 15.

290. JAMES MADISON, WRITINGS, *supra* note 3, at 483. Other opponents of the bank shared Madison’s view that the bank violated the rights of states, not the rights of individuals. According to bank opponent, Mr. Giles:

Several gentlemen have said, that this authority may be safely exercised, since it does not interfere with the rights of States or individuals. I think this assertion not very correct; if the States be constitutionally entitled to the exercise of this authority, it is an intrusion on their rights to do an act which would eventually destroy or impede the freest exercise of that authority.

2 ANNALS OF CONG. 1990 (1791) (remarks of Mr. Giles, Feb. 7, 1791).

I object to the Bill because it is an essential principle of the Government that powers not delegated by the Constitution cannot be rightfully exercised; because the power proposed by the Bill to be exercised is not expressly delegated; and because I cannot satisfy myself that it results from any express power by fair and safe rules of implication.

(if to the merits alone or in addition)

I object to the Bill because it appears to be unequal between the public and the Institution in favor of the institution; imposing no conditions on the latter equivalent to the stipulations assumed by the former. [quer. if this lie within the intimation of the President.] I object to the Bill because it is in all cases the duty of the Government to dispense its benefits to individuals with as impartial a hand as the public interest will permit; and the Bill is in this respect unequal to individuals holding different denominations of public Stock and willing to become subscribers.<sup>291</sup>

In his final remarks on the bank, delivered on Tuesday, February 8, 1791, Madison again declined to raise any question of individual rights and instead repeated his claim that “the exercise of this power, on the part of the United States, involves, to all intents and purposes, every power which an individual State may exercise.”<sup>292</sup>

2. *The Original Understanding of the State Conventions.*—In the final section of his speech, Madison addressed the original understanding of federal power represented to the conventions that ratified the document. In one of the first constitutional arguments based on original understanding, Madison reminded the House that the original objection to a Bill of Rights had been due to the fear that this would “extend[]” federal power “by remote implications.”<sup>293</sup> State conventions had been assured that the Necessary and Proper Clause would not be interpreted to give “additional powers to those enumerated.”<sup>294</sup> 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.”<sup>295</sup> These state conventions had agreed to ratify the Constitution only on the condition that certain explanatory amendments be added which made express what the Federalists claimed were principles

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291. 6 THE WRITINGS OF JAMES MADISON: COMPRISING HIS PUBLIC PAPERS AND HIS PRIVATE CORRESPONDENCE, INCLUDING NUMEROUS LETTERS AND DOCUMENTS NOW FOR THE FIRST TIME PRINTED 42–45 n.1 (Gaillard Hunt ed., 1906).

292. 2 ANNALS OF CONG. 2009 (1791) (remarks of Mr. Madison, Feb. 8, 1791).

293. GAZETTE OF THE UNITED STATES (Phila.), Feb. 23, 1791, *reprinted in* 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 264, at 374.

294. JAMES MADISON, WRITINGS, *supra* note 3, at 489.

295. *Id.*

already implicit in the structure of the Constitution. Madison reminded his audience of the proposals submitted by the state conventions seeking to guard against the constructive extension 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.”<sup>296</sup>

Madison then arrives at the argument which he believes concludes the issue. The proper rule of interpretation, implied in the structure of the Constitution, represented by the Federalists to the state conventions, and demanded to be made express by those same conventions, found textual expression in the proposed Ninth and Tenth Amendments:

The explanatory amendments proposed by Congress themselves, at least, would be good authority with them [the state proposals]; 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.<sup>297</sup> He read several of the articles proposed, remarking particularly on the 11th and 12th. [T]he former, as guarding against a latitude of interpretation—the latter, as excluding every source of power not within the constitution itself.<sup>298</sup>

Madison then sums up his argument in a manner that establishes, without any further question, that the purpose of the Ninth Amendment was to protect the rights of the states:

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 all the barriers which limit the powers of the general government, and protect those of the state governments.<sup>299</sup>

3. *The Significance of the Bank Speech.*—By all accounts, Madison’s speech on the Bank of the United States should have a place of honor in the documentary history of the Ninth Amendment. That his discussion of the Ninth Amendment is missing in compilations like *The Founders’ Constitution* and *The Complete Bill of Rights* is nothing short of remarkable.<sup>300</sup> In his speech, Madison follows the Ninth from its beginnings

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296. *Id.*

297. Ratification was still pending in Virginia. *See supra* text accompanying note 249.

298. JAMES MADISON, WRITINGS, *supra* note 3, at 489.

299. GAZETTE OF THE UNITED STATES, (Philadelphia), Feb. 23, 1791, *reprinted in* 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 264, at 375.

300. For a discussion of missing Ninth Amendment materials in these compilations, see *infra* notes 449–58 and accompanying text.

in the state conventions, through the drafting process, and into the Virginia Assembly.<sup>301</sup> Having retraced these steps ourselves, Madison's argument is easy to follow: The federal government is one of limited enumerated power. All nondelegated powers are reserved to the states. Unduly broad interpretations of these enumerated powers would destroy this principle by allowing the government to invade areas of law reserved to the states. Important powers like those exercised by the Bank Bill are not appropriately derived by implication but require enumeration. The state conventions that ratified the Constitution had been promised that federal power would not receive this kind of latitudinous interpretation, and several states made the adoption of a rule rejecting this kind of interpretation a condition of their ratifying the Constitution. Although implied in the original Constitution, an express rule against latitudinarian constructions found its ultimate expression in the Ninth Amendment.

Madison's speech was given while Virginia continued to consider the Bill of Rights—a debate we know was focused in part on Congress's intended meaning of the Ninth Amendment. In the months following Madison's speech, antifederalist efforts in Virginia waned, and later that same year, on December 15, 1791, Virginia ratified the proposed amendments without further debate and the Bill of Rights became part of our Constitution.<sup>302</sup> There is no historical evidence that Madison's speech actually tilted Virginia toward ratification. It is nevertheless significant that Virginia's ratification vote took place following this public articulation of the meaning of the Ninth Amendment by Virginia's own congressional representative.

Madison's speech resolves any remaining ambiguity, if there is any, in regard to the correspondence between Burnley and Madison. The best understanding of Madison's letter was that he read the Ninth as an interpretive rule limiting the construction of federal power. His speech makes that view express. Madison's letter appeared to say that the "constructive enlargement of federal power" principle, expressed in his early draft of the Ninth, remained alive and well in the final version. His speech makes this clear. Finally, where his letter seemed to suggest that the Ninth followed the lead of the state conventions and limited federal power in order to reserve power to the states, Madison's speech explicitly links the Ninth to retained state powers, as well as to the desires and understandings of the state conventions. It is perhaps a happy coincidence of history that many of the same players from Madison's letter to Washington (Madison, Randolph, and Washington) repeat their roles with clearer lines in the debate over the Bank of the United States.

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301. The Virginia Assembly was still considering whether to ratify the Ninth and Tenth Amendments at the time Madison gave this speech.

302. See LEVY, *supra* note 8, at 43.

## V. The Original Meaning of the Ninth Amendment

### A. *A Federalism-Based Rule of Construction*

Having recovered the roots of the Ninth Amendment in the state convention proposals, followed its development through the Virginia debates, and listened to Madison's magisterial account of how the principles of the Ninth apply in an actual legal controversy, it is possible to now construct a general theory of the Ninth Amendment as it was likely understood by the Founding generation. As I stated in the Introduction, this is not an attempt to reconstruct the current meaning of the Clause. Subsequent to the Founding, the people may have exercised their sovereign right to alter or amend constitutional rules. Accordingly, developing a current theory of the Ninth Amendment must wait until we have considered constitutional developments in the nineteenth and twentieth centuries. This Article, however, is devoted to the lost original meaning of the Clause, and we now have considered enough evidence to construct at least a tentative account of that meaning.

Madison conceived the Ninth Amendment in response to calls from state conventions that a provision be added limiting the constructive expansion of federal power into matters properly belonging under state control. Madison's original draft of the Ninth Amendment expressly responded to these calls, and he insisted that the same states' rights principle was expressed in the final draft. A rule of construction guarding the retained rights of the people amounted to the same thing as limiting the power of the federal government to interfere with matters believed left to state control. Equating states' rights with the retained rights of the people, however, has long since fallen out of fashion, and it requires a degree of intellectual effort to hear the words of the Ninth Amendment as they were heard by James Madison and the Founders.

There is nothing historically contradictory about linking the prerogatives of the people with the autonomy of the states. The Tenth Amendment, for example, simultaneously reserves nondelegated power to the states and to the people of the several states. What may be difficult to appreciate from a contemporary standpoint is that, to the Founding generation, preserving the retained rights of the people amounted to the same thing as preserving the retained rights of the states. This is why Hardin Burnley could read the language of the Ninth Amendment, which spoke only of the retained rights of the people, as "protecting the rights of the people & of the States."<sup>303</sup> To both Madison and Burnley, the retained rights of the people were those rights left to local control, free from federal interference.

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303. Letter from Hardin Burnley to James Madison (Nov. 28, 1789), in 5 DOCUMENTARY HISTORY, *supra* note 1, at 219 (emphasis added).



The people remained free to assign them into the hands of their state government if they wished to do so. In this way, preserving the retained rights of the people also preserved the right of state governments to operate free from federal interference. As John Taylor, who also opposed the Bank Bill, put it, “states rights *are* rights of the people.”<sup>304</sup> Madison himself insisted that, with the adoption of the Bill of Rights, states were justified in “maintaining unimpaired, the authorities, rights, and liberties, reserved to the states respectively, or to the People.”<sup>305</sup> Even as strong a nationalist as Joseph Story conceded that “every state remains at full liberty to legislate upon the subject of rights, preferences, contracts, and remedies, as it may please.”<sup>306</sup>

This collective understanding of the people’s retained rights is quite different from the more individualistic conception of rights most often expressed in contemporary law. To the Founding generation, however, federalism was a liberty of the people.<sup>307</sup> For this reason, the state conventions insisted that a provision be added reserving all nondelegated powers, jurisdiction, and rights to the states. They did so to better secure liberty. While Madison could have framed the Ninth in terms of limiting federal power, he chose instead to frame the Amendment in terms of rights. By doing so, he prevented enumerated power from being interpreted as a mere matter of expediency and, instead, anchored the principles sought by the states in the language of enforceable rights.

To Madison, “[T]he permanent success of the Constitution depends on a definite partition of powers between the General and the State Governments.”<sup>308</sup> Overly broad interpretations of federal power “ha[d] the effect of subjecting both the Constitution and laws of the several states in all cases not specifically exempted to be superseded by laws of Congress.”<sup>309</sup> Worse, broad interpretations of federal power would have the effect of removing the federal courts from preserving a balance of power that, to Madison, was a matter of constitutional right. In a message accompanying his veto of a proposed bill for “internal improvements,” Madison wrote that viewing the “general welfare clause” as justification for the bill would have the effect of rendering the Government one of “general powers”:

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304. JOHN TAYLOR, *NEW VIEWS OF THE CONSTITUTION OF THE UNITED STATES* 96 (Washington, D.C., Way & Gideon 1823) (emphasis added).

305. James Madison, Report on the Alien and Sedition Acts (Jan. 7, 1800), in JAMES MADISON, *WRITINGS*, *supra* note 3, at 659 (quoting and defending his draft of the Virginia Resolutions).

306. STORY, *supra* note 43, at 176.

307. For an outstanding discussion of Founding-era antifederalist thought regarding federalism as liberty, see generally SAUL CORNELL, *THE OTHER FOUNDERS: ANTIFEDERALISM & THE DISSENTING TRADITION IN AMERICA, 1788–1828* (1999).

