

## The Inescapable Federalism of the Ninth Amendment

Kurt T. Lash\*

### *Abstract*

*For the past several decades, the majority of courts and commentators have viewed the Ninth Amendment as a provision justifying judicial enforcement of unenumerated individual rights against state and federal abridgment. The most influential advocate of this libertarian reading of the Ninth has been Professor Randy Barnett who has argued in a number of articles and books that the Ninth was originally understood as guarding unenumerated natural rights. Recently uncovered historical evidence, however, suggests that those who framed and ratified the Ninth Amendment understood the Clause as a guardian of the retained right to local self-government. Recognizing the challenge this evidence poses to libertarian theories of the Ninth Amendment, Randy Barnett now argues that what evidence we have is consistent with both a libertarian and federalist reading of the Ninth Amendment and that remaining gaps in the historical record preclude a solely federalist reading of the Ninth.*

*This article clarifies the distinction between the federalist and libertarian models of the Ninth Amendment and argues that the two models are in critical ways incompatible. In addition to critiquing Professor Barnett's reading of the historical evidence, I also present newly discovered evidence of the original meaning of the Ninth which fills in critical gaps in the historical record and strongly supports an originally federalist understanding of the Amendment. The article concludes by distinguishing the Ninth from the Tenth Amendment and considering the potential impact of the Fourteenth Amendment on the meaning and scope of the Ninth.*

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# The Inescapable Federalism of the Original Ninth Amendment

Kurt T. Lash\*

## Introduction

One of the benefits of using history as a guide to constitutional interpretation is that it allows for ever-more refined conclusions based on an ever-growing database of historical evidence. As prior conclusions are reassessed and reformulated, newer understandings become increasingly stable as the range of plausible interpretations grows increasingly narrow. Recently, Ninth Amendment scholarship has witnessed this kind of aggregated understanding as a number of works have greatly increased the stock of historical evidence surrounding the enactment of this heretofore mysterious clause.<sup>1</sup> For those interested in the original meaning of the Constitution, this new evidence provides a significant opportunity to refine (or alter) our prior assumptions about the Ninth Amendment.

The Supreme Court's decision in *Griswold v. Connecticut*<sup>2</sup> set the stage for the first modern debate over the meaning of the Ninth Amendment. The majority of the Justices in *Griswold* accepted the Ninth as textual support for judicial enforcement of a broad array of individual rights.<sup>3</sup> The dissenting Justices claimed the Ninth simply mirrored the Tenth as a general statement of limited federal power.<sup>4</sup> In the decades that followed, the scholarly debated essentially echoed the *Griswold* divide: Most legal commentators accepted the majority's libertarian reading of the Ninth,<sup>5</sup> while a few dissenters attempted to link the

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<sup>1</sup> Some of the more influential recent works on the Ninth Amendment include, Edward Dumbauld, *The Bill of Rights and What It Means Today* (1957); Calvin R. Massey, *Silent Rights: The Ninth Amendment and the Constitution's Unenumerated Rights* (1995); Bennett B. Patterson, *The Forgotten Ninth Amendment* (1955); Randy E. Barnett, Introduction: James Madison's Ninth Amendment, in 1 *The Rights Retained by the People: The History and Meaning of the Ninth Amendment* (Randy E. Barnett ed., 1989); Randy Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (2004); Raoul Berger, *The Ninth Amendment*, 66 *Cornell L. Rev.* 1 (1980); 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); Norman Redlich, *Are There "Certain Rights...Retained by the People" ?*, 37 *N.Y.U. L. Rev.* 787, 808 (1962); Eugene M. Van Loan, III, *Natural Rights and the Ninth Amendment*, 48 *B.U. L. Rev.* 1, (1968). I too have written on the Ninth. See Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 *Tex. L. Rev.* 331 (2004); Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 *Tex. L. Rev.* 597 (2005).

<sup>2</sup> 381 U.S. 479 (1965).

<sup>3</sup> See *id.* at 484 (Douglas, J.) and *id.* at 484 (Goldberg, J.).

<sup>4</sup> See *id.* at 518-519 (Black, J.).

<sup>5</sup> See e.g., Barnett, 1 *The Rights Retained by the People*, *supra* note 1 at 13; Barnett, *Restoring the Lost Constitution*, *supra* note 1; Massey, *supra* note 1 at 213; see also Charles L. Black Jr., *A New Birth of Freedom* 39 (1997); Mark C. Niles, *Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights*, 48 *U.C.L.A. L. REV.* 85, 117-23 (2000); Suzanne Sherry, *The Founders' Unwritten Constitution*, 54 *U. CHI. L. REV.* 1127, 1150-55 (1987); Eugene

Ninth to the state-protective declaration of the Tenth.<sup>6</sup> The latter passive-federalist accounts (so-called because they see no active role for the Ninth) failed to gain significant academic support, leaving the libertarian model as the predominant view in legal scholarship.

The pre-eminent scholarly standard bearer for the libertarian reading of the Ninth Amendment is Professor Randy Barnett. Because Professor Barnett is both the most eloquent and influential advocate of a libertarian reading of the Ninth, this paper will focus on his arguments in comparing the libertarian and federalist accounts of the Amendment. Over the past two decades, Barnett has produced a number of books and articles advocating a libertarian reading of the Ninth Amendment on both normative and originalist grounds.<sup>7</sup> Although Barnett's work ranges well beyond the Ninth Amendment, he has consistently argued that the original meaning of the Ninth supports judicial enforcement of unenumerated individual natural rights.<sup>8</sup> As Barnett believes the principles of the Ninth Amendment are enforceable by courts of law, I refer to his approach as an *active* libertarian reading of the Ninth.<sup>9</sup>

Recently uncovered historical evidence, however, calls into question the libertarian reading of the Ninth Amendment. In two prior articles, I presented a substantial body of evidence indicating that the Ninth was conceived and received as a federalist provision preserving the people's retained right to local self-government.<sup>10</sup> This is how its drafter James Madison understood the Clause and this is how scholars and judges construed the amendment for more than one

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M. Van Loan III, *Natural Rights and the Ninth Amendment*, 48 B.U. L. REV. 1, 4–24 (1968).

<sup>6</sup> See Thomas B. McAfee, *Inherent Rights, The Written Constitution, and Popular Sovereignty: The Founders' Understanding* (2000); Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 228–59 (1983). Professor Akhil Amar has suggested the Ninth Amendment protects the collective right of the people to alter or abolish their Constitution. See Akhil Reed Amar, *The Bill of Rights* 122 (1998) (“The rights of “the people” affirmed in the Ninth and Tenth Amendments may well mean more than the right to alter or abolish, but surely they mean this much at their core.”). As I later explain, I believe that Amar is correct that the collective right to revolution is one of the retained rights of the People. See *infra* at \_\_\_\_\_. Amar also has long recognized the general federalist relationship of the Ninth and Tenth Amendments. See Amar, *this note* at 123-24.

<sup>7</sup> See Randy Barnett, *Reconceiving the Ninth Amendment*, 74 Cornell L. Rev. 1 (1988); Randy Barnett, *James Madison's Ninth Amendment*, in *I The Rights Retained by the People: The History and Meaning of the Ninth Amendment* (1989); Randy Barnett, *Implementing the Ninth Amendment (Introduction)*, in *II The Rights Retained by the People: The History and Meaning of the Ninth Amendment* (1993); Randy Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (2004); Randy Barnett, *The Ninth Amendment: It Means What It Says*, 85 Tex. L. Rev. 1 (2006).

<sup>8</sup> See generally, Barnett, *Restoring the Lost Constitution*, *supra* note \_\_\_\_; Randy Barnett, *The Ninth Amendment: It Means What it Says*, 85 Tex. L. Rev. 1 (2006).

<sup>9</sup> See Lash, *The Lost Original Meaning of the Ninth Amendment*, *supra* note \_\_ at 343-47 (describing the difference between active and passive interpretations of the Ninth Amendment.).

<sup>10</sup> See Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 Tex. L. Rev. 331 (2004); Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 Tex. L. Rev. 597 (2005).

hundred years after its enactment. Although libertarian theorists like Professor Barnett correctly read the Ninth as an active enforceable amendment and not a mere passive statement of principle, the evidence suggests a much broader understanding of retained rights prevailed at the time of the Founding than that proposed by the libertarian model. The Ninth was understood to preserve all retained rights, both individual and majoritarian (collective), from undue federal interference, reserving control of the same to state majorities. This makes the Ninth an *active federalist* provision that calls upon courts to limit the interpretation of enumerated federal power in order to preserve the people's retained right to local self-government.

Recognizing the challenge this evidence presents to libertarian theories of the Constitution, Randy Barnett has now drafted a response to both my work and the work of others on the Ninth Amendment.<sup>11</sup> In his response, Barnett concedes that the evidence supports either an active federalist or active libertarian reading of the Ninth Amendment.<sup>12</sup> However, Barnett downplays the significance of his conclusion due to his belief that nothing in the federalist model is necessarily inconsistent with his own libertarian reading of the Ninth.<sup>13</sup>

Because my articles concentrated more on historical evidence than the construction of constitutional theory, the specific differences and similarities between the libertarian and federalist reading of the Ninth remained unclear.<sup>14</sup> For example, Randy Barnett and I both concede the possibility that the retained rights of the Ninth include both individual and collective rights. We also both agree that the clause is “federalist” to the extent that it binds only the federal government and not the states. Perhaps, then, Randy and I are merely focusing on two sides of the same coin: He, emphasizing retained libertarian side of the

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<sup>11</sup> Randy Barnett, *The Ninth Amendment: It Means What It Says*, 85 *Tex. L. Rev.* 1 (2006).

<sup>12</sup> *Id.* at 21. See also *id.* at 79 (“the evidence considered in this article, taken cumulatively, strongly supports the individual natural rights model of the original meaning of the Ninth Amendment as well as the federalism model”).

<sup>13</sup> See *id.* at 62 (“But even if [retained rights include state rights] this is not logically inconsistent with a reading of the Ninth Amendment as protecting both individual and states’ rights from a latitudinarian interpretation of the enumerated powers. [cite omitted] Were states’ rights included in the meaning along with individual rights, it would simply broaden the scope of the Ninth Amendment to include situations where no individual liberty rights were at issue.”). Indeed, Barnett insists that I have misled readers into thinking our two approaches to the Ninth Amendment are somehow incompatible. *Id.* at 79.

<sup>14</sup> For example, despite my expressly stating otherwise, Barnett still believes I *might* be arguing that the Ninth Amendment protects *only* majoritarian rights. Compare Lash, *The Lost Original Meaning of the Ninth Amendment*, *supra* note \_\_ at 401 (“[T]here is no textual reason and little historical reason to believe that the “other rights” of the Ninth Amendment did not include natural rights”), with Barnett, *The Ninth Amendment*, *supra* note \_\_ at 20 (“Here and elsewhere in his two articles, Lash appears to suggest that the active federalism approach is meant to protect *only* collective rights.”). As I hope this article makes clear, I believe the evidence strongly suggests the Ninth protected both majoritarian and individual rights. Barnett’s confusion arises from my argument that the Ninth leaves all such rights under the collective control of local state majorities. See *infra* note \_\_ and accompanying text.

Ninth; I, emphasizing the collective (majoritarian) side. How much substantive difference can there be between these two positions?

Quite a bit, it turns out. Randy's libertarian Ninth is the mirror image of his libertarian reading of the Fourteenth Amendment's Privileges or Immunities Clause. He believes that these two Clauses work in tandem to protect the same set of unenumerated individual rights and justify judicial enforcement of these rights against both state and federal action.<sup>15</sup> Under my reading of the Ninth Amendment, however, the original federalist aspect of the Clause remains in force and requires judicial protection of local self-government today just as it did in 1791. Not only is it logically impossible for the Ninth and Fourteenth Amendments to protect the same set of rights, the Ninth forbids reading the Privileges or Immunities Clause as negating the general police powers of the state. Thus, if my reading of the Ninth Amendment is correct, it significantly undermines Barnett's theory of a libertarian Constitution.

My prior two law review articles were meant to provide an exhaustive account of recently uncovered historical materials involving the Ninth Amendment. Even now, however, I continue to discover previously unknown documents involving early discussion and application of the Ninth. The most significant of these new discoveries are presented for the first time in this article. The purpose of this paper, however, is to focus those aspects of the historical record that have particular significance in the federalist v. libertarian debate. Following a roughly chronological approach, I will summarize the relevant evidence and address Randy Barnett's arguments as I go. In the penultimate section, I will consider the relationship between the Ninth and Fourteenth Amendments.<sup>16</sup>

## I. Preliminary Matters: Defining Terms and Approach

Behold two stories of the Ninth Amendment:

### *The Libertarian Account*

The Ninth Amendment is James Madison's unique and personal contribution to our Constitution. Like other Founders, Madison shared the belief that the retained natural rights of man require no enumeration (indeed, they *cannot* be enumerated). Madison added the Ninth Amendment in order to prevent the erroneous assumption that the rights listed in the Bill of Rights were the only individual rights retained by the people. Although the Ninth (and the Bill as a whole) originally restricted only the federal government, the natural rights of individuals deserve protection from any government, including state governments. However, it was not until the adoption of the Fourteenth Amendment in 1868 that courts were authorized to protect unenumerated natural rights against both state and federal governments. Although no court prior to

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<sup>15</sup> See, e.g., Barnett, *The Lost Constitution*, *supra* note \_\_ at 66 (The Ninth and Fourteenth Amendments both "refer to the same set of unenumerable rights").

<sup>16</sup> This last section by necessity must be no more than a sketch. I present a more comprehensive text-based theory of the Ninth Amendment in a forthcoming article. See Kurt T. Lash, *Towards a Textual-Historical Theory of the Ninth Amendment* (forthcoming 2007).

1965 embraced such a view of the Ninth, it is only due to historic accident and erroneous judicial interpretations that we have lost sight of this original meaning. In short, the Ninth and Fourteenth Amendments work in tandem, accomplishing similar goals, through different means.

### *The Federalist Account*

The Ninth Amendment, like the rest of the Bill of Rights, has its roots in proposals submitted by the state ratifying conventions. In addition to a provision prohibiting the exercise of unenumerated powers, the state conventions also demanded a clause prohibiting any implied enlargement of enumerated federal power due to the enactment of the Bill of Rights. Madison's original draft of the Ninth and Tenth Amendment expressly addressed these particular concerns of the states. Although the final version of the Ninth spoke only of the retained rights of the People, Madison insisted that preserving retained rights and constraining federal power amounted to the same thing, and that the final version continued to express the same federalist principle demanded by the state conventions. This is how Madison described the Ninth in a major speech while the amendment was under consideration and this is how every scholar and court read the Ninth Amendment for the next one hundred years. Although the Fourteenth Amendment adds additional restrictions upon the states, it does not negate the purpose or operation of the Ninth. In short, the Ninth and Tenth Amendments were meant to work in tandem, accomplishing similar goals, through different means.

The first account is advocated by Professor Randy Barnett. The second reflects my reading of the historical evidence. Not all aspects of these two accounts are mutually exclusive. As I noted above, the federalist model accepts Barnett's contention that individual natural rights were among the retained rights of the people. The key difference between the two accounts involves the scope and purpose of the Ninth Amendment. The libertarian Ninth Amendment comes into play whenever a forbidden construction of the Constitution threatens an individual natural right.<sup>17</sup> The federalist Ninth, on the other hand, is triggered *anytime* federal power is unjustifiably extended, regardless of whether the extension affects an individual or collective right (including the right to local self-government). This distinction is important for two reasons: First, the federalist model<sup>18</sup> embraces a much broader category of rights than that proposed

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<sup>17</sup> "According to the individual natural rights model, the Ninth Amendment was meant to preserve the "other" individual natural rights that were "retained by the people." (draft at 12).

<sup>18</sup> In his work, Barnett appears to equate the federalism model with limiting the scope of federal power. Under this definition Barnett is correct to see close similarities between the "federalist" model (limiting federal power) and his libertarian model (which limits both state and federal power). He distinguishes this approach from what he calls the "collectivist" model of the Ninth Amendment that views the Ninth as preserving local majoritarian (collective) rights. See Barnett, *The Ninth Amendment*, *supra* note \_\_ at 15. Barnett's use of the term "federalism" diverges from standard usage of the term as a reference to a theory of divided government, with some matters delegated to the national government, and left under the autonomous control of local majorities. Barnett's categories also obscure the historical situations in which retained rights had a dual nature, being both individual and collective at the same time. See *infra* note \_\_ and

by the libertarian model. Secondly, the broad category of rights protected under the federalist model cannot be reconciled with Barnett's attempt to read the Ninth and Fourteenth Amendments as protecting the same set of liberties and cumulatively justifying a "presumption of liberty" in matters meant to be left to state control.

The libertarian account of the Ninth Amendment may seem more intuitively plausible since it tracks modern conceptions of rights and liberties. The federalist model, on the other hand, stresses long contested notions of "states rights" and, from a modern perspective, seems to suggest an overwrought fear of the federal government. Nevertheless, if the goal is to recover the original meaning of the Ninth Amendment, we must see terms like "the retained rights of the people" through the eyes of those who debated and ratified the text. Even if one is more concerned with the present than the past, today there is a growing appreciation of how preserving the right to local self-government plays a liberty-enhancing role in matters ranging from medicinal use of marijuana to physician assisted suicide to affirmative action programs in the public schools. Thus, more than just originalists may be interested in recovering the original understanding of the Ninth Amendment.

A recurring theme in what follows is the need to hesitate before ascribing modern implications to terms like "rights" and the retained prerogatives of "the people." What today might seem to have a single meaning in 1791 might have referred to a complicated *set* of concerns involving both individual and local majoritarian liberty. Those who debated and ratified the Ninth Amendment were faced with a problem altogether new in political science: How to create a federalist system of government whereby both the national and local government remained sovereign in their respective spheres. Such a division of power had no historical counterpart.<sup>19</sup> Describing it and debating its merits required a new language; older terms had to be re-conceptualized and adapted to a new theory of divided government.<sup>20</sup> For example, in 1787, the idea of individual natural rights had deep roots in the common law. The need to protect such rights at a state level was commonly accepted, even if disputes remained regarding the precise content of natural rights. At the same time, however, sovereign states *also* had natural rights that they retained when they entered into a treaty or compact with another sovereign.<sup>21</sup> The Articles of Confederation, for example, declared that all non-

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accompanying text. As I have in previous articles, I continue to distinguish "libertarian" models of the Ninth (limiting the power of the federal governments to interfere with individual rights in furtherance of an overall theory of liberty against state and federal governments) and federalism models of the Ninth (dividing federal and state power in a manner that preserves the retained right to local self-government). I believe my approach conforms with standard usage and it allows for the existence of retained rights which were both individual (in terms of their protection from federal interference) and collective (in terms of their being retained under the control of local state majorities).

<sup>19</sup> See Michael Zuckert, *A System Without Precedent: Federalism in the American Constitution*, in *The Framing and Ratification of the Constitution*, ed., by Leonard W. Levy and Dennis J. Mahoney (1987) pp. 132-50.

<sup>20</sup> See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *Yale L. Rev.* 1425, 1437 (1987).

<sup>21</sup> See Emerich de Vattel, *The Law of Nations* (1758). Vattel's work was widely relied upon at the time of the Founding and for decades afterwards. The first major

delegated powers jurisdiction and *rights* were retained to the states.<sup>22</sup> If the Constitution was to be ratified, the state conventions had to be convinced that the federal government not only lacked power to interfere with individual rights, it must also lack the authority to interfere with the retained collective rights of the people in the several states. In this way, debates regarding individual rights merged with debates regarding states' rights. As we shall see, these dual concerns played a critical role in the drafting and public understanding of the Ninth Amendment.

### 1. *Constitutional Theory and Method*

Randy Barnett and I both embrace the method of constitutional interpretation known as originalism. Originalism seeks the meaning of the text as it was likely understood by those who added the provision to the Constitution. The method can be traced back to the Founding generation itself. James Madison, for example, expressly embraced the idea that the meaning of the Constitution should reflect the understanding of the ratifiers—in his case, the members of the state ratifying conventions.<sup>23</sup> As Madison wrote during the 1796 debate on the Jay treaty:

Whatever veneration might be entertained for the body of men who formed our Constitution, the sense of that body could never be regarded as the oracular guide in the expounding of the Constitution. As the instrument came from them, it was nothing more than the draught of a plan, nothing but a dead letter, until life and validity were breathed into it, by the voice of the people, speaking through the several state conventions. If we were to look therefore, for the meaning of the instrument, beyond the face of the instrument, we must look for it not in the general convention, which proposed, but in the state conventions, which accepted and ratified the constitution.<sup>24</sup>

Madison's emphasis on ratifiers' understanding reflects the Founders belief in popular sovereignty. A political theory in ascendancy at the time of the

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constitutional treatise by St. George Tucker relied heavily on Vattel. See, e.g., St. George Tucker, *A View of the Constitution*, in 1 Blackstone's Commentaries. Appendix, Note D 140 (Philadelphia 1803). Others in the Founding generation shared Vattel's view that governments in general, and states in particular, had retained natural rights. See Thomas Jefferson, *Draft of Kentucky Resolutions* (Nov. 10, 1798), in 5 *The Founders' Constitution*, *supra* note \_\_, 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.”).

<sup>22</sup> Art. II, Articles of Confederation and Perpetual Union of the United States.

<sup>23</sup> Madison first relied on the understanding of the state conventions even before the states had ratified the Bill of Rights, and he would repeatedly do so throughout his life. See Madison's *Speech Against the Bank of the United States*, in *Writings*, *supra* note \_\_ at 480, 482, 489 (discussing how the meaning of the constitution should be interpreted in light of the understanding of the ratifying conventions).

<sup>24</sup> Madison's *Speech on the Jay Treaty*, April 6, 1796 *Writings* at 574-75.

