The Inescapable Federalism of the Ninth Amendment

Kurt T. Lash
University of Richmond, klash@richmond.edu

Follow this and additional works at: https://scholarship.richmond.edu/law-faculty-publications

Part of the Constitutional Law Commons, and the Legal History Commons

Recommended Citation

This Article is brought to you for free and open access by the School of Law at UR Scholarship Repository. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.
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 Amendment has been Professor Randy Barnett, who has argued in a number of articles and books that the Ninth Amendment was originally understood as guarding unenumerated natural rights. Recently uncovered historical evidence, however, suggests that those who framed and ratified the Ninth Amendment understood it as a guardian of the retained right to local self-government. Recognizing the challenge this evidence poses to libertarian theories of the Ninth Amendment, Professor 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 Clause.

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

I. INTRODUCTION .......................................................................................804

II. PRELIMINARY MATTERS: DEFINING TERMS AND APPROACH ..........808

A. Two Stories ................................................................. 808
   1. The Libertarian Account ........................................... 808
   2. The Federalist Account ............................................ 808
B. Constitutional Theory and Method ................................. 811
C. The Pool of Relevant Evidence ....................................... 813

III. The Concerns That Triggered the Ninth Amendment ...... 814
   A. The Traditional Account of the Ninth Amendment ....... 814
   B. Madison's Original Draft of the Ninth Amendment ...... 816
   C. The Proposals of the State Ratifying Conventions ...... 817

IV. The Final Language of the Ninth Amendment ............... 823
   A. The Altered Language ............................................. 823
   B. The People's Retained Rights ................................. 824
   C. The People's Retained Rights and Popular Sovereignty 825
   D. The Virginia Response to the Final Draft ................. 834
      1. The Concerns of Edmund Randolph ....................... 835
      2. The Letters of Hardin Burnley and James Madison ... 838
      3. The Virginia Senate Report ................................. 840
   E. Madison's Speech on the Bank of the United States .... 844
   F. Barnett's Interpretation of Madison's Speech .......... 848

V. Post-Adoption Commentary .......................................... 854
   A. Discussions of the Ninth Amendment, 1791–1820 ........ 855
      1. The 1796 "Political Catechism" of Elhanan Winchester . 855
      2. John Page's 1799 Remonstrance Against the Alien and Sedition Acts ............................................. 856
      3. St. George Tucker's 1803 "View of the Constitution" ... 859
      4. 1805: The Earliest Discovered State Court Application of the Ninth Amendment—By a Ratifier of the Constitution .......................................................... 861
      5. 1811: Defending the State's Right to Grant a Steamboat Monopoly ................................................. 862
      6. The Continued Debates Regarding the Bank of the United States .................................................... 863
      7. The Retained Concurrent Powers of the States .......... 866
      8. 1820: The First Supreme Court Discussion of the Ninth Amendment ................................................. 869
      9. Summation .......................................................... 870
   B. The Tenth Amendment ............................................. 871

VI. The Fourteenth Amendment ........................................ 875
   A. The Ninth Amendment and Incorporation Doctrine ....... 876
VII. Conclusion: The Inescapable Federalism of the Ninth Amendment
I. 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 scholars reassess and reformulate prior conclusions, newer understandings increasingly stabilize as the range of plausible interpretations narrows. Recently, Ninth Amendment scholarship has witnessed this kind of aggregated evolution of understanding as a number of works have greatly increased the stock of historical evidence surrounding the enactment of this heretofore mysterious Amendment. 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* set the stage for the first modern debate over the meaning of the Ninth Amendment. The majority of Justices in *Griswold* accepted the Ninth Amendment as textual support for judicial enforcement of a broad array of individual rights. The dissenting Justices claimed the Ninth Amendment simply mirrored the Tenth Amendment as a general statement of limited federal power. In the decades that followed, the scholarly debate essentially echoed the *Griswold* divide: Most legal commentators accepted the majority’s libertarian reading of the Ninth Amendment, while a few dissenters attempted to link the

---


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


4. See id. at 484; id. at 486–92 (Goldberg, J., concurring).

5. See id. at 529–30 (Black, J., dissenting).

6. See, e.g., Barnett, supra note 1, at 13; BARNETT, supra note 1, at 240–42; 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
Ninth Amendment to the state-protective declaration of the Tenth Amendment. The latter passive-federalist accounts (so-called because they see no active role for the Ninth Amendment) failed to gain significant academic support, leaving the libertarian model as the predominant view in legal scholarship.

The preeminent 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 Amendment, this Article focuses 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. Although Barnett's work extends well beyond the Ninth Amendment, he has consistently argued that the original meaning of the Ninth Amendment supports judicial enforcement of unenumerated individual natural rights. As Barnett believes Ninth Amendment principles are enforceable by courts of law, this Article refers to his approach as an active libertarian reading of the Ninth Amendment.

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 Amendment was conceived and received as a federalist provision preserving the people's retained right to local self-government. This is how its drafter, James Madison, understood the Amendment, and this is how scholars and judges construed the Amendment for more than one-hundred years after its

---

7. See THOMAS B. McCAFFEE, INHERENT RIGHTS, THE WRITTEN CONSTITUTION, AND POPULAR SOVEREIGNTY: THE FOUNDERS' UNDERSTANDING (2000); Caplan, supra note 1, at 228–59. Professor Akhil Amar has suggested the Ninth Amendment protects the people's collective right 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 at least 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 note 217. Amar also has long recognized the general federalist relationship of the Ninth and Tenth Amendments. See AMAR, supra, at 123–24.


9. See generally BARNETT, supra note 1; Barnett, The Ninth Amendment, supra note 8.

10. See Lash, The Lost Original Meaning, supra note 1, at 343–47 (describing the difference between active and passive interpretations of the Ninth Amendment).

Although libertarian theorists like Professor Barnett correctly read the Ninth Amendment as an active enforceable amendment and not a mere passive statement of principle, the evidence suggests that a much broader understanding of retained rights prevailed at the time of the Founding than that proposed by the libertarian model. The Ninth Amendment was understood to preserve all retained rights, whether individual, majoritarian, or collective, from undue federal interference, reserving control of the same to state majorities. This understanding makes the Ninth Amendment 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, Professor Barnett has now drafted a response to both my work and the work of others on the Ninth Amendment. In his response, Barnett concedes that the evidence supports either an active federalist or active libertarian reading of the Ninth Amendment. 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 Amendment.

Because my articles concentrated more on historical evidence than the construction of constitutional theory, the specific differences and similarities between the libertarian and federalist readings of the Ninth Amendment remained unclear. For example, Professor Barnett and I both concede the


14. For a discussion of each of these categories as retained rights under the Ninth Amendment, see Kurt T. Lash, Federalism, Freedom, and the Founders' View of Retained Rights: A Reply to Randy Barnett, 60 STAN. L. REV. 969 (2008).


16. See id. at 21 ("[E]vidence supporting a federalism function of the Ninth Amendment can be viewed as logically consistent with both the individual and collective rights models."); id. at 79 ("[T]he 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 ....").

17. See id. at 62. Barnett writes:

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. 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.

Id. (internal citation omitted). Indeed, Barnett insists that I have misled readers into thinking our two approaches to the Ninth Amendment are somehow incompatible. Id. at 79.

18. 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, supra note 1, at 401 ("[T]here is no textual reason and little historical reason
possibility that the retained rights of the Ninth Amendment include both individual and collective rights. We also both agree that the Ninth Amendment is "federalist" to the extent that it binds only the federal government and not the states. Perhaps, then, Barnett and I are merely focusing on two sides of the same coin: he, emphasizing the libertarian side of the Ninth Amendment; I, emphasizing the collective (or federalist) side. How much substantive difference can there be between these two positions? Quite a bit, it turns out. Barnett's libertarian Ninth Amendment is the mirror image of his libertarian reading of the Fourteenth Amendment's Privileges or Immunities Clause. He believes that these two Amendments 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. Under my reading of the Ninth Amendment, however, the original federalist aspect of the Amendment remains in force and requires judicial protection of local self-governance 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 Amendment 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 would significantly undermine Barnett's theory of a libertarian Constitution.

My prior two articles in the Texas Law Review 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 that involve early discussion and application of the Ninth Amendment. The most significant of these new discoveries are presented for the first time in this Article. The purpose of this Article, however, is to focus on those aspects of the historical record that have particular significance in the federalist versus libertarian debate. Following a roughly chronological approach, this Article summarizes the relevant evidence and addresses Professor Barnett's arguments as it proceeds. In the penultimate Section, I consider the relationship between the Ninth and Fourteenth Amendments. 

---

19. See, e.g., Barnett, supra note 1, at 66 (stating that the Ninth and Fourteenth Amendments both "refer to the same set of unenumerable rights").


21. This last Section by necessity must be no more than a sketch. For a more comprehensive text-based theory of the Ninth Amendment, see Kurt T. Lash, A Textual-Historical Theory, supra note 1.
II. PRELIMINARY MATTERS: DEFINING TERMS AND APPROACH

A. TWO STORIES

Behold two stories of the Ninth Amendment:

1. 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 Amendment (and the Bill of Rights 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 the Constitution authorized the courts to protect unenumerated natural rights against both state and federal governments. Although no court prior to 1965 embraced such a view of the Ninth Amendment, 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.

2. 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 an amendment 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 Amendments expressly addressed these particular concerns of the states. Although the final version of the Ninth Amendment 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 Amendment 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 Amendment. In short, the Ninth and Tenth Amendments were
meant to work in tandem, accomplishing similar goals, through different means.

Professor Barnett advocates the first account. 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. The federalist Ninth Amendment, on the other hand, is triggered anytime federal power is unjustifiably extended, regardless of whether the extension affects an individual or non-individual right, such as the collective right to local self-government. This distinction is important for two reasons. First, the federalist model22 embraces a much broader category of rights than that proposed by the libertarian model. Second, 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 the Founders meant to leave 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, one must see

---

22. 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 (which limits 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 Amendment as preserving local majoritarian or collective rights. See Barnett, The Ninth Amendment, supra note 8, at 15-17. 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 others 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 notes 99-101 and accompanying text. As I have argued in previous articles, I continue to distinguish "libertarian" models of the Ninth Amendment (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 Amendment (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 that 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).
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 governments remained sovereign in their respective spheres. Such a division of power had no historical counterpart. Describing it and debating its merits required a new language; older terms had to be reconceptualized and adapted to a new theory of divided government. 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. The Articles of Confederation, for example, declared that all non-delegated powers,


25. See generally EMERICH DE VAETTEL, THE LAW OF NATIONS (1758). Vattel's work was widely relied upon at the time of the country's founding and for decades afterward. The first major constitutional treatise by St. George Tucker relied heavily on Vattel. See, e.g., St. George Tucker, View of the Constitution of the United States, in 1 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA app. Note D (St. George Tucker ed., Phila., William Young Birch & Abraham Small 1803) [hereinafter TUCKER, BLACKSTONE'S COMMENTARIES]. Others in the founding generation shared Vattel's view that governments in general, and states in particular, had retained natural rights. See, e.g., Kentucky Resolutions 10 Nov. 1798, 14 Nov. 1799, reprinted in 5 THE FOUNDERS' CONSTITUTION 131, 134 n.* (Philip B. Kurland & Ralph Lerner eds., 1987) (noting that Thomas Jefferson's draft stated in part that "every 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 (Leonard W. Levy ed., De Capo Press 1970) (1820) ("The states have a natural right to make all necessary and proper laws within their national powers reserved...").
jurisdiction, and *rights* were retained by the states.\textsuperscript{26} If state conventions were to ratify the Constitution, the Founders had to convince them that the federal government not only lacked power to interfere with individual rights but also lacked 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. These dual concerns played a critical role in the drafting and public understanding of the Ninth Amendment.