308. James Madison, Veto Message to Congress (Mar. 3, 1817), in JAMES MADISON, *WRITINGS*, *supra* note 3, at 720.

309. *Id.*

Such a view of the Constitution, finally, would have the effect of excluding the judicial authority of the United States from its participation in guarding the boundary between the legislative powers of the General and the State Governments, inasmuch as questions relating to the general welfare, being questions of policy and expediency, are unsusceptible of judicial cognizance and decision.<sup>310</sup>

The rule of construction preventing latitudinarian interpretations of federal power was not only a guide for the legislature, it was the duty of the judicial branch to apply such a rule in order to “guard the boundary” between the state and federal governments.<sup>311</sup>

In the end, the Select Committee’s decision to place the Ninth and Tenth Amendments side by side was prescient. From the moment they were enacted (indeed, *before*), the two provisions were cited as expressing twin principles of federalism: limited and enumerated federal power. Madison linked the two in his speech as dual guardians of state autonomy, and numerous treatise writers of the Founding generation did the same. St. George Tucker shared the Antifederalists’ view that federalism was a critical aspect of liberty,<sup>312</sup> and in his influential essays on the Constitution, he combined the Ninth and Tenth Amendments to create a single rule of strict construction of federal power. According to Tucker, state governments “retain every power, jurisdiction and right not delegated to the United States, by the constitution, nor prohibited by it to the states.”<sup>313</sup> Under the principles of the Ninth and Tenth Amendments “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.”<sup>314</sup>

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310. *Id.* at 719. One account of Madison’s remarks during the congressional debates on the Bank Bill echoes these concerns. GAZETTE OF THE UNITED STATES (Philadelphia), Apr. 20, 1791, reprinted in 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 264, at 475. The report summarized:

The constructions of the constitution, he asserted, which have been maintained on this occasion go to the subversion of every power whatever in the several States—but we are told for our comfort that the judges will rectify our mistakes; how are the judges to determine in the case; are they to be guided in their decisions by the rules of expediency?

*Id.*

311. Nor did it matter whether the state favored congressional action in this case. According to Madison, if Congress had not the power, “the assent of the States in the mode provided in the bill cannot confer the power.” James Madison, Veto Message to Congress (Mar. 3, 1817), in JAMES MADISON, WRITINGS, *supra* note 3, at 720; see also *New York v. United States*, 505 U.S. 144, 182 (1992) (“Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the consent of state officials.”). *But see* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1985) (holding that the political process, not the courts, protects the autonomy of the states).

312. See CORNELL, *supra* note 307, at 265.

313. TUCKER, BLACKSTONE’S COMMENTARIES, *supra* note 227, at 141.

314. *Id.* at 154.

According to Tucker, under the Ninth Amendment, federal power should be strictly construed “wherever the right of personal liberty” was in dispute.<sup>315</sup> This interpretation of the Ninth was firmly grounded in the ideas of federalism and state autonomy. According to Tucker, the Ninth and Tenth Amendments prevented the federal government from interfering with or adding to the individual’s *prior* obligations to the state:

As [a federal compact] it is to be construed strictly, in all cases where the antecedent rights of a state may be drawn in question [citing the Tenth Amendment]; as a social compact it ought likewise to receive the same strict construction, wherever the right of personal liberty, of personal security, or of private property may become the subject of dispute; because every person whose liberty or property was thereby rendered subject to the new government, was antecedently a member of a civil society to whose regulations he had submitted himself, and under whose authority and protection he still remains, in all cases not expressly submitted to the new government [citing the Ninth and Tenth Amendments].<sup>316</sup> The few particular cases in which he submits himself to the new authority, therefore, ought not to be extended beyond the terms of the compact, as it might endanger his obedience to that state to whose laws he still continues to owe obedience; or may subject him to a double loss, or inconvenience for the same cause.<sup>317</sup>

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315. *Id.* at 151.

316. The footnote to the Ninth and Tenth Amendments can be found in the photo-reproductions of the original 1803 edition of Tucker’s Commentaries. At least one modern reproduction of Tucker’s Commentaries deletes Tucker’s cite to the Ninth and Tenth Amendments. See ST. GEORGE TUCKER, VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS (Foreword by Clyde N. Wilson) (Liberty Fund 1999) (1803).

317. *Id.*; see also *id.* at 307–08 (pairing the Ninth and Tenth Amendments). Randy Barnett cites Tucker’s rule of strict construction regarding federal interference with personal rights in support of an unenumerated individual natural rights reading of the Ninth Amendment. See BARNETT, RESTORING THE LOST CONSTITUTION, *supra* note 12, at 241–42. As the above shows, Tucker placed both the Ninth and Tenth Amendments in a decidedly federalist context. Tucker could not possibly have been referring to individual natural rights if the Ninth was meant to avoid interfering with or adding to an individual’s prior obligations to the state. In his *Commentaries on the Constitution*, Joseph Story quoted the above passage by Tucker up to the citation to the Ninth and Tenth Amendments. Story omits the citation, but nevertheless criticizes Tucker’s rule of strict construction as based not on the “rights of the people” but on the “rights of the states.” See STORY, *supra* note 43, at 711–14. Story evidently read Tucker’s interpretation of the Ninth as a states’ rights interpretation, despite Tucker’s language of personal liberty. In fact, Tucker’s work was widely regarded as representing a states’ rights perspective of constitutional interpretation. G. EDWARD WHITE, 3–4 HISTORY OF THE SUPREME COURT OF THE UNITED STATES, THE MARSHALL COURT AND CULTURAL CHANGE, 1815–35, at 86–87 (1988) (noting that Tucker “was particularly concerned with the preservation of state sovereignty in a federal republic”). Addressing Tucker’s Ninth and Tenth Amendment based rule of construction, G. Edward White wrote:

The effect of Tucker’s remarks was to advance three propositions about the interplay between federal and state sovereignty in the American republic. First, after the passage of the Constitution the states retained a vast array of reserved powers. Second, the inalienable rights of man preserved in the social compact were associated with the sovereign rights of the states preserved in the federal compact: liberty and state

Other writers of the Founding generation joined Madison and Tucker in linking the Ninth and Tenth Amendments as twin guardians of federalism. In his *Construction Construed and Constitutions Vindicated*, political writer John Taylor declared:

The [Ninth Amendment] prohibits a *construction* by which the rights retained by the people shall *be denied or disparaged*; and the [Tenth] “reserves *to the state respectively or to the people* the powers not delegated to the *United States*, nor prohibited *to the states*.” The precision of these expressions is happily contrived to defeat a construction, by which the origin of the union, or the sovereignty of the states, could be rendered at all doubtful.<sup>318</sup>

Distinguishing the rights listed in the first eight amendments, which he described as protecting “personal and individual rights,” Taylor described the Ninth and Tenth Amendments as protecting “political conventional rights.”<sup>319</sup> Through the adoption of these two amendments, “The states, instead of receiving, bestowed powers; and in confirmation of their authority, reserved every right they had not conceded, whether it is particularly enumerated, or tacitly retained.”<sup>320</sup> Taylor thus shared Madison’s and Tucker’s view that preserving the retained rights of the people amounted to the same thing as preserving the autonomy of the states.<sup>321</sup> Taylor’s particular view that “states

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autonomy were linked. Third, the Union was expressly not a consolidation of the states justified by the will of the people; it was a confederacy of the states based on the consent of states in their capacity as representatives of the people.

*Id.* at 489.

318. TAYLOR, *supra* note 153, at 46. Thomas Jefferson called Taylor’s book “the most logical retraction of our governments to the original and true principles of the Constitution creating them, which has appeared since the adoption of that instrument.” Letter from Thomas Jefferson to Spencer Roane (1821) in *THE JEFFERSON CYCLOPEDIA* 859 (John Foley ed., 1900). For a discussion of John Taylor and the influence of his work *Construction Construed and Constitutions Vindicated*, see DWIGHT WILEY JESSUP, *REACTION AND ACCOMMODATION: THE SUPREME COURT AND POLITICAL CONFLICT, 1809–1835*, at 200 (1987) and CORNELL, *supra* note 307, at 283.

319. TAYLOR, *supra* note 153, at 46.

320. *Id.* at 49.

321. States’ rights advocates typically described state autonomy from federal control as a matter of individual liberty. In an 1826 speech, Kentucky Senator, and future Chair of the Senate Judiciary Committee, John Rowan declared:

[T]his is the sense, Mr. President, in which liberty is power: it is the power created by the social compact—which constitutes the liberty of the citizens. The controlling power of the will of the majority, is not only the power, but the essence of liberty. The control of this will, by the functionaries of the Government, whether Executive or Judicial, is any thing but the power of liberty. Liberty is power, when the People of the State govern themselves, by their own will, according to their own plan of government; by functionaries of their own appointment. Thus it is evident that the states were, anterior to the formation of this Union, independent Sovereigns: aliens in their nature, as all sovereigns are, to each other. That each had an organized Government—its Constitution; that the People, and their property, belonged exclusively to the States of which they were citizens.

rights *are* the rights of the people”<sup>322</sup> would be tested and found wanting at the time of the American Civil War. This does not alter the fact, however, that the Ninth and Tenth Amendments originally were understood to represent dual limitations on the power of the federal government to interfere with the states. Nor would this linking of the amendments change in the nineteenth century. While listing the first eight amendments as important privileges or immunities protected by the Fourteenth Amendment, the drafter of that amendment, John Bingham, left both the Ninth and Tenth Amendments off his list.<sup>323</sup>

### *B. Applying the Ninth Amendment*

Although the Ninth and Tenth Amendments both limited federal power, they did so in different ways. The Tenth insured that the federal government would exercise only those powers enumerated in the Constitution. The Ninth Amendment went further, however, and prohibited an expanded interpretation of those enumerated powers. This is reflected in the state proposals and is express in Madison’s original draft. In his correspondence with Burnley and Washington and in his speech on the Bank of the United States, Madison continued to describe the final language of the Ninth as limiting the constructive expansion of enumerated federal power. The final language, of course, speaks of retained rights, not limited powers. Libertarian theories of the Ninth focus on this language and claim that it represents an intention to protect individual natural rights.

One problem with such a view, however, is that it unduly limits the scope of the Ninth Amendment. The text of the Ninth does not limit its application to natural rights. *All* retained rights, natural or otherwise, were protected from denial or disparagement as a result of the decision to enumerate “certain rights.” Neither the text nor the purpose of the Ninth Amendment was limited to protecting a subcategory of retained rights. The point was to protect the right of the people to manage *all* those affairs not intended to be handed over to the federal government. The bank controversy provides a compelling example of how the Ninth Amendment applied even in those situations where no natural right was at issue. It was not that immunity from monopolies was a natural right of the people. The problem was that no fair construction of federal power justified the chartering of the bank, thus leaving the matter to be decided by local, not federal, governments. Accordingly, Madison argued that the Bill violated the rule of

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Remarks of Senator Rowan (Apr. 10, 1826), *reprinted in* REGISTER OF DEBATES IN CONGRESS, 19th Congress, 1st Session, at 425–26; *see also* JESSUP, *supra* note 318, at 313 (discussing Rowan’s speech on the judiciary).

322. TAYLOR, *supra* note 304, at 96 (emphasis added).

323. CONG. GLOBE, 42d Cong., 1st Sess. 84 (1871) (statement of Rep. Bingham). The second of these two articles on the history of the Ninth Amendment will address developments in the nineteenth century.

construction expressed by the Ninth Amendment and intruded upon the retained rights of the states. Natural rights interpretations of the Ninth thus miss the full breadth of the Amendment.

The history of the Ninth Amendment also suggests that the Founders generally viewed rights and powers as two sides of the same coin. As Madison explained to President Washington, limiting powers and securing rights amount to the same thing: the extension of one results in the disparagement of the other.<sup>324</sup> Thus, unduly latitudinarian interpretations of federal power necessarily abridged the people's retained rights, even in the absence of a specific argument based on "the enumeration of certain rights."

Early Supreme Court Justice Joseph Story agreed with Madison that the Ninth simultaneously limited federal power as it secured the retained rights of the people. In his *Commentaries on the Constitution*, Story wrote that the Ninth "was manifestly introduced to prevent any perverse, or ingenious misapplication of the well known maxim, that an affirmation in particular cases implies a negation in all others; and *e'converso*, that a negation in particular cases implies an affirmation in all others."<sup>325</sup> To Story, the Ninth prevented both an implied rejection of "other rights" (an affirmation which implies a negation) and an implied grant of other powers (a negation that implies an affirmation). Of the two, Story apparently viewed the limitation on federal power as the Ninth's primary focus—his section on the Ninth Amendment is titled "Non-Enumerated Powers."<sup>326</sup>

Understanding the Founders' view of the dependent relationship between rights and powers explains how Madison could argue that the principles of the Ninth Amendment were violated by the method of interpretation used by proponents of the Bank Bill, even though none of those proponents expressly used the enumeration of certain rights as an excuse to justify power to charter a national bank. Madison saw that the rule deployed by the bank proponents would allow Congress to exercise any

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324. Letter from James Madison to George Washington (Dec. 4, 1789), in *THE COMPLETE BILL OF RIGHTS*, *supra* note 13, at 661–62.