Founding,<sup>25</sup> popular sovereignty distinguishes the government from the governed, with only the latter having the sovereign right to establish (or amend) fundamental law. The governed “speak as a People” when they meet in convention and debate, vote, and reduce to writing the People’s fundamental law.<sup>26</sup> Because these conventions of the People are responsible for “breathing life” into the document, it is their understanding of the words that control.

Most originalists today accept popular sovereignty as the normative basis for their interpretive method, and follow Madison’s lead in treating the understanding of the ratifiers as the most authoritative word on the original meaning of the Constitution.<sup>27</sup> The originalist work of Randy Barnett, however, is an exception. Although Barnett accepts (at least provisionally<sup>28</sup>) the legitimacy of originalism, he strongly rejects popular sovereignty as a normative theory of constitutional law. According to Barnett, no person can be bound to follow the constitution without their consent. Because unanimous consent is impossible, consent based theories fail to “bind in conscience” anyone who does not individually consent to the Constitution.<sup>29</sup> Popular sovereignty is thus a flawed theory, for it allows a supermajority (both at the time of adoption and through later use of Article V) to bind a non-consenting minority. Barnett believes the only way around this unanimous consent dilemma is by adopting a constitution that would earn the consent of all reasonable people—a constitution based on libertarian principles of freedom. It is because Barnett believes that the original meaning of the Constitution meets this condition that he accepts the legitimacy of originalism as an interpretive method.<sup>30</sup>

Barnett’s rejection of popular sovereignty places him in the uncomfortable position of rejecting the very political theory embraced by those who debated and adopted the Ninth Amendment.<sup>31</sup> This is not a criticism of Barnett’s normative theory (he may well be correct about constitutional legitimacy). But, as Barnett himself concedes, “particular items of evidence assume a greater or lesser importance depending on which version of originalism is being employed.”<sup>32</sup>

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<sup>25</sup> See e.g., (“It is indeed a “most excellent maxim, that the original and fountain of all just power and government is in the people;” and if ever this maxim was fully demonstrated and exemplified among men, it was in the late American Revolution, where thirteen governments were taken down from the foundation, and new ones erected wholly by the people, as an architech would pull down an old building and erect a new one.”), John Adams, *Defense of the Constitutions of Government of the United States* (1787), *reprinted in* 1 *The Founders’ Constitution* at 60. See generally, Gordon Wood, *The Creation of the American Republic, 1776-1787* (1969).

<sup>26</sup> *Id.* at 328-43 (describing the special legitimacy of conventions).

<sup>27</sup> See, e.g., Akhil Reed Amar, *The Bill of Rights*, *supra* note \_\_; Keith Whittington, *Constitutional Interpretation*, *supra* note \_\_; Bruce Ackerman, *We the People*, *supra* note \_\_; Michael Kent Curtis, *No State Shall Abridge* [others]

<sup>28</sup> See Barnett, *Restoring the Lost Constitution*, *supra* note \_\_ at 109 (“If the substance of a constitution’s original meaning falls short of what it takes to establish a legitimate lawmaking process, then that constitution is not binding and can be ignored . . .”).

<sup>29</sup> See Barnett, *Restoring the Lost Constitution*, *supra* note \_\_ at 11-14.

<sup>30</sup> *Id.* at 109-113.

<sup>31</sup> See Trevor Morrison, *Lamenting Lochner’s Loss: Randy Barnett’s Case for a Libertarian Constitution*, 90 *Cornell L. Rev.* 839, 846 (2005) (Barnett’s rejecting of the original theory of the Constitution places him an “a rather awkward position”).

<sup>32</sup> Barnett, *The Ninth Amendment*, *supra* note \_\_ at 6.

Popular sovereignty-based originalism gives substantial weight to the understanding of the ratifiers, for it is their action and authority that “breathes life” into the constitutional text. Professor Barnett, however, distinguishes “original public understanding” from “original ratifier understanding” with his preference being the latter.<sup>33</sup> This distinction has real bite in Barnett’s work. A theme running throughout his essays involves how the Ninth *does not* reflect the concerns declared by the state ratifying conventions.<sup>34</sup> As I will explain below, I believe that Barnett’s rejection of the Founders’ theory of popular sovereignty critically undermines his analysis of the historical evidence. For now, the reader should know that the originalist approach of this article follows the popular sovereigntist originalism of James Madison and affords special consideration and weight to the concerns and understanding of those who debated and ratified the text.<sup>35</sup>

## 2. *The Pool of Relevant Evidence*

The search for original meaning is not the same thing as a search for the original framers’ private intent. On this point, Randy Barnett and I agree. Whatever private intentions may have motivated the players in this history, the key inquiry is determining the likely public meaning of a proposed text. This is the meaning that is debated and either rejected or ratified. For that reason, although Barnett and I might give some sources different weight, we generally look to the same historical sources as relevant to determining the original meaning of the text. Contemporary use of phrases and terms in the text is relevant, and this can be identified through public documents (newspapers, official enactments and the like) or private letters and diaries. The issue which gave rise to the proposed text is clearly relevant, as are the debates which surrounded its drafting, submission and ratification. Private statements by those involved are helpful, but only to the extent that they illuminate likely public understanding.

Post-adoption materials can be relevant, depending on the date of the material and the degree to which it likely reflects later political disputes as opposed to reflecting traditional understanding. Although Randy Barnett downplays the significance of post-adoption commentary in the case of the Ninth Amendment, this is a departure from his work on other clauses in the Constitution.<sup>36</sup> I believe that post-adoption commentary and usage is particularly helpful in the case of the Ninth Amendment,<sup>37</sup> but none of my conclusions are dependent on post-enactment material.

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<sup>33</sup> See *id.* at 5-6.

<sup>34</sup> See, for example, Barnett, The Ninth Amendment, *supra* note \_\_ at 17 (“Madison designed the Ninth Amendment by substantially altering state proposals to address the concerns expressed during ratification by *Federalist* supporters of the Constitution.”) (emphasis in original).

<sup>35</sup> Other constitutional scholars who base their work on the theory of popular sovereignty include Akhil Amar, Keith Whittington, Bruce Ackerman, Michael Kent Curtis, John Harrison, Michael McConnell, Michael Paulson (103 YLJ 677 Yale Law Journal, A General Theory of Article V: The Constitutional Lessons of the Twenty . . . and Caleb Nelson (115 HVLR 1559, Sovereign Immunity as a Doctrine of Personal Jurisdiction (also Gary Lawson).

<sup>36</sup> See *infra*, note \_\_ and accompanying text.

<sup>37</sup> See generally Lash, The Lost Jurisprudence of the Ninth Amendment, *supra* note \_\_.

## II. The Concerns Which Triggered the Ninth Amendment

The commonly told story about the birth of the Ninth Amendment recounts how the Clause was meant to prevent any erroneous implications arising due to the adoption of the Bill of Rights. Identifying these erroneous implications, however, leads to one of the first differences between the federalist and libertarian accounts of the Ninth Amendment. The federalist reading views the Ninth as having the dual purpose of both restraining power and retaining rights--concerns that were raised by the state ratifying conventions as part of their demands for a Bill of Rights. Randy Barnett's libertarian reading, on the other hand, asserts that the amendment had the single purpose of protecting retained individual rights<sup>38</sup> and that it reflects concerns raised by the Federalists who originally supported ratification of the Constitution without a Bill of Rights.

### 1. *The Traditional Account of the Ninth*

Most accounts of the Ninth Amendment focus on Madison's speech to the House of Representatives where he introduced his proposed Bill of Rights.<sup>39</sup> There, Madison noted that the Federalists had originally resisted a Bill of Rights due to the danger that such a Bill might be erroneously read as an exhaustive list of the people's retained rights. According to Madison, however, this danger might be "guarded against" by adopting a provision that expressly prohibited such an erroneous implication.<sup>40</sup> The provision he proposed ultimately became the Ninth Amendment.

This is an accurate, but critically abbreviated, account of the Amendment's birth. It makes it appear as if the provision sprang from the mind of Madison and reflected Federalist concerns, not those of the state conventions. Randy Barnett, for example, believes that the Ninth was "formulated specifically to respond" to Federalist objections to adding a Bill of Rights and that securing retained rights was the "single end" of Madison's proposal. If true, then this makes the Ninth Amendment unique among the rest of the Bill of Rights. All the other provisions in the Bill of Rights have their roots in proposals emanating from the state conventions and reflect their particular concerns.<sup>41</sup> Although he concedes that state conventions submitted proposals *related* to the Ninth, Barnett nevertheless maintains that Madison "substantially alter[ed] state proposals" in order to focus the Ninth on concerns regarding the people's retained rights. As Barnett puts it:

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<sup>38</sup> Barnett, *The Ninth Amendment*, *supra* note \_\_\_ at 2 ("The purpose of the Ninth Amendment was to ensure that all individual natural rights had the same stature and force after some of them were enumerated as before; and its existence argued against a latitudinarian interpretation of federal power."); *id* at 13 ("I have defended the view that the "other rights" protected by the Ninth Amendment are individual natural rights. [cite omitted] The purpose of the Ninth Amendment was to ensure that these rights had the same stature and force after enumeration as before.").

<sup>39</sup> See Madison, *Speech in Congress Proposing Constitutional Amendments (June 8, 1789)*, in *Writings*, *supra* note \_\_\_ at 437.

<sup>40</sup> *Id.* at 449.

<sup>41</sup> For a helpful comparison of the amendments and their state precursors, see Bernard Schwartz, *A Documentary History of the Bill of Rights* (1971).

“In this regard, within the Bill of Rights, the Ninth Amendment is *sui generis*. . . . Madison’s version of the Ninth Amendment was a departure from, rather than an incorporation of, the public meaning of similarly-worded Anti-federalist inspired state proposals . . .”<sup>42</sup>

Barnett’s account uncouples the Ninth from the rest of the Bill of Rights and, in so doing, distances the Ninth from the state-centered concerns informing the rest of the Bill.

I believe the evidence supports Barnett’s claim that *one* of the purposes of the Ninth Amendment was to address concerns about adding a Bill of Rights.<sup>43</sup> However, his attempt to drive a wedge between Madison’s Ninth and concerns emanating from the states is expressly rebutted by James Madison himself on at least five different occasions (detailed below). According to Madison, the Ninth Amendment had the *dual* purpose of guarding retained rights and limiting undue enlargement of federal power—and it is this second purpose that ties the Ninth to the concerns and proposals of the state conventions.

## 2. *The State Proposals and Madison’s Original Draft of the Ninth Amendment*

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.

. . .

The powers not delegated by this Constitution, nor prohibited by it to the states, are reserved to the States respectively.<sup>44</sup>

These two amendments address two different and equally erroneous readings of the Constitution. The first, his original draft of the Ninth Amendment, addresses retained rights and the erroneous enlargement of *enumerated* federal power. The second (a draft of the Tenth) addresses the erroneous exercise of *unenumerated* federal power. As Madison later explained, the former guards against “a latitude

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<sup>42</sup> Barnett, *The Ninth Amendment*, *supra* note \_\_ at 17. See also *id.* at 75 (“The Ninth Amendment was invented by James Madison”).

<sup>43</sup> Actually, it is misleading to characterize the dangers of adding a Bill of Rights as solely a Federalist concern, or to claim that the proposals from the states were inspired by Anti-federalists. The proposed amendments from the state conventions clearly echo the “dangerous implications” concern, and they were championed by men like Edmund Randolph whom Madison himself called a “friend of the [proposed] Constitution.” See *infra* note \_\_ and accompanying text.

<sup>44</sup> House of Representatives, *Amendments to the Constitution (June 8, 1789)*, in 5 *The Founders’ Constitution*, *supra* note \_\_, at 25–26.

of interpretation” while the latter “excludes every source of power not within the Constitution itself.”<sup>45</sup>

Although Madison’s original draft of the Ninth Amendment addresses both enlarged powers and retained rights, these two subjects in Madison’s mind were inextricably linked:

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 (his original draft of the Ninth).<sup>46</sup>

According to Madison, disparagement of unenumerated rights led to the implied “*assignment*” of such rights into the hands of the general government. Such an implied assignment, of course, would wrongfully enlarge the powers of the federal government. Madison’s original draft of the Ninth addresses both of these related problems by guarding “retained rights” and prohibiting constructions that “enlarge[d] the powers” of the federal government. This same dual purpose shows up in Madison’s notes for his speech where he writes in regard to the Ninth: “disparage other rights—or constructively enlarge.”<sup>47</sup> His notes, of course, simply track the express dual-purpose language contained in his original draft of the Ninth.

Nor is there any evidence that, of the two listed purposes, retaining rights was the *true* or “main” purpose of the clause and that constraining power was just a means to that end. Both the text of the amendment and Madison’s notes treat both purposes as equally important. In fact, Madison’s private musings on the subject focused on the need to prevent enlarged federal power. Only months earlier, Madison had written to Thomas Jefferson regarding the need for a Bill of rights,

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<sup>45</sup> James Madison, Speech on the Bank of the United States, *in* Writings, *supra* note \_\_ at 489.

<sup>46</sup> James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), *in* James Madison, Writings, *supra* note \_\_, at 448–49.

<sup>47</sup> See James Madison, Notes for Amendments Speech (1789), *in* Rights Retained by the People, *supra* note \_\_ at 65. Although Randy Barnett discusses some aspects of Madison’s notes, he does not address the lines that refer to the Ninth Amendment. Although our received account of his speech does not include his point about enlarged power, he may have been forced to limit his remarks according to time constraints. A possibility Randy Barnett also acknowledges. See Barnett, The Ninth Amendment, *supra* note \_\_ at 34 n.135 (noting Madison’s self-reminder “watch time” in his notes).

“My own opinion has always been in favor of a bill of rights; provided it be so framed as not to *imply powers not meant to be included in the enumeration.*”<sup>48</sup>

Thus, Madison’s private correspondence, his speech, and the notes for his speech all expressly link the Ninth to preventing enlarged federal power. In the face of such express evidence, it is not credible to maintain that Madison’s sole purpose in proposing the Ninth was to preserve individual rights. Madison was just as concerned about the enlargement of federal power, and this concern came straight from the state conventions.

### 3. *The Proposals of the State Ratifying Conventions*

Unlike Madison’s original draft, the final language of the Ninth Amendment refers only to rights, not powers. Because this particular language cannot be found in any proposal submitted by the state conventions, some scholars conclude that the Ninth Amendment was solely Madison’s idea.<sup>49</sup> According to this view, the Ninth reflects Federalist concerns that a list of rights might be read as an exhaustive list of the people’s retained rights. Anti-federalist concerns about government powers, on the other hand, were addressed by the Tenth Amendment.

Reading Madison’s original draft of the Ninth, however, calls this distinction into question. Madison viewed the Ninth as addressing both rights and powers. Madison’s speech to the House clearly links the purpose of the Ninth to concerns about enlarged federal power, and this was a critical concern of the state conventions. It flips history on its head to say that the Federalists, but not the anti-federalists in the state ratifying conventions, were concerned about implied enlargement of federal power. In fact, once one considers the declarations and proposals submitted by the state conventions, the link between Madison’s Ninth and the state conventions becomes clear.

Like Madison’s draft of the Ninth and Tenth, the state conventions also saw the need for a dual strategy to prevent a dangerous expansion of federal power. New York, for example, submitted the following declarations along with its notice of ratification.

[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;

And that those Clauses in the said Constitution, which declare, that Congress shall not have or exercise certain Powers, do not imply that

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<sup>48</sup> Madison to Thomas Jefferson (Oct. 17, 1788), in *Writings supra* note \_\_ at 420 (emphasis added).

<sup>49</sup> In addition to Randy Barnett, the historian Leonard Levy also credited Madison with conceiving the Ninth entirely on his own. See Leonard Levy, *Origins of the Bill of Rights* 247 (1999) (“Madison improvised that proposal. No precise precedent for it existed.”).

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>50</sup>

The first of these declares the principle of enumerated power—a principle that ultimately informs the Tenth Amendment. The second addresses a separate issue: the implied expansion of federal power that might arise due to the addition of the Bill of Rights. Other states expressed the same dual concerns. The Virginia convention, for example, proposed the following two amendments:

*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 Federal 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>51</sup>

Once again, the first provision limits the federal government to enumerated powers while the second limits the implied enlargement of federal power due to the addition of a Bill of Rights.<sup>52</sup> North Carolina followed Virginia’s approach

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50. Amendments Proposed by the New York Convention (July 26, 1788), *in* Creating the Bill of Rights, *supra* note \_\_, at 21–22; *see also* 1 Elliot’s Debates, *supra* note \_\_, at 329 (“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.”).

51. Amendments Proposed by the Virginia Convention (June 27, 1788), *in* The Complete Bill of Rights, *supra* note \_\_, at 675. James Madison was a member of the committee that drafted the Virginia proposal, and he expressly 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).

<sup>52</sup> Although New York’s proposal addressed the implied abandonment of the principle of enumerated federal power, Virginia’s Seventeenth goes further and prohibits any implied enlargement of even those powers which *were* enumerated. Patrick Henry in the Virginia Convention:

“If you will, like the Virginia government, give them knowledge of the extent of the rights retained by the people, and the powers themselves, they will, if they be honest men, thank you for it. . . . But if you leave them otherwise, they will not know how to proceed; and being in a state of uncertainty, they will assume rather than give up powers by implication. A Bill of rights may be summed up in a few words. What do they tell us? That our rights are reserved.”

and submitted the same two proposals.<sup>53</sup> Other states submitted related proposals seeking to limit the construction of federal power.<sup>54</sup>

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Debates and other proceedings of the Convention of Virginia(Richmond; Monday, June 2, 1788). Page 36. Here Henry shows the relationship between retained/reserved rights and limiting the constructive enlargement of power (by implication).

<sup>53</sup> Randy Barnett attempts to disparage North Carolina’s agreement with Virginia as an unthinking “copying of the Virginia amendments.” See Barnett, *The Ninth Amendment*, *supra* note \_\_ at 42. Barnett’s point is to minimize the degree of agreement with Virginia’s approach by making North Carolina’s proposals seem rote and ill-considered. Barnett bases his skepticism on a letter written by William Davie of North Carolina to James Madison in which Davie notes “[t]hat farrago of amendments borrowed from Virginia is by no means to be considered the sense of this country.” William Davie to James Madison, June 10, 1789, 5 Doc. Hist. Of Const. *supra* note \_\_ at 176. But Davies’ comment went to the bulk of Virginia’s numerous proposals which Madison ultimately rejected. Davie did not mean to disparage, however, those proposals by the North Carolina that sought to limit the construction of federal power—in particular the provisions that echoed Virginia’s 1<sup>st</sup> and 17<sup>th</sup>. As Davie *goes on* to write, he had “collected with some attention the objections of the honest and serious—they are but few and perhaps necessary. . . . Instead of a Bill of rights attempting to enumerate the rights of the individual or the State governments, they seem to prefer some general negative [“as will” struck out in original] confining Congress to the exercise of the powers particularly granted, with some express negative restriction in some important cases.” *Id.* at 177. Davies letter indicates that even those North Carolinians who counted themselves friends of the Constitution (Davies’ “honest and serious” men) nevertheless shared the Virginia convention’s concerns about “state rights” and the need to limit the powers of Congress.

<sup>54</sup> See Lash, *The Lost Original Meaning of the Ninth Amendment*, *supra* note \_\_ at 355-360. Barnett claims that in previous work I have “greatly overstat[ed] the commonality of New York and Virginia’s proposals. According to Barnett:

Virginia’s proposal speaks of the retention of “every power jurisdiction and right” in “*each State* in the Union.” [cite omitted] In contrast, New York’s speaks of “every power, Jurisdiction, and Right” remaining in “*the People* of the several states, *or* to their respective state governments, to whom they may have granted the same.” In this manner, New York’s proposal distinguishes between “the People” and “state governments” and reserves rights to the people, as opposed to Virginia’s which refers only to reserving right to the states.”

Barnett, *The Ninth Amendment*, *supra* note \_\_ at 44. Although Barnett here refers to proposals Madison would rely on in drafting the Tenth Amendment (not the Ninth), his point goes to the meaning of “the people” in the Ninth Amendment. I have claimed that all of these state proposals endorsed the addition of amendments that would protect the rights of the states. See Lash, *The Lost Original Meaning*, *supra* note \_\_ at 358. Barnett disagrees by pointing to New York’s proposals which seem to distinguish the rights of states from the rights of the people. Barnett believes that Madison made the same distinction when he referred to the retained rights of the people in the Ninth. But here Barnett falls into the trap of anachronism. Today “the people” sounds in terms of individual rights, not state rights. This was not true in 1787, and it was most certainly not true of the New York Convention. New York did not simply refer to “the people.” The Convention expressly declared all non-delegated power jurisdiction and rights were reserved to “the people *of the several states*.” This is the precise language that Barnett elsewhere recognizes as a declaration of state rights. See Barnett, *The Ninth Amendment*, *supra* note \_\_ at 79 (referring to the precise same language in the Confederate Constitution). As far as Virginia’s reference to the retained rights of the states is concerned, this statement is no different from New York’s reference to the

Madison culled through the various proposals submitted by the state conventions and “exclud[ed] every proposition of a doubtful & unimportant nature.” Although not all of Virginia’s (or any states’) proposals made the final cut, Madison considered the dual strategy of Virginia’s “First” and “Seventeenth” important enough to add to his list of suggested amendments. Madison’s proposals thus included two amendments: One declaring the principle of enumerated power, and a separate amendment prohibiting any implied enlargement of enumerated federal power.

Here is a side-by-side comparison of Madison’s Ninth and Tenth and Virginia’s First and Seventeenth:

**Madison’s “Tenth”**

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

**Virginia’s “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 Federal Government.”

**Madison’s “Ninth”**

The exceptions, here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed

**Virginia’s “Seventeenth”**

That those clauses which declare that Congress shall not exercise certain powers be not interpreted

[as to diminish the just importance ]  
[of other rights retained by the people, ]

or as to enlarge the powers delegated by the Constitution;

in any manner whatsoever to extend the powers of Congress.

but either as actual limitations of such powers, or as inserted merely for greater caution.