**B. CONSTITUTIONAL THEORY AND METHOD**

Professor 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.\textsuperscript{27} As Madison stated during the 1796 debate on the Jay Treaty:

[W]hatever 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 expounding the Constitution. As the instrument came from them it was nothing more than the draft 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.\textsuperscript{28}

Madison's emphasis on the ratifiers' understanding reflects the Founders' belief in popular sovereignty. A political theory in ascendency at the time of the Founding, popular sovereignty distinguishes the government

\textsuperscript{26} The Articles of Confederation art. II (U.S. 1781) ("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.").

\textsuperscript{27} 2 Annals of Cong. 1944, 1946, 1951 (1791) (statement of Rep. Madison). Madison 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 id. at 1951 (statement of Rep. Madison) ("The explanations in the state conventions all turned on the same fundamental principle [Congress could not abridge the retained powers of the states], and on the principle that the terms necessary and proper gave no additional power to those enumerated.").

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. Because these conventions of the people are responsible for "breathing life" into the document, it is their understanding of the words that controls.

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. The originalist work of Professor Barnett, however, is an exception. Although Barnett accepts the legitimacy of originalism (at least provisionally), 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 his or her consent. Because unanimous consent is impossible, consent-based theories fail to bind in conscience anyone who does not individually consent to the Constitution.

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 to adopt 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

29. See, e.g., John Adams, A Defence of the Constitutions of Government of the United States of America, in 6 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 116 (Boston, Little & Brown 1851). As Adams stated:

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 elected wholly by the people, as an architect would pull down an old building and erect a new one.


30. See WOOD, supra note 29, at 328-43 (describing the special legitimacy of conventions).


32. See BARNETT, supra note 1, 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 despite the fact it is in writing.").

33. See id. at 11-14 ("I challenge the idea, sometimes referred to as 'popular sovereignty,' that the Constitution of the United States was or is legitimate because it was established by 'We the People' or the 'consent of the governed.'").
meaning of the Constitution meets this condition that he accepts the legitimacy of originalism as an interpretive method.\textsuperscript{34}

Professor 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.\textsuperscript{35} This is not a criticism of Barnett's normative theory (as he may well be correct about constitutional legitimacy). But, as Barnett himself concedes, "[P]articular items of evidence assume a greater or lesser importance depending on which version of originalism is being employed."\textsuperscript{36} 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 meaning" from "original ratifiers' understanding," with his preference being the former.\textsuperscript{37} This distinction has real bite in Barnett's work. A theme running throughout his work involves how the Ninth Amendment does not reflect the concerns declared by the state ratifying conventions.\textsuperscript{38} As explained 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.\textsuperscript{39}

C. THE POOL OF RELEVANT EVIDENCE

The search for original meaning is not the same as a search for the original Framers' private intent. On this point, Professor 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

\begin{itemize}
\item \textsuperscript{34} Id. at 109-13.
\item \textsuperscript{35} See Trevor Morrison, Lamenting Lochner's Loss: Randy Barnett's Case for a Libertarian Constitution, 90 CORNELL L. REV. 899, 846 (2005) (arguing that Barnett's rejection of the original theory of the Constitution places him in "a rather awkward position").
\item \textsuperscript{36} Barnett, The Ninth Amendment, supra note 8, at 6.
\item \textsuperscript{37} See id. at 5-6.
\item \textsuperscript{38} See, e.g., id. 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.").
\item \textsuperscript{39} Other constitutional scholars who base their work on the theory of popular sovereignty include Akhil Reed Amar, Keith E. Whittington, Bruce Ackerman, Michael Kent Curtis, John Harrison, Michael McConnell, Michael Paulson, Caleb Nelson, and Gary Lawson.
\end{itemize}
public documents (newspapers, official enactments, and the like) or private letters and diaries. The issue that gave rise to the proposed text is clearly relevant, as are the debates that surrounded its drafting, submission, and ratification. Private statements by those involved are helpful, but only to the extent that the statements illuminate likely public understanding.

Post-adoption materials can be relevant, depending on the date of the material and the degree to which it reflects the original understanding as opposed to later political disputes. Although Professor 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. I believe that post-adoption commentary and usage is particularly helpful in the case of the Ninth Amendment, but none of my conclusions are dependent on post-enactment material.

III. THE CONCERNS THAT TRIGGERED THE NINTH AMENDMENT

The commonly told story about the birth of the Ninth Amendment recounts how the Amendment was meant to prevent any erroneous implications arising from 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 Amendment as having the dual purpose of both restraining power and retaining rights—concerns that the state ratifying conventions raised as part of their demands for a Bill of Rights. Professor Barnett’s libertarian reading, on the other hand, asserts that the Ninth Amendment had the single purpose to protect retained individual rights and that it reflects concerns raised by the Federalists who originally supported ratification of the Constitution without a Bill of Rights.

A. THE TRADITIONAL ACCOUNT OF THE NINTH AMENDMENT

Most accounts of the Ninth Amendment focus on Madison’s speech to the House of Representatives where he introduced his proposed Bill of

40. See infra notes 194–99 and accompanying text (discussing Barnett’s use of post-adoption commentary in his analysis of the Second Amendment).

41. See generally Lash, The Lost Jurisprudence, supra note 1 (documenting how the Ninth Amendment played a significant role in some of the most important constitutional disputes in American history).

42. See, e.g., Daniel A. Farber, Retained by the People: The “Silent” Ninth Amendment and the Constitutional Rights Americans Don’t Know They Have 39 (2007).

43. Barnett, The Ninth Amendment, supra note 8, 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 they had 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. The purpose of the Ninth Amendment was to ensure that these rights had the same stature and force after enumeration as they had before.” (internal citation omitted)).
There, Madison noted that the Federalists had originally resisted a Bill of Rights due to the danger that such a bill might erroneously be read as an exhaustive list of the people's retained rights. According to Madison, this danger might be "guarded against" by adopting a provision that expressly prohibited such an erroneous implication. 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. Professor Barnett, for example, believes that the Ninth Amendment 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, 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. Although he concedes that state conventions submitted proposals related to the Ninth Amendment, Barnett nevertheless maintains that Madison "substantially alter[ed] state proposals" in order to focus on concerns regarding the people's retained rights. As Barnett puts it: "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 . . . ." Barnett's account uncouples the Ninth Amendment from the rest of the Bill of Rights and, in so doing, distances it from the state-centered concerns informing the rest of the Bill of Rights.

I believe the evidence supports Professor Barnett's claim that one of the purposes of the Ninth Amendment was to address concerns about adding a Bill of Rights. However, Madison himself expressly rebuts Barnett's attempt to drive a wedge between Madison's Ninth Amendment and concerns

---

45. Id. at 449–50 (statement of Rep. Madison).
47. Id. at 54.
50. Id.; see also id. at 75 ("[T]he Ninth Amendment was invented by James Madison . . . .").
51. Actually, it is misleading to characterize the dangers of adding a Bill of Rights as solely a Federalist concern or to claim that Anti-Federalists inspired the proposals from the states. The proposed amendments from the state conventions clearly echo the "dangerous implications" concern, and men like Edmund Randolph, whom Madison called a "friend of the [proposed] Constitution," championed them. Letter from James Madison to George Washington (Dec. 4, 1789), in 5 DOCUMENTARY HISTORY OF THE CONSTITUTION 221–22 (1905) [hereinafter DOCUMENTARY HISTORY OF THE CONSTITUTION]; see also infra Part III.C.
emanating from the states on at least five different occasions. 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.

B. 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.

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 Amendment, addresses the erroneous exercise of unenumerated federal power. As Madison later explained, the former guards against "a latitude of interpretation" while the latter "exclud[es] every source of power not within the Constitution itself." Although Madison's original draft of the Ninth Amendment addresses both enlarged powers and retained rights, in Madison's mind these two subjects 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

52. See infra.
by turning to the last clause of the fourth resolution [the original
draft of the Ninth Amendment]. 55

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 Amendment 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
Amendment: “disparage other rights—or constructively enlarge.” 56 His notes
thus track the express dual-purpose language contained in his original draft
of the Amendment.

Nor is there any evidence that, of the two listed purposes, retaining
rights was the “true” or “main” purpose of the Ninth Amendment 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: “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.” 57

In sum, Madison’s private correspondence, his speech, and the notes
for his speech all expressly link the Ninth Amendment 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
Amendment 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.

C. 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


56. JAMES MADISON, SPEECH TO THE HOUSE EXPLAINING HIS PROPOSED AMENDMENTS WITH
NOTES FOR THE AMENDMENTS SPEECH (1789), reprinted in 1 THE RIGHTS RETAINED BY THE
PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 65 (Randy E. Barnett ed.,
1989). Although Barnett discusses some aspects of Madison’s notes, he does not address
the lines that refer to the Ninth Amendment. Moreover, although our received account of his
speech does not include his point about enlarged power, Madison may have been forced to
limit his remarks according to time constraints, a possibility Barnett also acknowledges. See
Barnett, The Ninth Amendment, supra note 8, at 34 n.135 (noting Madison’s self-reminder “watch
Time” in his notes).

57. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 5 WRITINGS OF
MADISON, supra note 28, at 271 (emphasis added).
language cannot be found in any proposal submitted by the state conventions, some scholars conclude that the Ninth Amendment was solely Madison's idea. According to this view, the Ninth Amendment 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 Amendment, however, calls this distinction into question. Madison viewed the Amendment as addressing both rights and powers. Madison's speech to the House clearly links the purpose of the Ninth Amendment to concerns about enlarged federal power, a critical concern of the state conventions. It flips history on its head to say that the Federalists, but not the Anti-Federalists, 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 Amendment and the state conventions becomes clear.

Like Madison's draft of the Ninth and Tenth Amendments, 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 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.

58. In addition to Professor Barnett, the historian Leonard Levy also credited Madison with conceiving the Ninth Amendment 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.").

59. Ratification by the New York Convention (July 26, 1788), in 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 327 (Jonathan Elliot ed., 1836) [hereinafter ELLIOT'S DEBATES]; see also id. at 329. In ratifying the Constitution, the New York Convention also declared:

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
The first of these declarations states 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 two concerns. The Virginia Convention, for example, proposed the following two amendments:

1st. 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."

... 

17th. 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.60

Once again, the first (Virginia’s “First”) provision limits the federal government to enumerated powers, while the second (Virginia’s “Seventeenth”) limits the implied enlargement of federal power due to the addition of a bill of rights.61 North Carolina followed Virginia’s approach

people of the state of New York, do, by these presents, assent to and ratify the said Constitution.