325. STORY, *supra* note 43, at 711.

326. The title is used in both the three volume edition of Story's *Commentaries* and in the single volume abridged version that he prepared for use in legal education. Similarly, in the index to his *Commentaries*, Story lists his discussion of the Ninth Amendment under both "Rights Reserved to the States and People" and under "Powers Reserved to States or People." *Id.* at 734, 731. Other early constitutional commentators echoed Madison and Story's view of the Ninth as relating to a limitation on federal power. In his 1800 treatise on the liberty of the press, Tunis Wortman wrote:

With regard to the [Ninth and Tenth Amendments], it is to be observed that they are strictly declaratory, and that they produce no alteration in the law as it in reality stood at the time of their formation. They amount to nothing more than would have resulted from a fair and regular interpretation of the Constitution: because it must ever have been a fundamental position, that the general Government is entitled to no other authority than what is substantially granted by that instrument.

TUNIS WORTMAN, *A TREATISE CONCERNING POLITICAL INQUIRY AND THE LIBERTY OF THE PRESS* 226 (Da Capo Press 1970) (1800).

power, so long as the exercise of that power was not prohibited by a particular enumerated right. To Madison, unduly broad interpretations of federal power constituted independent violations of the Ninth Amendment, for they allowed congressional power to abridge or disparage any right other than those expressly enumerated in the Constitution. Madison's use of the Ninth Amendment in the bank controversy thus confirms his belief that securing rights and limiting powers were the same thing. It also reveals the Ninth as having an operational effect on the construction of federal power, even in the absence of a specific claim that the enumeration of certain rights suggests a denial or disparagement of other rights retained by the people.

### C. *Natural Rights and the Ninth Amendment*

Because so much of the debate over the original meaning of the Ninth Amendment has involved the issue of natural rights, it seems appropriate to consider the relationship of such rights with the federalist reading of the Ninth Amendment. Libertarian scholars have criticized federalist readings of the Ninth for ignoring the Founders' commitment to protect natural rights.<sup>327</sup> In fact, evidence that many Founders embraced the idea of natural rights is broad and deep.<sup>328</sup> Madison himself referred to natural rights in his speech introducing the Bill of Rights.<sup>329</sup> Most state constitutions referred to natural rights,<sup>330</sup> and prior to the adoption of the Constitution, state courts referred to natural rights, as did some early Supreme Court cases.<sup>331</sup> In light of this evidence, there is no textual reason and little historical reason to believe that the "other rights" of the Ninth Amendment did not include natural rights. But understanding that the Founders embraced natural rights is not the same thing as understanding the Founders' view of the Ninth Amendment. The story of the Ninth indicates that it served as a rule of construction protecting the autonomy of local government. The evidence in this regard is as broad and deep as evidence regarding natural rights. How then are we to reconcile natural rights with the historical Ninth Amendment?

The answer lies in determining the manner in which natural rights were to be protected. The Ninth and Tenth Amendments drew and maintained the boundary between the jurisdictions of federal and local authorities. This line can be perceived in other amendments as well. For example, it is Congress that "shall make no law respecting an establishment of religion," not the

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327. See Sherry, *Textualism and Judgment*, *supra* note 68, at 1149–50 (criticizing Professor Amar's interpretation of the Ninth Amendment).

328. As Professor Sanford Levinson puts it, "[E]ven moral skeptics . . . do not deny that the founding generation, as a general matter, accepted the idea of natural rights." Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 CHI.-KENT L. REV. 131, 155 (1988).

329. See *supra* note 51 and accompanying text.

330. For a list of such provisions, see THE COMPLETE BILL OF RIGHTS, *supra* note 13, at 636–41.

331. See generally Sherry, *The Founders' Unwritten Constitution*, *supra* note 12.

states.<sup>332</sup> The states continued to establish religion for a great many years after the adoption of the Bill of Rights.<sup>333</sup> The concern animating the Bill was how to limit federal power without simultaneously suggesting that federal authority reached all matters not expressly prohibited. Such a reading would swamp the right of the people to decide, on a local level, how they wished to exercise their rights, including natural rights such as religion and freedom of speech.<sup>334</sup>

While this kind of “home rule” approach to individual liberty may seem strange to us, it was a matter of first principles to the Founders. For example, when Congress passed the Alien and Sedition Acts, the primary claim made by James Madison and Thomas Jefferson was that this law abridged the retained rights of the states to regulate on matters of speech, even though the Founders considered speech to be a natural right.<sup>335</sup> The very presumption of the Bill of Rights is that personal rights will be better protected if left to the states. As Samuel Adams wrote to Richard Henry Lee:

I mean my friend, to let you know how deeply I am impressed with a sense of the Importance of Amendments; that the good People may clearly see the distinction, for there is a distinction, between the *federal* Powers vested in Congress, and the *sovereign* Authority belonging to the several States, which is the Palladium of the private, and personal rights of the Citizens.<sup>336</sup>

The rights referred to in the Ninth Amendment, natural or otherwise, were to be administered on a state by state basis. The administration of such rights was one of the reserved powers left to the states under the Tenth Amendment. As the New York Convention declared:

[T]hat *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.<sup>337</sup>

332. U.S. CONST. amend. I.

333. See Lash, *The Second Adoption of the Establishment Clause*, *supra* note 32, at 1096, 1105.

334. See STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* 18 (Oxford Univ. Press 1999) (1995) (arguing that the religion clauses were “simply an assignment of jurisdiction over matters of religion to the states—no more, no less”).

335. Compare James Madison, Report on the Alien and Sedition Acts (Jan. 7, 1800), in JAMES MADISON, *WRITINGS*, *supra* note 3, at 659 (stating that the Act abridges the sovereignty of the states), with James Madison, Notes for Speech Introducing the First Amendment to the House of Representatives (1789), in 1 *RIGHTS RETAINED BY THE PEOPLE*, *supra* note 14, at 64.

336. Letter from Samuel Adams to Richard Henry Lee (Aug. 24, 1789), in *CREATING THE BILL OF RIGHTS*, *supra* note 2, at 286.

337. Amendments Proposed by the New York Convention (July 26, 1788), in *THE COMPLETE BILL OF RIGHTS*, *supra* note 13, at 635 (emphasis added).



Under this reading of the Ninth and Tenth Amendments, we would expect natural rights to be enforced by courts, both state and federal, as an aspect of state, not federal law. In fact, this is exactly what they did.

1. *Calder v. Bull*.—*Calder v. Bull*<sup>338</sup> involved an act by the Connecticut legislature granting a new trial in a probate case. The plaintiffs alleged that this act violated the Ex Post Facto Clause of the federal Constitution.<sup>339</sup> The United States Supreme Court heard the appeal under section 25 of the Judiciary Act, which granted the Court authority to review certain cases arising in state court involving questions of federal law. After recounting the facts, Justice Samuel Chase begins his opinion with a sentence generally omitted from scholarly accounts of the case:

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. The establishing courts of justice, the appointment of judges, and the making regulations for the administration of justice within each state, according to its laws, on all subjects not intrusted to the federal government, appears to me to be the peculiar and exclusive province and duty of the State Legislatures. All the powers delegated by the people of the United States to the federal government are defined, and no *constructive* powers can be exercised by it.<sup>340</sup>

Although Justice Chase does not expressly mention the Tenth Amendment, contemporary scholars would have no difficulty seeing in Chase's opening statement a paraphrase of the Tenth, despite his rewording of the Clause. But Chase has done much more. His opening statement declares the principles of the Ninth *and* Tenth Amendments. Not only does he graft the term "retained" onto the general principle of reserved state power, he follows that declaration with a principle forbidding the constructive enlargement of federal power.

Justice Chase's opinion is often cited as an early example of natural rights jurisprudence and is included in general discussions of the meaning of the Ninth Amendment.<sup>341</sup> In the early decades of the Nineteenth century, however, Chase's opinion was understood as seriously limiting the power of

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338. 3 U.S. (3 Dall.) 386 (1798).

339. *Id.* at 387.

340. *Id.*

341. *E.g.*, BARNETT, RESTORING THE LOST CONSTITUTION, *supra* note 12, at 126; MASSEY, *supra* note 12, at 49, 158–59; BREST ET AL., *supra* note 21, at 111; Sherry, *The Founders' Unwritten Constitution*, *supra* note 12, at 1166–73.

the federal government to interfere with the states.<sup>342</sup> The fact that this aspect of the opinion has gone unnoticed for so long is probably due to the common assumption that a belief in natural rights is incompatible with a strong position on state autonomy. Having disabused ourselves of this presumption, we are now in a position to appreciate all of Chase's opinion.

After declaring the fundamental principle of delegated power and the rule that such power is not to be enlarged by construction, Justice Chase next addressed whether the state law violated the Ex Post Facto Clause. In an extended rumination on an issue "not necessary now to be determined," regarding whether a state legislature can revise a decision of one of its state courts,<sup>343</sup> Justice Chase announced:

I cannot subscribe to the omnipotence of a state legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the constitution, or fundamental law, of the State. . . . There are acts which the federal, or state, legislature cannot do, without exceeding their authority. There are certain vital principles in our free republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof of the government was established. An act of the legislature (for I cannot call it a law), contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.<sup>344</sup>

In this passage, Justice Chase repeats the broadly held view that certain fundamental principles of law limited the legitimate authority of the state. Founders such as Edmund Randolph shared the same view. In his report to President Washington regarding the constitutionality of the Bank of the

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342. In his 1826 *Commentaries on American Law*, Chancellor James Kent criticized Chase's states' rights reading of the Constitution. According to Kent:

Judge Chase, in the case of *Calder v. Bull*, declared that the state legislatures retained all the powers of legislation which were not expressly taken away by the Constitution of the United States; and he held, that no constructive powers could be exercised by the federal government. Subsequent judges have not expressed themselves quite so strongly in favor of state rights, and in restriction of the powers of the national government.

JAMES KENT, 1 COMMENTARIES ON AMERICAN LAW 388–89 (O.W. Holmes Jr. ed., Fred B. Rothman & Co. 1989) (1826). In *United States v. New Bedford Bridge*, 27 F. Cas. 91, 100 (C.C.D. Mass. 1847) (No. 15,867), the court cites *Calder* alongside of states' rights opinions such as Justice Story's in *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820), Justice Daniels's in *Prigg v. Pennsylvania*, 41 U.S. 539 (1842), and Justice Thompson's dissenting opinion in *New York v. Miln*, 36 U.S. 102 (1837). See also *People ex rel. Attorney Gen. v. Naglee*, 1 Cal. 232, 235 (Cal. 1850) (citing *Calder* alongside *Houston*).

343. *Calder*, 3 U.S. (3 Dall.) at 387.

344. *Id.* at 387–88.

United States, Attorney General Randolph described state legislatures as governments which are “presumed to be left at large as to all authority which is communicable by the people, and does not affect any of those paramount rights, which a free people cannot be supposed to confide even to their representatives.”<sup>345</sup> We know, however, that Randolph also preferred a draft of the Ninth Amendment that limited constructive enlargement of federal power and protected the autonomy of the states. The Founders’ beliefs in natural rights and in the reserved powers of the states are reconciled under the Madisonian reading of the Ninth Amendment. The people retain all nondelegated powers and rights, which they then may delegate to state authorities if they believe such delegation is proper.

Justice Chase’s dicta in *Calder* does not contradict this view. Nor would we expect it to, given Chase’s opening declaration of the retained powers of the states.<sup>346</sup> Chase merely insisted that the presumed existence of fundamental principles should raise a presumption that the legislature did not intend to violate such principles:

A law that punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys or impairs the lawful private contracts of citizens; a law that makes a man a Judge in his own cause; or a law that takes property from A. and gives it to B: It is against all reason and justice, for a people to intrust a legislature with such powers; and therefore, it cannot be presumed that they have done it.<sup>347</sup>

This reconciles Chase’s opening declaration of states’ rights with his belief in natural law. Following the principle of the Tenth Amendment, all powers not delegated are reserved to the states or to the people. The people have the retained right to delegate those powers to their respective governments.<sup>348</sup> Chase believed that the powers the people have granted their state governments should be read against the presumed background of natural rights. The people may invest their government with any power they choose, but, Chase argued, when it comes to laws in conflict with natural rights they will not be presumed to have done so.

In his concurring opinion, Justice Iredell addressed the situation in which Chase’s presumption is overcome and it appears that a law does in fact transgress the Court’s understanding of natural rights. In such a case, argued

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345. Edmund Randolph, The Constitutionality of the Bank Bill (Feb. 12, 1791), in POWELL, *supra* note 254, at 4.