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.

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retained rights of the people of the states or to their respective state governments. All of the Founders agreed that powers and rights retained by the states were, in fact, powers and rights retained by the people in the several states who could delegate them to their respective state governments as they saw fit. This was a fundamental principle of popular sovereignty.

Randy Barnett’s attempt to characterize Madison’s Ninth as a *sui generis* provision unrelated to the concerns of the state conventions seems rebutted by a simple textual comparison of the Ninth with Virginia’s Seventeenth.<sup>55</sup> With the exception of the “rights retained by the people” language, his proposal has clear counterparts in Virginia’s 17<sup>th</sup> proposal. More, even Madison’s unique “retained rights” language cannot be divorced from the concerns of the Virginia Convention. We know that Madison wished to prevent an implied “assignment” of unenumerated rights into the hands of the federal government. His language regarding retained rights prevents such an “assignment” and thus fits with Virginia’s express concerns about the implied extension of federal power. In other words, even if we exclude the major part of Madison’s proposal and focus only on the retained rights language, this *still* reflects the concerns of Virginia and other state conventions. By including the “enlarged powers” language, the link to the state convention proposals is obvious.

### III. The Final Language of the Ninth Amendment

#### 1. *The Altered Language*

On July 21, 1789, the House of Representatives referred Madison’s proposed Bill of Rights to a Select Committee made up of one member from each state.<sup>56</sup> The Ninth emerged from this committee in what would be its final form:

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

There are no records of the committee’s discussions or reasoning, so we cannot know what went into the decision to delete Madison’s original language regarding the implied enlargement of federal power. Although some scholars claim that the powers language was moved to the Tenth Amendment, this clearly is not the case. The committee left Madison’s proposed Tenth Amendment unchanged.<sup>57</sup> In addition, we know that the Tenth addresses the issue of *unenumerated* power. The powers referred to in Madison’s initial draft of the Ninth involved implied enlargement of those powers that *were* enumerated. This language was not moved to the Tenth, it simply disappeared.

Thus, we are left with a clause that, to modern eyes, seems almost inescapably libertarian. Unlike the Tenth Amendment, there is no mention of the states, only

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<sup>55</sup> Historians have long been aware of the relationship between Virginia’s 17<sup>th</sup> proposal and the Ninth Amendment. See Leslie W. Dunbar, James Madison and the Ninth Amendment, 42 Va. L. Rev. 627, 631 (1956); See Schwartz, The Documentary History of the Bill of Rights; Akhil Reed Amar, The Bill of Rights, *supra* note \_\_ at 121 (discussing both Virginia’s and New York’s statements as precursors to the Ninth Amendment).

<sup>56</sup> James Madison (Virginia), John M. Vining (Delaware), Abraham Baldwin (Georgia), Roger Sherman (Connecticut), Aedanus Burke (South Carolina), Nicholas Gilman (New Hampshire), George Clymer (Pennsylvania), Egbert Benson (New York), Benjamin Goodhue (Massachusetts), Elias Boudinot (New Jersey), and George Gale (Maryland).

<sup>57</sup> Ultimately, the words “or to the people” would be added to the Tenth Amendment.

“the people.” Also unlike the Tenth, there is no mention of governmental powers, only “retained rights.” It is no wonder that Randy Barnett feels comfortable declaring the Ninth Amendment “Means What it Says,” knowing that most contemporary readers will assume that the retained rights of the people must be individual rights. Our endeavor, however, is to recover the public meaning of the clause circa 1787. As we shall see, “retained rights” in *that* period was a far richer concept than what we might expect today. Similarly, where today we read terms like “the people” as referring to a single national people, at the time of the Founding the idea of the people was a complicated subject indeed.

## 2. *The People’s Retained Rights*

“In establishing that [federal] Government the people retained other governments capable of exercising such necessary and useful powers as were not to be exercised by the General Government.”

James Madison<sup>58</sup>

[T]here 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 citizen.

Samuel Adams<sup>59</sup>

All power, jurisdiction, and rights of sovereignty, not granted by the people by that instrument, or relinquished, are still retained by them in their several states, and in their respective state legislatures, according to their forms of government.

Supreme Court Justice Samuel Chase

The Ninth Amendment speaks of “other rights” retained by the People. Libertarians like Randy Barnett give a narrow construction to this term and read it as referring to *individual* rights and nothing more. Although Barnett at times suggests these other rights *might* include majoritarian or collective rights,<sup>60</sup> his overall theory makes such a reading impossible. Barnett claims the Ninth and Fourteenth Amendments protect the *same* set of rights, and one can no more apply a majoritarian right of local government against the states under the

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<sup>58</sup> *Id.*

<sup>59</sup> Letter from Samuel Adams to Richard Henry Lee (Aug. 24, 1789), in *Creating the Bill of Rights*, *supra* note \_\_ at 286.

<sup>60</sup> See Barnett, *The Ninth Amendment: It Means What it Says*, *supra* note \_\_ at 16 (“It is possible that the “other” rights retained by the people were both individual and collective, in which case the collective rights model identifies a potential application of the Ninth Amendment beyond the protection of individual liberties.”).

Fourteenth Amendment than one can incorporate the Tenth Amendment. The federalist reading of the Ninth, however, gives the term “rights” full value: *All* rights not delegated away are retained by the People, regardless of the nature of those rights.

The issue then is determining whether “retained rights” was understood narrowly to include only individual natural rights, or broadly to include all manner of non-delegated rights. One of the ways to determine the likely public meaning of a term in the Constitution is to consider how it was used generally at the time of ratification. Randy Barnett, for example, has conducted an exhaustive investigation of uses of the term “to regulate” and the single word “*commerce*” in order to identify the public meaning of the broader phrase “Congress shall have power to regulate commerce among the several states.”<sup>61</sup> Similarly, Barnett has investigated uses of the term “bear arms” and the single word “keep” in order to discern the likely public meaning of the broader (and complicated) phrase “A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.”<sup>62</sup> For the Ninth Amendment, a similar approach would consider common usage of the word “rights” or terms like “retained rights” and “the people” to try and identify how the ratifiers would have understood the full language of the amendment.

In the case of the Ninth Amendment, however, Barnett declines to engage in his usual search for common usage of constitutional terms, and instead asserts without explanation that the broader phrase “other rights retained by the people” cannot be established by a systematic study of general usage.”<sup>63</sup> It may be that Barnett has not located examples of the exact phrase “other rights retained by the people.” That, of course, would be no surprise. There also was no common usage of the exact phrases “regulate commerce among the several states” or “the right of the people to keep and bear arms.” As Barnett’s own work shows, however, this does not preclude investigation of particular terms embedded within the broader text. As Barnett’s own work has shown, an investigation of the common usage of terms like “retained rights” and “the people” provides important insights into the likely original public meaning of the Ninth.

#### *The People’s Retained Rights and Popular Sovereignty*

Prior to the adoption of the federal Constitution, the term “the people” referred to the collective sovereign entity of the citizens of a given state. As chronicled by Gordon Wood, the revolutionary experience created a common belief that the ultimate source of sovereign power was found in the people themselves, not in

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<sup>61</sup> See Randy Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101 (2001); Randy Barnett, *New Evidence of the Original Meaning of the Commerce Clause* 55 Ark. L. Rev. 847 (2003).

<sup>62</sup> See Randy Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in the Militia?*, 83 Tex. L. Rev. 237 (2004).

<sup>63</sup> Barnett, *The Ninth Amendment*, *supra* note \_\_ at 7. See also *id.* at 23 (“This is why, when direct evidence of particular usage is unavailable (unlike, for example, with the Commerce Clause), the formation of clear models is essential as a first step to adjudicating a dispute over original meaning.”).

their government.<sup>64</sup> In England, the government was (and is<sup>65</sup>) viewed as the highest representation of the English people. In the United States, however, the most recent historical representation of the people had been the colonial assemblies who continued to meet even when outlawed by the English government. These assemblies or *conventions* of the people, came to be viewed as the highest expression of sovereignty.<sup>66</sup> They, and not the government, represented the people themselves. The people meeting in convention apart from the ordinary institutions of government had the sovereign right to establish the state's fundamental law. In this way, the concept of popular sovereignty--the very idea of the People--first emerged in reference to the people of a given *state*.<sup>67</sup>

As far as rights are concerned, scholars have long recognized the Founders' widespread belief in retained individual natural rights.<sup>68</sup> However, at the time of the Founding, there were a variety of rights deemed held by the people in both their individual and collective capacity. Natural rights, most often associated with the work of John Locke,<sup>69</sup> were divided between those given up in return for the benefits of a stable government and those unalienable natural rights which could not legitimately be delegated away.<sup>70</sup> Political or civil rights involved those positive rights arising not from nature itself, but from the nature of government.<sup>71</sup> In addition to individual rights were collective rights, those held by the people as a collective entity. The most famous of these is announced in the Declaration of Independence which declared the people's unalienable right to alter or abolish their form of government.<sup>72</sup> In the period immediately following the Revolution, all these rights ran against one's own state government.

The need to form a league with other states, however, called into play a new kind of retained right. Under the Articles of Confederation, although the Continental Congress had certain express powers, all powers and rights not delegated were

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<sup>64</sup> See generally, Wood, *The Creation of the American Republic*, *supra* note \_\_. See also, Sean Wilentz, *The Rise of American Democracy* 32 (2005).

<sup>65</sup> See Ackerman, *We the People: Foundations*, *supra* note \_\_ at 7-10.

<sup>66</sup> Wood, *supra* note \_\_ at 319-43.

<sup>67</sup> See Amar, *Of Sovereignty and Federalism*, *supra* note \_\_ at 1446.

<sup>68</sup> See *The Federalist* No. 2 at 37 (Jay) (Clinton Rossiter ed. 1961) (whenever government "is instituted, the people must cede to it some of their natural rights, in order to vest it with requisite powers"); see also *id.* No. 43, at 279 (J. Madison) ("the transcendent law of nature and of nature's God . . . declares that the safety and happiness of society are the objects at which all political institution's aim"). See also Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 *Chi-Kent L. Rev.* 131, 155 (1988) ("[E]ven moral skeptics . . . do not deny that the founding generation, as a general matter, accepted the idea of natural rights.").

<sup>69</sup> See John Locke, *Second Treatise of Government* §23, at 128 (W. Carpenter ed. 1986)(1<sup>st</sup> ed. 1690).

<sup>70</sup> See *The Federalist* No. 2, *supra* note \_\_ at 37 (Jay) (whenever government "is instituted, the people must cede to it some of their natural rights, in order to vest it with requisite powers").

<sup>71</sup> See 1 *The Debates and Proceedings in the Congress of the United States* 454 (Joseph Gales & William Seaton eds., 1834) (statement of Rep. Madison).

<sup>72</sup> See *The Declaration Of Independence* (U.S. 1776) ("whenever any Form of Government becomes destructive of [unalienable rights], it is the Right of the People to alter or to abolish it").

retained by the individual states. As declared by Article II, “[e]ach state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.” This declaration of “states’ rights” did not signal the abandonment of popular sovereignty and the embrace of some kind of reified deity called a “state.” The men who drafted the articles embraced the emerging theory of popular sovereignty.<sup>73</sup> Instead, the reference to the retained rights of the states was a shorthand reference to the retained right of the people in their respective states to local self-government.<sup>74</sup> This is a majoritarian right in that it preserves the right of local majorities to make decisions regarding local municipal law.<sup>75</sup>

When the Constitution was first proposed, the immediate issue was whether it would erase the sovereign independence of the people in the several states and consolidate United States citizens into a single undifferentiated mass. However great the benefits of a national government, the proposed constitution would never be ratified if it appeared the cost would be such a consolidation.<sup>76</sup> Accordingly, advocates of the proposed constitution assured the state conventions that states would retain a substantial degree of their sovereign independence. As Alexander Hamilton wrote in Federalist No. 32:

“The state governments would clearly retain all the rights of sovereignty which they before had, and which were not by that act exclusively delegated to the United States.”<sup>77</sup>

In 1787, writing in the Cumberland Gazette, *Centinel* supported the proposed Constitution because “we retain all our rights which we have not expressly relinquished to the Union. That section declares that all legislative powers herein given . . . shall be vested in Congress, etc. The legislative powers which are not given therein are sure not in Congress; and if not in Congress, are retained by the

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<sup>73</sup> See Gordon Wood, *The Creation of the American Republic*. The pre-constitutional commitment to popular sovereignty in the states can be seen in the decision to call state constitutional conventions of the people to reenact state Constitutions adopted by the state legislature. State governments were not “the people themselves” and had no authority to establish the fundamental law of the state. See *id.* at 328-343. Even the Tenth Amendment’s reference to the reserved power of the “states” could be viewed as a reference to the people in the several states. See Madison’s Report on Virginia Resolutions, *in Writings*, *supra* note \_\_ at 610 (The term states in the Tenth Amendment (and in the Virginia Resolutions) “means the people composing those political societies, in their highest sovereign capacity.”).

<sup>74</sup> As Madison explained in his Report on the Alien and Sedition Acts, references to the rights of states can be understood as references to the sovereign people of a given state. See James Madison, Report on the Alien and Sedition Acts, *in Writings*, *supra* note \_\_ at 610.

<sup>75</sup> See, e.g. St. George Tucker, 1 Blackstone’s Commentaries, Appendix, Note D: View of the Constitution of the United States 151 (discussing state municipal law as among the powers reserved to the states under the Ninth and Tenth Amendments).

<sup>76</sup> See Gordon Wood, *The Creation of the American Republic*, *supra* note \_\_ at 524-32 (discussing the Federalist assurances that the proposed Constitution would not result in the consolidation of the states into a single national mass).

<sup>77</sup> Federalist No. 32 (Hamilton), *in The Federalist Papers* (Clinton Rossiter, ed.) at 198.

several States, and secured by their several constitutions.”<sup>78</sup> Centinel saw no difference between “[our] retained rights” and the retained powers of the states.

In the Virginia Ratifying Convention, Patrick Henry referred to the “retained rights of the people” and the “retained rights of the states” as if they were the same thing.

If you intend to reserve your unalienable rights, you must have the most express stipulation. For if implication be allowed, you are ousted of those rights. If the people do not think necessary to reserve them, they will be supposed to be given up. How were the congressional rights defined when the people of America united by a confederacy to defend their liberties and rights against the tyrannical attempts of Great Britain? The states were not then contended with implied reservation. No, Mr. Chairman. It was expressly declared in our Confederation that every right was retained by the states respectively, which was not given up to the Government of the United States.<sup>79</sup>

In this one fascinating passage, Patrick Henry speaks of how the retained rights of the *people* of America were protected by the Articles’ express declaration that the respective *states* retained all non-delegated rights. Virginia proposed a similar reservation of rights be added to the federal Constitution, as did other states. Notice how Henry merges the language of individual rights with that of state autonomy. Retained rights, whatever their specific nature, were collective in regard to the federal government in that they were left to the control of the collective people in the states. For example, the North Carolina Convention declared that “the people have a right to freedom of speech”—an individual right— but then went on to declare that “each state in the union shall, respectively, retain every power, jurisdiction and right” which is not delegated to the federal government—a collective right.<sup>80</sup> Federalist advocates of the proposed Constitution stressed the same idea—the *people* retained collective rights on a state by state basis. According to James Madison in the Federalist Papers:

“The truth is, that this ultimate redress [political removal at the polls] may be more confided in against unconstitutional acts of the federal, than of the state legislatures, for the plain reason, that as every act of the former, will be an invasion of the rights of the latter, these will ever be ready to mark the innovation, to sound the alarm to the people, and to exert their local influence in affecting a change of federal representatives.”<sup>81</sup>

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<sup>78</sup> Letter from Centinel (Dec.13, 1787) in The Cumberland Gazette p. 1 (Portland, Maine Territory).

<sup>79</sup> Patrick Henry, Debates and other proceedings of the Convention of Virginia p. 34 (Richmond, Monday, June 2 1788).

<sup>80</sup> Amendments Proposed by the North Carolina Convention (Aug. 1, 1788), in The Complete Bill of Rights, *supra* note \_\_, at 674–75.

<sup>81</sup> Federalist Papers #44, *supra* note \_\_\_\_ at 286.

The same language of the retained rights of the collective people occurred outside the debates over the federal Constitution. In 1791, the same year as the adoption of the Bill of Rights, the Pennsylvania legislature passed resolutions expressing the “sense” of the assembly that the states need not wait for federal consent to call out the state militia when faced with imminent danger (in this case, Indian attacks), because states ““retain the right of taking up arms in their own defense.”<sup>82</sup> Similarly, James Madison’s former colleague in the House of Representatives (and future governor of Georgia), James Jackson wrote a series of essays in 1795 under the name Sicilius criticizing Yazoo land fraud scandal.<sup>83</sup> In his third essay, Jackson considered whether the Georgia legislature had authority to sell off the western lands. In doing so, he discussed the proper method of determining whether the people have delegated power to their governments:

It is a part of some constitutions, and understood in them all, that all power, not expressly given, is retained by the people. On this ground it was that Judge Wilson, of the supreme court, whatever opinion his interest may dictate to him now, strenuously argued in the convention of Pennsylvania, against the insertion of a bill of rights, giving the best of reasons for its being left out, that it was impossible to enumerate all the rights of the people, and that by the expression of some the others might be supposed to be delegated. The same arguments prevailed in the House of Representatives of the United States, on the proposed amendments to the United States constitution, where Mssrs Madison, Burke, and others, wished to express some of the retained rights, and surely the people of Georgia possess those retained rights, in as great a degree, as those of other states. We have seen that alienating or mortgaging public lands, requires, in all governments, an express fundamental law.<sup>84</sup>

This is yet another example of how the rights “retained by the people” could be viewed as rights “retained by the states.” Jackson believed that among the unenumerated retained rights of the people of Georgia was the collective majoritarian right to “alienate or mortgage” public land. Notice that his argument about retained rights focuses on the very issue that led to the adoption

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<sup>82</sup> Mail, published as *The Mail*; or, Claypoole's Daily Advertiser (Jan. 16, 1791) (Issue: 197; Page: [3]; Philadelphia, Pennsylvania) .

<sup>83</sup> See George Lamplugh, “Oh the Colossus! The Colossus!”: James Jackson and the Jefferson Republican Party in Georgia, 1796-1806, 9 *Journal of the Early Republic* 315 (1989). Jackson was a member of the First Congress when Madison gave his speech against the Bank of the United States. Jackson lost re-election in 1791 but was appointed to the Senate in 1792. See generally *id.* As Lamplugh writes, “[i]n a private letter to James Madison, Jackson linked the Yazoo speculation to funding and assumption, the Bank of the United States, and John Jay’s Treaty with Britain as evil fruits of Hamilton’s loose construction of the Constitution.” See *id.* at 319 (citing Jackson to James Madison, Nov. 17, 1795). Lamplugh refers to Jackson’s Letters of Sicilius as the “bible of anti-Yazooists.”

<sup>84</sup> See “The Letters of Sicilius, To the Citizens of the state of Georgia, on the Constitutionality, the Policy, and the Legality of the Late Sale of Western Lands, in the state of Georgia (August 1795) (page 24).

of the Ninth Amendment. He does not mention the Ninth by name, but it is clear that Jackson considers unenumerated retained rights to include federalist majoritarian rights.<sup>85</sup>

By stressing the common usage of “retained rights” as referring to the collective rights of the people in the several states, I do not mean to imply that retained rights did not also include retained individual rights. The evidence strongly suggests that it did. As just one example, James Madison expressly referred to an individual’s freedom of speech as one of the retained natural rights of the people.<sup>86</sup> There are many others.

Once again, however, the adoption of the Constitution complicated the idea of “retained individual rights.” Under a state constitution, retaining a right meant restricting state power. Under the federal constitution, however, retaining a right from the federal government, *by definition* meant leaving the matter to state control (assuming the constitution did not also expressly bind the states in the same matter). For example, although the First Amendment prohibits any law

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<sup>85</sup> Writing in response to Jackson’s Sicilius essays, the author of a “Letter of a Farmer” concedes that Georgia’s right to alienate its land is one of the rights the state has retained from the national legislature. This, however, leaves the Georgia legislature free to sell the land.

“Suppose then we admit to give full weight and credit to those theorists, who declaim against the proceedings of the last legislature, as unconstitutional; that the power of alienating any part of the domain of the state, is one of the retained rights of the people; that it is a power not delegated, either expressly or by implication ; and that the attempt of the national legislature to exercise it is usurpation?” . . . I take it, the power of each succeeding legislature is equal, where the fundamental laws have undergone no change, and the last much reprobated majority stood as high in their constitutional trust, as the majority of any former, or after assemblage of the national representatives , under the same modification of government.; if this is true, and I scarcely think it can be denied, either the power of alienating such part of the domain, as to the legislature shall appear beneficial is delegated . . .”

The Letters of a Farmer to the People of Georgia: or, The constitutionality, policy, and legality of the late sales of western lands examined. (1796) (pages 7-8). Farmer’s response illustrates how opposite sides of a contemporary political debate had the same view of retained rights. Such rights belong to the people of each state. The issue dividing Sicilius and Farmer was whether the people of the state had delegated the same to their state legislature. In a similar vein, see “The letters of Fabius on the Federal Constitution in 1788 and in 1797 on the present situation of public affairs” (1797):

“The proposition was expressly made upon this principle, that the territory of such extent as that of United America, could not be safely and advantageously governed, but by combination of Republics, each retaining all the rights of supreme sovereignty, excepting such as ought to be contributed to the Union.”

Id at 66.