Id.

60. Amendments Proposed by the Virginia Convention (June 27, 1788), in 3 ELLIOT’S DEBATES, supra note 59, at 657, 659, 661. 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 5 WRITINGS OF MADISON, supra note 28, at 425.

61. Although New York’s declarations addressed the implied abandonment of the principle of enumerated federal power, Virginia’s Seventeenth goes further and prohibits any implied enlargement of those powers that were enumerated. In the Virginia Convention, Patrick Henry stated:

If you will, like the Virginian 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.

Remarks of Patrick Henry, Debates in the Convention of the State of Virginia (June 14, 1788), in 3 ELLIOT’S DEBATES, supra note 59, at 448. Here, Henry shows the relationship between retained/reserved rights and limiting the constructive enlargement of power (by implication).
and submitted the same two proposals.\(^{62}\) Other states submitted related proposals seeking to limit the construction of federal power.\(^{65}\)

\(^{62}\) Amendments Proposed by the North Carolina Convention (Aug. 1, 1788), in 4 ELLIOT’S DEBATES, supra note 59, at 240, 244, 246. Professor Barnett attempts to disparage North Carolina’s agreement with Virginia. See Barnett, The Ninth Amendment, supra note 8, at 45. 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 from 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 as the sense of this country.” Letter from William R. Davie to James Madison (June 10, 1789), in 5 DOCUMENTARY HISTORY OF THE CONSTITUTION, supra note 51, at 176. But Davie’s comment went to the bulk of Virginia’s numerous proposals that Madison ultimately rejected. Davie did not mean to disparage, however, those proposals by North Carolina that sought to limit the construction of federal power—in particular, the provisions that echoed Virginia’s First and Seventeenth. 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 confining Congress to the exercise of the powers particularly granted, with some express negative restriction in some important cases.

Id. at 177. Davie’s letter indicates that even those North Carolinians who counted themselves friends of the Constitution (Davie’s “honest and serious” men) nevertheless shared the Virginia convention’s concerns about “state rights” and the need to limit the powers of Congress.

\(^{63}\) See Lash, The Lost Original Meaning, supra note 1, at 355–60. Barnett claims that in previous work I have “greatly overstated the commonality of [New York’s and Virginia’s] proposals.” Barnett, The Ninth Amendment, supra note 8, at 43. According to Barnett:

[T]here is a major difference between the Virginia and New York proposed rules of construction. Virginia’s proposal speaks of the retention of “every power, jurisdiction and right” in “each State in the Union.” 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 reserves only to reserving rights to the states.

Id. at 44 (internal citations omitted). Although Barnett refers here to proposals Madison would rely on in drafting the Tenth Amendment (not the Ninth Amendment), 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 states’ rights. See Lash, The Lost Original Meaning, supra note 1, at 358. Barnett disagrees by pointing to New York’s proposals that 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 Amendment. 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.” Ratification by the New York Convention (July 26, 1788), in 1 ELLIOT’S DEBATES, supra note 59, at 327. This is the precise language that Barnett recognizes elsewhere as a declaration of state rights. See Barnett, The Ninth Amendment, supra note 8, at 79 (referring to the precise same language in the Confederate Constitution). As far as Virginia’s reference to the states’ retained rights is concerned, this
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 state's) proposals made the final cut, Madison considered the dual strategy of Virginia's First and Seventeenth amendments important enough to add to his list of suggested amendments. Thus, Madison's proposals included two amendments: one declaring the principle of enumerated power and a separate amendment prohibiting any implied enlargement of enumerated federal power.

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

---

statement is no different from New York's reference to the retained rights of the people of the states or to their respective state governments. All 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.

64. Letter from James Madison to Edmund Randolph (Aug. 21, 1789), in 5 WRITINGS OF MADISON, supra note 28, at 417–18.
Madison’s “Tenth” | Virginia’s “First”  
--- | ---  
The powers not delegated by this constitution, nor prohibited by it to the States, are reserved to the States respectively. | 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” | Virginia’s “Seventeenth”  
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. | 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.  

A simple textual comparison of Madison’s Ninth Amendment with Virginia’s Seventeenth amendment seems to rebut Professor Barnett’s attempt to characterize Madison’s Ninth Amendment as a *sui generis* provision unrelated to the concerns of the state conventions. With the exception of the “rights retained by the people” language, his proposal has clear counterparts in Virginia’s Seventeenth proposal. Furthermore, we cannot divorce Madison’s unique “retained rights” language from the concerns of the Virginia Convention. We know that Madison wished to prevent an implied “assignment” of unenumerated rights to the federal

---

65. Historians have been aware of the relationship between Virginia’s Seventeenth proposal and the Ninth Amendment for a long time. See Leslie W. Dunbar, *James Madison and the Ninth Amendment*, 42 VA. L. REV. 627, 631 (1956). See generally SCHWARTZ, supra note 48; AMAR, supra note 7, at 121 (discussing both Virginia’s and New York’s statements as precursors to the Ninth Amendment).
THE INESCAPABLE FEDERALISM OF THE NINTH AMENDMENT

66 His language 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.

IV. THE FINAL LANGUAGE OF THE NINTH AMENDMENT

A. 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.67 The Ninth Amendment emerged from this committee in what would be its final form: “The enumeration in the constitution of certain rights, shall not be construed to deny or disparage others retained by the people.”68

There are no records of the committee’s discussions or reasoning, so we cannot know what led them to delete Madison’s original language regarding the implied enlargement of federal power. Although some scholars claim that the language referencing powers was moved to the Tenth Amendment, this clearly is not the case. The committee left Madison’s proposed Tenth Amendment unchanged. In addition, we know that the Tenth Amendment addresses the issue of unenumerated power. The powers to which Madison refers in his initial draft of the Ninth involved only the implied enlargement of enumerated powers. This language was not moved to the Tenth; it simply disappeared.

Thus, we are left with an amendment that, to modern eyes, seems almost inescapably libertarian. Unlike the Tenth Amendment, the Ninth Amendment does not mention the states; it only mentions “the people.” Also unlike the Tenth Amendment, there is no mention of governmental powers, only “retained rights.” No wonder Professor Barnett feels comfortable declaring that 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.69 Our endeavor, however, is to recover the public meaning of the Amendment circa 1789. As we shall see,

67. Id. at 690-91. The committee was comprised of: 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).
68. 1 JOURNAL OF THE SENATE 97 (Joseph Gales ed., 1820); see also 1 ANNALS OF CONG. 948 (Joseph Gales ed., 1834).
“retained rights” in that period was a far richer concept than what we might expect today. Similarly, where today we construe “the people” to mean a single national people, at the time of the Founding, the idea of “the people” was a complicated one indeed.

B. THE PEOPLE’S RETAINED RIGHTS

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

—James Madison  

[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

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

—Samuel Chase

The Ninth Amendment speaks of “other rights” retained by the people. Libertarians like Professor Barnett narrowly construe the Ninth as referring to nothing more than individual rights. Although Barnett at times suggests that these other rights might include majoritarian or collective rights, 73 his overall theory makes such a reading impossible. Barnett claims that 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 Fourteenth Amendment than one can incorporate the Tenth Amendment. The federalist reading of the Ninth Amendment, however, gives the term “rights” full value. All non-delegated rights are retained by the people, regardless of the nature of those rights.

70. Letter from James Madison to Spencer Roane (Sept. 2, 1819), in 8 WRITINGS OF MADISON, supra note 28, at 452.
73. See Barnett, The Ninth Amendment, supra note 8, 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.”).
The issue, then, is whether "retained rights" was understood narrowly to include only individual natural rights or broadly to include all non-delegated rights. One way to determine the likely public meaning of a term in the Constitution is to consider its common usage at the time of ratification. Professor Barnett, for example, has conducted an exhaustive investigation of uses of the phrase "to regulate" and the word "commerce" in order to identify the original public meaning of the sentence: "Congress shall have power to regulate commerce among the several states." Similarly, Barnett has investigated the term "bear arms" and the single word "keep" in order to discern the likely public meaning of the broader sentence: "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." For the Ninth Amendment, a similar approach would consider common usage of the word "rights" or terms like "retained rights" and "the people" in order to identify how the ratifiers would have interpreted 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 words and terms and instead asserts, without explanation, that the phrase "other rights retained by the people" cannot be established by a systematic study. 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. 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 Amendment.

C. 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


76. Barnett, The Ninth Amendment, supra note 8, 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.")
common belief that the ultimate source of sovereign power was found in the people themselves, not in their government. In England, the government was (and is) 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. 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.

As far as rights are concerned, scholars have long recognized the Founders’ widespread belief in retained individual natural rights. However, at the time of the Founding, there were a variety of rights deemed to be held by the people in both their individual and collective capacities. Natural rights, most often associated with the work of John Locke, were divided between those given up in return for the benefits of a stable government and those unalienable natural rights that could not legitimately be delegated away. Political or civil rights involved those positive rights arising not from nature itself, but from the nature of government. 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

78. See 1 Bruce Ackerman, We the People: Foundations 7–10 (1991).
80. See Amar, supra note 24, at 1446 (“[T]he revolutionary generation initially seemed to have in mind the People of each state, and not the People of the United States as a whole.”).
81. See The Federalist No. 2, at 37 (John Jay) (Clinton Rossiter ed., 1961) (“[W]henever and however [government] is instituted, the people must cede to it some of their natural rights, in order to vest it with requisite powers.”); id. No. 43, at 279 (James Madison) (“[T]he 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 Sanford 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.”).
83. See The Federalist No. 2, at 37 (John Jay) (Clinton Rossiter ed., 1961) (“[W]henever government is instituted, the people must cede to it some of their natural rights, in order to vest it with requisite powers”).
abolish their form of government. 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 retained by the individual states. As declared by Article II, "Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled." 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. 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. This is a majoritarian right in that it preserves the right of local majorities to make decisions regarding local municipal law.

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 U.S. 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. Accordingly, advocates of the proposed constitution assured the state conventions that the states would retain a substantial degree of

85. See The Declaration of Independence para. 2 (U.S. 1776) ("[W]henever any Form of Government becomes destructive of [unalienable rights], it is the Right of the People to alter or to abolish it . . . .").
86. The Articles of Confederation art. II (U.S. 1781).
87. See Wood, supra note 29, at 354-63. 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 laws of the states. See id. at 328-43. 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 Report on the Virginia Resolutions (Jan. 1800), in 6 Writings of Madison, supra note 28, at 348 (stating the term "states" in the Tenth Amendment and in the Virginia Resolutions "means the people composing those political societies, in their highest sovereign capacity").
88. As Madison explained in his Report on the Virginia Resolutions, which argued that the Alien and Sedition Acts were unconstitutional, references to the rights of states can be understood as references to the sovereign people of a given state. See Report on the Virginia Resolutions (Jan. 1800), in 6 Writings of Madison, supra note 28, at 348.
89. The collective people of a state could then entire the right in their state constitution or leave the issue to the majoritarian control of the political process. See 1 Tucker, Blackstone's Commentaries, supra note 25, app. Note D 151-53 (discussing state municipal law as among the powers reserved to the states under the Ninth and Tenth Amendments).
90. See Wood, supra note 29, at 524-32 (discussing the Federalists' assurances that the proposed Constitution would not result in the consolidation of the states into a single national mass).
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."\(^9\)

In 1787, the Centinel, a pseudonymed advocate writing in the Cumberland Gazette, 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 surely not in Congress; and if not in Congress, are retained by the several States, and secured by their several constitutions.\(^9\)

The Centinel saw no difference between "[our] retained rights" and the retained powers of the states.