346. That same year, while riding circuit, Justice Chase repeated his assertion of the limited enumerated powers of the federal government and the concomitant limited jurisdiction of the federal courts in *United States v. Worrall*, 28 F. Cas. 774, 777 (C.C.D. Pa. 1798) (No. 16,766) (rejecting the idea that the laws of the United States include the common law).

347. *Calder*, 3 U.S. (3 Dall.) at 388.

348. *See, e.g., supra* notes 183–87 and accompanying text.

Iredell, a court would have no authority to invalidate the law.<sup>349</sup> Iredell did not deny the existence of natural rights, but he nevertheless maintained that such rights remained in the hands of the people of the state:

1st. If the legislature pursue the authority delegated to them, their acts are valid. 2nd. If they transgress the boundaries of that authority, their acts are invalid. In the former case, they exercise the discretion vested in them by the people, to whom alone they are responsible for the faithful discharge of their trust: but in the latter case, they violate a fundamental law, which must be our guide, whenever we are called upon, as judges, to determine the validity of a legislative act.<sup>350</sup>

Although Ninth Amendment scholars from all points of view believe that Justice Chase's opinion in *Calder* ignored the Ninth Amendment,<sup>351</sup> Chase's opening statement declared the federalist principles of both the Ninth and Tenth Amendments, and his articulation of natural rights fit perfectly with those principles. Iredell's concurrence emphasized that natural rights are matters best left to the people of a state to decide for themselves. Both Chase's and Iredell's opinions fit within the Madisonian vision of the Ninth and Tenth Amendments as reserving such rights to the people of the several states to deal with as they see fit.

2. *Fletcher v. Peck*.—Another case commonly cited in support of natural rights readings of the Ninth Amendment is *Fletcher v. Peck*.<sup>352</sup> *Fletcher* involved the Georgia legislature's corrupt sale of land to speculators.<sup>353</sup> A subsequent legislature invalidated the sale, and the original purchasers sued in federal court claiming a violation of the Contract Clause of Article I, Section 9 of the United States Constitution.<sup>354</sup> Had the case come to the Supreme Court on appeal from the state supreme court, under section 25 of the Judiciary Act, the Court would have been limited to consideration of federal questions. This was a diversity case, however, arising in federal court, so the Supreme Court remained free to consider issues of both state and federal law.<sup>355</sup> Accordingly, counsel raised

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349. *Calder*, 3 U.S. (3 Dall.) at 398–99.

350. *Id.* at 399.

351. E.g., Caplan, *supra* note 12, at 260–61 n.158; Steven J. Heyman, *Natural Rights, Positivism and the Ninth Amendment: A Response to McAfee*, 16 S. ILL. U. L.J. 327, 335 n.26 (1992); Levinson, *supra* note 328, at 144; Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 HASTINGS L.J. 305, 314 n.49 (1987).

352. 10 U.S. (6 Cranch) 87 (1810).

353. *Id.* at 87–89.

354. *Id.* at 87–92.

355. For a discussion of *Fletcher* and the jurisdictional issues in these cases, see WHITE, *supra* note 317, at 597–612.

arguments relating both to contract law and “first principles of natural justice.”<sup>356</sup>

Marshall’s opinion addresses the legislature’s rescission of the prior sale first under general rules of contract law, itself a matter of state law, and then secondly under the restrictions of the Contract Clause of the United States Constitution. Although Marshall began his analysis of contract law by citing “certain great principles of justice,”<sup>357</sup> such language disappeared when he turned to the construction of the Contract Clause.<sup>358</sup>

The most express declaration of natural law in *Fletcher* came in Justice Johnson’s concurrence: “I do not hesitate to declare that a state does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things: a principle which will impose laws even on the deity.”<sup>359</sup> According to Johnson, “When the legislature have once conveyed their interest or property in any subject to the individual,

356. *Id.* at 604.

357. Remarks by John Marshall (Mar. 11, 1809), in 1 THE MEMOIRS OF JOHN QUINCY ADAMS 547 (C. Adams ed., 1874).

358. Compare Marshall’s discussion of state law, *Fletcher*, 10 U.S. (6 Cranch) at 135–36 (“It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power.”), with his discussion of the federal Constitution. *See id.* at 136 (“Does the case now under consideration come within this prohibitory section of the constitution? In considering this very interesting question, we immediately ask ourselves what is a contract?”). In another case, *United States v. Fisher*, 6 U.S. (2 Cranch) 358 (1805), Marshall appears to invoke natural law in his construction of the Bankruptcy Code:

That the consequences are to be considered in expounding laws, where the intent is doubtful, is a principle not to be controverted; but it is also true that it is a principle which must be applied with caution, and which has a degree of influence dependent on the nature of the case to which it is applied. Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects.—But where only a political regulation is made, which is inconvenient, if the intention of the legislature be expressed in terms which are sufficiently intelligible to leave no doubt in the mind when the words are taken in their ordinary sense, it would be going a great way to say that a constrained interpretation must be put upon them, to avoid an inconvenience which ought to have been contemplated in the legislature when the act was passed, and which, in their opinion, was probably overbalanced by the particular advantages it was calculated to produce.

Of the latter description of inconveniences, are those occasioned by the act in question. It is for the legislature to appreciate them. They are not of such magnitude as to induce an opinion that the legislature could not intend to expose the citizens of the United States to them, when words are used which manifest that intent.

*Id.* at 389–90. At the outset of his opinion, however, Marshall lays out his principles of statutory construction, including “where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain; in which case it must be obeyed.” *Id.* at 386. Rather than a statement of natural rights binding the government, at most this is a plain statement rule. *But see* Sherry, *The Founders’ Unwritten Constitution*, *supra* note 12, at 1170 (linking this opinion to a natural rights jurisprudence of the Supreme Court).

359. *Fletcher*, 10 U.S. (6 Cranch) at 143.

they have lost all control over it; have nothing to act upon . . . .”<sup>360</sup> Given his striking invocation of natural law, from a contemporary perspective one might expect Justice Johnson to fall into the camp of unenumerated rights advocates of the Ninth Amendment. This would be a mistake. Although his embrace of judicially enforceable natural rights could not be clearer, just as clear was his belief that the enumeration of certain rights in the Constitution not be construed to disparage the retained rights of the states.

Johnson carefully distinguished his analysis of natural rights from his interpretation of the federal Constitution: “I have thrown out these ideas that I may have it distinctly understood that my opinion on this point is not founded on the provision in the constitution of the United States, relative to laws impairing the obligation of contracts.”<sup>361</sup> To Johnson, the court needed to be extremely careful not to unduly expand the reach of the federal Contract Clause:

I enter with great hesitation upon this question, because it involves a subject of the greatest delicacy and much difficulty. The states and the United States are continually legislating on the subject of contracts, prescribing the mode of authentication, the time within which suits shall be prosecuted for them, in many cases affecting existing contracts by the laws which they pass, and declaring them to cease or lose their effect for want of compliance, in the parties, with such statutory provisions. All these acts appear to be within the most correct limits of legislative powers, and most beneficially exercised, and certainly could not have been intended to be affected by this constitutional provision; yet where to draw the line, or how to define or limit the words, “obligation of contracts,” will be found a subject of extreme difficulty.

To give it the general effect of a restriction of the state powers in favour of private rights, is certainly going very far beyond the obvious and necessary import of the words, and would operate to restrict the states in the exercise of that right which every community must exercise, of possessing itself of the property of the individual, when necessary for public uses; a right which a magnanimous and just government will never exercise without amply indemnifying the individual, and which perhaps amounts to nothing more than a power to oblige him to sell and convey, when the public necessities require it.<sup>362</sup>

Justice Johnson limited his construction of the federal Contract Clause in order to avoid unduly interfering with “that right which every community

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360. *Id.*

361. *Id.* at 144.

362. *Id.* at 145.

must exercise” regarding the taking of private property for public use.<sup>363</sup> Johnson’s opinion is a perfect example of how both a states’ rights protective rule of constitutional interpretation could coexist with a strong embrace of natural rights. Although neither Marshall nor Johnson cited the Ninth Amendment, both opinions fit comfortably with the federalist account of the Ninth envisioned by James Madison and the ratifying conventions.

3. *Society for the Propagation of the Gospel v. Wheeler*.—There is one example of a case decided in this period which expressly raised both natural rights and Ninth Amendment claims. While riding circuit in New Hampshire only two years after joining the Supreme Court, Justice Joseph Story decided *Society for the Propagation of the Gospel v. Wheeler*.<sup>364</sup> In *Wheeler*, one of the issues was whether a state law allowing tenants to recover the value of improvements was void due to its retroactive effect. The claim was that the law was:

[I]n contravention of the 2d, 3d, 12th, 14th and 20th articles of the bill of rights, in the constitution of New Hampshire; and of the 10th section of the first Article, and the 9th article of the amendments, of the constitution of the United States; and is also repugnant to natural justice; and is therefore void.<sup>365</sup>

Justice Story quickly dismissed the constitutional claim:

In respect also to the constitution of the United States, the statute in question cannot be considered as void. The only article which bears on the subject, is that which declares, that no state shall pass “any ex post facto law, or law impairing the obligation of contracts.” There is no pretence of any contract being impaired between the parties before the court. The compensation is for a tort, in respect to which the legislature have created and not destroyed an obligation. Nor is this an ex post facto law within this clause of the constitution, for it has been solemnly adjudged, that it applies only to laws, which render an act punishable in a manner, in which it was not punishable, when it was committed. *Calder v. Bull*, 3 Dall. [3 U.S.] 386; *Fletcher v. Peck*, 6 Cranch [10 U.S.] 87. The clause does not touch civil rights or civil remedies.

The remaining question then is, whether the act is contrary to the constitution of New Hampshire.<sup>366</sup>

Story ignored the Ninth Amendment claim, despite the alleged violation of natural rights. *Calder* and *Fletcher* are discussed as relevant to the Ex

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363. *Id.*

364. 22 F. Cas. 756 (C.C.D.N.H. 1814) (No. 13,156).

365. *Id.* at 766.

366. *Id.* at 767.

Post Facto and Contract Clause Claims, not the Ninth. Story does go on to consider principles of “natural justice,” but only after he concludes his discussion of the federal Constitution and moves on to the issue of state law.<sup>367</sup> On that issue, the Ninth Amendment was irrelevant. This is precisely what we would expect under the Madisonian reading of the Ninth. It was not that natural rights did not exist, nor was it that they were not subject to judicial enforcement even by federal courts. Such rights did exist as matters of state law and were discussed as such when addressed by the Supreme Court.

*D. The Rise of the Tenth Amendment as a Rule of Construction*

As noted earlier, the Ninth’s rule of construction must be distinguished from the Tenth Amendment’s declaration of principle. Though related, the two provisions operate, and were intended to operate, in different ways. The Tenth declares the principle of enumerated federal power. The Ninth controls the interpretation of those powers. In situations where Congress has implausibly extended its enumerated powers, this would call into play both Amendments: the Ninth, as establishing the proper rule of construction, and the Tenth, as prohibiting the exercise of any power not fairly attributable to an enumerated power. Madison’s argument regarding the Bank Bill is an example of how the two amendments work together in a situation involving unduly expansive interpretations of enumerated powers. On the other hand, situations where Congress claimed the power to act independently of any particular enumeration would raise concerns under the Tenth, but not the Ninth Amendment. An example of an early “Tenth Amendment” crisis occurred in the debates over the Alien and Sedition Acts. Madison’s Tenth Amendment-based argument against the Acts became a touchstone for future states’ rights interpretations of the Constitution, interpretations which viewed the Tenth Amendment, as well as the Ninth, as establishing a federalist rule of constitutional construction.

*1. The Alien and Sedition Acts and Madison’s Report of 1800.*—Passed in 1798, the Alien and Sedition Acts codified the common law offense of seditious libel and made it a crime to disparage the national government and its officials.<sup>368</sup> Congress justified the Acts as part of its duty to protect the general welfare and also as an exercise of its inherent unenumerated power to enforce the common law.<sup>369</sup> From the safety of the state legislative

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367. *Id.* at 768.