<sup>86</sup> See Madison’s Notes for Amendments Speech, *in* 1 Rights Retained by the People, *supra* note \_\_ at 64.

respecting an establishment of religion, states remained free to establish religion as they pleased in the decades following the adoption of the Bill of Rights (and they did<sup>87</sup>). Likewise, even if the federal government had no power to regulate seditious libel, according to Madison the states *did* have such power. Thus, although Madison claimed that the Alien and Sedition Acts asserted powers forbidden to the government under the First Amendment, and therefore violated the Tenth Amendment's declaration that all non-delegated, non-prohibited power is reserved to the states under the Tenth Amendment. In other words, even if one viewed the "people" of the Ninth Amendment to refer to the undifferentiated people of the United States, this people retained the right to divide powers and rights between national and local control. As Madison put it in the quote presented at the top of this section:

"In establishing that [federal] Government the people retained other governments capable of exercising such necessary and useful powers as were not to be exercised by the General Government."<sup>88</sup>

Randy Barnett claims that "because the enumerated rights were individual in nature, one may reasonably conclude that so too would be the unenumerated rights retained by the people."<sup>89</sup> To the extent that Barnett is trying to claim that unenumerated rights did not include collective rights, this is simply incorrect and easily disproved<sup>90</sup> (Barnett himself seems to back away from this absolute claim in other parts of his article<sup>91</sup>). But even those aspects of the people's retained rights which *were* individual in nature nevertheless had a dual-aspect under the Ninth Amendment: They might be personal rights retained from federal control, but this meant that they were left to local majoritarian (collective) control. This is how Samuel Adams put it in a letter to Richard Henry Lee in 1789:

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 citizen.<sup>92</sup>

Adams here expresses a fundamental principle of federalism in the early republic: Individual liberty is best protected by preserving local control over "private and personal rights."

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<sup>87</sup> Massachusetts, for example, did not abandon its official religious establishment until 1833. See Leonard Levy, *The Establishment Clause* 41-42 (2d ed. rev. 1994).

<sup>88</sup> James Madison to Spencer Roane (1821), in *Writings*, *supra* note \_\_ at 736-37.

<sup>89</sup> Barnett, *supra* note \_\_ at 26.

<sup>90</sup> See discussion of Madison's Bank Speech, *supra* note \_\_ and accompanying text; discussion of St. George Tucker, *supra* note \_\_ and accompanying text; sources cited notes \_\_ through \_\_ and accompanying text.

<sup>91</sup> See Barnett, *The Ninth Amendment*, *supra* note \_\_ at 16 (noting that the retained rights of the people may include majoritarian collective rights).

<sup>92</sup> Letter from Samuel Adams to Richard Henry Lee (Aug. 24, 1789), in *Creating the Bill of Rights*, *supra* note \_\_ at 286.

Both before and after 1791, it was commonplace to speak of the “retained rights of the states” and it was just as common to view the “retained rights of the people” as the equivalent of the retained rights of the people in their respective state. This was true both of defenders and detractors of the federal Constitution, and the references occur both within and outside the debates over adopting the federal Constitution. It was no accident, in other words, that the Bill of Rights bound only the federal government. Although the first eight amendments did in fact protect personal rights, the intent and effect of those protections was to leave control over such matters in the majoritarian hands of the people in the states.

In 1791, of course, the concept of the “people” was neither uniformly understood nor uncontroversial. After all, the very notion of popular sovereignty was relatively new, and the adoption of a federal constitution created the conundrum of divided or dual sovereignty. Worse, the Constitution’s opening declaration of “We the People” remained critically ambiguous in regard to whether this referred to “We the (single national) people of the *United States*, or We the (many) People of the *United States*.”<sup>93</sup> It was precisely because the term was capable of these different meanings that the Federalists were compelled to assure the state conventions that the term did not imply a consolidation of the states and the people therein into a single mass.<sup>94</sup>

In later decades, nationalists such as Chief Justice John Marshall and his admiring associate on the Supreme Court, Joseph Story, claimed that “the People” were indeed a single united mass of citizens who only happened to live in several states.<sup>95</sup> Both jurists rejected the compact theory of the Constitution

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<sup>93</sup> See, e.g., Debate in the Mass. House of Representatives on the Suability of the State (Oct. 17, 1793) (Dr. Jarvis), in *The Independent Chronicle and Universal Advertiser* p. 1 (“It is true sir, that the words of the preamble, recognize the power and authority of the people, but they also confirm the existence and independence of the states –for it is not the people generally, but the people of the United States, which are described in that very preamble, as the author of the Constitution”). See also generally, Amar, *Of Sovereignty and Federalism*, *supra* note \_\_ at 1450.

<sup>94</sup> Although some Anti-Federalists complained that the Tenth Amendment’s reference to “the people” might be read as consolidating the nation into a single unitary mass, Federalists denied the claim and moderates had no difficulty in reading the clause as reserving non-delegated power to the people of the individual states. Compare Letter from Richard Henry Lee to Patrick Henry (Sept. 14<sup>th</sup>, 1789), in *Creating the Bill of Rights*, *supra* note \_\_ at 295, 296 (complaining about the language of the Tenth Amendment), with Letter from Edmund Randolph to George Washington (Dec. 6, 1789), in *5 Documentary History*, *supra* note \_\_, at 223 (“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.”).

<sup>95</sup> See *McCulloch v. Maryland*, 17 U.S. 316, 404-05 (“The government of the Union, then (whatever may be the influence of this fact on the case), is, emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.); *Martin v. Hunter’s Lessee*, 14 U.S. 304 (1816) (“The constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by ‘the people of the United

embraced by theorists like St. George Tucker,<sup>96</sup> and presented their own broad view of federal power. Cases like *McCulloch v. Maryland*,<sup>97</sup> *Cohens v. Virginia*,<sup>98</sup> and *Gibbons v. Ogden*<sup>99</sup> articulated a nationalist vision of the Constitution that enraged compact theorists who continued to read “the People” as a reference to the many People in the several states.<sup>100</sup> Not surprisingly, when the Confederate states seceded from the Union, they adopted language that removed the ambiguity of the original Constitution.<sup>101</sup>

But these debates remained for the future. The immediate issue is whether it was possible that, in 1791, the ratifiers understood the Ninth Amendment as retaining unenumerated rights to the collective control of the people in the several states. In light of the common usage of terms like “retained rights” and “the people,” the answer is clearly yes, it is quite possible. Resolving whether they *did* requires a continued investigation of the historical evidence.

### 3. *The Virginia Response to the Final Draft*

The decision to remove Madison’s language addressing the implied enlargement of federal power may have streamlined the Ninth, but it resulted in a text unlike any suggested by the state ratifying conventions. In theory, the clause limited federal power but did so only by implication, not express declaration. Nevertheless, the language satisfied most of the state legislative assemblies who quickly ratified the Ninth along with most of the other proposed amendments. In

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States.”); Joseph Story, 1 Commentaries on the Constitution at 400 (1833) (citing the nationalist depictions of the people in *Martin* and *McCulloch*).

<sup>96</sup> For a discussion of Tucker’s federalist vision of the Constitution, and Story’s rejection of the same, see Kurt T. Lash, “Tucker’s Rule”: St. George Tucker and the Limited Construction of Federal Power 47 *William & Mary L. Rev.* 1343 (2006).

<sup>97</sup> 17 U.S. 316 (1819).

<sup>98</sup> 19 U.S. 264 (1821).

<sup>99</sup> 22 U.S. 1 (1824).

<sup>100</sup> See, for example, Spencer Roane’s “Hampden” essays objecting to Marshall’s opinion in *McCulloch v. Maryland* in John Marshall’s *Defense of McCulloch v. Maryland* 106 (Gerald Gunther, ed. 1969).

<sup>101</sup> See Constitution of the Confederate States of America art. VI, §§ 5-6 (March 11, 1861)(“The enumeration, in the constitution, of certain rights shall not be construed to deny or disparage others retained by the people of the several states. 6. The powers not delegated to the Confederate States by the Constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people thereof.”). Barnett concedes that it is logically possible that the additional words in the Confederate Constitution reflect an intent to restore the original meaning of the Clauses. See Barnett, *The Ninth Amendment*, *supra* note \_\_ at 80. n. 339. He claims, however, that there is no evidence this is the case and that if my assertion about the original and continued understanding of the Ninth were correct, there would have been no reason to add the additional words. See *id.* As my article on the Lost Jurisprudence of the Ninth Amendment makes clear, however, the Marshall Court ignored the Ninth and insisted that the “people” of the Tenth were the undifferentiated people of the United States. Every court and commentator who discussed or applied the Ninth during this period rejected this “consolidationist” reading. By focusing only on the founding and dismissing the relevance of evidence in the antebellum period, Barnett misses this debate and thus misses the reason why the Confederate states would feel the need to clarify what they believed was the correct original meaning of the Ninth and Tenth Amendments.

Virginia, however, the changed language of the Ninth caused such concern that it delayed that state's ratification of the Bill of Rights for two years.

Although anti-federalist sentiment ran high in Virginia, a majority of the state convention had ratified the Constitution on the understanding that amendments limiting the scope of federal power would be forthcoming. Adding a Bill of Rights not only would deliver on a promise Madison made to the State convention, it also would rob the anti-federalists of their *cause celebre*' and deflate the calls for a second constitutional convention.<sup>102</sup> Thus, it was a matter of immediate concern to Madison when he heard that efforts to ratify the Bill of Rights in Virginia had been brought to a halt by a "friend of the Constitution," Edmund Randolph, due to his concerns about Ninth and Tenth Amendments.

a. *The Concerns of Edmund Randolph*

As a member of the Philadelphia Convention, Edmund Randolph had refused to sign the proposed Constitution. He did not oppose the idea of a national government, but believed that provisions like the Necessary and Proper Clause opened the door to unconstrained federal power. According to Randolph

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>103</sup>

Despite his doubts, Randolph nevertheless supported the Constitution trusting that federal power could be constrained through the adoption of appropriate amendments. As Madison wrote to Jefferson in December of 1787, men like Edmund Randolph "do not object to the substance of the Governmt. but contend for a few additional guards in favor of the rights of the states and of the people."<sup>104</sup> It soon would be clear that Randolph's concerns involved the "people" of the several states.

Madison helped to secure Virginia's ratification by assuring doubters like Edmund Randolph that he would support a Bill of Rights.<sup>105</sup> Both Madison and Randolph had helped draft the Virginia convention's proposed amendments, including the Seventeenth proposal that Madison substantially copied in his original draft of the Ninth Amendment. Madison's proposed amendments were published in local newspapers, and he sent a copy directly to Edmund Randolph.<sup>106</sup> No one in Virginia, including Randolph, voiced any complaint

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<sup>102</sup> See, Kurt T. Lash, *Rejecting Conventional Wisdom: Federalist Ambivalence in the Framing and Implementation of Article V*, 38 *Am. J. Legal Hist.* 197 (1994)

<sup>103</sup> Edmund Randolph, *Speech in Virginia Convention*, in 3 *Elliot's Debates*, *supra* note \_\_, at 470.

<sup>104</sup> James Madison to Thomas Jefferson, (Dec. 9, 1787), in 10 *Madison Papers*, *supra* note \_\_ at 312.

<sup>105</sup> Paul Finkleman, *James Madison and the Bill of Rights: A Reluctant Paternity*, *supra* note \_\_ at 325. See also James Madison to Edmund Randolph (April 10, 1788).

<sup>106</sup> See *N.Y. Daily Advertiser* (June 12); *Gazette of the United States* (June 13); Madison to Edmund Randolph (June 15, 1789), in 12 *Madison Papers* at 219.

about Madison's original draft of proposed amendments. Indeed, upon receiving Madison's proposals, Randolph wrote "The amendments proposed by you, are much approved by the *strong* foederalists here and at the metropolis."<sup>107</sup>

Towards the end of the summer of 1789, Congress submitted to the states the final form of twelve proposed amendments. The altered language of the final draft of the Ninth (eleventh on a list of twelve proposed amendments) now caused Randolph grave concern. As reported by a member of the Virginia House, Hardin Burnley:

On the two last [the Ninth and Tenth Amendments] a debate of some length took place, which ended in rejection. Mr. E. Randolph who advocated all the other[] [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 1<sup>st</sup> & 17<sup>th</sup> 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 reducable to no definitive certainty.<sup>108</sup>

According to Burnley, Randolph understood the Ninth was meant to be a "reservation against constructive power" (as opposed to a guardian of natural rights). As such, it would have been more consistent with the "spirit" of Virginia's 1<sup>st</sup> and 17<sup>th</sup> proposed amendments to use language expressly addressing the issue of extended federal power. In his letters to George Washington, Edmund Randolph elaborated on his objections. Although he did not think that the Tenth Amendment was particularly troublesome, Randolph nevertheless viewed the Tenth by itself to be an inadequate limitation on federal power:

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

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<sup>107</sup> Edmund Randolph to Madison (June 30, 1789), in 12 Madison Papers at 273 (emphasis in original). Randolph wrote to Madison again on July 19, 1789 and, again, said nothing about the Bill in general or the Ninth in particular. See Randolph to Madison (July 19<sup>th</sup>, 1789), in 12 Madison Papers at 298-300.

<sup>108</sup> See Hardin Burnley to James Madison (Nov. 28, 1789), in 5 Documentary History of the Constitution of the United States of America, 1786-1870 (F.B. Rothman 1998) (1901) at 219.

adopted, it may produce new matter for the cavils of the designing.<sup>109</sup>

Randolph's more serious concerns involved the *Ninth*. The final draft of that provision, Randolph complained to 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>110</sup> Instead of this merely "plausible alteration," Randolph preferred "a provision against extending the powers of Congress." Such an expressly limitation on the implied enlargement of federal power would be "more safe, & more consistent with the spirit of [Virginia's] 1<sup>st</sup> and 17<sup>th</sup> amendments."<sup>111</sup>

Randolph was deeply concerned about the federal government stretching its powers to the injury of the states. This is why he originally refused to sign the proposed Constitution. The 1<sup>st</sup> and 17<sup>th</sup> proposals of the Virginia convention sought to avoid such injury and did so by directly addressing the issue of federal power. Although Madison's original draft of the Ninth expressly addressed this concern, the final draft did not. To Edmund Randolph, this was a problem precisely because it might *plausibly* be read as limiting federal power. This *plausibility* might induce states to ratify the Ninth even though it was not at all clear that the amendment would effectively preserve state autonomy. Thus, this version of the Ninth would act as an "opiate" and dampen the calls for a more effective guardian of state rights. Accordingly, Randolph advised rejecting both the proposed the Ninth and Tenth in order to maintain pressure on Congress to produce a more "federalist" amendment. As he wrote to Washington:

I confess I see no propriety in adopting [the 9<sup>th</sup> and 10<sup>th</sup>]. But I trust that the refusal to ratify will open the road to such an expression of foederalism, as will efface the violence of the last year, and the intemperance of the enclosed letter, printed by the enemies to the constitution."<sup>112</sup>

In sum, Randolph believed the Ninth was meant to prevent the implied enlargement of federal power to the injury of the states. This was the purpose of Virginia's 1<sup>st</sup> and 17<sup>th</sup> proposed amendments and this had been expressly stated in Madison's original drafts of the Ninth and Tenth Amendments. The final draft of the Tenth was fine, but inadequate—an additional rule limiting the construction of enumerated federal power was required. The final draft of the Ninth *plausibly* accomplished this goal, but it would have been better to use the clearer language of Virginia's original proposals. So concerned was Randolph

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109. Letter from Edmund Randolph to George Washington (Dec. 6, 1789), in 5 Documentary History, *supra* note \_\_, at 223. Notice that Randolph has no objection to the addition of the words "or to the people" in the final draft of the Tenth Amendment. It was only the hyper (and strategically) sensitive anti-federalists who saw this addition as posing any danger to the states.

110. Letter from Edmund Randolph to George Washington (Dec. 6, 1789), in 5 Documentary History, *supra* note, at 223.

111. See *supra* text accompanying note.

<sup>112</sup> Edmund Randolph to George Washington (Nov. 26, 1789) 5 Documentary History, *supra* note \_\_ at 216.

about the final draft, he was willing to temporarily hold up ratification of the Bill in the hopes of obtaining a clearer, more “foederal” draft of the Ninth Amendment.

*b. The Letters of Hardin Burnley and James Madison*

When Madison heard about Randolph’s actions in the Virginia House, he was mystified. Although the final language of the Ninth had been altered, it continued to advance the principles as Virginia’s Seventeenth. As Madison immediately reported to George Washington,

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>113</sup>

Randolph thought the Ninth was insufficiently “federalist” because it used the language of *rights* instead of the language of limited *power* (as had Virginia’s 17<sup>th</sup>). Madison, however, believed that Randolph’s distinction between rights and powers was “fanciful.” If the goal is to establish a line between delegated power and retained rights, then limiting power or retaining rights amount to the same thing. Accordingly, Randolph was wrong to complain about the altered language of the Ninth—the final draft remained just as “federalist” as the original.

Randy Barnett believes that Madison’s letter to Washington exhibits “Madison’s typically complex phraseology,”<sup>114</sup> and actually refers to two different means of accomplishing the single end of preserving individual natural rights. Madison’s letter, however, is neither complex nor has it anything to do with preserving individual natural rights. Barnett misses this point by failing to consider the subject of Madison’s letter—the concerns of Edmund Randolph. Those concerns were about state rights and *not* retained individual natural rights. Madison believed Randolph’s concerns were “fanciful” because he read the final language of the Ninth as meeting Randolph’s federalism-based concerns. Hardin Burnley agreed with Madison about the Ninth’s protection of state rights and said so in a letter (which Madison passed on to Washington) that makes this point as clear as is humanly possible:

But others among whom I am one see not the force of [Randolph’s] distinction, for by preventing an extension of

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113. Letter from James Madison to George Washington (Dec. 5, 1789), *in* 5 Documental History, *supra* note \_\_, at 221–22. Randy Barnett rejects this rights-powers distinction as out of sync with modern understanding of personal rights. See, e.g., Barnett, Restoring the Lost Constitution, *supra* note \_\_ at 3. Madison, it appears, had a different point of view.

<sup>114</sup> Barnett, The Ninth Amendment, *supra* note \_\_ at 54.

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>115</sup>

Here Burnley—a ratifier in the Virginia Assembly-- *expressly describes* the Ninth Amendment as protecting the rights of the states. Indeed, if Madison and Burnley were not talking about how the Ninth guards state autonomy, then their entire exchange becomes nonsensical (it would mean, for one thing, that Randolph was right to be concerned). Randy Barnett nevertheless maintains that Madison was speaking about individual rights and he dismisses Burnley's comment about state rights because "Burnley himself clearly distinguishes between "the people" and "the states" and the actual words of the Ninth Amendment refer only to the former."<sup>116</sup> This, of course, begs the very question under discussion-- whether the ratifiers understood the retained rights of the Ninth to include "state rights." Burnley obviously thought it did.

Most significantly, Barnett's dismissive treatment of Burnley's statement misses the point of Madison's and Burnley's letters: Both men believed that Randolph had wrongly criticized the Ninth as inadequately "federalist." Preserving the retained rights of the people would necessarily constrain federal power and adequately protect the retained rights of the people and the states.<sup>117</sup> This is the only way to make sense of both Burnley's and Madison's response to Randolph's concerns. Keeping the letter's subject in view has the happy effect of rendering Madison's prose quite clear: preventing an extension of power and retaining rights amount to the same thing.<sup>118</sup>

#### *d. The Virginia Senate Report*

Given that they were in constant touch throughout this period, we can assume that Madison's assurances regarding the Ninth Amendment were promptly communicated to Randolph.<sup>119</sup> In any event, we know that Randolph quickly abandoned his opposition to the Ninth and Tenth Amendments.<sup>120</sup> Unfortunately, the damage was done. Anti-federalists managed to exploit the delay and put off a

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115. Letter from Hardin Burnley to James Madison (Nov. 28, 1789), *in* 5 Documentary History, *supra* note \_\_, at 219.

<sup>116</sup> Barnett, The Ninth Amendment, *supra* note \_\_ at 55.

<sup>117</sup> Although Burnley distinguished the rights of the people from the rights of the States. The critical point is that he believed the Ninth protected *both*. Burnley's distinction is perfectly in line with a pro-state autonomy reading of the Ninth once one realizes that the Tenth Amendment makes the same distinction.

<sup>118</sup> To date, Randy Barnett has never addressed the subject of Burnley and Madison's correspondence.

<sup>119</sup> See James Madison to Edmund Randolph (Oct. 7, 1787), *in* 10 The Papers of James Madison, *supra* note \_\_ at 185; James Madison to Edmund Randolph (Oct. 21, 1787), *id.* at 199; James Madison to Edmund Randolph (Nov. 18, 1787), *in id.* at 252.

<sup>120</sup> Letter from Edmund Randolph to George Washington (Dec. 15, 1789), *in* 5 Documentary History, *supra* note \_\_, at 225.

final vote on ratifying the Bill of Rights.<sup>121</sup> Although the House voted in support of the Amendments, ratification ran into trouble in the anti-federalist dominated Senate where Randolph's original concerns were "revived."<sup>122</sup> The Senate majority resisted ratification and produced a Report "reviving" Randolph's concerns and added a few of their own.<sup>123</sup> In brief, the Senate amplified Randolph's concerns and expanded them to include criticism of the First, Sixth, Ninth and Tenth Amendments.<sup>124</sup>

The complaints of the Senate majority have to be taken with more than a grain of salt: The anti-federalists wanted to derail ratification of the Bill of Rights in order to maintain the pressure for a second constitutional convention.<sup>125</sup> They had every reason to exaggerate their concerns about the proposed amendments.<sup>126</sup> Nevertheless, even the exaggerated claims and concerns of the Virginia Senate majority can shed some light on the original meaning (or ambiguity) of the Ninth Amendment.

In its Report, the Virginia Senate objected that the Ninth Amendment had not been "asked for by Virginia or any other State," and that it "appears to us highly exceptionable."<sup>127</sup>

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

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<sup>121</sup> See Ed. Carrington to James Madison (Dec. 20, 1789), in 5 Documentary History, *supra* note \_\_ at 227-30.

<sup>122</sup> James Madison to George Washington (Jan. 4, 1790), in 5 Documentary History, *supra* note \_\_ at 231.