In the Virginia 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 it 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.\(^9\)

Henry spoke 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. Many states, including Virginia, proposed that a similar reservation of rights be added to the Federal Constitution. 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 because retained rights were left to the control of the collective people in the states. The North Carolina

\(^9\)3. Remarks of Patrick Henry, Debates in the Convention of the State of Virginia (June 14, 1788), in 3 ELLIOT'S DEBATES, supra note 59, at 445–46.
Convention, for example, declared that "the people have a right to freedom of speech"—an individual right—but then went on to assert the Constitution be amended such that "each state in the Union shall respectively retain every power, jurisdiction, and right which is not by this Constitution delegated" to the federal government—a collective right. Federalist advocates of the proposed constitution stressed the same idea—the people retained collective rights on a state-by-state basis. According to 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.

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." Similarly, 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 the Yazoo-land fraud scandal. 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 to determine 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

---

94. Amendments Proposed by the North Carolina Convention (Aug. 1, 1788), in 4 ELLIOT'S DEBATES, supra note 59, at 244.
97. George R. Lamphugh, "Oh the Colossus! The Colossus!": James Jackson and the Jeffersonian Republican Party in Georgia, 1796-1806, 9 J. OF EARLY REPUBLIC 315 (1989). Jackson was a member of the First Congress when Madison gave his speech against the Bank of the United States. Id. at 317-19. Jackson lost re-election in 1791 but was appointed to the Senate in 1792. Id. As Lamphugh writes, "In 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." Id. at 319. Lamphugh refers to Jackson's Letters of Sicilius as the "bible of the anti-Yazooists." Id.
opinion his interest may dictate to him now, strenuously argued in
the convention of Pennsylvania, against the insertion of a bill of
di
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
delated. The same arguments prevailed in the house of
representatives of the United States, on the proposed amendments
to the United States' constitution, when Messrs. 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.98

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 "alienat[e] or mortgag[e] public land." Notice that his argument about retained rights focuses on the very issue that
led to the adoption of the Ninth Amendment. He does not mention the
Ninth Amendment by name, but it is clear that Jackson considers
unenumerated retained rights to include federalist majoritarian rights.99

98. JAMES JACKSON, 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 23–24 (Augusta, Ga., John E. Smith 1795), available at Archive
of Americana, Early American Imprints, Series I: Evans, 1639-1800, No. 28889 (Readex,
NewsBank, Inc.).

99. 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. THE LETTERS OF A FARMER TO THE PEOPLE OF GEORGIA: OR, THE
CONSTITUTIONALITY, POLICY, AND LEGALITY OF THE LATE SALES OF WESTERN LANDS EXAMINED 7–
8 (Charleston, S.C, William P. Young 1796), available at Archive of Americana, Early American
Imprints, Series I: Evans, 1639-1800, No. 30689 (Readex, NewsBank, Inc.). 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 representatives 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
delected . . .

Id.
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, Madison expressly referred to an individual's freedom of speech as one of the retained natural rights of the people. 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 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). Likewise, any federal abridgment of the Speech and Press Clause necessarily intruded upon matters reserved to the states by the Tenth Amendment. Thus, even if one views the "people" of the Ninth Amendment as referring to the undifferentiated people of the United States, this same people has the sovereign authority to divide powers and rights between national and state governments—and clearly did so according to the terms of the Tenth Amendment. As Madison put it, "In establishing that Govt. [federal government] the people retained other Govts. [governments] capable of exercising such necessary and useful powers as were not to be exercised by the General Government."

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 these rights to their state legislature. In a similar vein, "Fabius" said:

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 a combination of republics, each retaining all the rights of supreme sovereignty, excepting such as ought to be contributed to the union . . . .


101. Massachusetts, for example, did not abandon its official religious establishment until 1833. See LEONARD LEVY, THE ESTABLISHMENT CLAUSE 41–42 (2d ed., rev. 1994).

102. Letter from James Madison to Spencer Roane (Sept. 2, 1819), in 8 WRITINGS OF MADISON, supra note 28, at 452.
Professor 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." To the extent that Barnett is trying to claim that unenumerated rights did not include collective rights, this is simply incorrect and easily disproved. 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.

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."

Both before and after 1791, it was just as common to speak of the "retained rights of the states" as it was to view the "retained rights of the people" as the equivalent of the retained rights of the people in their respective states. 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 collective 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


104. See discussion of Madison's Bank Speech, infra Part IV.E, and discussion of St. George Tucker, infra Part V.A.3. In The Ninth Amendment, Barnett sometimes seems to back away from the claim that unenumerated rights only included individual rights. See Barnett, The Ninth Amendment, supra note 8, at 16 (noting that the retained rights of the people may include majoritarian collective rights). More recently, however, Barnett has taken a more aggressive stance and insisted that the Ninth Amendment is purely "individualist" in its protection of retained rights. See Randy E. Barnett, Kurt Lash's Majoritarian Difficulty: A Response to A Textual-Historical Theory of the Ninth Amendment, 60 STAN. L. REV. 937, 946-48 (2008).

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." 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.

In later decades, nationalists such as Chief Justice John Marshall and his admiring associate on the Supreme Court, Justice Joseph Story, claimed that "the People" were indeed a single united mass of citizens who only happened to live in several states. Both jurists rejected the compact theory of the Constitution embraced by theorists like St. George Tucker and presented their own broad view of federal power. Cases like *McCulloch v. Maryland*, *Cohens v. Virginia*, and *Gibbons v. Ogden* articulated a...
nationalist vision of the Constitution that scandalized compact theorists who continued to read "the People" as a reference to the many people in the several states. Not surprisingly, when the Confederate states seceded from the Union, they adopted language that removed the ambiguity of the original Constitution.

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 yes. Resolving whether they did requires a continued investigation of the historical evidence.

D. 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 Amendment, but it resulted in a text unlike any suggested by the state ratifying conventions. In theory, the Amendment limited federal power, but it did so only by implication, not express declaration. Nevertheless, the language satisfied most of the state legislative assemblies, who quickly ratified the Ninth Amendment along with most of the other proposed amendments. In Virginia, however, the changed language of the Ninth Amendment caused such concern that it delayed that state's ratification of the Bill of Rights for two years.

114. See Const. of the Confederate States of America art. VI, § 5 (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."); id. art. VI, § 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 amendments. See Barnett, The Ninth Amendment, supra note 8, at 80. He claims, however, that there is no evidence that this is the case and that if my assertion about the original and continued understanding of the Ninth Amendment were correct, there would have been no reason to add the additional words. See id. at 79–80.

As my article, The Lost Jurisprudence of the Ninth Amendment, makes clear, however, the Marshall Court ignored the Ninth Amendment and insisted that the "people" of the Tenth Amendment were the undifferentiated people of the United States. See Lash, The Lost Jurisprudence, supra note 1, at 606. Every court and commentator who discussed or applied the Ninth Amendment during this period rejected this "consolidationist" reading. See id. at 642. 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.
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. Furthermore, 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 célèbre and deflate the calls for a second constitutional convention. 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.

1. 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 he 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.” 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 Governt. [government] but contend for a few additional guards in favor of the Rights of the States and of the people.” It would soon 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. 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.

116. See LEVY, supra note 58, at 104.
117. Remarks of Edmund Randolph, Debates in the Convention of the State of Virginia (June 15, 1788), in 3 ELLIOT’S DEBATES, supra note 59, at 470.
118. Letter from James Madison to Thomas Jefferson (Dec. 9, 1787), in 5 WRITINGS OF MADISON, supra note 28, at 65.
120. See, e.g., Amendments to the New Constitution, Proposed by the Hon. Mr. Madison, GAZETTE U.S. (New York), June 13, 1789, at 71, available at Archive of Americana, America’s Historical
and he sent a copy directly to Edmund Randolph. No one in Virginia, including Randolph, voiced any complaint 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."2

Toward 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 Amendment (eleventh on a list of twelve proposed amendments) now caused Randolph grave concern. As Hardin Burley, a member of the Virginia House, reported to Madison:

On the two last [the Ninth and Tenth Amendments] a debate of some lenght [sic] 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 1st & 17th amendments proposed by Virginia, that this reservation against constructive power, should operate rather as a provision against extending the powers of Congress by their own authority, than as a protection to rights reducible to no definitive certainty.2

According to Burnley, Randolph understood the Ninth Amendment 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 First and Seventeenth proposed amendments to use language expressly addressing the issue of extended federal power. In his letters to George Washington, Edmund Randolph elaborated on his

---

Newspapers, 1690-1876 (Readex, NewsBank, Inc.); Congressional Intelligence: House of Representatives, DAILY ADVERTISER (New York), June 12, 1789, at 2, available at Archive of Americana, America's Historical Newspapers, 1690-1876 (Readex, NewsBank, Inc.).

121. Letter from James Madison to Edmund Randolph (June 15, 1789), in THE PAPERS OF JAMES MADISON 219 (Charles F. Hobson et al. eds., 1979) [hereinafter PAPERS OF MADISON].

122. Letter from Edmund Randolph to James Madison (June 30, 1789), in 12 PAPERS OF MADISON, supra note 121, at 273. Randolph wrote to Madison again on July 19, 1789, and, again, said nothing about the Bill of Rights in general or the Ninth Amendment in particular. Letter from Edmund Randolph to James Madison (July 19, 1789), in 12 PAPERS OF MADISON, supra note 121, at 298–300.


objections. Although he did not think that the Tenth Amendment was particularly troublesome, Randolph nevertheless viewed the Amendment 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 adopted, it may produce new matter for the cavils of the designing.\(^{125}\)

Randolph's more serious concerns involved the Ninth Amendment. 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."\(^{126}\) Instead of this merely "plausible alteration," Randolph preferred "a provision against extending the powers of Congress."\(^{127}\) Such an express limitation on the implied enlargement of federal power would be "more safe, & more consistent with the spirit of [Virginia's] 1st & 17th amendments."\(^{128}\)

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 First and Seventeenth 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 Amendment expressly addressed this concern, the final draft did not. To Edmund Randolph, this was a problem precisely because it only plausibly limited federal power. This left the door open to Anti-Federalist complaints of unconstrained federal power and the continued calls for a second national convention. Accordingly, Randolph advised rejecting both the proposed the Ninth and Tenth Amendments in order to maintain pressure on Congress to produce a more "federalist" amendment. As he wrote to Washington:

I confess, that I see no propriety in adopting . . . [the Ninth and Tenth Amendments]. But I trust that the refusal to ratify will open the road to such an expression of foederalism, as will efface the

\(^{125}\) Letter from Edmund Randolph to George Washington (Dec. 6, 1789), in \textit{5 Documentary History of the Constitution, supra} note 51, 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.