368. Ch. 74, 1 Stat. 596 (1798).

369. See John Marshall, Report of the Virginia Minority (Jan. 22, 1799), reprinted in 5 THE FOUNDERS’ CONSTITUTION, *supra* note 13, at 137. Marshall argued:

What are cases arising under the constitution, as contradistinguished from those which arise under the laws made in pursuance thereof? They must be cases triable by a rule which exists independent of any act of the legislature of the union. That rule is the common or unwritten law which pervades all America, and which declaring libels against government to be a punishable offence, applies itself to and protects any



assemblies, James Madison and Thomas Jefferson wrote the Virginia and Kentucky Resolutions decrying the Acts as an abuse of federal power. Both the Acts and the Resolutions are famous landmarks in the history of freedom of speech. Less well known, however, are Madison's and Jefferson's arguments that the Acts abridged the rights of the states. In his speech introducing the Bill of Rights to the House, Madison described freedom of speech as a natural right.<sup>370</sup> The First Amendment, however, bound only the federal government, and according to the Tenth Amendment, all nondelegated powers were reserved to the states. Thus, by enacting restrictions on the natural right to free speech, Congress had usurped a matter belonging in the hands of local governments.

Madison's federalism argument against the Acts is presented in his Virginia Resolutions, and then more fully developed in his 1800 Report on the Alien and Sedition Acts. In his Virginia Resolutions, Madison wrote that "the powers of the federal government as resulting from the compact to which the states are parties" were "limited by the plain sense and intention of the instrument constituting that compact."<sup>371</sup> It was the duty of the states to "interpose" in order to maintain "the authorities, rights and liberties" of the states.<sup>372</sup> Madison then referred to Congress's recent habit of making unduly expansive interpretations of its own power:

[T]he General Assembly doth also express its deep regret, that a spirit has, in sundry instances, been manifested by the federal government to enlarge its powers by forced constructions of the constitutional charter which defines them . . . and so as to consolidate the states, by degrees, into one sovereignty.<sup>373</sup>

In his Report on the Alien and Sedition Acts, later known as the "Report of 1800,"<sup>374</sup> Madison supported this point by citing the bank law:

[T]he resolution may be presumed to refer particularly to the bank law, which from the circumstances of its passage as well as the latitude of construction on which it is founded, strikes the attention

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government which the will of the people may establish. The judicial power of the United States, then, being extended to the punishment of libels against the government, as a common law offence, arising under the constitution which creates the government, the general clause gives to the legislature of the union the right to make such laws as shall give that power effect.

*Id.* Marshall apparently believed that subjects within the jurisdiction of the federal courts were equally within the jurisdiction of Congress. G. Edward White has described this as the theory of "coterminous power." See WHITE, *supra* note 317, at 538. We will return to this issue again in the second Article.

370. See JAMES MADISON, WRITINGS, *supra* note 3, at 444–45.

371. James Madison, Virginia Resolutions (Dec. 21, 1798), in 4 ELLIOT'S DEBATES, *supra* note 42, at 528.

372. *Id.*

373. *Id.*

374. See CORNELL, *supra* note 307, at 241.

with singular force; and the carriage tax, distinguished also by circumstances in its history having a similar tendency.<sup>375</sup>

Given Congress's appetite for expanding its own powers, it was "incumbent in this, as in every other exercise of power by the federal government, to prove from the constitution, that it grants the particular power exercised."<sup>376</sup> If the law was based on the unenumerated power to enforce the common law, this was a test Congress could not possibly meet. Not only was there no single "common law" embraced by all the states,<sup>377</sup> the very idea of inherent power to enforce the common law destroyed the concept of enumerated power:

Should . . . the common law be held, like other laws, liable to revision and alteration, by the authority of Congress; it then follows, that the authority of Congress is co-extensive with the objects of common law; that is to say, with every object of legislation: For to every such object does some branch or other of the common law extend. The authority of Congress would therefore be no longer under the limitations, marked out in the constitution. They would be authorized to legislate in all cases whatsoever.<sup>378</sup>

According to Madison, "[a]dmitting the common law as the law of the United States . . . would overwhelm the residuary sovereignty of the states, and by one constructive operation new model the whole political fabric of the country."<sup>379</sup> As Madison put it in his Address to the People of Virginia, "The sedition act is the offspring of these tremendous pretensions, which inflict a death-wound on the sovereignty of the States."<sup>380</sup>

Some scholars have wondered why, if the Ninth was meant to be a limit on the constructive enlargement of federal power, Madison did not raise the Ninth in the controversy over the Alien and Sedition Acts.<sup>381</sup> As the above shows, Madison did refer to the earlier controversy regarding the Bank of the United States. Because it is not generally known that Madison's opposition to the bank was based in part on the Ninth Amendment, scholars have missed

375. See James Madison, Report on the Alien and Sedition Acts (Jan. 7, 1800), in JAMES MADISON, WRITINGS, *supra* note 3, at 615.

376. *Id.* at 621.

377. *Id.* at 633.

378. *Id.* at 639; TUCKER, BLACKSTONE'S COMMENTARIES, *supra* note 227, at 422–23.

379. James Madison, Report on the Alien and Sedition Acts (Jan. 7, 1800), in JAMES MADISON, WRITINGS, *supra* note 3, at 640.

380. James Madison, Address of the General Assembly to the People of the Commonwealth of Virginia (Jan. 23, 1799), in 5 THE FOUNDERS' CONSTITUTION, *supra* note 13, at 139.

381. See Dunbar, *supra* note 207, at 635–37 (pondering the significance of Madison's failure to raise the Ninth during discussion of the Alien and Sedition Acts); Niles, *supra* note 12, at 96 n.30 (discussing Madison's failure to mention the Ninth). Others have tried to argue that the Ninth Amendment was irrelevant to the issues raised by the Acts. See, e.g., Caplan, *supra* note 12, at 261 n.158.

the significance of Madison's reference to the bank controversy in his Report on the Virginia Resolutions.<sup>382</sup> Nevertheless, despite Madison's reference to the bank controversy and "latitudinarian constructions," his Report focused on the Tenth Amendment, not the Ninth.<sup>383</sup> This emphasis makes sense given the nature of the claims of federal power asserted by Congress in support of the Acts.

Congress based its authority to pass the Acts on its inherent unenumerated power to enforce the common law.<sup>384</sup> According to the Virginia Resolutions, the Acts "exercise[] in like manner, a power not delegated by the constitution, but on the contrary, expressly and positively forbidden by one of the amendments thereto."<sup>385</sup> This case did not involve the construction of enumerated power. It involved a power derived from unenumerated common law and stood in clear violation of the positive denial of power contained in the First Amendment. As we shall see in the second of these two articles, some constitutional controversies seemed mainly to involve the Ninth, such as determining the scope of concurrent state power,<sup>386</sup> while others seemed mainly to involve the Tenth, such as unenumerated emergency economic power.<sup>387</sup> Given the common law basis of arguments supporting the Alien and Sedition Acts, if ever there was a *Tenth* Amendment issue, this was it.

2. *The Tenth Amendment as a Rule of Construction.*—The controversy over the Alien and Sedition Acts fueled opposition to the Federalist party, and in the election of 1800, they were swept from office and replaced by Madison's and Jefferson's party, the Democratic Republicans. Madison's Report of 1800, which Spencer Roane referred to as the *Magna Charta* of the Republicans<sup>388</sup> became a foundational document for nineteenth-century

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382. You can find Madison's Report on the Virginia Resolutions in *The Founders' Constitution* under the section on speech and the press. See 5 THE FOUNDERS' CONSTITUTION, *supra* note 13, at 141–47. Omitted, however, are the first two thirds of the speech in which Madison links the latitudinous Alien and Sedition Acts with prior intrusions upon state sovereignty such as the incorporation of the Bank of the United States. The full speech is reproduced in JAMES MADISON, WRITINGS, *supra* note 3, at 608–62. The point at which *The Founders' Constitution* picks up the speech occurs at approximately page 36 of a 54 page speech. Compare *id.* at 644, with 5 THE FOUNDERS' CONSTITUTION, *supra* note 13, at 141.

383. See Thomas Jefferson, Kentucky Resolutions (Nov. 10, 1798), in 5 THE FOUNDERS' CONSTITUTION, *supra* note 13, at 131; James Madison, Report on the Virginia Resolutions (Jan. 7, 1800), in JAMES MADISON, WRITINGS, *supra* note 3, at 610 (emphasizing the notion that powers are reserved to the states unless delegated to the federal government).

384. See *supra* note 369.

385. James Madison, Report on the Virginia Resolutions (Jan. 7, 1800), in JAMES MADISON, WRITINGS, *supra* note 3, at 620.

386. See Lash, *The Lost Jurisprudence*, *supra* note 24.

387. *Id.*

388. Spencer Roane, Hampden Essays (June 11, 1819), in JOHN MARSHALL'S DEFENSE OF McCULLOCH V. MARYLAND 107, 113 (Gerald Gunther ed., 1969).

advocates of state rights.<sup>389</sup> Because Madison's Report focused on the Tenth Amendment, it had the effect of eclipsing the Ninth Amendment to some degree as the constitutional provision most responsible for limited constructions of federal power. For example, in his treatise on the federal Constitution, St. George Tucker described the Tenth Amendment as "added 'to prevent misconstruction or abuse' of the powers granted by the Constitution,"<sup>390</sup> and found that it established that the Constitution was to be "construed strictly, in all cases where the antecedent rights of a *state* may be drawn in question."<sup>391</sup> Tucker penned his Tenth Amendment-based "rule of construction" in 1803, soon after Madison's Tenth Amendment-based Report of 1800. In fact, Tucker cites to Madison's Report of 1800 in support of his Tenth Amendment-based criticism of the Bank Bill.<sup>392</sup> Similarly, when the Supreme Court upheld the constitutionality of the second Bank of the United States in *McCulloch v. Maryland*, a number of critics of the opinion cited the Tenth Amendment arguments from Madison's "celebrated" Report of 1800,<sup>393</sup> instead of Madison's earlier speech regarding the first Bank of the United States.

3. *Marshall v. Madison: McCulloch v. Maryland.*—

*a. The Opinion.*—Although the charter for the first Bank of the United States was allowed to lapse in 1811, Congress voted to establish the second bank in 1815.<sup>394</sup> At that time, now President James Madison vetoed the bill, although he deferred on the issue of whether the bank was a constitutional exercise of federal power.<sup>395</sup> When the Bank Bill came up again in 1816, however, he finally signed it.<sup>396</sup> In protest, the Maryland Assembly in 1818 enacted an annual tax of \$15,000 on any bank not chartered by the state.<sup>397</sup> When cashier J.W. McCulloch refused to pay the tax, he was sued in state court and fined.<sup>398</sup> Under the leadership of Chief

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389. See CORNELL, *supra* note 307, at 245 (describing Madison's Report as the "framework" upon which antifederalist ideas could be directed at the Federalists).

390. Here, Tucker cites the preamble to the Bill which was sent to the states along with the 12 proposed amendments. TUCKER, *BLACKSTONE'S COMMENTARIES*, *supra* note 227, at 143.

391. *Id.* at 151.

392. *Id.* at 287 n.\*.

393. See Spencer Roane, *Hampden Essays* (June 15, 1819), in JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND*, *supra* note 388, at 116 (referring to Madison's Report as the "celebrated report of 1799").

394. David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1474 (2001).

395. *Id.*

396. Despite doing so, Madison never relinquished his doubts about the method of interpretation required to justify federal power to charter the bank. See *infra* note 428.

397. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 317–21 (1819).

398. *Id.* at 317–18.

Justice John Marshall, the United States Supreme Court heard his appeal and, in *McCulloch v. Maryland*,<sup>399</sup> upheld the constitutionality of the bank.

In his original speech on the Bank of the United States, Madison had argued that construing Congress's powers to encompass the bank constituted an improper latitude of construction in violation of the Ninth and Tenth Amendments. Madison himself, however, had ultimately (if reluctantly) signed the 1816 Bank Bill.<sup>400</sup> This made him a rather unpersuasive source of constitutional arguments against the bank. Instead, opponents of the bank focused their arguments on the Tenth Amendment.<sup>401</sup> In his opinion, Marshall says nothing about the Ninth Amendment and mentions the Tenth only in passing. In regard to claims that the Tenth Amendment limits the federal government to only those powers specifically expressed in the Constitution, Marshall pointed out that the Tenth, unlike the Articles of Confederation, does not limit Congress to those powers expressly delegated.<sup>402</sup> The Tenth itself, argued Marshall, did not restrict the powers of Congress but merely "was framed for the purpose of quieting the excessive jealousies which had been excited."<sup>403</sup>

Marshall was correct that the Tenth of itself did not forbid Congress from exercising implied power.<sup>404</sup> The issue, however, was the proper construction of enumerated power, an issue for which the Ninth was especially designed. Marshall not only ignored the Ninth, he deployed a rule of construction that conflicts with the literal terms of the Ninth:

[The Constitution's] nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the ninth section of the first article, introduced? It is also, in some degree, warranted, by their having

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399. *Id.* at 316.