<sup>123</sup> I have written elsewhere in detail about the debate in the Virginia legislature. See Lash, The Lost Original Meaning of the Ninth Amendment, *supra* note \_\_ at 371. Prior to my original article on the Ninth Amendment, this first public debate regarding the meaning of the Ninth Amendment had gone unnoticed.

<sup>124</sup> See Levy, *supra* note \_\_, at 42 (discussing the anti-Federalist opposition to the Bill of Rights in the Virginia Senate).

<sup>125</sup> For a general discussion over the struggles for and against a second convention, see Kurt T. Lash, Rejecting Conventional Wisdom: Federalist Ambivalence in the Framing and Implementation of Article V, 38 Am. J. Legal Hist. 197 (1994)

<sup>126</sup> Leonard Levy describes the Senate Report as "grossly misrepresenting the First Amendment (then the third)." *Id.* at 42. 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 (which they listed as the third). See Letter from James Madison to George Washington (Jan. 4, 1790), in 5 Documentary History, *supra* note \_\_, 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).

<sup>127</sup> Entry of Dec. 12, 1789, Journal of the Senate of the Commonwealth of Virginia 63 (Richmond 1828).

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>128</sup>

The Report seems to suggest that there are two possible readings of the Ninth. If this was an attempt to address the concerns Virginia's 17<sup>th</sup> proposal, it was "greatly defective." If, on the other hand, this was an attempt to secure the people's retained rights, then it was ineffective (and might be "dangerous"). Randy Barnett reads these alternate complaints and concludes that the Senate Report establishes that the final version of the Ninth "represents a change in meaning from the protection of state powers to the protection of 'personal rights.'" The Report, however, actually presents *two* possible meanings: One in line with the state proposals but defective, the other *also* in line with the state concerns but ineffective.<sup>129</sup>

Taking the latter first, the Senate majority complains that, if this was an attempt to secure retained personal rights, then it was ineffective because the plaintiff in such a case would be unable to establish the existence of such a right from the text of the Constitution.<sup>130</sup> As explained above, even if the Senate is *only* referring to individual natural rights (and there is no reason to think that the anti-federalist Senate would be concerned *solely* with retained individual natural rights), then these rights would be retained to the people of the individual states. If Barnett is trying to argue the anti-federalist dominated Senate understood retained rights in a manner that would *not* leave all such rights under state control, he simply does not understand anti-federalism.

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128. *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. This exaggerated concern about the Tenth Amendment does not appear to have been shared by any one other than those seeking to force a second constitutional convention. See *infra* note \_\_ and accompanying text.

<sup>129</sup> Even if meant to protect the "retained rights of the people," this could include the people's retained right to local self-government.

<sup>130</sup> This probably echoes a concern originally voiced by Randolph in the House. Burnley's letter to Madison collapses this argument with Randolph's second and independent complaint that the best approach to limiting power is to use the language of Virginia's Seventeenth proposal. Even Burnley wasn't sure he had adequately presented Randolph's concerns. See See Hardin Burnley to James Madison (Nov. 28, 1789), in 5 Documentary History, *supra* note \_\_ at 219 (Burnley indicating that he may not have understood the precise nature of Randolph's objection).

But even if one concedes (which I do not) that the Senates' second concern is a reference *only* to retained individual rights, the Senate majority expressly notes that this is only one of two possible meanings. The first possible meaning suggested by the Senate is an attempt to address the same concerns as those addressed by Virginia's 17<sup>th</sup> proposal. If this was the intended meaning of the Ninth, says the Senate, then it fails to adequately address those particular concerns.

The Senate's language here is an exaggerated restatement of Randolph's preference for the language of Virginia's 17th (the final version of the Ninth to Randolph "by no means comprehend the idea expressed in the 17th article of amendments proposed by Virginia"). The entire Senate Report, in fact, was given to exaggeration. Among other things, the Report argued that the proposed Free Exercise Clause "does not prohibit the rights of conscience from being violated or infringed," and the Establishment Clause allows Congress "to levy taxes, to any amount, for the support of religion or its preachers; and any particular denomination of Christians might be so favored and supported by the General government, as to give it a decided advantage over others."<sup>131</sup> Finally, the Report claimed that Free Speech and Press Clauses did not "declare and assert the right of the people to speak and publish their sentiments."<sup>132</sup> It is difficult to take these criticisms seriously—much less at face value. According to Leonard Levy, the Senate Report "grossly misrepresented" the First Amendment, and Madison himself believed that the Senate had overplayed its hand and its Report would backfire.<sup>133</sup> In fact, the Virginia anti-federalist effort to derail the Bill of Rights ultimately failed.

On the other hand, despite the obviously exaggerated rhetoric, the Senate Report does represent *possible* readings of the Ninth Amendment. Even if the Senate had an incentive to exaggerate, they did not intend their arguments to stray so far from reason as to discredit their position (though this may have happened anyway). Therefore, I agree with Professor Barnett that the complaints of the Senate majority should be granted at least some plausibility, given their goal of winning over a sufficient number of moderates to derail ratification of the Bill of Rights. For example, the Senate correctly pointed out that the final language of the Ninth did not track the language of any proposal submitted by the state conventions. This left the Senate in the position of guessing at the purpose of the altered language. The fact that the Senate could not decide on the precise object of the Ninth Amendment raises the possibility that that the final version of the Ninth was hopelessly ambiguous. It might be an attempt to preserve the autonomy of the states but, then again, it might not. Given the reaction of the

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<sup>131</sup> Entry of Dec. 12, 1789, Journal of the Senate of the Commonwealth of Virginia 63 (Richmond 1828).

<sup>132</sup> *Id.*

<sup>133</sup> Leonard Levy describes the Senate Report as "grossly misrepresenting the First Amendment (then the third)." *Id.* at 42. 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 (which they listed as the third). See Letter from James Madison to George Washington (Jan. 4, 1790), in 5 Documentary History, *supra* note \_\_, 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).

Senate majority, perhaps the final language of the Ninth was so unclear as to render the Clause without *any* commonly accepted public meaning.

However, before abandoning the originalist effort altogether, some facts must be kept in mind. To begin with, no other state legislature complained about the final language of the Ninth. All of these states knew that Madison's original version of the Ninth expressly limited federal power (his proposals had been widely published in newspapers across the country). Only in Virginia were concerns raised about the final version of the Ninth. Also, we know that Virginians like Madison and Burnley believed that the final version guarded the same principles as those expressed in Virginia's seventeenth (thus the unreasonableness of Randolph's complaint). If others shared this reading of the Ninth, this explains the general lack of concern by moderates and proponents of the Bill. We also know that despite his concerns, Randolph believed the federalist reading was a "plausible" one and he soon abandoned his opposition. Finally, we know that the Senate majority had every reason to exaggerate concerns about the Ninth Amendment and we know that their efforts to prevent ratification failed.

In sum, there is no good reason to make one part of the Senate Report's complaint about the Ninth the common public understanding of the Ninth Amendment. In fact, there is good historical reason not to do so. Nevertheless, given that moderates like Edmund Randolph were initially thrown by the final language of the Ninth, one cannot completely dismiss their complaint. Even if other states were satisfied with the language of the Ninth, Virginia remained temporarily undecided about the Ninth Amendment and the rest of the Bill of Rights. The ambiguous nature of the Ninth needed to be addressed, if only to satisfy Virginia moderates.

. . . enter James Madison.

#### 4. *Madison's Speech on the Bank of the United States*

Perhaps the most important source of historical evidence regarding the public understanding of the Ninth Amendment is Madison's speech opposing the First Bank of the United States. Delivered by the person who drafted the Ninth Amendment, the speech includes both an explanation and an application of the Ninth, and it was delivered while Virginia remained undecided about the Ninth Amendment and the rest of the Bill of Rights. To put the speech in perspective, no other provision in the Bill of Rights received anything near this kind of public discussion and application at the very time its ratification was under consideration.

One of the most important aspects of Madison's speech on the Bank of the United States is that it establishes Madison's view that the Ninth was meant to limit unduly broad interpretations of federal power. On this point, Randy Barnett and I agree. Madison understood the Ninth as more than a mere passive statement of principle. He read the clause as a judicially enforceable rule of construction—an *active* constraint on federal power. Where Barnett and I disagree involves whether Madison's use of the Ninth involved the protection of an individual natural right or the preservation of state autonomy. Elsewhere, I have argued in detail that Madison used the Ninth in defense of state rights and

did so in a manner that recapitulates the entire history of the Amendment, from its roots in the state conventions to its final placement along side, and in tandem with, the Tenth Amendment.<sup>134</sup> What follows is more of a summary of that argument than a complete analysis of the speech, and I will concentrate on those aspects that are particularly relevant to my disagreement with Randy Barnett.

Madison delivered his speech early in 1791 while the Bill of Rights remained pending in Virginia. The subject involved one of the first debates over the interpretation of federal power, in this case whether the enumerated powers of Congress included the power to incorporate a national bank. Nationalists like Alexander Hamilton argued for a broad reading of federal power, in particular the Necessary and Proper Clause.<sup>135</sup> James Madison, however, believed such broad readings of federal power betrayed the assurances Federalists made to the state conventions in their attempt to win support for the Constitution.

Madison's major argument was delivered in a speech before the House of Representatives on February 2, 1791.<sup>136</sup> After some brief remarks regarding the merits of incorporating a bank, Madison presented an extended argument regarding the constitutionality of the Bank. He begins this section by laying out the proper rules of constitutional interpretation:

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

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

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

[4] 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>137</sup>

These rules are developed and applied in the main body of Madison's speech. As Madison will make clear in the next section of his remarks, the "characteristic of government" to be preserved under Rule [1] involved the reserved autonomy of the states. The "parties" referenced in Rule [2], whose understanding are a proper guide to constitutional interpretation, are the state ratifying conventions.

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<sup>134</sup> See Lash, *The Lost Original Meaning of the Ninth Amendment*, *supra* note \_\_ at 384-92.

<sup>135</sup> 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).

<sup>136</sup> 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*].

137. *Id.*

Promises made to those conventions about the limited nature of federal power are the “expositions” of Rule [3]. Finally, Rule [4] is an interpretive rule Madison derives from the Constitution itself: the more important the power, the more likely the parties would have expressly listed it in the text rather than leave such an important matter to implication.

After laying out the appropriate approach to interpreting the Constitution, Madison then addressed the specific arguments in support of congressional power. Attempts to locate the power to incorporate a bank in the General Welfare Clause “would render nugatory the enumeration of particular powers; would supercede all the powers reserved to the state governments.”<sup>138</sup> In response 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 argued that chartering a bank “would directly interfere with the rights of the States to prohibit as well as to establish banks.”<sup>139</sup>

Addressing the Necessary and Proper Clause, Madison argued that that deriving the power to charter a bank as necessary and proper to borrowing money opened the door to an unlimited list of “implied powers” and required a “latitude of interpretation . . . condemned by the rule furnished by the Constitution itself.”<sup>140</sup> Madison believed that the manner in which powers were enumerated in the Constitution, established an implicit “rule” requiring the express enumeration of all “great and important powers.”<sup>141</sup> Declaring that “it cannot be denied that the power proposed to be exercised is an important power,”<sup>142</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>143</sup> To Madison, these effects established that the power to charter a bank was a “great and important power” which required express enumeration.<sup>144</sup>

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138. Gazette of The United States (Philadelphia), Feb. 23, 1791, *reprinted in* 14 Documentary History of the First Federal Congress, *supra* note \_\_, at 369.

139. *Id.* at 370.

140. *Id.* at 371–72.

141. “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. *Id.* at 373; *see also* Gazette of the United States (Philadelphia), Apr. 20, 1791, *reprinted in* 14 Documentary History of the First Federal Congress, *supra* \_\_, 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”).

142. Gazette of the United States (Philadelphia), FEB. 23, 1791, *reprinted in* 14 Documentary History of the First Federal Congress, *supra* \_\_, at 373.

143. *Id.*

144. “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

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 fear that this would “extend[]” federal power “by remote implications.”<sup>145</sup> State conventions had been assured that the Necessary and Proper Clause would not be interpreted to give “additional powers to those enumerated.”<sup>146</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>147</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 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>148</sup>

Madison then arrives at the argument that 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>149</sup> He read several of the articles proposed, remarking particularly on the 11<sup>th</sup>. and 12<sup>th</sup> [the 9<sup>th</sup> and 10<sup>th</sup>] the former, as guarding against a latitude of interpretation—the latter, as excluding every source of power not within the constitution itself.<sup>150</sup>

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to be included in it, and not being included could never have been rightfully exercised.”  
*Id.*

145. Gazette of the United States (Philadelphia), FEB. 23, 1791, *reprinted in* 14 Documental History of the First Federal Congress, *supra* \_\_\_, at 374.

146. James Madison, Speech Opposing the National Bank, *in* Writings, *supra* note \_\_\_ at 489.

147. *Id.*

148. *Id.*

149. Ratification was still pending in Virginia. *See supra* text accompanying note 253.

150. Madison, Speech Opposing a National Bank, *in* Writings, *supra* note \_\_\_ at 489.

Madison then sums up his argument in a manner that establishes, without any further question, that Madison read the Ninth as preserving the autonomy 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>151</sup>

Madison's speech is an extended dissertation on the proper rules of constitutional interpretation—and how that interpretation ought to be informed by the expectations of the state conventions. Justifying the Bank required an unduly broad reading of federal power. The state conventions had been *assured* there would be no “latitudinary” readings of federal power; they had ratified the Constitution with the express *understanding* that would be the case, and they secured amendments *insuring* this would not be the case. The Ninth amendment expressly prohibited this latitude of interpretation and thus preserved the expected degree of state autonomy. As Madison's colleague, Nathaniel Niles remarked a few months later, “Congress have very extensive powers, but they are not at liberty to infringe on certain rights retained by the states . . .”<sup>152</sup>

*Randy Barnett's Interpretation of Madison's Speech*

Despite Madison's repeated references to state rights and powers, and his summation linking the Ninth Amendment to the concerns of the state conventions, Randy Barnett nevertheless argues that Madison's speech establishes that “Madison viewed the Ninth Amendment as providing authority for a rule against a loose construction of [federal] powers—especially the Necessary and Proper Clause—when legislation affected the rights retained by the people.”<sup>153</sup> To Barnett, the Bank speech supports his conclusion “that the unenumerated individual rights retained by the people provide the same sort of check on latitudinarian constructions of federal power as do the enumerated rights.”<sup>154</sup> The problem with this reading of Madison's speech is that Madison nowhere claims that the Bank Bill violates “unenumerated individual rights.” Indeed, Madison never even mentions the “rights retained by the people.” Instead, Madison repeatedly asserts that the Bill violates *states rights*. Barnett's claim to the contrary is based on a single reference by Madison to a monopoly's effect on “the equal rights of every citizen.”

I want to do full justice to Barnett's argument because of his repeated reliance on it in later works and the critical role it plays in his overall theory of a libertarian

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151. Gazette of the United States (Philadelphia), FEB. 23, 1791, *reprinted in* 14 Documentary History of the First Federal Congress, *supra* \_\_\_, at 375.

<sup>152</sup> The Federal Gazette, and Philadelphia Evening Post; Date: 01-10-1792; Page: [2];

<sup>153</sup> Barnett, The Ninth Amendment, *supra* note \_\_ at 56.

<sup>154</sup> *Id.*

Ninth Amendment: This is Barnett's *only* piece of historical evidence in which (he believes) the Ninth is described as a libertarian guardian of individual rights.<sup>155</sup> Barnett's argument is not presented in his recent article, but can be found in his earlier work.<sup>156</sup> Here it is in full:

In evaluating whether the necessary and proper clause justified the claimed power to create a national bank, Madison contrasted the requirement of necessity with that of mere convenience or expediency. "But the proposed bank," he said:

"could not even be called necessary to the Government; at most it could be but convenient. Its uses to the Government could be supplied by keeping the taxes a little in advance; by loans from individuals; by the other Banks, over which the Government would have equal command; nay greater, as it might grant or refuse to these the privilege (a free and irrevocable gift to the proposed Bank) of using their notes in the Federal revenues."

Notice that Madison was not simply making what would now be called a "policy" choice. Earlier in his address to the House, Madison did address the policy issues raised by the proposal when he "began with a general review of the advantages and disadvantages of Banks." However, "[I]n making these remarks on the merits of the bill, he had reserved to himself the right to deny the authority of Congress to pass it." Rather, in the passage I quoted, Madison is making the *constitutional* argument that these other means of accomplishing an enumerated objector end are superior precisely because they did not entail the violation of the rights retained by the people and are therefore to be preferred in principle. In particular, these measures do not involve the grant of a monopoly, "which," in Madison's words, "affects the *equal rights* of every citizen."<sup>157</sup>

This is a clearly erroneous reading of Madison's speech. Madison's reference to equal rights has nothing to do with his statement regarding the Bank's "necessity." Nor is Madison making a point about retained individual rights. Barnett has collapsed two entirely separate arguments and reversed the order in which they appear. Just to let Madison's own words be our guide, here is his reference to "equal rights" in context:

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<sup>155</sup> In his early work, Barnett appeared to claim that Sherman's Draft Bill of Rights also linked the Ninth to retained individual natural rights. He has since backed away from that claim.

<sup>156</sup> See Randy Barnett, Introduction: Implementing the Ninth Amendment, *in Rights Retained by the People*, *supra* note \_\_ at 15.

<sup>157</sup> *Id.*

“It cannot be denied that the power proposed to be exercised is an important power. . . .

In the power to make bye laws, the bill delegated a sort of legislative power, which is unquestionably an act of a high and important nature. . . .

It takes from our successors, who have equal rights with ourselves, and with the aid of experience will be more capable of deciding on the subject, an opportunity of exercising that right, for an immoderate term. . . .

It involves a monopoly, which affects the equal rights of every citizen.

It leads to a penal regulation, perhaps capital punishments, one of the most solemn acts of sovereign authority.

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 be rightfully exercised.”<sup>158</sup>

Madison’s argument about the Bank’s effect on “equal rights” was part of a larger argument regarding the *importance* of the power at issue. The Bank’s effect on equal rights was one among a number of listed “effects” that marked it as an important power requiring enumeration.

Madison *next* argues that enumeration was required even if the power was believed “necessary” to the proper operation of the national government. Madison points out that people had not always appreciated the difference “between a power necessary and proper for the Government or Union, and a power necessary and proper for executing the enumerated powers.”<sup>159</sup> Just because a power was deemed “necessary” did not bring it within reach of the “necessary and proper clause.” For example, “[h]ad the power of making treaties, for example, been omitted, however necessary it might have been, the defect could only have been lamented, supplied by an amendment to the Constitution.”<sup>160</sup> It is only at this point that Madison goes further and claims “[b]ut the proposed Bank could not even be called *necessary* to the Government,” and he then lists the various alternate means available to Congress

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<sup>158</sup> Madison. Speech on the Bank of the United States (1791), *in* Writings, *supra* note \_\_\_ at 487-88.

<sup>159</sup> *Id.* at 488.

<sup>160</sup> *Id.*

quoted by Randy Barnett.<sup>161</sup> At this point, Madison is making a new and separate argument that there also is no necessity of adding the power of chartering Banks to the Constitution.

I addressed this passage and Professor Barnett's error in a previous article.<sup>162</sup> In his recent response, Barnett addresses a secondary argument based on Madison's draft veto, and objects to my placing the "equal rights" argument in Madison's merits-based objections instead of placing it in his constitutional objections.<sup>163</sup> I now think Barnett is right—the equal rights argument is within Madison's section on constitutional objections. However, Barnett never addresses my primary criticism of his claim about Madison's reference to equal rights. Yes, it was a constitutional argument, but one that had nothing to do with the Bank Bill violating unenumerated individual rights, much less individual natural rights. There is nothing about individual rights in Madison's summation, nor is there any mention of individual rights in his draft veto of the Bank bill.<sup>164</sup> What we do find, on the other hand, are repeated express claims that the Bill violates the retained rights of the *states*.<sup>165</sup>

Faced with Madison's references expressly linking the Ninth to state rights, Barnett makes the same move as he did when faced with Hardin Burnley's express statement that the Ninth protected states rights, he dismisses the references as "mistakes":

“[W]e cannot make too much of Madison's two uses of the word “rights” when referring to the powers of the states. The Constitution is far more scrupulous about using the terms “rights” only when speaking of the people or citizens or persons, and “powers” when speaking of either the government or the people. In everyday discourse, speakers were not so punctilious. Overwhelmingly, however, in his speech Madison refers to the powers of states, rather than to their rights.”

This is a surprising statement coming from someone supposedly committed to the search for original meaning. Because the text is not self-explanatory, originalists search for original meaning in public debates and common contemporary usages of phrases and terms. Put another way, originalists use “everyday discourse” to help them understand a text; they do not use assumed meanings of the text to dismiss common contemporary usage. Barnett's approach instead flips the originalist inquiry on its head and judges common

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<sup>161</sup> *Id.*

<sup>162</sup> See Lash, The Lost Original Meaning of the Ninth Amendment, *supra* note \_\_\_ at 384-93.

<sup>163</sup> See Barnett, The Ninth Amendment, *supra* note \_\_\_ at 58.

<sup>164</sup> See 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.I. (Gaillard Hunt ed., 1906) (reprinted a draft veto of the Bank Bill).

<sup>165</sup> Although Barnett cites other speakers who complained about the Bank Bill establishing a monopoly, none of these speakers made any reference to the Ninth Amendment or to a violation of retained individual rights. See Barnett, *supra* note \_\_\_ at 59.

usage according to his assumed interpretation of the text. In the end, Barnett simply begs the question when he assumes that Madison must have been referring to state *powers* when he (repeatedly) referred to state *rights*. We cannot know this without consulting common usage—the very evidence Barnett dismisses.