\(^{126}\) \textit{Id.}

\(^{127}\) Letter from Hardin Burnley to James Madison (Nov. 28, 1789), in \textit{5 Documentary History of the Constitution, supra} note 51, at 219.

\(^{128}\) \textit{Id.}
violence of the last year, and the intemperance of the enclosed letter, printed by the enemies to the constitution, without authority.\textsuperscript{129}

In sum, Randolph believed the Ninth Amendment was meant to prevent the implied enlargement of federal power to the injury of the states. This was the purpose of Virginia's First and Seventeenth 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 Amendment was fine, but inadequate—an additional rule limiting the construction of enumerated federal power was required. The final draft of the Ninth Amendment \textit{plausibly} accomplished this goal, but it would have been better to use the clearer language of Virginia's original proposals. Randolph was so concerned about the final draft that he was temporarily willing to hold up ratification of the Bill of Rights in the hopes of obtaining a clearer, more "foederal" draft of the Ninth Amendment.

2. 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 Amendment had been altered, it continued to advance the principles as Virginia's Seventeenth. Madison immediately reported to George Washington:

The difficulty started agst. [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.\textsuperscript{130}

Randolph thought the Ninth Amendment was insufficiently "federalist" because it used the language of \textit{rights} instead of the language of limited \textit{power} (as had Virginia's Seventeenth). 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 Amendment—the final draft remained just as "federalist" as the original.

\textsuperscript{129} Letter from Edmund Randolph to George Washington (Nov. 26, 1789), \textit{in 5 DOCUMENTARY HISTORY OF THE CONSTITUTION, supra note 51, at 216.}

\textsuperscript{130} Letter from James Madison to George Washington (Dec. 5, 1789), \textit{in 5 DOCUMENTARY HISTORY OF THE CONSTITUTION, supra note 51, at 221-22.} Randy Barnett rejects this rights-powers distinction as out of sync with modern understanding of personal rights. \textit{BARNETT, supra note 1, at 3.} Madison, it appears, had a different point of view.
Professor Barnett believes that Madison's letter to Washington exhibits "Madison's typically complex phraseology," 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 anything to do with preserving individual natural rights. Barnett misses this point by failing to consider the subject matter 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 Amendment as meeting Randolph's federalism-based concerns. Hardin Burnley agreed with Madison about the Ninth Amendment's protection of state rights and said so in a letter (which Madison passed on to Washington) that makes this point as clear as humanly possible:

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

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 Amendment guards state autonomy, then their entire exchange becomes nonsensical (it would mean, for one thing, that Randolph was right to delay ratification). Professor Barnett nevertheless maintains that Madison was speaking about individual rights and dismisses Burnley's comment about states' 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." This, of course, begs the very question under discussion—whether the ratifiers understood the retained rights of the Ninth Amendment 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 Amendment as inadequately "federalist." Preserving the retained rights of the people would necessarily constrain federal power and adequately protect the retained rights of the

132. Letter from Hardin Burnley to James Madison (Nov. 28, 1789), in 5 Documentary History of the Constitution, supra note 51, at 219 (emphasis added).
people and the states. This is the only way to make sense of both Burnley's and Madison's responses 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.

3. The Virginia Senate Report

Given that they were in constant touch throughout this period, we can assume that Madison promptly communicated his assurances regarding the Ninth Amendment to Randolph. In any event, we know that Randolph quickly abandoned his opposition to the Ninth and Tenth Amendments. Unfortunately, the damage was done. Anti-Federalists managed to exploit the delay and put off a final vote on ratifying the Bill of Rights. 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." The Senate majority resisted ratification and produced a Report repeating Randolph's concerns and adding a few of their own. In brief, the Senate amplified Randolph's concerns and expanded them to include criticism of the First, Sixth, Ninth, and Tenth Amendments.

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. They had every reason to exaggerate their concerns about the

134. Id. at 54-55. Although Burnley distinguished the rights of the people from the rights of the States, the critical point is that he believed the Ninth Amendment protected both. Burnley's distinction is perfectly in line with a pro-state autonomy reading of the Ninth Amendment once one realizes that the Tenth Amendment makes the same distinction.

135. To date, Professor Barnett has never addressed the actual subject of Burnley and Madison's correspondence—the concerns of Edmund Randolph.

136. Letter from James Madison to Edmund Randolph (Oct. 7, 1787), in 5 WRITINGS OF MADISON, supra note 28, at 8-9; Letter from James Madison to Edmund Randolph (Oct. 21, 1787), in 5 WRITINGS OF MADISON, supra note 28, at 15-17; Letter from James Madison to Edmund Randolph (Nov. 18, 1787), in 5 WRITINGS OF MADISON, supra note 28, at 56-58.


140. I have written elsewhere in detail about the debate in the Virginia legislature. See Lash, The Lost Original Meaning, supra note 1, 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.

141. See LEVY, supra note 58, at 42 (discussing the Anti-Federalist opposition to the Bill of Rights in the Virginia Senate).

142. For a general discussion over the struggles for and against a second convention, see Lash, supra note 115.
proposed amendments. 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." If . . . [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 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.

The Report seems to suggest that there are two possible readings of the Ninth Amendment. If this was an attempt to address the concerns of Virginia's Seventeenth 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"). Barnett reads these alternate

---

143. Leonard Levy describes the Senate Report as "grossly misrepresenting the First Amendment (then the third)." LEVY, supra note 58, at 42. Madison himself was not troubled by the Senate Report because he believed the Senate had gone too far, particularly in regard to the Senate's purported objections to the First Amendment, which it listed as the third. See Letter from James Madison to George Washington (Jan. 4, 1790), in 5 DOCUMENTARY HISTORY OF THE CONSTITUTION, supra note 51, 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 3d. art. particularly, will have this effect").


145. Id. at 68–64. The Senate's reported objections to the Tenth Amendment were as follows:

We conceive that [the Tenth Amendment] 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 anyone other than those seeking to force a second constitutional convention. See supra notes 136–43 and accompanying text.
complaints and concludes that the Senate Report establishes that the final version of the Ninth "represented a change in its public meaning from the protection of state powers to the protection of 'personal rights.'"146 The Report, however, actually presents two possible meanings both in line with the state's concerns: one inadequate, the other ineffective.

Taking the latter first, the Senate majority complained 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.147 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 that 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.

But even if one concedes (which I do not) that the Senate's 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 Seventeenth proposal. The Senate argued that if this was the intended meaning of the Ninth Amendment, then it inadequately addressed those particular concerns.

The Senate's language here is an exaggerated restatement of Randolph's preference for the language of Virginia's Seventeenth proposal.148 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."149 The Report also claimed that the Free Speech and Press Clauses did not "declare

147. 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 limit power was to use the language of Virginia's Seventeenth proposal. Even Burnley was not sure that he had adequately presented Randolph's concerns. See Letter from Hardin Burnley to James Madison (Nov. 28, 1789), in 5 Documentary History of the Constitution, supra note 51, at 219 (indicating that Burnley may not have understood the precise nature of Randolph's objection).
148. See supra note 122 and accompany text.
and assert the right of the people to speak and publish their sentiments." 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 that its Report would backfire. In fact, Virginia's 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 scholars should grant at least some plausibility to the complaints of the Senate majority, given the senators' goal of winning over a sufficient number of moderates to derail the ratification of the Bill of Rights. For example, the Senate correctly pointed out that the final language of the Ninth Amendment 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 the final version of the Ninth Amendment is 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 Senate majority, perhaps the final language of the Ninth Amendment was so unclear as to render the Amendment 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 Amendment. All of these states knew that Madison's original version of the Ninth Amendment expressly limited federal power. Only in Virginia did the legislators raise concerns about the final version of the Ninth Amendment. 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 Amendment, this would explain the general lack of concern by moderates and proponents of the Bill of Rights. 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

150. Id.
151. See supra note 143 and accompanying text.
152. Madison's proposals had been widely published in newspapers across the country. See supra note 120 and accompanying text.
Ninth Amendment, and we know that their efforts to prevent ratification failed.

In sum, there is no good reason to believe that one part of the Senate Report's complaint about the Ninth Amendment represented the common public understanding of the Clause. 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 Amendment, one cannot completely dismiss their complaint. Even if the language of the Ninth Amendment satisfied other states, Virginia remained temporarily undecided about the Ninth Amendment and the rest of the Bill of Rights. Legislators needed to address the ambiguous nature of the Ninth Amendment, if only to satisfy Virginia moderates.

... enter James Madison.

E. 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 Amendment, and he delivered it 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 Amendment was meant to limit unduly broad interpretations of federal power. On this point, Barnett and I agree. Madison understood the Ninth Amendment as more than a mere passive statement of principle. He read the Amendment 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 Amendment 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 Amendment 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 alongside, and in tandem with, the Tenth Amendment.\footnote{See Lash, The Lost Original Meaning, supra note 1, at 384-92.}

What follows is more of a summary of that argument than a complete analysis of the speech, concentrating on those aspects that are particularly relevant to my disagreement with Professor Barnett.

Madison delivered his speech early in 1791 while the Bill of Rights remained pending in Virginia. The speech 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, particularly in regard to the Necessary and Proper Clause.154 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 delivered his major argument in a speech before the House of Representatives on February 2, 1791.155 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.156

Madison developed and applied these rules in the main body of his speech. As Madison made clear in the next section of his remarks, preserving the “characteristic of the Government” under Rule [1] involved the reserved autonomy of the states. The “parties” referenced in Rule [2], whose understandings are a proper guide to constitutional interpretation, are the state ratifying conventions. The 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 that 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

---

156. Id.
congressional power. For instance, if the power to incorporate a bank were located in the General Welfare Clause it "would render nugatory the enumeration of particular powers; would supersede all the powers reserved to the State Governments."\(^\text{157}\) 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."\(^\text{158}\)

Addressing the Necessary and Proper Clause, Madison argued 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."\(^\text{159}\) Madison believed that the manner in which the Founders enumerated powers in the Constitution established an implicit "rule" requiring the express enumeration of all "great and important power[s]."\(^\text{160}\) Declaring that "[i]t cannot be denied that the power proposed to be exercised is an important power,"\(^\text{161}\) 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 "[i]t involves a monopoly, which affects the equal rights of every citizen."\(^\text{162}\) To Madison, these effects established that the power to charter a bank was a "great and important power" that required express enumeration.\(^\text{163}\)

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

\(^{157}\) Id.

\(^{158}\) Id.

\(^{159}\) Id. at 1947–48, 1949.

\(^{160}\) 1 ANNALS OF CONG. 1949 (Joseph Gales ed., 1834) (statement of Rep. Madison) ("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."); see also id. at 2009 (observing during the debates over the Bank Bill that "[t]he power of granting Charters . . . is a great and important power, and ought not to be exercised unless without we find ourselves expressly authorized to grant them").

\(^{161}\) Id. at 1949.

\(^{162}\) Id. at 1950.

\(^{163}\) Id. at 1949. Madison stated:

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.