400. See *infra* sources cited in note 428.

401. See, e.g., *McCulloch*, 17 U.S. (4 Wheat.) at 372.

402. *Id.* at 406.

403. *Id.* at 407.

404. As Justice Story put it in his Commentaries:

It is plain, therefore, that it could not have been the intention of the framers of [the Tenth Amendment] to give it effect, as an abridgment of any of the powers granted under the constitution, whether they are express or implied, direct or incidental. Its sole design is to exclude any interpretation, by which other powers should be assumed beyond those which are granted. All that are granted in the original instrument, whether express or implied, whether direct or incidental, are left in their original state. All powers not delegated, (not all powers not *expressly* delegated), and not prohibited, are reserved.

STORY, *supra* note 43, at 712–13.

omitted to use any restrictive term which might prevent its receiving a fair and just interpretation.<sup>405</sup>

If there is one constant theme in the history of the Ninth Amendment, from the state conventions through ratification, it is that the enumeration of certain rights was not to be construed to imply any expansion of federal power. Yet this is exactly the implication Marshall draws from the enumeration of rights in Article I, Section 9. Instead of reconciling his interpretive approach with either the Ninth or Tenth Amendments, Marshall simply asserts that the Framers omitted “any restrictive term” preventing “a fair and just interpretation” of federal power.<sup>406</sup> Marshall’s assertion, of course, is a bit of a cheat. Of course Congress did not include a restrictive term requiring an unfair and unjust interpretation of the Constitution. Congress did, however, add a provision restricting the construction of federal power, a provision which a former President had argued applied in just this situation.<sup>407</sup>

Having denied the existence of any restrictive term, Marshall goes on to articulate a broad understanding of federal power as justifying any means fairly related to an enumerated end.<sup>408</sup> Deploying the Necessary and Proper Clause as a kind of reverse Ninth Amendment, Marshall declared that the Founders could not have been expected to enumerate every possible means for advancing legitimate ends in the manner of a legal code. “[W]e must never forget,” after all, “it is a *constitution* we are expounding.”<sup>409</sup> Perhaps anticipating objections that this seemed to grant Congress unlimited discretion to determine the scope of its powers, Marshall provided a caveat:

Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful

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405. *McCulloch*, 17 U.S. (4 Wheat.) at 407.

406. *Id.*

407. John Marshall is generally regarded as the author of the Minority Report of the Virginia Assembly on the Alien and Sedition Acts. Report of the Minority of the Virginia Resolutions (Jan. 22, 1799), in 5 THE FOUNDERS’ CONSTITUTION, *supra* note 13, at 136 (attributing authorship to Marshall). If so, he probably would have been aware of Madison’s arguments regarding latitudinarian constructions of federal power such as those deployed in the bank controversy. In fact, in letters published following the decision, Marshall defended himself against claims of latitudinarian construction of the Constitution. See *infra* notes 422 and accompanying text.

408. See *McCulloch*, 17 U.S. (4 Wheat.) at 421 (“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 consist with the letter and spirit of the constitution, are constitutional.”).

409. *Id.* at 407. In his bank speech, of course, Madison did not deny the existence of implied powers. Madison argued that such powers did not include “great and important powers” which required a separate enumeration. See *supra* note 284 and accompanying text.

duty of this tribunal . . . to say, that such an act was not the law of the land.<sup>410</sup>

This left judicial review restricted to two situations: those where Congress had violated a specific prohibition and those where Congress intended to accomplish objects not entrusted to the government. Given Marshall's disclaimer about second-guessing Congress's determination regarding the reasonableness of a law, this suggested that the only limits on congressional power were those limitations expressly enumerated in the Constitution.<sup>411</sup> The result feared by the Antifederalists and intended to be prevented by the adoption of the Ninth and Tenth Amendments appeared to have come to pass.

*b. The Tenth Amendment and Criticism of Marshall's "Latitudinarian" Interpretation of Federal Power.*—Criticism of Marshall's opinion was swift and voluminous. Ardent Republican John Taylor, who had himself delivered Madison's Virginia Resolutions,<sup>412</sup> ridiculed Marshall's opinion in his colorfully entitled book, *Construction Construed and Constitutions Vindicated*.<sup>413</sup> "As ends may be made to beget means, so means may be made to beget ends, until the cohabitation shall rear a progeny of unconstitutional bastards, which were not begotten by the people . . ." <sup>414</sup> To Taylor, Marshall had violated the proper rule of construction presented by the Ninth and Tenth Amendments:

The eleventh amendment prohibits a *construction* by which the rights retained by the people shall *be denied or disparaged*; and the twelfth "reserves *to the states respectively or to the people* the powers not delegated to the *United States*, nor prohibited *to the states*. The precision of these expressions is happily contrived to defeat a construction, by which the origin of the union, or the sovereignty of the states, could be rendered at all doubtful.<sup>415</sup>

410. *Id.* at 423.

411. Marshall would expressly take this position in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). For a discussion of that case, see Lash, *The Lost Jurisprudence*, *supra* note 24 (manuscript at 43–46).

412. See F. Thornton Miller, *Foreword* to JOHN TAYLOR, *TYRANNY UNMASKED* xiii (F. Thornton Miller ed., Liberty Fund 1992) (1822).

413. TAYLOR, *supra* note 153.

414. *Id.* at 84.

415. *Id.* at 46. Taylor goes on:

In one other view, highly gratifying, these two amendments correspond with the construction I contend for. Several previous amendments had stipulated for personal or individual rights, as the government of the union was invested with a limited power of acting upon persons; these stipulate for political conventional rights. But different modes are pursued. By the first, certain specified aggressions are forbidden; by the second, all the rights and powers not delegated are reserved. The first mode is imperfect, as the specified aggressions may be avoided, and yet oppression might be practiced in other forms. By the second, specification is transferred to the government

Other critics echoed Taylor's criticism of *McCulloch*. The editor of the *Richmond Enquirer*, Thomas Richie, published a series of pseudonymous papers written by "Amphictyon" and "Hampden," both of whom castigated Marshall's latitudinarian interpretation of federal power.<sup>416</sup> In his essays, Amphictyon accused the Chief Justice of having adopted a "liberal and latitudinous construction" of the Necessary and Proper Clause.<sup>417</sup> "[S]o wide is the latitude given to the words 'general welfare,' in one of these clauses, and to the word 'necessary' in the other, that it will, (if the construction be persisted in) really become a government of almost unlimited powers."<sup>418</sup> This, argued Amphictyon, conflicted with the proper vision of federal power because "[t]he government of the U.S. is one of specified and limited powers. . . . The state governments have all residuary power; every thing necessary for the protection of the lives, liberty and property of individuals is left subject to their control."<sup>419</sup> This "residuary power was left in possession

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of the union; and the states, instead of being the grantees of limited rights, which might have been an acknowledgement of subordination, are the grantors of limited powers; and retain a supremacy which might otherwise have been tacitly conceded. . . . Thus the powers reserved are only exposed to specified deductions, whilst those delegated are limited, with an injunction that the enumeration of certain rights shall not be construed to disparage those retained though not specified, by not having been parted with. The states, instead of receiving, bestowed powers; and in confirmation of their authority, reserved every right they had not conceded, whether it is particularly enumerated, or tacitly retained. Among the former, are certain modes by which they can amend the constitution; among the latter, is the original right by which they created it.

*Id.* at 48–49.

416. The essays are reproduced in JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND, *supra* note 388. The phrase "latitudinarian construction" was widely used to condemn readings of the Constitution which unduly expanded federal power at the expense of the states. For instance, in *Commercial Bank of Cincinnati v. Buckingham's Executors*, it was argued that

[t]his court will not feel inclined to enlarge the construction of the constitution, in order to abridge the power of legislation belonging to the States, their highest attribute of sovereignty, by any implication extending this constitutional inhibition to all preëxisting laws relating to the subject-matter of contracts. Of such *latitudinarian construction*, so startling to State power, the end cannot be seen from the beginning.

While this court, in the exercise of that high function which sits in judgment upon the validity of the legislative acts of a sovereign State, has always shown itself firm to maintain all just rights under the constitution of the United States, it has also shown itself not less careful to guard against trenching, by its decisions, upon the remnant of rights which that constitution has left to the States. So cautious does it move, in the execution of this most delicate trust, that it will not set aside an act of the legislature of a State, as a void thing, unless it appear clearly to be repugnant to the constitution. If its constitutionality be doubtful only, the doubt resolves itself in favor of the exercise of State power, and the act takes effect.

*Commercial Bank of Cincinnati v. Buckingham's Ex'rs*, 46 U.S. (5 How.) 317, 332–33 (1847) (argument of Mr. Convers) (emphasis added).

417. See A Virginian's "Amphictyon" Essay (Mar. 30, 1819), *reprinted in* JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND, *supra* note 388, at 53. Editor Gerald Gunther suggests that the essays were "probably written by Judge William Brockenbough." *Id.* at 1.

418. *Id.* at 65.

419. *Id.* at 70.



of the states for wise purposes. It is necessary that the laws which regulate the daily transactions of men should have a regard to their interests, their feelings, even their prejudices.”<sup>420</sup> If the rule of *McCulloch* prevailed, the judiciary would be unable to control federal expansion into the powers reserved to the states. Scoffing at Marshall’s claim that it would be the “painful duty” of the court to invalidate mere pretextual assertions of enumerated power,<sup>421</sup> Amphictyon wrote that “[t]he latitude of their construction will render it unnecessary for them to discharge a duty so ‘painful’ to their feelings.”<sup>422</sup>

Although John Taylor claimed that the Court’s decision violated both the Ninth and Tenth Amendments, most critics focused on the Tenth. For example, a series of essays critical of *McCulloch* were printed in the *Richmond Enquirer* under the pseudonym “Hampden.” The author was John Marshall’s great nemesis and Chief Justice of the Virginia Supreme Court, Spencer Roane. Referring repeatedly to the odious precedent of the Alien and Sedition Acts and Madison’s now famous Report of 1800,<sup>423</sup> Roane argued that Congress, and the Court, had once again invaded the reserved powers of the States:

It has been our happiness to believe, that in the partition of powers between the general and state governments, the former possessed only such as were expressly granted . . . while all residuary powers were retained by the latter. . . . This, it is believed, was done by the constitution, in its original shape; but such were the natural fears and jealousies of our citizens, in relation to this all important subject, that

420. *Id.* at 71.

421. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819).

422. A Virginian’s “Amphictyon” Essay (Mar. 30, 1819), reprinted in JOHN MARSHALL’S DEFENSE OF MCCULLOCH V. MARYLAND, *supra* note 388, at 75. The criticism was serious enough to prompt John Marshall to write his own anonymous defense of *McCulloch*. In a remarkable exchange of essays, unique in constitutional history, the Chief Justice of the United States Supreme Court defended his opinion against claims which he had brushed off in the opinion itself—that his interpretation of the Constitution adopted the latitudinarian construction Madison had warned about years earlier. “The court does not, in a single instance” huffed Marshall, “claim the aid of a ‘latitudinous,’ or ‘liberal’ construction; but relies, decidedly and confidently, on the true meaning, ‘taking into view of the subject, the context, and the intention of the framers of the constitution.’” John Marshall, “A Friend to the Union” Essay II (Apr. 28, 1819), reprinted in JOHN MARSHALL’S DEFENSE OF MCCULLOCH V. MARYLAND, *supra* note 388, at 92. Throughout his essays, Marshall repeatedly denies that the opinion deploys a latitudinous interpretation of the Constitution:

It is a palpable misrepresentation of the opinion of the court to say, or to insinuate that it considers the grant of a power “to pass all laws necessary and proper for carrying into execution” the powers vested in the government, as augmenting those powers, and as one which is to be construed “latitudinously,” or even “liberally.”

*Id.* at 97.