Madison’s complaints about the Bank Bill violating state rights were not unique. Newspapers echoed Madison’s concern that the proposed bank violated the retained rights of the states. According to the New York based *The Daily Advertiser*:

The arguments against establishing the proposed National Bank acquire new strength by every investigation. It is no less to be deprecated as unconstitutional, than as founded on an improper basis. If power had been given to Congress to incorporate great trading companies, our boasted liberty had been at an end. . . . Within the states in which they were established, they might soon have created powers injurious to its sovereignty, and destructive of its freedom. But we must be on our guard how we suffer the doctrine of political expediency or necessity, or *plausible constructions of the constitution, to be pleaded against manifestly retained rights, in the separate states.*<sup>166</sup>

In a state that only a few months earlier had ratified the Ninth Amendment, these newspaper editors speak of constitutional *constructions* that violate *retained rights* “in the separate states.” Their argument in regard to the Bank echoes Madison’s view that the charter required an unduly broad construction of federal power—one that violated the retained rights of the states. Decades later, opponents to a renewed Bank charter revived Madison’s arguments against the Bank (his entire speech was republished in newspapers) and opponents once again stressed the need to enumerate a great and important power in order to guard the retained autonomy of the states.<sup>167</sup> All of these arguments use the language of retained rights in the service of state sovereignty.

Although I disagree with Barnett’s reading of Madison’s speech, I do not deny that the Ninth protects individual natural rights, nor do I insist that the Bank threatened only state rights and not individual rights. Indeed, some critics contended that monopolies threatened both.<sup>168</sup> But this merely illustrates how the

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<sup>166</sup> Daily Advertiser (New York) , published as The Daily Advertiser; Date: 02-11-1791; Volume: VII; Issue: 1866; Page: [2]

<sup>167</sup> Although Madison failed to prevent the chartering of the First Bank of the United States, his Ninth Amendment-based arguments against the Bank would live to fight another day. When the Bank came up for renewal in 1810, newspapers reprinted Madison’s 1791 speech. See The Richmond Enquirer (Jan. 4, 1810), at 4. For use of the Ninth amendment in later congressional debates over renewing the Bank of the United States, see *infra* note \_\_ and accompanying text.

<sup>168</sup> See General Advertiser [published as The General Advertiser and Political, Commercial, Agricultural and Literary Journal] (Feb. 5, 1791) (Issue: 110; Page: [3]) (Remarks of Mr. Jackson in the House of Representatives, Feb. 5, 1791) (“[The Bank] interfered with the rights of private citizens, and in particular with those of state

federalist Ninth protects all retained rights, natural and positive, individual and collective, personal and “state.” Barnett’s error is not his identifying natural rights as an important subject to the Founders, it is his attempt to deny Madison’s use of the Ninth as guarding state majoritarian rights and his insistence that protecting individual rights was the “single goal” of the Clause. The evidence suggests that this was not even the primary goal.

Most critically, Randy Barnett never addresses the penultimate section of Madison’s speech in which he expressly links the Ninth to the concerns of the state conventions. Here, Madison recapitulates the entire history of the Ninth Amendment, from the promises made to the state conventions, to the state declarations and proposals, to the final draft that, according to Madison, prevented a “latitude of interpretation.”<sup>169</sup> Madison then declares in summation that all of his arguments have established how violating this rule of construction violates the autonomy of the states. This is the most elaborate discussion of the roots and purposes of the Ninth Amendment to be found in the historical record, and it establishes that the *author* drafted the Ninth in response to the concerns and demands of the state conventions. In all of his work on the Ninth Amendment, however, Randy Barnett never discusses Madison’s argument in these critical paragraphs or their implications regarding Madison’s (or the public’s) understanding of the Ninth.<sup>170</sup>

#### IV. Post-Adoption Commentary

I have devoted over 100 pages in a single law review article to post-adoption commentary on the Ninth Amendment.<sup>171</sup> For the purposes of this article, however, it can be easily summarized: The scholarly and judicial commentary regarding the Ninth Amendment is extensive and uniformly federalist. Every scholar or judge (state or federal) prior to the Progressive era who discussed or applied the Ninth viewed it as a federalist provision protecting the reserved autonomy of the states. I have found scattered attempts by lawyers to use an individual rights reading of the Ninth in defense of their client. This is not surprising given that the Ninth protected both individual and collective rights.

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governments.”). See also James Jackson’s Sicilius essays on the Yazoo scandal, *infra* note \_\_\_ and accompanying text (deriding the scandal as involving a monopoly and injuring both individual equal rights and the collective retained rights of the people of Georgia) (at 50).

<sup>169</sup> “The defense against the charge founded on the want of a bill of rights, presupposed, he said, that the powers not given were retained; and that those given were not to be extended by remote implications . . . The explanations in the state conventions all turned on the same fundamental principle. . . . The explanatory declarations and amendments accompanying the ratifications of the several states formed a striking evidence, wearing the same complexion. . . . The explanatory amendments proposed by Congress themselves, at least, would be good authority with them; all these renunciations of power proceeded on a rule of construction, excluding the latitude now contended for.”

<sup>170</sup> Although Barnett quotes some portions of this section of Madison’s speech, he limits his discussion to the description of the Ninth as preventing a latitude of interpretation. He never discusses, or even notes, Madison’s linking of the Ninth to the declarations and demands of the state conventions.

<sup>171</sup> See Lash, *The Lost Jurisprudence of the Ninth Amendment*, *supra* note \_\_\_.

What is surprising is how exceedingly rare are these exceptions to the general rule. There are literally hundreds of cases and commentaries linking the Ninth and Tenth Amendments as twin guardians of federalism. Randy Barnett accuses me of attempting to use these later references as evidence of the original meaning of the Constitution, and he derides any attempt to use these “much later interpretations” as “bootstrapping at best.” Instead, Barnett dismisses nineteenth century cases and authorities due to their being tainted by “[t]he rise of the Calhounian states rights position.”<sup>172</sup>

Professor Barnett is inconsistent in his claims about the value of post-adoption testimony. In other works, Barnett consistently relies on antebellum sources as evidence supporting his claims of original meaning.<sup>173</sup> In the same very article Barnett dismisses post-adoption federalist readings of the Ninth, he himself relies on Tucker’s 1803 Treatise on the Constitution and a variety of antebellum state constitutional amendments, including some adopted as late as 1857.<sup>174</sup> Indeed, Barnett goes so far as to cite 1861 Constitution of the Confederate States (so much for Calhounian tainted sources!).<sup>175</sup> Although I agree with Barnett that the weight of historical evidence tends to lessen as distance increases between it and the adoption of the relevant text, all ante-bellum commentary on the Ninth remains extremely relevant to determining the role that Amendment played in the adoption of the Fourteenth Amendment (as my second article makes clear).<sup>176</sup>

Nevertheless, for the purposes of this article I accept Barnett’s criteria and present only pre-“Calhounian” commentary on the Ninth Amendment. In fact, I’ll go further than that. The Supreme Court’s 1820 opinion in *McCulloch v. Maryland* triggered a vociferous defense of state autonomy that only grew in the years prior to the Civil War. Accepting Barnett’s premise that this kind of passion potentially skewed readings of the Ninth Amendment, I will consider only that commentary regarding the Ninth Amendment that occurred *prior* to the Court’s decision in *McCulloch v. Maryland*. Even in this limited period, express references to the Ninth abound, and they are uniformly federalist. Some of what follows is discussed in more detail in my article *The Lost Jurisprudence of the Ninth Amendment*. Most of the evidence recounted below, however, was uncovered during the preparation of this article. I imagine there is much more to be found.

#### 1. *Discussions of the Ninth Amendment, 1791-1820*

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<sup>172</sup> Barnett, The Ninth Amendment, *supra* note \_\_ at 79 n.336.

<sup>173</sup> See, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia*, 83 Tex. 237 (2004) (note that Randy relies on these cases not just to refute, but to support his own reading).

<sup>174</sup> See Barnett at 75 (citing state constitutional amendments that adopt the language of the Ninth Amendment).

<sup>175</sup> Barnett at 79. Barnett also dismisses Joseph Story’s discussion of St. George Tucker in his famous 1833 Commentaries on the Constitution on the grounds that Story was an “opinionated” man and his Commentaries were written “thirty years” after Tucker published his work. Again, this is hard to understand given that Barnett himself relies on historical evidence much further removed from the ratification of the Ninth Amendment.

<sup>176</sup> See Lash, *The Lost Jurisprudence*, *supra* note \_\_ at 639-52.

a. *The 1796 “Political Catechism” of Elhanan Winchester*

In 1796, the Reverend Elhanan Winchester published “A plain political catechism intended for the use of schools, in the United States of America: wherein the great principles of liberty, and of the federal government, are laid down and explained, in the way of question and answer.” A friend of Declaration of Independence signatory Benjamin Rush, Elhanan had recently returned to the United States after having spent seven year successfully preaching in England. Although Winchester was out of the country during the ratification debates, when he looked at the words of the Ninth Amendment, he saw the same federalist principles as James Madison. Here is his section on the Ninth and Tenth Amendments:

**Question XLI.**

*What rights and powers remain to the individual states?*

**Answer:**

All 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. And the enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people. So that a great number of rights and powers, which the several states individually claim, remain perfectly to them, notwithstanding this constitution.<sup>177</sup>

Like Madison, the Rev. Winchester viewed the Ninth and Tenth Amendments as federalist guardians of reserved state rights and powers. Nor was Winchester a proto-Calhounian: The good Reverend was an abolitionist.

b. *John Page’s 1799 Remonstrance Against the Alien and Sedition Acts*

In both his book and his most recent article, Randy Barnett presents a dialogue between Theodore Sedgwick and future Virginia governor John Page during the debates over the Bill of Rights.<sup>178</sup> The discussion involved whether adding the specific right of assembly to the First Amendment brought the Bill down to a level of trivial rights (like the right to wear a hat) that could never be exhaustively listed. Page’s response was that men had in fact been forced to pull off their hats in the past, and because the right to assemble had likewise been

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<sup>177</sup> A plain political catechism intended for the use of schools, in the United States of America: wherein the great principles of liberty, and of the federal government, are laid down and explained, in the way of question and answer. Made level to the lowest capacities. By Elhanan Winchester (1796) at 46.

<sup>178</sup> See Barnett, The Ninth Amendment, *supra* note \_\_ at 30-33; Barnett, Restoring the Lost Constitution, *supra* note \_\_ at 58-60.

denied in the past it was worth adding the right to the list.<sup>179</sup> Barnett cites the exchange to illustrate the personal nature of retained rights and claims that “[t]his exchange stands in sharp contrast with the collective rights model” because the discussion only involved references to “the people’s” individual rights. If Barnett means to imply that men like Page understood the people’s retained rights to include only (or even mainly) individual or personal rights, this is rebutted by John Page himself. Only a few years after his discussion with Sedgwick, Page expressly described the Ninth Amendment as protecting the retained rights of the States.

In his 1799 campaign pamphlet, John Page argued that the Alien and Sedition Acts were “not only unnecessary, impolitic and unjust, but unconstitutional.”<sup>180</sup> According to Page, the Acts violated the retained rights of the states as protected by the Ninth and Tenth Amendments (which he refers to as the 11<sup>th</sup> and 12<sup>th</sup> articles).

The power therefore which Congress has claimed and exercised in enacting the Alien Act, not having been granted by the people in their constitution, but on the contrary having been claimed and hitherto wisely and patriotically exercised by the state legislatures, for the benefit of individual states, and for the safety of the general government, must be among those powers, which not having been granted to Congress, nor denied to the states, are declared by the 11<sup>th</sup> and twelfth articles of the amendments to the constitution to be reserved to the states respectively, and therefore the alien act is an encroachment on those rights, and must be unconstitutional. . . . Because it is an interference with, and an encroachment on, the reserved rights of the individual states (see the 11<sup>th</sup> and 12<sup>th</sup> articles of the amendments).<sup>181</sup>

Page speaks interchangeably about reserved state rights and reserved state powers. Both are protected by the combined effect of the Ninth and Tenth Amendments. In fact, Page argued that the Ninth Amendment actually *enhanced* the federalist effect of the Tenth. In another part of his essay, Page addressed a Report by the Virginia Minority that defended the Acts as falling within the implied powers of Congress.<sup>182</sup> The Minority Report pointed out that under the earlier Articles of Confederation, the states retained all powers not “expressly”

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<sup>179</sup> See 1 Annals of Cong. 760 (Joseph Gales ed., 1834) (statement of Rep. Page, Aug 15, 1789).

<sup>180</sup> Address to the freeholders of Gloucester County, at their election of a member of Congress, to represent their district, and of their delegates, and a senator, to represent them in the General Assembly of the Commonwealth of Virginia, April 24, 1799, by John Page, of Rosewell. (at [9] no pagination in text). Page was a member of Congress from 1789-1797, and Governor of Virginia from 1802 to 1805. Thus, not only was he in congress when Madison gave his Bank speech, he was a representative from Virginia at the time that state was considering the Bill of Rights. He would be well aware of Madison’s opposition to the bank—indeed, the men regularly corresponded.

<sup>181</sup> *Id.* at 13, 14.

<sup>182</sup> The Minority Report likely was written, at least in part, by future Chief Justice John Marshall. See Kurt T. Lash & Alicia Harrison, *Minority Report: John Marshall and the Defense of the Alien and Sedition Acts*, \_\_ Ohio St. L.J. (forthcoming 2007).

delegated to the federal government. The Tenth Amendment, however, omitted the term “expressly” and thus implied a broader range of federal authority under the new Constitution. Page rejected this reading of the Tenth and argued that the combination of the Ninth and Tenth Amendments expressed the same limited reading of federal power as that declared by Article II of the Articles of Confederation. Because this is a newly discovered discussion of the Ninth Amendment by a Founder involved with its framing, I have provided an extended excerpt:

For how could it be supposed when the 2d article of the confederation declared that “Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled” and the design of appointing a convention and the authority given by the different confederated states to that convention went no farther than to “render the then Federal Constitution adequate to the exigencies of government and the preservation of the union.”(neither of which could require farther powers in government than are expressly granted) that although the convention omitted the insertion of a familiar article; where as unnecessary in their opinion or, through design (such as seems now avowed) as the amendment was made, and as these words preceded it in the 11<sup>th</sup> article “the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people”

I say considering these things, how could it be possible to suppose, that these two amendments taken together, were not sufficient to justify every citizen in saying, that 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, as fully and completely; as if the word expressly had been inserted? . . . and candor and respect for the majority of congress which recommended the amendments ought to induce us to think, that they also were of the same opinion [that the 2d art. of the art’s still operated] and therefore that they would not have recommended the addition of the 11<sup>th</sup> and 12<sup>th</sup> articles to the constitution, had they not been called upon by some states for such amendments.<sup>183</sup>

Page was a member of Congress that helped frame and submit the Bill of Rights, including the Ninth Amendment. He was a member of the House when Madison gave his speech on the Bank of the United States and he represents yet another Virginian who had a distinctly federalist vision of the Ninth Amendment. For years, historians have believed the Ninth Amendment played little, if any, role in the debates over the Alien and Sedition Acts. In the process of preparing this article, however, I discovered not only Page’s arguments, but also others who

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<sup>183</sup> Id. at 27-28.

criticized the Acts as violations of the First, Ninth and Tenth Amendments.<sup>184</sup> Page's testimony, however, is particularly significant as a fellow member of Congress who both helped frame the Ninth and agreed with Madison's federalist reading of the Clause.

c. *St. George Tucker's 1803 "View of the Constitution"*

A judge on the Supreme Court of Virginia, Tucker's 1803 View of the Constitution was the most influential constitutional treatise in the United States prior to 1833 when Joseph Story published his Commentaries on the Constitution. Tucker's View of the Constitution was *the* state's rights treatise of the early 19<sup>th</sup> century. Joseph Story later attacked Tucker's work (including his writing on the Ninth Amendment) as the prime example of the erroneous states' rights-protective "compact theory" of the Constitution.<sup>185</sup> Tucker was so devoted to states rights that throughout his life he refused to believe that the Articles of Confederation had been abrogated by the adoption of the federal Constitution.<sup>186</sup> As one would expect, Tucker's views of the Ninth Amendment reflect his overarching theory of a federalist constitution as a compact between the states and the federal government.

Tucker's federalist view of the Ninth appears in the very first section of Tucker's "View of the Constitution." There, Tucker addresses the people's fundamental collective right to alter or abolish their form of government whenever they see fit.

It must be owned that Mr. Locke, and other theoretical writers, have held, that "there remains still inherent in the people a supreme power to remove or alter the legislative when they find the legislative act contrary to the trust reposed in them; for, when such trust is abused, it is thereby forfeited, and devolves to those who gave it." Fn: This principle is expressly recognized in our government, Amendments to the C.U.S. Art. 11, 12.[the Ninth and Tenth Amendments]<sup>187</sup>

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<sup>184</sup> See Tunis Wortman, A treatise, concerning political enquiry, and the liberty of the press.

<sup>185</sup> In his Commentaries on the Constitution, Joseph Story quotes Tucker's discussion of the Ninth and Tenth Amendments. Story then 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 45, 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, 1815-1835, at 86-87 (1988) (noting that Tucker "was particularly concerned with the preservation of state sovereignty").

<sup>186</sup> See 2 Blackstone's Commentaries (Appendix Book the First) at 128. ("In the articles of confederation of perpetual union, concluded between the several states, which perhaps were abrogated").

<sup>187</sup> *Id.* at at 161. Tucker's reference to "Art. 11, 12" is a reference to the Ninth and Tenth Amendments (at that time, 11<sup>th</sup> and 12<sup>th</sup> on a list of 12 proposed amendments).

Here, Tucker links the Ninth Amendment to the people's retained collective right to revolution.<sup>188</sup> There is no reference to individual rights.<sup>189</sup> Instead, Tucker speaks of powers devolving to the people on a state by state basis (thus the pairing with the Tenth Amendment). As did Madison, Tucker understood that the concepts "powers and rights" are inextricably linked—a delegated right is an extension of power, and a retained right is a reservation of power.<sup>190</sup> In this case, people's retained right to revolution includes the right to recall a delegation of power when the government abuses its trust. More, the reference to the Tenth Amendment exemplifies Tucker's view that the "people" exist as independent sovereigns in the several states. There is much more that can be said about St. George Tucker's federalist reading of the Constitution.<sup>191</sup> For now, it is enough to note that although Barnett discusses St. George Tucker at length in his recent article, he appears to have missed Tucker's expressly federalist rendering of the Ninth Amendment in the above passage.<sup>192</sup>

Despite Barnett's best efforts to read libertarian theory into the writing of St. George Tucker, Tucker's *View of the Constitution* remains one of the most closely reasoned and influential works of federalist theory to emerge in the early period of the Constitution.<sup>193</sup> His views of the Ninth and Tenth Amendments reflected this same theory. One final point: Tucker was an abolitionist.<sup>194</sup>

d. *1805: The Earliest Discovered State Court Application of the Ninth—By a Ratifier of the Constitution*<sup>195</sup>

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<sup>188</sup> This single passage explodes Randy Barnett's claim that "no direct or indirect evidence" supports Akhil Amar's claim about the Ninth protecting this collective right of the people. See Barnett, *The Ninth Amendment*, *supra* note \_\_ at 22. Barnett himself relies on Tucker as evidence of the original meaning of the Ninth Amendment. See *id.* at

<sup>189</sup> Barnett claims that the right of revolution can be understood as an individual natural right. The Founders would not have agreed. Retained individual natural rights were those which could be perfected by the individual himself, without any collective assistance from others. For example, the retained right to religious belief or political opinion. Obviously, revolutionary alteration of the standing government does not fall into this category. This is a right retained, and exercised, by the collective people.

<sup>190</sup> See also James Wilson, *Debates in the Convention of the State of Pennsylvania* ((Oct. 28, 1787) ("A bill of rights annexed to a constitution is an enumeration of the powers reserved.")).

<sup>191</sup> For a general discussion of St. George Tucker's federalist vision of the Constitution, see Lash, *Tucker's Rule*, *supra* note \_\_\_\_.

<sup>192</sup> As had I prior to researching this article.

<sup>193</sup> Tucker also saw the bank episode as an instance of violating the Tenth Amendment—not the Ninth. This tells us, among other things, that Tucker did not see the issue in the bank episode as having anything to do with individual rights. Tucker, of course, read the tenth as a rule of construction protecting the rights of the states. See Tucker, *Appdx vol. 1* p287 n.\*(also citing Mad's report).

<sup>194</sup> See St. George Tucker, *A Dissertation on Slavery: With a Proposal for the Gradual Abolition of It, in the State of Virginia* (1796), in St. George Tucker, *View of the Constitution of the United States: With Selected Writings* 409 (Clyde N. Wilson ed., 1999).

<sup>195</sup> From website : [www.usconstitution.net](http://www.usconstitution.net) (us constitution online) "Ratification of the Constitution by the State of North Carolina, November 21, 1789. North Carolina was the twelfth state to do so. North Carolina held a ratification convention in 1788, convening

John Overton was a member of the second North Carolina Ratifying Convention. Although, the first state convention neither accepted nor rejected the Constitution, the second convention in 1789 voted in favor of ratification. Overton went on to join the Tennessee bench and there presided over case that contains one of the earliest state judicial references to the Ninth Amendment. The background issue involved whether a state property judgement was binding on a portion of land falling within Indian territory. Overton holds that it is, based in part on the retained sovereignty of the states as protected under the Ninth and Tenth Amendments. Once again, as a newly uncovered piece of historical evidence regarding the Ninth, I provide an extended excerpt:

But how far has the Constitution and laws of the United States, made in pursuance of it, abridged the sovereign rights of each State? The answer is easy. No further than the States have expressly, and not by equitable construction, delegated authority to the United States. The Constitution of the United States was proposed to each State possessing the rights of sovereignty within their respective limits. It proposed that each State should give up a portion of its sovereignty for the more secure and convenient enjoyment of the remainder.