Id. at 1950.
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." 164 State conventions had been assured that the Necessary and Proper Clause would not be interpreted to give "additional powers to those enumerated." 165 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." 166 These state conventions had agreed to ratify the Constitution only on the condition that certain explanatory amendments be added that 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." 167

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. 168 He read several of the articles proposed, remarking particularly on the 11th and 12th [the 9th and 10th Amendments] the former, as guarding against a latitude of interpretation; the latter, as excluding every source of power not within the Constitution itself. 169

Madison then sums up his argument in a manner that establishes, without any further question, that he read the Ninth and Tenth Amendments as preserving the autonomy of the states:

164.  Id. at 1951.
166.  Id.
167.  Id.
168.  Id.
169.  Ratification was still pending in Virginia.
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.  

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 ensuring this would not be the case. The Ninth Amendment expressly prohibited this latitude of interpretation and, thus, preserved the expected degree of state autonomy.

F. 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, Professor 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.” 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.” 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 Ninth Amendment: this is Barnett’s only piece of historical evidence in which (he believes) the Ninth is described as a libertarian

170. Id.
172. Id.
guarantor of individual rights.\footnote{In his early work, Barnett appeared to claim that Sherman's Draft Bill of Rights also linked the Ninth Amendment to retained individual natural rights. He seems to have since backed away from that claim.} Barnett's argument is not presented in his recent article\footnote{Barnett, The Ninth Amendment, supra note 8.} but can be found in his earlier work.\footnote{See Barnett, Implementing the Ninth Amendment, supra note 8, at 15.} 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 \textit{constitutional} argument that these other means of accomplishing an enumerated object or 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."\footnote{Id. (internal citations omitted).}

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

In the power to make by-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. 178

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 argued that enumeration was required even if the power was believed “necessary” to the proper operation of the national government. Madison pointed 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.” 179 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, or supplied by an amendment of the Constitution.” 180 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

179. Id. at 1950.
180. Id.
available to Congress quoted by Randy Barnett. 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 discussed this passage and Professor Barnett’s error in a previous article. 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. 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 neither anything about individual rights in Madison’s summation nor is there any mention of individual rights in his draft veto of the Bank Bill. What we do find, on the other hand, are repeated express claims that the Bill violates the retained rights of the states.

Faced with Madison’s references expressly linking the Ninth Amendment to state rights, Barnett makes the same move as he did when faced with Burnley’s express statement that the Ninth Amendment protected states’ rights—he dismisses the references as “mistakes”:

[W]e ought not 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

---

181. Id. (emphasis added).
185. Although Barnett cites other speakers who complained that the Bank Bill established a monopoly, none of these speakers made any reference to the Ninth Amendment or to a violation of retained individual rights. See Barnett, The Ninth Amendment, supra note 8, at 59.
186. Id. at 61 (citations omitted).
not use assumed meanings of the text to dismiss common contemporary usage. Barnett's approach flips the originalist inquiry on its head and judges common 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.187

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 (newspapers republished his entire speech), and opponents once again stressed the need to enumerate a great and important power in order to guard the retained autonomy of the states.188 All of these arguments use the language of retained rights in the service of state sovereignty.


188. 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, e.g., The Bank Bill Under Consideration, ENQUIRER (Richmond, Va.), Jan. 4, 1810, at 4, available at Archive of Americana, America's Historical Newspapers, 1690-1876 (Readex, NewsBank, Inc.). For use of the Ninth Amendment in later congressional debates over renewing the Bank of the United States, see infra Part V.A.6.
Although I disagree with Barnett’s reading of Madison’s speech, I do not deny that the Ninth Amendment 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. This merely illustrates how the federalist interpretation of the Ninth Amendment protects all retained rights—natural and positive; individual and collective; personal and “state.” Barnett’s error is not his identification of natural rights as an important subject to the Founders, it is his attempt to deny Madison’s use of the Ninth Amendment as a guardian of state majoritarian rights and his insistence that the protection of individual rights was the “single goal” of the Amendment. The evidence suggests that this was not even the primary goal.

Most critically, Barnett never addresses the penultimate section of Madison’s speech where he expressly links the Ninth Amendment to the concerns of the state conventions. Here, Madison recapitulates the entire history of the Ninth Amendment, including the promises made to the state conventions, the state declarations and proposals, and the final draft that, according to Madison, prevented a “latitude of interpretation.” 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 in the historical record, and it establishes that the author drafted the Ninth Amendment in response to the concerns and demands of the state conventions. In all of his work on the Ninth Amendment, however, Barnett never discusses Madison’s argument in these critical paragraphs or

189. See House of Representatives of the United States, GEN. ADVERTISER & POL., COM., AGRIC. & LITERARY J., Feb. 5, 1791, at 3, available at Archive of Americana, America’s Historical Newspapers, 1690-1876 (Readex, NewsBank, Inc.) (“[The Bank] interfered with the rights of private citizens, and in particular with those of state governments.”); see also JACKSON, supra note 98, at 50 (deriding the Yazoo scandal as involving a monopoly and injuring both individual equal rights and the collective retained rights of the people of Georgia).


The defense against the charge founded on the want of a bill of rights, presupposed . . . 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.

Id. at 1951.
their implications regarding Madison’s (or the public’s) understanding of the Ninth Amendment.\footnote{191}{Although Barnett quotes some portions of this section of Madison’s speech, he limits his discussion to the description of the Ninth Amendment as preventing a latitude of interpretation. He never discusses, or even notes, Madison’s linking of the Ninth Amendment to the declarations and demands of the state conventions.}

V. POST-ADOPTION COMMENTARY

I have devoted over one-hundred pages in a single law review article to post-adoption commentary on the Ninth Amendment.\footnote{192}{Lash, The Lost Jurisprudence, supra note 1.} For the purposes of this Article, however, it can easily be 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 Amendment, 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 Amendment in defense of their clients. This is not surprising given that the Ninth Amendment protected both individual and collective rights. What is surprising, however, is the exceeding rarity of these attempts to the general rule. There are literally hundreds of cases and commentaries linking the Ninth and Tenth Amendments as twin guardians of federalism. Professor 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 interpretation[s]” as “bootstrapping at best.”\footnote{193}{Id.} Instead, Barnett dismisses nineteenth-century cases and authorities as tainted by “[t]he rise of the Calhounian states’ rights position.”\footnote{194}{Id. at 79. Barnett also dismisses Justice Joseph Story’s discussion of St. George Tucker in his famous 1833 Commentaries on the Constitution because Justice Story was an “opinionated” man and because Story wrote his Commentaries “thirty years” after Tucker published his work. Id.}

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 to support his claims of original meaning.\footnote{195}{See Barnett, supra note 75, at 246, 249–56, 261, 269.} In the very same article where Barnett dismisses post-adoption federalist readings of the Ninth Amendment, 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.\footnote{196}{See Barnett, The Ninth Amendment, supra note 8, at 75 (citing state constitutional amendments that adopted the language of the Ninth Amendment).} Indeed, Barnett goes so far as to cite the 1861 Constitution of the Confederate States (so much for Calhounian-tainted sources!).\footnote{197}{Id. at 79.} Although I agree with Barnett
that the weight of historical evidence tends to lessen as time increases between it and the adoption of the relevant text, all antebellum commentary on the Ninth Amendment remains extremely relevant to determine the role that it played in the adoption of the Fourteenth Amendment (as my second article makes clear). 198

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 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. 199 Accepting Barnett’s premise that this kind of passion potentially skewed readings of the Ninth Amendment, I consider only that commentary regarding the Ninth Amendment that occurred prior to the Court’s decision in McCulloch. Even in this limited period, express references to the Ninth Amendment 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. 200 Most of the evidence recounted below, however, was uncovered during the preparation of this Article, and I imagine there is much more to be found.

A. DISCUSSIONS OF THE NINTH AMENDMENT, 1791–1820

1. The 1796 “Political Catechism” of Elhanan Winchester

In 1796, the Reverend Elhanan Winchester published “A Plain Political Catechism.” 201 A friend of Declaration of Independence signatory Benjamin Rush, Reverend Winchester had recently returned to the United States after having spent seven years 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 Winchester’s section on the Ninth and Tenth Amendments:

Question XLI.

What rights and powers remain to the individual states?

---

198. See Lash, The Lost Jurisprudence, supra note 1, at 639–52.
201. ELHANAN WINCHESTER, 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, BY WAY OF QUESTION AND ANSWER. MADE LEVEL TO THE LOWEST CAPACITIES (Phila., Richard Folwell 1796), available at Archive of Americana, Early American Imprints, Series I: Evans, 1639-1800, No. 31645 (Readex, NewsBank, Inc.).
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 ... 202

Like Madison, Reverend 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.

2. John Page's 1799 Remonstrance Against the Alien and Sedition Acts

In both his book and his most recent article, Professor Barnett presents a dialogue from the floor of Congress between Theodore Sedgwick and future Virginia Governor John Page during the debates over the Bill of Rights. 203 The discussion involved whether adding the specific right of assembly to the First Amendment brought the Bill of Rights 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 likewise had been denied in the past, it was worth adding the right to the list. 204 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. 205 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 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, Page argued that the Alien and Sedition Acts were "not only unnecessary, impolitic and unjust, but

202. Id. at 50–51.
Page stated:

[1]et me observe to him that such rights have been opposed, and a man has been obliged to pull off his hat when he appeared before the face of authority; people have also been prevented from assembling together on their lawful occasions, therefore it is well to guard against such stretches of authority, by inserting the privilege in the declaration of rights.

Id.

constitutional." 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 11th and 12th 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 amongst those powers, which not having been granted to congress, nor denied to the states, are declared by the 11th and 12th 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 11th and 12th articles of the amendments)...

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. The Minority Report pointed out that under the earlier Articles of Confederation, the states retained all powers not "expressly" 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 Amendment 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

206. John Page, 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, Apr. 24, 1799, at 10 (Richmond, John Dixon 1799), available at Archive of Americana, Early American Imprints, Series I: Evans, 1639-1800, No. 36027 (Readex, NewsBank, Inc.). Page was a member of Congress from 1789 to 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.

207. Id. at 13–14; see also 1 Journal of the Senate 97 (Joseph Gales ed., 1820).

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 U. 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, whether 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 11th 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 a respect for the majority of congress which recommended the amendments ought to induce us to think, that they also were of the same opinion, and therefore that they would not have recommended the addition of the 11th and 12th articles to the constitution, had they not been called upon by some states for such amendments . . . .

Page was a member of Congress who 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 that 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 criticized the Acts as violations of the First, Ninth, and Tenth Amendments. Page's testimony,

\[209. \text{PAGE, supra note 206, at 28-29.} \]

however, is particularly significant as a fellow member of Congress who both helped frame the Ninth Amendment and agreed with Madison's federalist reading of the Amendment.

3. 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 Justice Joseph Story published his Commentaries on the Constitution. Tucker's "View" was the states' rights treatise of the early nineteenth century. Justice Story later attacked Tucker's work (including his writing on the Ninth Amendment) as the prime example of the states' rights-protective "compact theory" of the Constitution. 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. 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 Amendment is clear from the very first section of his treatise. 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."