423. See Spencer Roane, Hampden Essays (June 11–15, 1819), reprinted in JOHN MARSHALL’S DEFENSE OF MCCULLOCH V. MARYLAND, *supra* note 388, at 109 n.5, 110 n.9; see also *id.* at 113, 115–16 (“For truth, perspicuity and moderation, it has never been surpassed. . . . It was the *Magna Charta* on which the republicans settled down, after the great struggle in the year 1799.”).

it was deemed necessary to quiet those fears, by the 10th amendment to the constitution.<sup>424</sup>

Tying the hated Sedition Acts to Marshall's opinion in *McCulloch*, Hampden argued that "[t]he latitude of construction now favored by the supreme court, is precisely that which brought the memorable sedition act into our code."<sup>425</sup> In a famous paragraph, Hampden declared, "That man must be a deplorable idiot who does not see that there is no earthly difference between an *unlimited* grant of power, and a grant limited in its terms, but accompanied with *unlimited* means of carrying it into execution."<sup>426</sup> It was not simply the Bank Act that drew Hampden's ire; it was the method of interpretation used by the Supreme Court that threatened the reserved powers of the states. To Hampden, Marshall's opinion was "the 'Alpha and Omega,' the beginning and the end, the first and the last—of federal usurpations."<sup>427</sup>

Despite the fact that he signed the Bill establishing the second Bank of United States, James Madison never lost his doubts about congressional power to charter such a bank.<sup>428</sup> When Roane sent James Madison his Hampden essays, he received a congratulatory reply: "I have found their latitudinary mode of expounding the Constitution, combated in them with the ability and the force which were to be expected."<sup>429</sup> Picking up where his speech on the Bank of the United States left off, 28 years in the past, Madison once again decried latitudinous constructions of the Constitution:<sup>430</sup>

But what is of most importance is the high sanction given to a latitude in expounding the Constitution which seems to break down the landmarks intended by a specification of the Powers of Congress, and

424. *Id.* at 108; *see also id.* at 114, 149 (asserting in later Hampden Essays that the Tenth Amendment merely declared the principle that residuary powers not granted to the government were reserved to the states and the people, and noting the existence of some judicial decisions that reflected this).

425. *Id.* at 134. Madison, of course, had tied the Alien and Sedition Acts to the *earlier* controversy over the Bank of the United States. *See supra* note 20 and accompanying text.

426. *Id.* at 110.

427. *Id.* at 114. Marshall's responses to Hampden's essays are reprinted and available. *Id.* at 155–214; *see also* Jack N. Rakove, *Judicial Power in the Constitutional Theory of James Madison*, 43 WM. & MARY L. REV. 1513, 1534–42 (2002) (discussing Madison's commentary on judicial power and its role as demonstrated by his responses to the Hampden Essays sent to him by Spencer Roane).

428. *See* Letter from James Madison to Mr. Ingersoll (June 25, 1831), *reprinted in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 183–87 (1867). Madison acquiesced on the basis of the bank's usefulness and deference to past precedent, but declined to alter his earlier stated views regarding the methods of interpretation originally used to justify the bank. *Id.* at 186. ("A veto from the Executive, under these circumstances, with an admission of the expediency and almost necessity of the measure, would have been a defiance of all the obligations derived from a course of precedents amounting to the requisite evidence of the national judgment and intention.")

429. Letter from James Madison to Spencer Roane (Sept. 2, 1819), *reprinted in* JAMES MADISON, WRITINGS, *supra* note 3, at 733.

430. *Id.* at 733–37.

to substitute for a definite connection between means and ends, a Legislative discretion as to the former to which no practical limit can be assigned. In the great system of Political Economy having for its general object the national welfare, everything is related immediately or remotely to every other thing; and consequently a Power over any one thing, if not limited by some obvious and precise affinity, may amount to a Power over every other.<sup>431</sup>

Although in his letter Madison did not expressly mention the Ninth Amendment, he nevertheless repeated a number of arguments originally made in his 1791 speech before the House. In particular, Madison pointed out how chartering the bank thwarted the expectations of the state conventions:

It could not but happen, and was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms & phrases necessarily used in such a charter; more especially those which divide legislation between the General & local Governments . . . . But it was anticipated I believe by few if any of the friends of the Constitution, that a rule of construction would be introduced as broad & as pliant as what has occurred. And those who recollect, and still more those who shared in what passed in the State Conventions, thro' which the people ratified the Constitution, with respect to the extent of the powers vested in Congress, cannot easily be persuaded that the avowal of such a rule would not have prevented its ratification.<sup>432</sup>

Throughout his life, Madison continued to insist that the Bank Bill was based on a latitudinarian construction of the Constitution “incompatible with the rights of the states and the liberties of the people.”<sup>433</sup> Ultimately,

431. *Id.* at 734.

432. *Id.* at 735.

433. See H.R. J., 26th Cong., 2d Sess. 17 (Dec. 9, 1840). Madison’s arguments regarding the bank continued to appear as long as the bank remained an issue. At the second session of the 26th Congress, a written communication from President Van Buren was read, which included the following language:

If a national bank was, as is undeniable, repudiated by the framers of the constitution as incompatible with the rights of the States and the liberties of the people; if, from the beginning, it has been regarded by large portions of our citizens as coming in direct collision with that great and vital amendment of the constitution, which declares that all powers not conferred by that instrument on the General Government are reserved to the States and to the people; if it has been viewed by them as the first great step in the march of *latitudinous* construction, which, unchecked, would render that sacred instrument of as little value as an unwritten constitution, dependent, as it would alone be, for its meaning, on the interested interpretation of a dominant party, and affording no security to the rights of the minority;—if such is undeniably the case, what rational grounds could have been conceived for anticipating aught but determined opposition to such an institution at the present day?

*Id.* (emphasis added).

Madison's view prevailed: In 1832, President Andrew Jackson vetoed a proposed extension of the bank's charter explaining that, among other things, the bank amounted to an "invasion[] of the rights and powers of the several States."<sup>434</sup> Whether intentionally or not, Jackson thus repeated Madison's original argument that the bank violated the nondelegated rights and powers reserved to the people of the several states under the Ninth and Tenth Amendments.

The history of the bank controversy not only illuminates the original meaning of the Ninth Amendment, it also reveals the Tenth Amendment's development as a rhetorical tool against expansive constructions of federal power. Although some critics of *McCulloch* raised Ninth Amendment concerns, most focused on the Tenth. It is not that the Ninth Amendment lost its original meaning. Neither Madison, nor any other writer, reversed or revised Madison's original reading of the Ninth.<sup>435</sup> Instead, Madison's Ninth Amendment-based arguments from his bank speech were eclipsed by the more famous Tenth Amendment-based assertions of state autonomy contained in his 1800 Report. It seems only an accident of history that the Alien and Sedition Acts and the Election of 1800 focused states' rights arguments on the Tenth Amendment to the point that the Tenth, not the Ninth, became the basis for most arguments decrying the constructive enlargement of federal power displayed in Marshall's opinion. In this way, the bank controversy is yet another example of the unlucky history of the Ninth Amendment.

## VI. Losing the History of the Ninth Amendment

The roots of the Ninth Amendment are found in the amendments proposed by the state conventions, and the most significant discussion of the origins and purpose of the Ninth Amendment is found in James Madison's speech on the Bank of the United States. Unfortunately, in major works on the history of the Ninth Amendment, the state proposals, the Virginia debate, and Madison's speech on the Bank of the United States have been mislabeled, misconstrued, or, until now, simply missed. Some of this may be attributed to Founding-period conventions that mask discussions of the Ninth Amendment from contemporary view. In his bank speech, for example, Madison referred to the Ninth Amendment as the "Eleventh." By referring to the Ninth according to its position on the original list of twelve proposed amendments, Madison was using a common convention of the early years of

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434. Andrew Jackson, Veto Message to the Senate (July 10, 1832), in 2 MESSAGES AND PAPERS OF THE PRESIDENTS 576-91 (James D. Richardson ed., 1896).

435. As the next Article will discuss, the Ninth Amendment continued to be deployed for more than a century as establishing a rule of construction limiting the scope of enumerated congressional power. See Lash, *The Lost Jurisprudence*, *supra* note 24.

the Constitution. As the years went by, and it became clear that the first two proposals would not be ratified, the convention changed and the amendments came to be known as One through Ten. As demonstrated in *The Lost Jurisprudence of the Ninth Amendment*, this “renumbering” has had the effect of obscuring other early references to the Ninth Amendment.<sup>436</sup>

Contemporary assumptions about rights and powers, however, appear to have played an even greater role in masking the historical roots of the Ninth Amendment. If one assumes that the Ninth Amendment is about individual rights, while the Tenth is about government power, the state convention precursors to the Ninth Amendment disappear from view: None of the proposed drafts of the Ninth Amendment from the state conventions used the language of rights. Instead, the state conventions proposed a rule of construction limiting the interpretation of federal power. A historian who assumes that the Ninth Amendment was about unenumerated individual rights and not government power would overlook these provisions and either erroneously focus attention on proposed amendments dealing with individual rights or assume that there were no state precursors to the Ninth Amendment at all.

In fact, contemporary assumptions about rights and powers have influenced the collection and presentation of historical materials relating to the Ninth Amendment. In his extensive collection of historical materials on the Bill of Rights, Neil Cogan identifies only three proposals for the “Ninth Amendment” suggested by the state ratifying conventions, all of them involving language protecting individual rights.<sup>437</sup> The first is an expanded version of New York’s explanatory declaration, with Cogan’s version including New York’s declaration of the “essential rights” of life, liberty and the pursuit of happiness.<sup>438</sup> Cogan’s second “proposed Ninth Amendment” is in fact the first two clauses of the North Carolina Convention’s submitted “Declaration of Rights”:

1st. That there are certain natural rights of which men, when they form a social compact, cannot deprive or divest their posterity, among which are the enjoyment of life, and liberty, with the means of acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.

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436. *Id.*

437. THE COMPLETE BILL OF RIGHTS, *supra* note 13, at 635–36.

438. Amendments Proposed by the New York Convention (July 26, 1788), *in* THE COMPLETE BILL OF RIGHTS, *supra* note 13, at 635.

2d. That all power is naturally vested in, and consequently derived from the people; that magistrates therefore are their trustees, and agents, and at all times amenable to them.<sup>439</sup>

If one assumes that the Ninth was a Libertarian provision intended to protect unenumerated natural rights, the above choice makes sense, despite the lack of any resemblance to the actual words of any draft of the Ninth Amendment and despite the fact that the above was not a proposed amendment to the Constitution. On the other hand, consider the following amendment which actually was proposed by North Carolina, but is not cited by Cogan in his section on the Ninth Amendment:

That those clauses which declare that Congress shall not exercise certain powers, be not interpreted in any manner whatsoever to extend the powers of Congress; but that they be construed either as making exceptions to the specified powers where this shall be the case, or otherwise, as inserted merely for greater caution.<sup>440</sup>

This proposal clearly echoes Madison's original draft of the Ninth Amendment which declared that "exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed . . . to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution."<sup>441</sup> Despite the similarity to Madison's Ninth, however, Cogan places North Carolina's proposal with materials relating to the *Tenth* Amendment.<sup>442</sup>

As his third and final example of a proposed Ninth Amendment, Cogan cites one of the Virginia explanatory declarations—an almost verbatim repeat of the North Carolina's "natural rights" provision cited above.<sup>443</sup> Cogan omits from his section on the Ninth Amendment Virginia's seventeenth proposed amendment, despite its obvious relationship to Madison's original draft of the Ninth. Instead, Cogan places Virginia's first *and* seventeenth proposals in his section on the Tenth Amendment.<sup>444</sup> This placement can only be explained as reflecting a powerful assumption; provisions speaking

439. Amendments Proposed by the North Carolina Convention (Aug. 1, 1788), in *THE COMPLETE BILL OF RIGHTS*, *supra* note 13, at 635–36. The critical language distinguishing North Carolina's "Declaration of Rights" from its "Amendments to the Constitution" can be found in 4 *ELLIOT'S DEBATES*, *supra* note 42, at 242–47 and 1 *RIGHTS RETAINED BY THE PEOPLE*, *supra* note 14, at 364–70.

440. Amendments Proposed by the North Carolina Convention (Aug. 1, 1788), in *THE COMPLETE BILL OF RIGHTS*, *supra* note 13, at 674–75.

441. JAMES MADISON, *WRITINGS*, *supra* note 3, at 443.

442. Amendments Proposed by North Carolina (Aug. 1, 1788), in *THE COMPLETE BILL OF RIGHTS*, *supra* note 13, at 674–75.

443. Proposal from the Virginia State Convention (June 27, 1788), in *THE COMPLETE BILL OF RIGHTS*, *supra* note 13, at 636.