This construction is conformable to the law of nature applied to nations. By this law, nations as well as individuals are tenacious of the rights of self-preservation, of which, as applied to sovereign States, the right of soil or eminent domain is one. Constitutions, treaties, or laws, in derogation of these rights are to be construed strictly. Vattel is of this opinion, and, what is more satisfactory, the Federalist, and the American author of the Notes to Blackstone's Commentaries, two of the most eminent writers on jurisprudence, are of the same opinion. [*Here Judge Overton cites, among other things, the Ninth and Tenth Amendments, and Tucker's discussion of the same.*<sup>196</sup>]

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on July 21 and adjourning on August 4. At that convention, the convention drafted a "Declaration of Rights" and a list of "Amendments to the Constitution," but in the end, the convention voted "neither to ratify nor reject the Constitution proposed for the government of the United States." Another state convention met later the next year, and in the face of the ratifications of eleven other states, the state drafted a short ratification message. Added to it were the Declaration and Amendments list adopted the year before. The following text is taken from the Library of Congress's copy of Elliot's Debates. The Declaration and Amendments lists follow the message."

From the online "Tennessee Encyclopedia of History and Culture": John Overton 1766-1833. "Overton represented Sumner County as a delegate to the 1789 North Carolina Convention to ratify the U.S. Constitution." "In August 1804 Overton was elected to succeed [Andrew] Jackson as a member of the Superior Court of Tennessee, the forerunner of the Tennessee Supreme Court. He served on that court until 1810 . . ."

<sup>196</sup> The footnote in full reads: "See vat. B. 2 c, 17, §§ 305, 308; Amendment to Con. U. S. arts 11, 12; 1 T. Bl. app. to part 1, 307. 308: Ib. 412; Vat. B. 1, c., § 10; [2 Dall. 384](#); 1 T. Bl. app. to part 1, 269; [4 Johns., 163](#)."

The Constitution of the United States gave the power to the General Government to regulate intercourse with the Indians and to make treaties. The States, having conceded these powers, no longer possess them. The Constitution was a dead letter until the treaties and the laws of the United States pointed out the principles of this intercourse. By treaty certain lands within the limits of the State are in its language "allotted, granted, and secured to the Indians, within which the citizens are not to hunt, drive stock, survey, nor even go there without permission. If they do, or commit other trespasses, they are subject to heavy penalties. But does the Constitution of the United States or its laws take from the sovereign rights of the State further than is incompatible with these regulations? They do not.<sup>197</sup>

Overton reads the Ninth as preserving the retained rights of the states. He has no difficulty in finding this same federalist reading of the Ninth in the works of St. George Tucker. Like Tucker, Overton read the Ninth and Tenth as creating a rule of strict construction of federal power, preserving where possible the concurrent power of the states. And this by one of the ratifier's of the original Constitution.

*1811: Defending the State's Right to Grant a Steamboat Monopoly*

New York's decision to grant Robert R. Livingston and Robert Fulton a monopoly on ferryboat traffic between ports in New Jersey and Manhattan Island triggered a series of lawsuits that culminated with the Supreme Court's invalidation of the monopoly in *Gibbons v. Ogden*. In the decades prior to that case, however, the monopoly had been successfully defended before the New York courts. In 1811, an anonymous author published an extended defense of the monopoly arguing, among things, that the states retained the right to grant monopolies under the Ninth and Tenth Amendments:

It is hardly necessary to add that the 12<sup>th</sup> amendment can have no other influence on this question than to strengthen this position. This amendment was made, not to give additional powers to the Federal Government, not one of them tending to this object, but to guard the states against a constructive extension of those powers. If then certain powers were by a fair construction equally within the jurisdiction of Congress and the States respectively, such power could not by force of this restrictive amendment, be taken from the states and vested in Congress, particularly when the preceding article of the amendment, contains an express provision against this constructive assumption of power. 11<sup>th</sup> Art. "The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people;" thus the enumeration of the right of arming the militia, and maintaining a Navy shall not

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<sup>197</sup> See *Glasgow's Lessee v. Smith*, 1 Tenn. 144, (1805) at \*14 (Westlaw pagination) .

disparage the right that the States have to arm the militia or to keep a navy in time of war.<sup>198</sup>

The author reads the Ninth as guarding against constructive extensions of federal power in matters involving the concurrent authority of the States. As we shall see, this Ninth Amendment-based defense of concurrent state power will be adopted by Supreme Court Justice Joseph Story in a case involving, coincidentally enough, concurrent state powers over matters involving the militia. Like John Page, the author reads the Ninth as enhancing the federalist protections of the Tenth Amendment. Nothing here involves individual rights. This is purely a matter of the retained rights of state majorities.

*e. The Continued Debates Regarding the Bank of the United States*

Although in 1791 Madison failed to convince a majority to reject the Bank of the United States, his arguments continued to resonate over the next two decades. In 1811, during the congressional debate over renewing the Bank charter, opponents agreed with Madison that the latitude of construction pressed by the Bank's proponents exceeded congressional power. As Representative William Burwell pointed out to the assembly, the subject of the Bank had been "more thoroughly examined in 1791 & more ably elucidated than any other since the adoption of the government; the celebrated speech of Mr. Madison, to which I ascribe my conviction, has been recently presented to us in the newspapers, and gentlemen must be familiar with it."<sup>199</sup> Representative W. T. Barry echoed Burwell's praise of Madison's "perspicuous and luminous argument that has been so justly celebrated as defining and marking out the proper limits of power assigned to the general government."<sup>200</sup> These men obviously would be aware of how Madison relied on the Ninth and Tenth Amendments. Others expressly raised the Ninth. According to Representative (and future Vice President) Richard Johnson:

The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people" which amendment refers to the prohibitions to be found in the 9<sup>th</sup> section of the 1st article, and others of the same kind [listing examples]. And more especially the Tenth Amendment, viz [quoting the Tenth]. The parts of the constitution recited prove the position taken that, that the Constitution is a grant of

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<sup>198</sup> 1811 Early American Imprints, 2nd series, no. 23819 (filmed); Title: The Right of a state to grant exclusive privileges, in roads, bridges, canals, navigable waters, &c. vindicated [microform] by a candid examination of the grant from the state of New-York to and contract with Robert R. Livingston and Robert Fulton, for the exclusive navigation of vessels, by steam or fire, for a limited time, on the waters of said state, and within the jurisdiction thereof.

<sup>199</sup> Debates of the third session of the Eleventh Congress [microform] comprising the most interesting debates in both houses in the session commencing Dec. 8, 1810. At page 161 [105 in microform].

<sup>200</sup> *Id.* 304 (\*309)

specified powers; that we can exercise no power not expressly delegated to us.”<sup>201</sup>

Likewise, Representative William Crawford argued:

Congress cannot therefore usurp this power over the states, so expressly & explicitly reserved without a flagrant violation of this (not an interpolation as it has been jesuitically styled, but) integral part of the Constitution. This opinion is confirmed by article 9<sup>th</sup>, amendments to the constitution, which declares, that the enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people. But the people have retained the right to establish banks—for all powers not delegated to the people [sic<sup>202</sup>], or prohibited to the states, are reserved to the states respectively or to the people.<sup>203</sup> [Power to incorporate a bank] is of too imperious a nature to be sought for by implication, inclusion or as an incidental means to carry any other power into effect . . . If it had ever been parted with, it was all-important that it should have been parted with expressly.<sup>204</sup>

The same Ninth Amendment-based arguments were raised in the Senate. Senator William Giles, for example, recounted the concerns that led to the adoption of a Constitution that reserved all unenumerated powers to the states:

From this short history of the origins of the Constitution, and the causes which produced it, it evidently appears, that the general or federal government is in its nature and character a government of enumerated powers taken from previously existing states governments, enumerated and conferred on it, reserving all unenumerated powers to the state governments, or to the people in their individual capacities. But if any doubts had existed on this subject, two amendments to the constitution, growing out of some jealousies lest a contrary interpretation should be given to the constitution, have been adopted, which ought to put this question to rest forever. The 9<sup>th</sup> and 10<sup>th</sup> articles of amendment to the constitution are as follows [quotes both the Ninth and Tenth]. Now sir, can language be more explicit than this, in declaring that this charter contains enumerated powers and that all not enumerated are reserved to the states or to the people?<sup>205</sup>

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<sup>201</sup> Debates of the third session of the Eleventh Congress [microform] comprising the most interesting debates in both houses in the session commencing Dec. 8, 1810. At page 189 [page 193 in microform].

<sup>202</sup> Either the reporter or Crawford is referring to the federal government and mistakenly referred to the people. This is clear from the full text.

<sup>203</sup> Debates of the third session of the Eleventh Congress [microform] comprising the most interesting debates in both houses in the session commencing Dec. 8, 1810. At page 197 [page 201 in microform].

<sup>204</sup> *Id.* at 196 (202 in microform). Note the use of Madison’s argument in his original speech against the Bank. See *supra* note \_\_ and accompanying text.

<sup>205</sup> *Id.* at 378/383.

The Bank's proponents disagreed that the charter violated the Ninth Amendment, but they accepted the federalist nature of the clause. For example, Senator John Taylor argued that Congress had not rigorously applied the Ninth Amendment in the past and that if one took the obvious meaning of the Ninth Amendment to its logical conclusion, Congress could not operate:

“Mr. Giles has called attention of the Senate to the 9<sup>th</sup> article of the amendments to the constitution [quotes the amendment] . . . I know not how Mr. Adams found the states so much asleep to their rights when he tempted their citizens to become usurers, and this too in denial and disparagement of state powers actually exercised. If the present vigilance had then been exerted I should suppose he was very lucky, that he was not as much harassed as were some of the victims of the sedition law. Carry this doctrine of rigid construction in respect to this instance of collision of state and United State authorities to the extent contended for by the opposers of the bill—enforce to the fullest extent, according to its obvious meaning, the amendment last quoted, and we shall be surrounded with powers that we dare not use.

*f. The Retained Concurrent Powers of the States*

In 1807, a petition was sent to Congress on behalf of “sundry citizens of the United States” asking that Congress allow the state courts concurrent jurisdiction over diversity cases despite the preferences of the plaintiff. The petition grounded its argument on the Ninth and Tenth Amendments which, to the petitioners, preserved wherever possible the concurrent powers of the states.<sup>206</sup> In 1808, Senator James Lloyd argued cited the Ninth and Tenth Amendments as limiting federal regulation of commerce. The argument had nothing to do with individual rights, and everything to do with state autonomy.<sup>207</sup> In the murder trial of Cyrus Dean, the Supreme Court of Vermont rejected a claim that an alien freeholder cannot serve as a grand juror due to exclusive federal authority over immigrants. According to the Court, the Ninth and Tenth Amendments established the state's retained concurrent right to determine the rights of alien freeholders within the state.<sup>208</sup>

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<sup>206</sup> See American State Papers 037, Miscellaneous Vol. 1 9th Congress, 2nd Session Publication No. 225 Title: Amendment to the Constitution -- judicial powers. Communicated to the House of Representatives, March 3, 1807.

<sup>207</sup> See Mr. Lloyd's speech in the Senate, Monday, Dec. 19 [microform] on the bill making further provisions for enforcing the Embargo. Page 3.

<sup>208</sup> See The trial of Cyrus B. Dean [microform] for the murder of Jonathan Ormsby and Asa Marsh, before the Supreme Court of ... Vermont ... Burlington 23rd of August, A.D. 1808 revised and corrected from the minutes of the judges. Page 47. (“We learn from the eleventh and twelfth articles of the first amendment to the Constitution of the United States [then quotes the Ninth and Tenth Amendments]. If then, Congress have power to intermeddle with the soil within a state's jurisdiction—to say who should , or rather who should not hold or possess it, this power must have been expressly delegated to the government of the United States.”).

In 1816, South Carolina courts were faced with the question whether states have the authority to prosecute persons passing counterfeit federal coins.<sup>209</sup> Although the Constitution expressly empowers the federal government to punish counterfeiters,<sup>210</sup> it was not clear whether this express enumeration should be interpreted to prohibit the concurrent power of the states to punish persons *passing* counterfeit coins. Writing for the South Carolina Supreme Court, Judge Grimke noted that the Constitution does not expressly grant Congress the power to punish persons passing counterfeit coins.<sup>211</sup> Applying a rule of construction based on the Ninth and Tenth Amendments, Judge Grimke concluded that this, then, was a power retained by the states:

[I]t does not appear that the power of punishing persons for passing counterfeit coin, knowing it to be counterfeit, was either expressly given to the Congress of the United States, or divested out of the individual States. Now the 9th section of the amendments to the constitution, as agreed to by the several States, and which has now become a component part of the constitution, declares, that the enumeration in the constitution of certain rights, shall not be construed to deny or disparage others retained by the people; and in the 10th section of the same, it is further provided, that the powers not delegated to the United States by the constitution, nor prohibited by it to the State, are reserved to the States, respectively, or to the people. When we examine the powers conceded by the individual states, we find no enumeration of this power given to Congress, and when we review the powers denied to the individual States, we discover no mention whatever of their being divested of this power. The individual States were in possession of this power before the ratification of the constitution of the United States; and if there is no express declaration in that instrument, which deprives them of it, they must still retain it, unless they should be divested thereof by construction or implication.<sup>212</sup>

Grimke read the Ninth and Tenth Amendments as applying to powers exercised by the states prior to the adoption of the Constitution.<sup>213</sup> If such powers are not expressly granted to the federal government or divested from the states, then under the Ninth Amendment, enumerated federal power should be interpreted in

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209. *State v. Antonio*, 3 S.C.L. (1 Brev.) 562 (1816).

210. U.S. CONST. art. I, § 8, cl. 6 (“[Congress shall have power] [t]o provide for the Punishment of counterfeiting the Securities and current Coin of the United States.”).

211. *Antonio*, 3 S.C.L. (1 Brev.) at 567–68.

212. *Id.*

213. From Judge Nott’s dissent in this case, it appears the Ninth Amendment was the primary clause relied on to support concurrent jurisdiction:

“The advocates for a concurrent jurisdiction derive no support from the amendment of the constitution which has been relied on. It does not say that the powers not expressly delegated, &c., shall be reserved; but that the enumeration of certain rights shall not be construed to deny or disparage others retained by the people; and whether by express or necessary implication, the effect is the same.”

*Id.* at 578 (Nott, J., dissenting).

a manner retaining such rights to the states. Other courts repeated this idea of retained concurrent state power. In *Livingston v. Van Ingen*, the state of New York had granted a ferry monopoly to Robert Livingston and Robert Fulton<sup>214</sup> by virtue of their “new and advantageous” mode of transportation.<sup>215</sup> A competitor claimed that granting such monopolies was an exclusive power of the federal government under its enumerated powers to “promote the progress of science and useful arts” and to regulate interstate commerce.<sup>216</sup> Livingston’s counsel Thomas A. Emmet<sup>217</sup> responded that the federal government had only such power as was expressly granted and that all other powers were reserved to the states under the Ninth and Tenth Amendments.<sup>218</sup>

In 1817, state supreme court judge William Tilghman embraced the same federalist reading of the Ninth Amendment:

Antecedent to the adoption of the Federal constitution, the power of the several states was supreme and unlimited. It follows, therefore, that all power, not transferred to the United States, remains in the states and the people, according to their several constitutions. This would have been the sound construction of the constitution, without amendment. But the jealousy of those, who feared that the federal government would absorb all the

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214. This monopoly would be the subject of a great deal of litigation. See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). In *North River Steamboat Co. v. Livingston*, 1 Hopk. Ch. 170 (N.Y. Ch. 1824), Livingston argued that neither the Ninth nor Tenth Amendment reserved powers or rights to the states, but only to “the people.” Thus, the state had no right to interfere with his ferry operations from one place to another in New York waters. See *id.* at 182–84. The court ignored his argument, ruling instead that his ferry run was protected under the holding of *Gibbons v. Ogden*, since it involved stops on both the New York and New Jersey sides of the water. *Id.* at 227–28.

215. 9 Johns. 507, 508 (N.Y. 1812).

216. *Id.* at 515.

217. Thomas Emmet argued a number of important cases in state and federal court, including the Supreme Court, between 1815 and 1824. See 3–4 WHITE, *supra* note \_\_\_, at 204–14. The culmination of his legal career was his argument before the Supreme Court in *Gibbons v. Ogden*. *Id.* at 210–11; see also *infra* note \_\_\_ and accompanying text.

218. According to Emmet:

In the year 1789, certain amendments to the constitution were proposed; and of the articles adopted, the ninth and tenth were, “that the enumeration in the constitution of certain rights, shall not be construed to deny or disparage others retained by the people.” That “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.” The convention of this state adopted the constitution with the explanation given by General *Hamilton*, who was a member, that no powers were conferred on congress but such as were explicitly given by the constitution.

*Livingston*, 9 Johns. at 550–51.

power of the states, caused it to be expressly recognized in the 11th and 12th articles of amendment.”<sup>219</sup>

Judge Tilghman was a member of the Federalist Party and likely shared his Party’s broad view of national power. This makes all the more significant his embrace of a state-protective reading of the Ninth Amendment.

*g. 1820: The First Supreme Court Discussion of the Ninth Amendment*

In 1820 John Taylor of Caroline declared in his book *Construction Construed and Constitutions Vindicated*, “[t]he [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>220</sup> Taylor was an ardent states-rights advocate, and his thoughts on the Ninth Amendment perhaps should be taken with a grain of salt, especially given the distance from the original ratification of the Ninth Amendment. The same year Taylor published his book, however, the very *nationalist* Joseph Story embraced the very same view of the Ninth Amendment.

The first discussion of the Ninth Amendment in a Supreme Court case (only recently identified) occurred in *Houston v. Moore* (1820)<sup>221</sup> in an opinion by Justice Joseph Story. Once again, the decision was handed down before the rise of Calhoun’s nullification doctrine, and Justice Story is not known for his favoring of states’ rights. Nevertheless, according to Justice Story, the letter and spirit of the Ninth Amendment called for a narrow reading of federal power in order to preserve the concurrent powers of the states.

*Houston* involved the question of whether the states retained the concurrent power to established disciplinary rules for the militia, given the express enumerated power of Congress to regulate the militia. The case did not involve any claimed individual right. This important and influential case deserves more space than I can devote to it here.<sup>222</sup> In brief, the majority upheld the state disciplinary action, drawing a dissent from Justice Story. In that dissent, Story laid out what he viewed as the proper approach to determining concurrent state power over a given subject. His opinion is worth reading in full as an early

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<sup>219</sup> Chief Justice of the Pa. Court(1806-1827), William Tilghman (a federalist midnight justice who lost his seat with the repeal of the judiciary act): *Farmers' & Mechanics' Bank v. Smith* 1817 WL 1771 (Pa. 1817.) (at \*4).

<sup>220</sup> John Taylor, *Construction Construed and Constitutions Vindicated* 46 (De Capo Press 1970) (1820) (emphasis in original). 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 Encyclopedia* 859 (John Foley ed., 1900).

<sup>221</sup> 5 Wheat. 1 (1820).

<sup>222</sup> For a more complete discussion, see Lash, *The Lost Jurisprudence of the Ninth Amendment*, *supra* note \_\_ at 613.

example of how the Ninth Amendment can be applied in a live case or controversy. For our purposes, it is enough to simply quote Story's declaration that "it seems unquestionable that the states retain concurrent authority with Congress, not only upon the letter and spirit of the [ninth] amendment of the constitution, but upon the soundest principles of general reasoning."<sup>223</sup>

To the dismay of those who supported his nomination to the Court, Joseph Story was a nationalist. He had no incentive to find state-protective provisions in the Bill of Rights or anywhere else in the constitution. Nevertheless, Story follows the traditional account of the Ninth and views it—wholly apart from the Tenth Amendment—as a provision that guards the concurrent authority of the states. Story's discussion of the Ninth Amendment was quoted in later Supreme Court cases, and Story's reading of the Ninth was echoed by countless state and federal court judges for the next one hundred years. In fact, an early compendium of the opinions of John Marshall included Story's opinion in *Houston*, since the great Chief Justice apparently joined Story's dissent.<sup>224</sup>

### *Summation*

At some point the mercy rule should apply. I have not selected only federalist references to the Ninth by courts and commentators and omitted others. There are *no* such references to a libertarian Ninth during this period.<sup>225</sup> With the exception of a defendant's attempt to use the Ninth (and Tenth!) in support of the right to trial by jury—an attempt ignored by the court—the historical record is devoid of libertarian readings of the Ninth Amendment.<sup>226</sup> Scholarly and judicial commentary is extensive and uniformly federalist and I have no doubt that further research will uncover many more examples. Indeed, I seem to uncover more every time I run a general search in a historical database. Many of the above examples were uncovered just during the preparation of this article.

I have limited my analysis of post-adoption commentary in deference to Barnett's claim that later sources might be tainted by Calhounian state rights theory in the years leading up to the Civil War. There is much more, and, again, I believe that all pre-Civil War commentary is relevant to the impact of the Fourteenth Amendment. But even under this limited view of the evidence, the record is unequivocal: From the moment of its submission to the states to its earliest application in state and federal court, the Ninth Amendment was broadly viewed as a provision guarding the retained sovereignty of the states. This

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223. *Houston*, 18 U.S. at 48–50 (Story, J., dissenting). In the actual quote, Story refers to the Ninth as the "eleventh" amendment, reflecting an early custom of referring to the first ten amendments according to their placement on an original list of twelve proposed amendments. Our Ninth was 11<sup>th</sup> on that list.

224 See The writings of John Marshall, late Chief Justice of the United States, upon the federal Constitution Boston, 1839. 740pp. American Law: Constitutional Law: Special Topics.

225 It would not undermine the conclusions of this article if there are such individual rights uses of the Ninth Amendment during this period. Again, the federalist Ninth would be understood to apply to the denial or disparage of any right, individual or collective. The extensive pairing of the Ninth and Tenth Amendments as federalists provisions, however, are impossible to ignore.

226 See Lash, *The Lost Jurisprudence*, *supra* note \_\_\_ at 605.

testimony includes those involved with the drafting of the amendment and its ratification.