211. Tucker's "View on the Constitution" is Note D to the appendix of his treatise on Blackstone's Commentaries. TUCKER, BLACKSTONE'S COMMENTARIES, supra note 25, app. Note D.

212. In his Commentaries on the Constitution, Joseph Story quotes Tucker's discussion of the Ninth and Tenth Amendments. 1 STORY, supra note 108, § 410, at 393-94. 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." Id. § 411, at 394. Story evidently read Tucker's interpretation of the Ninth Amendment 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. See 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 (Paul A. Freund & Stanley N. Katz eds., 1988) (noting that Tucker "was particularly concerned with the preservation of state sovereignty").

213. 2 TUCKER, BLACKSTONE'S COMMENTARIES, supra note 25, at 128 n.5 ("The declarations of rights, of the people of the United States are contained, . . . [i]n the articles of confederation and perpetual union, concluded between the several states; which perhaps were abrogated.").

214. Id. at 162 (internal citation omitted).
In a footnote following his quotation of Locke, Tucker notes that “[t]his principle is expressly recognized in our government, Amendments to the C. U. S. Art. 11, 12.” The reference is to the Ninth and Tenth Amendments, which at the time were 11th and 12th on the original list of twelve proposed amendments.

Here, Tucker links the Ninth Amendment to the people’s retained collective right to revolution. There is no reference to individual rights. 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 of “powers” and “rights” are inextricably linked: a delegated right is an extension of power, and a retained right is a reservation of power. In this case, the 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 Tucker’s federalist rendering of the Ninth Amendment in the above passage. For now, it is enough to note that although Barnett discusses 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.

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. His views of the Ninth and Tenth

215. Id. at 162 n.25.
217. This single passage explodes Professor Barnett’s claim that “no direct or indirect evidence” supports Amar’s claim about the Ninth Amendment protecting this collective right of the people. Barnett, The Ninth Amendment, supra note 8, at 22. Barnett himself relies on Tucker as evidence of the original meaning of the Ninth Amendment. Id. at 169-75.
218. 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 that 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.
219. See, e.g., Remarks of James Wilson, Debates in the Convention of the State of Pennsylvania (Oct. 28, 1787), in 2 ELLIOT’S DEBATES, supra note 59, at 436 (“A bill of rights annexed to a constitution is an enumeration of the powers reserved.”).
220. For a general discussion of St. George Tucker’s federalist vision of the Constitution, see Lash, supra note 109 passim.
222. As had I prior to researching this Article.
223. Tucker also saw the bank episode as an instance of violating the Tenth Amendment—not the Ninth Amendment. 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 1 TUCKER, BLACKSTONE’S
Amendments reflected this same theory. One final point: Tucker was an abolitionist.\textsuperscript{224}

4. 1805: The Earliest Discovered State Court Application of the Ninth Amendment—By a Ratifier of the Constitution

John Overton was a member of the second North Carolina Ratifying Convention.\textsuperscript{225} Although the first North Carolina Convention neither accepted nor rejected the Constitution, the second convention voted in favor of ratification in 1789.\textsuperscript{226} Overton went on to join the Tennessee bench and preside over a case that contained one of the earliest state judicial references to the Ninth Amendment. The background issue involved whether a state property judgment was binding on a portion of land falling within Indian territory. Overton held that it was, based in part on the retained sovereignty of the states as protected under the Ninth and Tenth Amendments. Once again, as it is a newly uncovered piece of historical evidence regarding the Ninth Amendment, 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


\textsuperscript{225} After serving as a delegate to the second convention, Overton was later elected to the Superior Court of Tennessee, the precursor to the Tennessee Supreme Court. Theodore Brown, Jr., \textit{John Overton 1766–1833}, in \textsc{Tennessee Encyclopedia of History and Culture}, http://tennesseeencyclopedia.net/imagegallery.php?EntryID=0023 (last visited Feb. 1, 2008).

\textsuperscript{226} North Carolina’s initial ratification convention debated the Constitution, drafted a “Declaration of Rights” and “Amendments,” and voted “neither to ratify nor reject the Constitution.” Resolution of the North Carolina Convention (Aug. 1, 1788), in \textsc{4 Elliot’s Debates, supra note 59, at 243, 249, 251. Over a year later, North Carolina ratified the Constitution. Resolution of the North Carolina Convention (Nov. 21, 1789), in \textsc{2 Documentary History of the Constitution, supra note 51, at 290.}
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.]

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 "[sic] 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.

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

5. 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, New York had successfully defended its monopoly before the New York courts. In 1811, an anonymous author published an extended defense of the monopoly, arguing, among other things, that the states retained the right to grant monopolies under the Ninth and Tenth Amendments:

It is hardly necessary to add that the 12th amendment, can have no other influence on this question than to strengthen this position.

227. Glasgow's Lessee v. Smith & Blackwell, 1 Tenn. (1 Overt.) 144, 166 n.1 (1805). 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. 1, § 10; 2 Dall. 384; 1 T. Bl. app. to part 1, 269; 4 Johns. 163.").

228. Id. at 166–67.

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 powers 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. 11th 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 disparage the right that the States have to arm the militia, or to keep a navy in time of war... 

The author reads the Ninth Amendment as guarding against constructive extensions of federal power in matters involving the concurrent authority of the states. As we shall see, Supreme Court Justice Story adopted this Ninth Amendment-based defense of concurrent state power in a case involving, coincidentally enough, concurrent state powers over matters involving the militia. Like John Page, the author reads the Ninth Amendment 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.

6. The Continued Debates Regarding the Bank of the United States

Although Madison failed to convince a majority to reject the Bank of the United States in 1791, 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, and 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." Representative William 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." These men obviously would be aware of how Madison relied on the Ninth and Tenth Amendments. Others expressly relied on the Ninth Amendment alone. 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 ninth section of the first article, and others of the same kind... [listing examples]. And more especially the tenth amendment... [quoting the Tenth].

The parts of the Constitution recited prove the position taken, that the Constitution is a grant of specified powers; that we can exercise no power not expressly delegated to us...

Likewise, Representative William Crawford argued:

Congress cannot therefore usurp this power over the States, so explicitly and expressly 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 ninth, 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 banks not delegated to the people [sic234], or prohibited to the States, are reserved to the States respectively, or to the people...

... [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.

The same Ninth Amendment-based arguments were raised in the Senate. Senator William Giles, for example, recounted the concerns that led

232. Id. at 696 (statement of Rep. William T. Barry).
234. Either the reporter or Crawford is referring to the federal government and mistakenly referred to the people. This is clear from the full text.
to the adoption of a Constitution that reserved all unenumerated powers to the states:

From this short history of the origin 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 9th and 10th 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?\textsuperscript{236}

The Bank's proponents disagreed that the charter violated the Ninth Amendment, but they accepted the federalist nature of the Amendment. 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:

The Gentleman from Virginia (Mr. Giles) has called attention of the Senate to the 9th 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.\textsuperscript{237}

\begin{footnotes}
\item[236.] 22 ANNALS OF CONG. 182–83 (statement of Sen. William Giles).
\item[237.] \textit{Id.} at 301–02.
\end{footnotes}
7. 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. In 1808, Senator James Lloyd 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. In the murder trial of Cyrus Dean, the Supreme Court of Vermont rejected a claim that an alien freeholder could not 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.

In 1816, a South Carolina court was faced with the question of whether states have the authority to prosecute persons passing counterfeit federal coins. Although the Constitution expressly empowers the federal government to punish counterfeiters, 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. Applying a rule of construction based on the Ninth and

238. 1 AMERICAN STATE PAPERS: MISCELLANEOUS 480 (Joseph Gales ed., 1834).
239. Id.
240. 19 ANNALS OF CONG. 251 (statement of Sen. James Lloyd).
241. Id.

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.

Id.
244. 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 . . . .").
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.²⁴⁶

Grimke read the Ninth and Tenth Amendments as applying to powers exercised by the states prior to the adoption of the Constitution.²⁴⁷ If the Constitution does not expressly grant such powers to the federal government or divest them from the states, then under the Ninth Amendment, courts should interpret enumerated federal power in 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 Fulton²⁴⁸ by virtue of their “new and advantageous” mode of

²⁴⁶. Id. (internal citation omitted).
²⁴⁷. 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 618 (Nott, J., dissenting).
²⁴⁸. 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 Steam Boat Co. v. Livingston, 1 Hopk. Ch. 170 (N.Y. Ch. 1824), Livingston argued that neither the Ninth nor Tenth Amendment reserved
transportation. 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. Livingston's counsel, Thomas A. Emmet, responded that the federal government had only such power as was expressly granted and that the Ninth and Tenth Amendments reserved all other powers to the states.

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 power of the states, caused it to be expressly recognised in the 11th and 12th articles of amendment.

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.

Thomas Emmet argued a number of important cases in state and federal court, including the Supreme Court, between 1815 and 1824. See WHITE, supra note 212, at 204–14. The culmination of his legal career was his argument before the Supreme Court in Gibbons v. Ogden. Id. at 210–11.

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.

Chief Justice of the Pennsylvania State Supreme Court (1806–1827), William Tilghman was a federalist midnight justice who lost his seat with the repeal of the Judiciary Act. Farmers' & Mechs' Bank v. Smith, 3 Serg. & Rawle 63, 68 (Pa. 1817).
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.

8. 1820: The First Supreme Court Discussion of the Ninth Amendment

In 1820, John Taylor declared, in his book *Construction Construed and Constitutions Vindicated*, that:

The eleventh [Ninth] amendment prohibits a *construction* by which the rights retained by the people shall *be denied or disparaged*; and the twelfth [Tenth Amendment] "reserves to the states respectively or to the people the powers not delegated to the United States, nor prohibited to the states." The precision of these expressions is happily contrived to defeat a construction, by which the origin of the union, or the sovereignty of the states, could be rendered at all doubtful.\(^{254}\)

Taylor was an ardent states' rights advocate, and his thoughts on the Ninth Amendment perhaps should be taken with a grain of salt given the distance from the original ratification of the Ninth Amendment. The same year Taylor published his book, however, the very nationalist Justice 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), in a dissenting opinion by Justice Joseph Story.\(^{255}\) Once again, the decision arrived 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 establish 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 here.\(^{256}\) In brief, the majority upheld the state disciplinary action, drawing a dissent from Justice Story. In that dissent, Justice Story laid out what he viewed as the proper approach to

\(^{254}\) TAYLOR, *supra* note 25, at 46. Thomas Jefferson called Taylor's book "the most logical retraction of our governments to the original and true principles of the constitution creating them, which has appeared since the adoption of that instrument." Letter from Thomas Jefferson to Spencer Roane (June 27, 1821), in *THE WRITINGS OF THOMAS JEFFERSON* 189 (Paul Leicester Ford ed., 1899).


\(^{256}\) See id. at 1–4. For a more complete discussion, see Lash, *The Lost Jurisprudence*, *supra* note 1, at 613–22.
determining concurrent state power over a given subject. His opinion is worth reading in full as an early example of how a court can apply the Ninth Amendment in a live case or controversy. For our purposes, it is enough to simply quote Justice 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."  