444. *Id.* at 675.

of individual rights must relate to the Ninth while provisions limiting the construction of power must relate to the Tenth.<sup>445</sup>

Another outstanding source of original historical materials consistently relied upon by legal scholars is Philip Kurland and Ralph Lerner's five-volume set, *The Founders' Constitution*.<sup>446</sup> These volumes bring together a remarkable set of original source materials relating to the principles and texts of every provision in the Constitution, including proposed amendments issued by the state conventions. For example, materials relating to the religion clauses of the First Amendment include the Virginia Ratifying Convention's proposed amendment on the subject of religion.<sup>447</sup> In the section on the Ninth Amendment, however, the Virginia Convention suddenly has nothing to say. In fact, Kurland and Lerner include not a single proposed amendment from the state conventions in their section on the Ninth.<sup>448</sup>

Cogan's *Complete Bill of Rights* and Kurland and Lerner's *The Founders' Constitution* are both significant sources of historical information. Both are on my bookshelf and I refer to them often. Neither source, however, adequately presents the documentary history of the Ninth Amendment. But neither are they unique in their failure to recognize the roots of the Ninth Amendment. Ninth Amendment scholar Randy Barnett has reproduced all of the state conventions' proposed amendments in an appendix to his two-volume set of essays, *The Rights Retained by the People*.<sup>449</sup> Just which (if any) of these proposed amendments relate to the Ninth and which to the Tenth, however, is left for the reader to decide on

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445. See generally THE COMPLETE BILL OF RIGHTS, *supra* note 13, at 627–62.

446. THE FOUNDERS' CONSTITUTION, *supra* note 13.

447. 5 THE FOUNDERS' CONSTITUTION, *supra* note 13, at 89.

448. *Id.* at 388. Also missing from this section of Kurland and Lerner's compendium is Madison's original draft of the Ninth (though the original draft of the First Amendment is included), Madison's letters discussing the Ninth (though hundreds of letters are reproduced in the volumes), the Virginia debate and Senate Report on the proposed Ninth Amendment, and Madison's speech on the Bank of the United States discussing the purpose and origins of the Ninth Amendment. *Id.* at 388. These missing pieces seem all the more significant when one considers that Professor Kurland testified before Congress that his research on the Ninth Amendment for *The Founders' Constitution* led him to embrace a Libertarian reading of the clause, and accordingly, he opposed the nomination to the Supreme Court of Robert Bork who rejected such a reading of the Ninth. See Senate Comm. on the Judiciary, Nomination of Robert H. Bork to be an Associate Justice of the Supreme Court, EXEC. REP. NO. 100-7, at 8 (1987).

449. See 1 THE RIGHTS RETAINED BY THE PEOPLE, *supra* note 14, at 353–85. Although Barnett emphasizes the importance of the state conventions in attempting to identify the original meaning of the constitution, see BARNETT, RESTORING THE LOST CONSTITUTION, *supra* note 13, at 96–100, Barnett does not discuss the state conventions and their proposed “Ninth Amendments” in his discussion of the Ninth in the same work. See *id.* at 54–60, 234–52. At one point, Barnett links a provision from Sherman's draft Bill of Rights that Barnett associates with the Ninth Amendment with similar proposals from North Carolina and Virginia. *Id.* at 247 n.85. As explained above, none of these provisions are precursors to the Ninth Amendment. See *supra* notes 14–16 and accompanying text.

their own. In his most recent book, *Restoring the Lost Constitution*, Barnett relates the history of the Ninth Amendment without once discussing the proposed state amendments.<sup>450</sup> The great historian Leonard Levy quotes Madison's original draft of the Ninth Amendment, including the "constructive enlargement of power" language suggested by the state conventions, but then declares that "Madison improvised that proposal. No precise precedent for it existed."<sup>451</sup> When it comes to the state conventions, in some of the most influential works written on the origins of the Ninth Amendment, it is as if the history is not there.<sup>452</sup>

Also missing from contemporary scholarship on the Ninth Amendment are the Virginia Assembly debates and the Report of the Virginia Senate. Scholars have known for some time about the correspondence between Burnley and Madison.<sup>453</sup> Surprisingly, however, no Ninth Amendment scholar has investigated the records of the Virginia Assembly, much less considered the significance of Virginia's proposed first and seventeenth amendments in explaining the concerns of Edmund Randolph. Had they

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450. The omission is surprising given that constitutional historians seeking the original meaning of a particular clause generally concede that state ratification debates are crucial sources of evidence. See, e.g., WHITTINGTON, *supra* note 25, at 163–64 (“[O]riginalism refers to the intentions of the various individuals who composed the ratifying convention and the degree of agreement that they expressed over the meaning of constitutional terms.”); BARNETT, *RESTORING THE LOST CONSTITUTION*, *supra* note 12, at 98 (advocating original meaning analysis and explaining the importance of ratifying conventions in determining such meaning).

451. LEVY, *supra* note 8, at 247. Like Cogan, as well as Kurland and Lerner, Levy finds the roots of the Ninth in broad declaration of rights provisions. See *id.* at 249.

452. Two contemporary Ninth Amendment scholars who at least have noted the importance of Virginia's seventeenth proposal are Russell L. Caplan and Thomas B. McAfee. See Caplan, *supra* note 12, at 254; Thomas B. McAfee, *The Federal System as a Bill of Rights: Original Understandings, Modern Misreadings*, 43 VILL. L. REV. 17, 147 (1998). Neither Caplan nor McAfee, however, identify the link between the final version of the Ninth and Virginia's call for a provision controlling the constructive enlargement of federal power. Interestingly, prior to the contemporary debate over unenumerated rights, the link between the Ninth Amendment and Virginia's seventeenth proposal was seen as obvious. See, e.g., DUMBAULD, *supra* note 12, at 55. Similarly, in his 1971 two-volume work on the Bill of Rights, Bernard Schwartz lists the “Sources of Bill of Rights.” The sole document listed as a source for the Ninth Amendment is “Va. Convention, proposed amendment 17.” 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY, *supra* note 122, at 1204. Akhil Amar, in his book *The Bill of Rights* points out the link between New York's and Virginia's convention statements and the Ninth and Tenth Amendments. AMAR, *supra* note 27, at 121–22. Amar does not address the Ninth as a rule of construction, but rather as a statement of popular sovereignty and the right of the people to alter or abolish their form of government. *Id.*

453. In his recent book, Thomas McAfee discusses Burnley's letter and Madison's letter to Washington in a section entitled “The Ratification Debate in Virginia.” See MCAFEE, *supra* note 12, at 145–47. Surprisingly, McAfee does not discuss the events taking place in Virginia at the time of Burnley's letter. McAfee limits his discussion to arguing (correctly in my mind) that Burnley and Madison's letters reflect a view of the Ninth Amendment as preventing an extension of federal power through the language of retained rights. McAfee continues to believe, however, that the Ninth does no more than preserve the doctrine of enumerated powers. *Id.* at 147.



done so, Randolph's concerns would have been clarified, as would have Madison's response.

But perhaps the most startling example of the lost history of the Ninth Amendment involves the treatment of Madison's speech on the Bank of the United States. The speech itself is hardly mentioned in most constitutional law textbooks, and in the one textbook that does present Madison's speech, his reference to the "Eleventh and Twelfth" Amendments is edited out.<sup>454</sup> You can find Madison's speech in *The Founders' Constitution* under the section relating to the Necessary and Proper Clause.<sup>455</sup> Almost the entire speech is reproduced . . . except for Madison's reference to the Ninth Amendment.<sup>456</sup> Jack Rakove devoted an entire book to Founding approaches to constitutional interpretation and specifically addressed Madison's speech as an example of Madison's approach to construing the Constitution, yet nowhere mentioned Madison's reference to the Ninth Amendment, the textual basis for Madison's rule of constitutional interpretation.<sup>457</sup> Although some Ninth Amendment scholars have debated the meaning of Madison's speech,<sup>458</sup> no one has recognized Madison's discussion of how the principles of the Ninth Amendment are rooted in the amendments proposed by the state conventions.

These key pieces of history that reveal the Ninth Amendment as a federalist rule of construction have been lost. Contemporary scholarship, and the current jurisprudence of the Supreme Court, assume that if there is a federalist rule of construction in the Constitution, that rule is expressed by the Tenth Amendment, not the Ninth. The key precedents in discussing federalism-based limitations on federal power are *McCulloch v. Maryland*,<sup>459</sup> which discusses the Tenth Amendment, not the Ninth, and *United States v. Lopez*,<sup>460</sup> which does the same. Instead of following Madison's approach and citing the Ninth Amendment alongside the Tenth as one of the twin guardians of federalism, contemporary scholars and courts regularly cite the Ninth *in opposition* to the Tenth Amendment and claims of local autonomy. Viewing the Ninth and Tenth Amendments as antagonists, however, is a recent development. For most of our history, bench and bar shared Madison's federalist reading of the Ninth and Tenth Amendments and recognized their dual role in guarding the states from federal interference.

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454. See PROCESSES OF CONSTITUTIONAL DECISIONMAKING, *supra* note 21, at 8–11.

455. 3 THE FOUNDERS' CONSTITUTION, *supra* note 13, at 244–45.

456. Compare *id.* with JAMES MADISON, WRITINGS, *supra* note 3, at 488–89.

457. See JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 350–54 (1996).

458. See BARNETT, RESTORING THE LOST CONSTITUTION, *supra* note 12, at 245; MCAFFEE, *supra* note 12, at 2–3.

459. 17 U.S. (4 Wheat.) 316 (1819).

460. 514 U.S. 549 (1995).

## VII. Epilogue

In his later years, Madison looked back on how the Supreme Court had fared in its fledgling efforts to interpret the Constitution. With disputes such as the Bank of the United States, the Alien and Sedition Acts, and Marshall's opinion in *McCulloch v. Maryland* still fresh in his mind, Madison had reason to be melancholy:

It is to be regretted that the Court is so much in the practice of mingling with their judgments pronounced, comments & reasonings of a scope beyond them; and that there is often an apparent disposition to amplify the authorities of the Union at the expence of those of the States. It is of great importance as well as of indispensable obligation, that the constitutional boundary between them should be impartially maintained. Every deviation from it in practice detracts from the superiority of a Chartered over a traditional Govt. and mars the experiment which is to determine the interesting Problem whether the organization of the Political system of the U.S. establishes a just equilibrium; or tends to a preponderance of the National or the local powers.<sup>461</sup>

Responding to Spencer Roane's concerns about the Supreme Court's decision in *Cohens v. Virginia*<sup>462</sup> limiting the scope of the Eleventh Amendment, Madison wrote "whatever may be the latitude of Jurisdiction assumed by the Judicial Power of the U.S. it is less formidable to the reserved sovereignty of the States than the latitude of power which it has assigned to the National Legislature."<sup>463</sup> Still, Madison conceded, the Court had failed to consider the Constitution's own directions regarding the construction of federal judicial power:

On the question relating to involuntary submissions of the States to the Tribunal of the Supreme Court, the Court seems not to have adverted at all to the expository language when the Constitution was adopted; nor to that of the Eleventh Amendment, which may as well import that it was declaratory, as that it was restrictive of the meaning of the original text.<sup>464</sup>

Despite his many disappointments, however, Madison never lost faith:

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461. Letter from James Madison to Spencer Roane (May 6, 1821), in JAMES MADISON, WRITINGS, *supra* note 3, at 773.

462. 19 U.S. (6 Wheat.) 264 (1821).

463. Letter from James Madison to Spencer Roane (May 6, 1821), in JAMES MADISON, WRITINGS, *supra* note 3, at 774.

464. *Id.* at 776. As the reader now knows, the "expository language" referred to by Madison included the Ninth and Tenth Amendments.

I am not unaware that the Judiciary career has not corresponded with what was anticipated. At one period the Judges perverted the Bench of Justice into a rostrum for partizan harangues. And latterly the Court, by some of its decisions, still more by extrajudicial reasonings & dicta, has manifested a propensity to enlarge the general authority in derogation of the local, and to amplify its own jurisdiction, which has justly incurred the public censure. But the abuse of a trust does not disprove its existence.<sup>465</sup>

The problem addressed by Madison's thoughtful meditations—the need to maintain a “just equilibrium” between “the National or the local powers”—would continue to be a thorn in the country's side for the next one hundred and fifty years. The “expository language” meant to help guide the Court in this endeavor may have been forgotten, but our forgetfulness is only recent. In fact, the original federalist meaning of the Ninth Amendment did not pass with James Madison. It was cited, quoted, discussed, and deployed in countless cases throughout the nineteenth and early twentieth centuries in precisely the manner hoped for by James Madison and the ratifying conventions. This jurisprudence, yet another missing piece of the lost history of the Ninth Amendment, is presented in the second of these articles, *The Lost Jurisprudence of the Ninth Amendment*.

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465. Letter from James Madison to Thomas Jefferson (June 27, 1823), in JAMES MADISON, WRITINGS, *supra* note 3, at 802.