## 2. *The Tenth Amendment*

The ubiquitous pairing of the Ninth and Tenth Amendments not only highlights the federalist character of the Ninth, it also shows how the Tenth as well as the Ninth was read as establishing a rule of strict construction of federal power. The text of the Tenth does not expressly announce such a rule (one of the reasons why Randolph did not think it would have “much effect”). It is clear however, that the Tenth quickly came to be viewed as establishing a federalist rule of construction. As I have written elsewhere, ultimately the Tenth would eclipse the Ninth as the primary textual expression of federalist interpretation of the Constitution.<sup>227</sup>

Although there are earlier examples,<sup>228</sup> perhaps the biggest reason why states rights theorists came to emphasize the Tenth over the Ninth involves what came to be known as James Madison’s “Celebrated Report of 1800.”<sup>229</sup> This extended defense of the Virginia Resolutions against the Alien and Sedition Acts explored in detail the Resolutions’ claim that the Acts violated a number of constitutional principles, including those announced by the First and Tenth Amendments. The Report became the federalists’ “magna charta” and found its way into almost every tract and essay on state rights during the nineteenth century.<sup>230</sup> It clearly influenced St. George Tucker’s *View of the Constitution*, who cites to the Report repeatedly and shares Madison’s use of the Tenth in the Report as counseling a narrow construction of federal power.<sup>231</sup> Given the status of Madison’s Report and the influence of Tucker’s treatise, it is not surprising that Madison’s Tenth Amendment-based defense of state rights established the general argument upon which later states rights theory would be based. It is important to note, however, that the rise of the Tenth was *not* accompanied by a decline in federalist readings of the Ninth. Throughout the nineteenth and early twentieth century, the Ninth Amendment continued to be read in tandem with the Tenth as one of the dual guardians of federalism and states’ rights.<sup>232</sup>

Randy Barnett believes that Madison’s decision to rely on the Tenth and not the Ninth in his Celebrated Report undermines my claims about the federalist Ninth. According to Barnett, if the Ninth Amendment calls for a limited reading of federal power in order to preserve state autonomy, then Madison *should* have relied on the Ninth in his objections to the Alien and Sedition Acts.<sup>233</sup> Barnett further claims that Madison’s emphasis on the Tenth shows that this Amendment

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<sup>227</sup> See Kurt T. Lash, James Madison’s Celebrated Report of 1800: The Transformation of the Tenth Amendment [Madison’s Report], 74 *Geo. Wash. L. Rev.* 165 (2006).

<sup>228</sup> See Edmund Randolph, The Constitutionality of the Bank Bill (Feb. 12, 1791), *in* H. Jefferson Powell, *The Constitution and the Attorneys General* 4 (1999) (claiming that chartering a national Bank would violate the Tenth Amendment).

<sup>229</sup> See James Madison, Report on the Alien and Sedition Acts, *in* *Writings*, *supra* note \_\_ at 608.

<sup>230</sup> See Lash, Madison’s Report, *supra* note \_\_ at 182-86.

<sup>231</sup> *Id.* at 182.

<sup>232</sup> See generally, Lash, *The Lost Jurisprudence*, *supra* note \_\_.

<sup>233</sup> See Barnett, *The Ninth Amendment*, *supra* note \_\_ at 65.

and not the Ninth was understood as a rule of construction guarding states rights.<sup>234</sup>

There are a number of problems with this argument. To begin with, Barnett seems unaware of the many federalist uses of the Ninth Amendment during the same period.<sup>235</sup> Whatever else one might conclude about the Alien and Sedition Act controversy, one cannot conclude that the Ninth was not understood at the time as a federalist rule of construction. There are too many examples to the contrary. Secondly, we know that men like John Page *did* rely on federalist readings of the Ninth in their opposition to the Alien and Sedition Acts.<sup>236</sup> Finally, nothing in Madison's Report repudiates, or even undermines, his earlier express statements about the Ninth Amendment. Barnett tries to imply otherwise by making it seem that if it was *possible* to use the Ninth, then Madison *should* have used the Ninth. Because he did not, this means that the Ninth was not understood as a federalist rule of construction. But this is a logical fallacy: One cannot get "should have" out of "could have."

In fact, there was good reason for Madison to discuss the Tenth and not the Ninth Amendment, even if a Ninth Amendment argument was possible. Although Madison's Report addressed arguments against the Alien and Sedition Acts, this was not its primary purpose. Madison's Report was a *defense* the Virginia Resolutions at time when political backlash from those Resolutions threatened to derail the political hopes of the Republican Party.<sup>237</sup> Because the Resolutions based their argument on the First and Tenth Amendments, defending them required Madison to do the same.

In December of 1798, the Virginia Legislature adopted and promulgated the (in)famous "Virginia Resolutions." Ghost-written by James Madison, the Resolutions declared that the Alien and Sedition Acts were a "deliberate, palpable and dangerous exercise of other powers not granted by the said compact [the Constitution]." <sup>238</sup> Because the "Acts aforesaid were unconstitutional" the states therefore were "duty bound, to interpose for arresting the progress of evil."<sup>239</sup> Accordingly, the "General Assembly doth solemnly appeal to the like dispositions of the other States in confidence that they will concur with this Commonwealth," and will "cooperat[e] with this state in maintaining unimpaired the authorities, rights, and liberties reserved to the states respectively, or to the people."<sup>240</sup>

This was no ordinary objection to an Act of Congress. Earlier controversies like that involving the Bank of the United States had raised the issue of proper interpretation of enumerated federal power. In this case, however, Virginia accused the federal government of deliberately exercising an extra-constitutional

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<sup>234</sup> *Id.* at 69.

<sup>235</sup> See *supra* note \_\_\_ and accompanying text.

<sup>236</sup> See *supra* note \_\_\_ and accompanying text.

<sup>237</sup> See Ralph Ketcham, James Madison: A Biography 399 (1990).

<sup>238</sup> Virginia Resolutions Against the Alien and Sedition Acts (Dec. 21, 1798), *in* Writings, *supra* note \_\_\_ at 589.

<sup>239</sup> *Id.* at 591, 589.

<sup>240</sup> *Id.* at 591.

power and the Assembly called upon other states to join them in “interposing” against enforcement of the Acts. This incendiary action<sup>241</sup> threatened the continued stability of union. Madison was well aware of delicacy of the situation and he feared that the Assembly’s Resolutions might be read as usurping the people’s ultimate right to decide whether there had been an unacceptable breach in the constitutional compact.<sup>242</sup> As it turned out, the Resolutions were roundly rejected by the other states whose assemblies issued stinging rebukes against Virginia and Kentucky’s unjustified and dangerous tilt towards disunion.<sup>243</sup> The backlash put the Republicans on the defensive at just the moment when they hoped political opposition to the Acts would lead to victory in the presidential elections of 1800. It was politically important that the Resolutions receive a strong defense, and Madison provided one in spades with his “Report of the Committee to Whom were Referred the Communications of Various States, Relative to the Resolutions of the Last General Assembly of this State, Concerning the Alien and Sedition Laws,” or, as it came to be known, Madison’s Celebrated Report.<sup>244</sup>

As Barnett points out, although Madison’s Report addresses the proper construction of federal power, its arguments are based on the First and Tenth Amendments, not the Ninth.<sup>245</sup> Although Barnett believes this proves Madison did not read the Ninth as a rule of construction protecting the states from overweening federal power, his claim misunderstands the purpose of the Report. The Virginia Resolutions were short and to the point: Congress had done more than merely adopted a “latitudinary” construction of its enumerated powers. It had clearly and intentionally sought to exercise an *unenumerated* power.<sup>246</sup> This is not a Ninth Amendment issue—this is a Tenth Amendment issue. It was because of this serious and “palpable” violation that Virginia believed a coordinated act of opposition was warranted.<sup>247</sup> In his defense of the Resolutions, Madison could not rely on Ninth Amendment arguments of undue

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<sup>241</sup> Had the Resolutions been produced anywhere but on the floor of the Assembly, the members would have likely been prosecuted under the very Act they opposed.

<sup>242</sup> See Madison to Thomas Jefferson (Dec. 29, 1798) in Writings, *supra* note \_\_ at 592.

<sup>243</sup> See 4 Elliot’s Debates at 532.

<sup>244</sup> The full title of Madison’s report is reprinted in *The Mind of the Founder: Sources of the Political Thought of James Madison* 231 (Marvin Meyers, ed. Revised edition 1981). The Report (inaccurately titled “Report on the Alien and Sedition Acts”) is reprinted in Madison’s Writings, *supra* note \_\_ at 608-662. The defensive posture of the Report is established in its opening paragraphs. After lightly objecting to the tone of some of the objections to the Virginia Resolutions, Madison concedes a defense is in order:

The committee have deemed it a more useful task, to revise with a critical eye, the resolutions which have met with this disapprobation; to examine fully the several objections and arguments which have appeared against them; and to enquire, whether there be errors of fact, of principle, or of reasoning, which the candour of the General Assembly ought to acknowledge and correct.”

See Madison’s Report, in Writings, *supra* note \_\_ at 608.

<sup>245</sup> See Barnett, *The Ninth Amendment*, *supra* note \_\_ at 64.

<sup>246</sup> For a text of the Virginia Resolutions, see *Virginia Resolutions Against the Alien and Sedition Acts*, in Writings, *supra* note \_\_ at 589.

<sup>247</sup> *Id.*

construction of enumerated power. This would not justify the more serious assertions of the Virginia Resolutions, and it would reduce the issue to the same issue as the Bank controversy—a controversy neither Madison nor anyone else believed warranted coordinated state opposition.<sup>248</sup> His Report accordingly ties all of its arguments to the basic point that Congress had exercised a power nowhere granted in the Constitution.<sup>249</sup>

The rise of the Tenth Amendment as an independent federalist rule of construction is an important story in its own right.<sup>250</sup> Madison’s focus on the Tenth in his Report on the Virginia Resolutions, however, does not undermine his express description of the Ninth in his speech on the Bank of the United States, nor does it conflict with the many other examples of federalist applications of the Ninth during the same period. Madison’s speech does show how application of the two amendments may overlap, but that cannot come as any surprise. Madison himself linked the two as supporting the general rule of limited interpretation of federal power in his speech on the Bank of the United States. We also know that post-adoption courts and commentators all saw the two amendments as expressing closely related principles of preserved state autonomy.

Randy Barnett’s attempt to read the Tenth as independently establishing a rule of construction for both enumerated and unenumerated federal power, while at the same time reading the Ninth as *only* applying to retained individual natural rights, is not only unsupported by the evidence, it is ironic. It places Barnett in the position of arguing that the Ninth Amendment means *less* than what it says (protecting only *some* retained rights), while the Tenth Amendment means *more* (serving as a rule of construction when there is no such rule in the text). The federalist reading of both amendments, on the other hand, allows them their full

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<sup>248</sup> In fact, the Resolutions themselves distinguish earlier disputes over broad constructions of federal power from the current objections to the Alien and Sedition Acts. See Madison’s Report, *in Writings*, *supra* note \_\_ at 615.

<sup>249</sup> According to Madison’s Report:

That the general assembly doth particularly protest against the palpable, and alarming infractions of the4 constitution, in the two late cases of the “Alien and Sedition acts,” . . . the first of which, exercises a power nowhere delegated to the federal government; and which by uniting legislative and judicial powers to those of executive, subverts the principles of free government, as well as the particular organization, and positive provisions of the federal constitution; and the other of which acts, exercises in like manner, a power not delegated by the constitution, but on the contrary, expressly and positively forbidden by one of the amendments thereto; a power, which more than any other, ought to produce universal alarm; because it is leveled against that right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right.”

See Madison’s Report, *in Writings*, *supra* note \_\_ at 620.

<sup>250</sup> One that I have elsewhere explored in depth. See Kurt T. Lash, James Madison’s Celebrated Report of 1800: The Transformation of the Tenth Amendment, 74 *Geo. Wash. L. Rev.* 165 (2006).

effect and *no more*. The Ninth guards retained rights (not just retained individual natural rights), and the Tenth reserves all non-delegated power to the states respectively, or to the people.

## V. The Fourteenth Amendment

This article has focused on the original meaning of the Ninth Amendment. If one seeks the original meaning of the Constitution in order to vindicate the sovereign right of the people to establish fundamental law, however, then one must consider the impact of later amendments on the original scope and operative effect of the Ninth Amendment. The people, after all, have the sovereign right to alter or abolish constitutional principles as they see fit.<sup>251</sup> Of particular importance is the impact of the Fourteenth Amendment. Whatever the scope of local autonomy under the original Constitution, the Fourteenth Amendment significantly reduced that autonomy when it comes to the privileges or immunities of United States citizens, or state laws that impact the right to due process or equal protection under the law. In this way, the original meaning of the Ninth Amendment must be synthesized with the original meaning of the Fourteenth.

A comprehensive theory of the Ninth Amendment that takes into consideration the impact of the Fourteenth Amendment and establishes the rules for contemporary judicial enforcement is beyond the scope of this particular paper.<sup>252</sup> Nevertheless, because Randy Barnett makes a number of claims regarding the application of the Ninth and Fourteenth Amendments, it is appropriate to at least sketch how the historical evidence informs the intended relationship between these two critical amendments.

### a. *The Ninth Amendment and Incorporation Doctrine*

Section One of the Fourteenth Amendment declares that “no state shall” abridge the privileges of immunities of United States citizens or deny any person the right to due process or equal protection under law. This restriction on state power carves out a portion of rights previously retained by state majorities and places them beyond the reach of the political process. The current scholarly debate involves the content of these rights; for example whether they include some or all of the first eight amendments, or whether they (also) include certain unenumerated rights such as the right to privacy or the common law right to pursue a trade.<sup>253</sup> No scholar or judge, however, has ever suggested that the

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<sup>251</sup> See Declaration of Independence; Art. V U.S. Const.

<sup>252</sup> In a forthcoming paper I hope to provide a comprehensive theory of the Ninth Amendment which reconciles the text of the Ninth, Tenth, and Fourteenth Amendments and presents an enforceable theory of judicial review. See Kurt T. Lash, *Towards a Textual-Historical Theory of the Ninth Amendment* (forthcoming 2007).

<sup>253</sup> See Amar, *The Bill of Rights*, *supra* note \_\_ (arguing that some, but not all of the first eight amendments were meant to be incorporated); Michael Kent Curtis, *No State Shall Abridge* (all eight were meant to be incorporated); Kurt T. Lash, *Two Movements of a Constitutional Symphony: Akhil Reed Amar’s The Bill of Rights*, 33 U. Rich. Law Review 485 (1999) (suggesting the possibility of incorporated common law economic rights).

Fourteenth Amendment incorporates the Ninth Amendment. From the earliest incorporation cases to modern doctrine, the Court has consistently limited the scope of incorporation doctrine to the first eight amendments.<sup>254</sup>

The history surrounding then adoption of the Fourteenth Amendment supports the long-standing position of the courts that neither the Ninth nor Tenth Amendment are proper candidates for incorporation. Throughout the first half of the nineteenth century, the Ninth and Tenth Amendments were viewed as preserving the autonomy of the states.<sup>255</sup> Despite the incentive to raise every possible liberty claim in opposition to slavery, abolitionists never referred to the Ninth Amendment in support of their cause. Instead, in the years leading up to the Civil War, both the Ninth and Tenth Amendments were invoked on behalf of slavery and the right of states to secede from the Union.<sup>256</sup> It is no surprise then that the man who drafted Section 1 of the Fourteenth Amendment, John Bingham, left both the Ninth and Tenth Amendments off of his list of individual privileges or immunities protected against state action by the Fourteenth Amendment.<sup>257</sup> In sum, the approach of courts and commentators seems well supported by the historical record: The Fourteenth Amendment was neither intended nor understood to incorporate the Ninth.

Although he has no historical evidence for his conclusion, Randy Barnett believes it is reasonable to assume that the Ninth Amendment and the Privileges or Immunities Clause “refer to the same set of unenumerable rights.”<sup>258</sup> In light of evidence presented in this paper, however, this seems clearly incorrect.<sup>259</sup> As we have seen, the evidence strongly suggests that the retained rights of the Ninth included collective majoritarian rights that, by definition, cannot logically be incorporated against state majorities (for example, the concurrent power of local majorities to regulate the state militia). Incorporating these majoritarian rights against the states would make no more sense than incorporating the *Tenth* Amendment against the states. If our reading of the historical record is correct, and at least *some* of the rights protected under the Ninth Amendment were

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<sup>254</sup> See generally, Lash, *The Lost Jurisprudence of the Ninth Amendment*, *supra* note \_\_\_ at 673. In fact, courts originally cited the Ninth Amendment in support of rejecting a theory of total incorporation. See *id.* at 675.

<sup>255</sup> See generally, Lash, *The Lost Jurisprudence*, *supra* note \_\_\_.

<sup>256</sup> See *id.* at 639.

<sup>257</sup> John Yoo points out that during the nineteenth century state constitutions adopted provisions echoing the language of the federal Ninth Amendment. See John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 *Emory L. J.* 967 (1993). Although I think this is important evidence that the language of the Ninth could be viewed in support of individual rights, these state constitutional provisions cannot trump the extensive express testimony regarding the public understanding of the federal clause itself. Unlike provisions like the Free Exercise and Establishment Clauses which appear to have been embraced as individual rights provisions by the Civil War, no such transformation appears to have occurred with the Ninth Amendment. See Lash, *The Lost Jurisprudence of the Ninth Amendment*, *supra* note \_\_\_ at 643-52.

<sup>258</sup> Barnett, *Restoring the Lost Constitution*, at 66.

<sup>259</sup> Even Barnett appears to realize the possibility that the Ninth and Privileges or Immunities Clause of the Fourteenth Amendment do not protect the same set of rights. See Barnett, *The Ninth Amendment*, *supra* note \_\_\_ at \_\_\_ (conceding that the Ninth might protect both individual and collective rights).

collective in nature, then the Ninth and Fourteenth Amendments cannot protect the *same* set of rights.

Once we understand that the Ninth and Fourteenth Amendments do not protect the same set of rights, this means that the rights of the Ninth Amendment must be *reconciled* with the rights of the Fourteenth. For example, we know that the original Ninth Amendment prohibited the extension of federal authority into any matter meant to be left under state majoritarian control. This potentially included everything from chartering a bank to establishing a religion to providing due process for deprivation of life liberty and property. The Fourteenth Amendment, however, substantially altered this arrangement and removed broad categories of rights from the local control of the States. More, under Section 5 of the Fourteenth Amendment, the federal government now gained regulatory power over matters originally *denied* to the federal government. In this way, the Fourteenth Amendment significantly altered the original scope of the Ninth.

On the other hand, whatever the substantive content of the Fourteenth Amendment, at some point a limit is reached regarding the plausible meaning of “privileges or immunities of United States’ citizens,” “due process” and “equal protection.” The retained rights of the Ninth remain in effect to the extent that they have not been abrogated (or transformed) by the Fourteenth. Put another way, where the enumerated rights of the Fourteenth end, the remnant rights of the Ninth Amendment begin.

The task then is to determine *which* of the retained rights protected by the original Ninth remain under state control, and which are now protected against state action by the Fourteenth Amendment. For example, the original Constitution conferred no express power over the subject of education. Although one could construe the Interstate Commerce Clause broadly enough to bring all education within national control, this is a good candidate for that kind of latitudinarian interpretation forbidden by the Ninth Amendment. Local control of public education thus is likely one of the rights retained by the collective people in the several states. Unless the Fourteenth Amendment transformed public education into an individual right, this means that local control of public education remains one of the people’s retained unenumerated rights guarded by the Ninth and unaffected by the Fourteenth.

It is precisely because the federalist principle of the Ninth Amendment remains alive and well even after the adoption of the Fourteenth Amendment that Randy Barnett’s “presumption of liberty” cannot be correct in regard to the local authority of the states. Although a number of retained collective rights were erased through the adoption of the Reconstruction Amendments (state regulation of slavery, among others), there yet remains an *unenumerable* set of rights preserved from federal interference and left under the control of the people in the several states as a matter of right. Indeed, the Ninth does create a presumption of liberty, but it runs in precisely the opposite direction as that proposed by Randy Barnett. Any intrusion upon the retained rights of the people must be justified as a necessary and proper construction of an enumerated federal power. This is as true for federal power conferred by the Fourteenth Amendment as it is for federal power conferred under the original Constitution. This does not mean that the Ninth trumps the Fourteenth Amendment. As noted above, the Fourteenth

necessarily carves out large portions of the original Ninth. The degree of impact the Fourteenth Amendment has on the Ninth, however, must be based on an interpretation of the *enumerated* rights and powers of the Fourteenth Amendment. There are no *unenumerated* restrictions on the retained rights of the people.

## VI. Conclusion: The Inescapable Federalism of the Ninth

The meaning I ascribe to the Ninth Amendment in this article is the same meaning embraced by countless jurists and legal theorists for over one hundred years. At the very least, then, the approach presented here is anything but idiosyncratic. Perhaps the greatest challenge to this understanding of the original Ninth Amendment is the modern tendency to view rights and powers through the lens of the Fourteenth Amendment and presume that state rights rhetoric generally stands as a crypto-apologia for segregation and slavery.

But views of local autonomy shift with political realignment. Progressive voices today are raised on behalf of local control of medicine,<sup>260</sup> affirmative action programs,<sup>261</sup> and election law.<sup>262</sup> There may yet be room for a vision of a national people with the sovereign right to divide authority between national and local governments. There is no doubt, however, that this was the view of those who debated and ratified the Ninth Amendment. The Ninth Amendment was then and, to the extent that original meaning informs current interpretation, remains today inescapably federalist.

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<sup>260</sup> See briefs submitted in *Raich v. Gonzales*.

<sup>261</sup> See briefs submitted in *Grutter v. Bollinger*.

<sup>262</sup> See briefs submitted in *Bush v. Gore*.