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

9. Summation

At some point the mercy rule should apply. I have not selected only federalist references to the Ninth Amendment by courts and commentators and omitted others. There are no references to a libertarian Ninth Amendment during this period. With the exception of a defendant's attempt to use the Ninth Amendment (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. 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.

257. Houston, 18 U.S. at 49 (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 eleventh on that list.  

258. The Writings of John Marshall, Late Chief Justice of the United States, upon the Federal Constitution 560-97 (Boston, James Munroe & Co. 1859).  

259. 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 Amendment would be understood to apply to the denial or disparagement of any right, individual or collective. The extensive pairing of the Ninth and Tenth Amendments as federalist provisions, however, is impossible to ignore.  

260. See Lash, The Lost Jurisprudence, supra note 1, at 605.
I have limited my analysis of post-adoption commentary in deference to Professor Barnett's claim that Calhounian state-rights theory in the years leading up to the Civil War might have tainted later sources. 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 testimony includes those involved with drafting the Amendment and its ratification.

B. THE TENTH AMENDMENT

The ubiquitous pairing of the Ninth and Tenth Amendments not only highlights the federalist character of the Ninth Amendment, it also shows how the Tenth Amendment, as well as the Ninth Amendment, were read as establishing a rule of strict construction of federal power. The semantic meaning of the text of the Tenth Amendment does not expressly announce such a rule (one of the reasons why Randolph did not think it would have "much effect"). For a discussion of primary semantic versus secondary implied meanings, particularly in regard to the Ninth Amendment, see generally Lash, A Textual-Historical Theory, supra note 1.

It is clear, however, that the Tenth Amendment quickly came to be viewed as implying a federalist rule of construction. As I have written elsewhere, ultimately the Tenth Amendment would eclipse the Ninth Amendment as the primary text supporting a federalist interpretation of the Constitution.

Although there are earlier examples, perhaps the biggest reason why states' rights theorists came to emphasize the Tenth Amendment over the Ninth Amendment involves what came to be known as James Madison's "Celebrated Report of 1800." 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

---

261. For a discussion of primary semantic versus secondary implied meanings, particularly in regard to the Ninth Amendment, see generally Lash, A Textual-Historical Theory, supra note 1.


264. James Madison, Report on the Alien and Sedition Acts, in 6 WRITINGS OF MADISON, supra note 28, at 341. The full title of Madison's Report is "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." Id.
principles, including those announced by the First and Tenth Amendments. The Report became the "magna charta" of states' rights advocates and found its way into almost every tract and essay on state autonomy during the nineteenth century.\(^{265}\) It clearly influenced St. George Tucker's view of the Constitution. Tucker cites to the Report repeatedly and shares Madison's use of the Tenth Amendment in the Report as counseling a narrow construction of federal power.\(^{266}\) 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 Amendment was not accompanied by a decline in federalist readings of the Ninth Amendment. Throughout the nineteenth and early twentieth centuries, the Ninth Amendment continued to be read in tandem with the Tenth Amendment as one of the dual guardians of federalism and states' rights.\(^{267}\)

Professor Barnett believes that Madison's decision to rely on the Tenth Amendment and not the Ninth Amendment in his "Celebrated Report" undermines my claims about the federalist Ninth Amendment. 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 Amendment in his objections to the Alien and Sedition Acts.\(^{268}\) Barnett further claims that Madison's emphasis on the Tenth Amendment shows that this Amendment, and not the Ninth Amendment, was understood as a rule of construction guarding states' rights.\(^{269}\)

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.\(^{270}\) Whatever else one might conclude about the Alien and Sedition Act controversy, one cannot conclude that the Ninth Amendment 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 Amendment in their opposition to the Alien and Sedition Acts.\(^{271}\) 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 had been possible to use the Ninth Amendment, then Madison should have used the Ninth Amendment. Because he did not, this means that the Ninth Amendment was not
understood as a federalist rule of construction. Barnett's theory is a logical fallacy, however: one cannot get "should have" out of "could have."

In fact, there was good reason for Madison to discuss the Tenth Amendment 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 of the Virginia Resolutions at a time when political backlash from those Resolutions threatened to negatively affect the political hopes of the Republican Party in Virginia. Because the Resolutions based their argument on the First and Tenth Amendments, Madison had to do the same to defend them.

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]." Because the "acts aforesaid were unconstitutional," the states therefore were "duty bound to interpose for arresting the progress of the evil." 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 "co-operat[e] with this State, in maintaining unimpaired the authorities, rights, and liberties reserved to the States respectively, or to the people."

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 power, and the Assembly called upon other states to join them in "interposing" against enforcement of the Acts. This incendiary action threatened the continued stability of union. Madison was well aware of the delicacy of the situation and 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. As it turned out, the Resolutions were rejected by most other states whose assemblies issued stinging rebukes against Virginia and

---

274. Id. at 331, 326.
275. Id. at 330-31.
276. 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.
Kentucky's unjustified and dangerous tilt toward disunion. The backlash put the Republicans on the defensive at just the moment when they had hoped political opposition to the Acts would lead to victory in the presidential elections of 1800. It was politically important that the Resolutions received a strong defense, and Madison provided one in spades with his "Celebrated Report."

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. Although Barnett believes this proves Madison did not read the Ninth Amendment 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. Congress had clearly and intentionally sought to exercise an unenumerated power. 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. In his defense of the Resolutions, Madison could not rely on Ninth Amendment arguments of undue 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.


279. 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 any errors of fact, of principle, or of reasoning, which the candour of the General Assembly ought to acknowledge and correct.


280. See Barnett, The Ninth Amendment, supra note 8, at 64.


282. Id.

283. 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 id. at 327.
accordingly ties all of its arguments to the basic point that Congress had exercised a power nowhere granted in the Constitution. The rise of the Tenth Amendment as an independent federalist rule of construction is an important story in its own right. Madison's focus on the Tenth Amendment in his Report on the Virginia Resolutions, however, neither undermines his description of the Ninth Amendment in his speech on the Bank of the United States nor conflicts with the many other examples of federalist applications of the Ninth Amendment during the same period. Madison's speech shows 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.

VI. 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. Of particular importance is the impact of the Fourteenth Amendment. Whatever the scope of local autonomy under the original

284. According to Madison's Report:

[5.] That the General Assembly doth particularly protest against the palpable and alarming infractions of the 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 [the] executive, subvert the general 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 levelled [sic] 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.

Id. at 327-29.

285. I have explored this story elsewhere in depth. See generally Lash, Madison's Report, supra note 262.

286. See supra Part IV.E.

287. See supra Part V.

288. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("[W]henever any Form of Government becomes destructive of [unalienable rights], it is the Right of the People to alter or to abolish it . . . ."); U.S. Const. art. V (providing for Constitutional amendments).
Constitution, the Fourteenth Amendment significantly reduced that autonomy when it comes to the privileges or immunities of U.S. 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 Amendment.

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 Article. Nevertheless, because Professor 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 or immunities” of U.S. 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. No scholar or judge, however, has ever suggested that the 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.

The history surrounding the adoption of the Fourteenth Amendment supports the long-standing position of the courts that neither the Ninth nor the Tenth Amendment is a proper candidate for incorporation. Throughout the first half of the nineteenth century, the Ninth and Tenth Amendments were viewed as preserving the autonomy of the states. Despite the

289. In a recently published paper, I provide a comprehensive theory of the Ninth Amendment that reconciles the text of the Ninth, Tenth, and Fourteenth Amendments and presents an enforceable theory of judicial review. See generally Lash, A Textual-Historical Theory, supra note 1.


291. See AMAR, supra note 7, at 215–30 (arguing that some but not all of the first eight amendments were meant to be incorporated); CURTIS, supra note 31, at 219–20 (arguing that all eight were meant to be incorporated). See generally Kurt T. Lash, Two Movements of a Constitutional Symphony: Akhil Reed Amar’s The Bill of Rights, 33 U. RICH. L. REV. 485 (1999) (suggesting the possibility of incorporated common law economic rights).

292. See Lash, The Lost Jurisprudence, supra note 1, at 673. In fact, courts originally cited the Ninth Amendment in support of rejecting a theory of total incorporation. See id. at 675.

293. See generally id.
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.\footnote{294} 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.\footnote{295} 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 Amendment.

Although he has no historical evidence for his conclusion, Professor 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.”\footnote{296} In light of evidence presented in this Article, however, this seems clearly incorrect.\footnote{297} As we have seen, the evidence strongly suggests that the retained rights of the Ninth Amendment 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 \textit{some} of the rights protected under the Ninth Amendment were collective in nature, then the Ninth and Fourteenth Amendments cannot protect the \textit{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 \textit{reconciled} with the rights of the Fourteenth

\footnote{294. \textit{See id.} at 639.}
\footnote{295. \textit{See CONG. GLOBE, 42d Cong., 1st Sess. App. 84 (1871) (statement of Rep. Bingham) (arguing that the Privileges or Immunities Clause applies the protections of the first eight amendments against states); \textit{see also} John Choon Yoo, \textit{Our Declaratory Ninth Amendment}, 42 EMORY L.J. 967, 1009-22 (1993). Yoo points out that during the nineteenth century state constitutions adopted provisions echoing the language of the federal Ninth Amendment. Although I think this is important evidence that the language of the Ninth Amendment 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 that appear to have been embraced as individual rights provisions by the Civil War, no such transformation appears to have occurred with the Ninth Amendment. \textit{See Lash, The Lost jurisprudence, supra} note 1, at 643-52.}
\footnote{296. \textit{BARNETT, supra} note 1, at 66.}
\footnote{297. Even Barnett appears to realize the possibility that the Ninth Amendment and the Privileges or Immunities Clause of the Fourteenth Amendment do not protect the same set of rights. \textit{See Barnett, The Ninth Amendment, supra} note 8, at 16 (conceding that the Ninth Amendment might protect both individual and collective rights).}
Amendment. 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 it. In this way, the Fourteenth Amendment significantly altered the original scope of the Ninth Amendment.

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 Amendment remain in effect to the extent that they have not been abrogated (or transformed) by the Fourteenth Amendment. Put another way, where the enumerated rights of the Fourteenth Amendment end, the remnant rights of the Ninth Amendment begin.

The task then is to determine which of the retained rights the original Ninth Amendment protected remain under state control and which the Fourteenth Amendment now protects against state action. 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 Clause 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 Amendment and unaffected by the Fourteenth Amendment.

It is precisely because the federalist principle of the Ninth Amendment remains alive and well even after the adoption of the Fourteenth Amendment that Professor 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 Amendment does create a presumption of liberty, but it runs in precisely the opposite direction that Barnett proposes. 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 Amendment trumps the Fourteenth Amendment. As noted above, the Fourteenth Amendment necessarily carves out large portions of the original Ninth Amendment. 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.

VII. CONCLUSION: THE INESCAPABLE FEDERALISM OF THE NINTH AMENDMENT

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 states' 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, affirmative action programs, and election law. 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.

298. See, e.g., Brief for the Petitioners, Gonzales v. Raich, 545 U.S. 1 (2005) (No. 03-1454).