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Three Myths of the Ninth Amendment

Kurt T. Lash

University of Richmond, klash@richmond.edu

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THREE MYTHS OF THE NINTH AMENDMENT

*Kurt T. Lash**

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I. INTRODUCTION

The breathtakingly broad language of the Ninth Amendment is both a blessing and a curse. It is a blessing for those seeking support for expansive theories of individual rights. Indeed, it is hard to conceive of a theory of individual liberty that cannot find at least rhetorical support in the Ninth Amendment’s declaration of retained rights. It is not surprising, therefore, to find the Ninth Amendment invoked in support of everything from Dial-a-Porn¹ to prostitution² to organ selling.³ Once one decides that the Ninth Amendment refers to “other” unnamed individual liberties, there is literally no textual reason to exclude any unenumerated right. This, of course, is also the curse of the Ninth Amendment. The very fact that it seems to support even the most implausible claims makes courts reluctant to rely on the Ninth Amendment at all. In fact, the modern Supreme Court has studiously avoided the Ninth Amendment despite being prodded by parties before the court to rely on it.

* Professor and W. Joseph Ford Fellow, Loyola Law School (Los Angeles). J.D. Yale Law School (1992); B.A. Whitman College (1989).

1. PAUL R. ABRAMSON, ET AL., *SEXUAL RIGHTS IN AMERICA: THE NINTH AMENDMENT AND THE PURSUIT OF HAPPINESS* 106–10 (2003).

2. *Id.* at 113.

3. Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813, 1819–20 (2007).

This has not prevented scholars from developing a number of theories related to the Ninth Amendment. Most recently, Daniel Farber has invoked the Ninth Amendment in support of judicial reliance on international human rights.⁴ Randy Barnett has relied on the Amendment in support of a general “presumption of liberty,” which places the burden on the government to justify intrusions on any individual activity that does not injure third parties.⁵ Although their individual rights theories of the Ninth Amendment differ in their details, both Farber and Barnett embrace a number of common assumptions about the Ninth Amendment: first, that the “other” rights of the Ninth Amendment are limited to individual rights;⁶ second, that the Ninth Amendment has nothing to do with the Tenth Amendment—in fact, the two clauses are generally interpreted in a manner placing them at odds with one another;⁷ third, like almost all scholars in the modern period, these individual rights theorists assume the Ninth Amendment was forgotten soon after its enactment, thus obviating the need to deal with any of its counter-interpretations or uses.⁸

These assumptions are not unique to Farber and Barnett. They are repeated in one form or another in almost all modern Ninth Amendment scholarship.⁹ Recently, however, a great deal of historical evidence has come to light that calls into question all three of these myths about the

4. See DANIEL A. FARBER, *RETAINED BY THE PEOPLE: THE “SILENT” NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON’T KNOW THEY HAVE* 103, 184–85 (2007) (arguing that the same unenumerated human rights identified in international law can be argued for under a Ninth Amendment analysis).

5. RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 259–60 (2005).

6. See, e.g., *id.* at 242; FARBER, *supra* note 4, at 44.

7. See, e.g., Randy E. Barnett, *Kurt Lash’s Majoritarian Difficulty: A Response to a Textual-Historical Theory of the Ninth Amendment*, 60 *STAN. L. REV.* 937, 947 (2008) (“[P]roponents of a collective rights or majoritarian reading of ‘the people’ in the Ninth and Tenth Amendments must claim that [the phrase’s] meaning shifts in these provisions.”); FARBER, *supra* note 4, at 44 (“The proposal that became the Ninth Amendment was not paired with the future Tenth Amendment. It was not about federalism; it was about individual rights.”).

8. See, e.g., FARBER, *supra* note 4, at 45 (“the Ninth Amendment went into hibernation almost as soon as it was created”); Floyd Abrams, *Foreword to 1 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT*, at vii (Randy E. Barnett ed., 1989) (“For all but the last quarter of a century the amendment lay dormant, rarely discussed and justifiably described as ‘forgotten’ in the one book devoted to it.”).

9. See, e.g., Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 *TEX. L. REV.* 597, 598 n.2 (citing scholars who believe the Ninth Amendment was soon forgotten after its enactment).

Ninth Amendment.¹⁰ In this short essay, I will briefly discuss the critical aspects of this evidence in the hope that readers will be encouraged to explore a growing corpus of original sources that challenge many of the modern scholarly assumptions about this mysterious Amendment. I present a more in-depth look at the history and theory of the Ninth Amendment in recent volumes of the *Stanford Law Review* and the *Iowa Law Review*.¹¹

II. THE NINTH AMENDMENT IS ONLY ABOUT INDIVIDUAL RIGHTS

The text of the Ninth Amendment states: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”¹² Today, the term “rights” is generally used in association with individual rights. Thus, it is intuitively tempting to assume that the rights of the Ninth Amendment are the same kind of rights one is accustomed to invoking today. The text, however, is not limited to this one particular category of retained rights—it simply refers to “other” rights. Additionally, at the time of the founding of the nation, rights came in many varieties, including: (1) alienable and unalienable natural rights;¹³ (2) positive rights;¹⁴ (3) individual rights;¹⁵ (4) collective revolutionary rights;¹⁶ (5) majoritarian democratic rights; and (6) the retained rights of the sovereign states.¹⁷ All of these rights could be exercised by “the

10. I first addressed this newly uncovered historical evidence in two articles published by the *Texas Law Review*. See generally *id.*; Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 *TEX. L. REV.* 331 (2004).

11. See generally Kurt T. Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 *STAN. L. REV.* 895 (2008); Kurt T. Lash, *The Inescapable Federalism of the Ninth Amendment*, 93 *IOWA L. REV.* 801 (2008).

12. U.S. CONST. amend. IX.

13. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (referring to the unalienable rights of “Life, Liberty and the pursuit of Happiness”). See generally JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* (C. B. Macpherson ed., Hackett Publ’g Co. 1980) (1690) (arguing that the presumed intention of the Creator was that all men were naturally equal, and thus were naturally free).

14. James Madison, *Speech in Congress Proposing Constitutional Amendments*, in JAMES MADISON: WRITINGS 445–46 (Jack Rakove ed., 1999).

15. See 1 *ANNALS OF CONG.* 732 (Joseph Gales ed., 1834) (statement of Rep. Sedgwick) (discussing the unenumerated individual right of a man to “wear his hat if he pleased” or “go to bed when he thought proper”).

16. See Madison, *supra* note 14, at 441 (proposing an amendment declaring “[t]hat the people have an indubitable, unalienable, and indefeasible right to reform or change their government”).

17. See ARTICLES OF CONFEDERATION art. II (“Each state retains its

people” and all were capable of being “retained.” The question becomes whether the Ninth Amendment was meant to protect only one category of rights, or whether it was understood as protecting all retained rights, regardless of their particular character.

Although there is much that is mysterious about the Ninth Amendment, discovering the answer to this particular question is not that difficult. Despite the reams of paper that have been used to discuss the history of the Ninth Amendment, all reasonable scholars would concede that the best source of information is provided by the man who actually drafted the original language: James Madison. Not only was Madison responsible for introducing the Ninth Amendment to the House of Representatives, he also delivered a major speech while the Ninth Amendment was pending before the states. In this speech, he described the history behind the Ninth Amendment and explained how it operated as a limitation on government power.¹⁸ Madison also explained that all subjects and activities not delegated to the federal government were reserved to the people in the states as a matter of right. This includes not only individual rights, but also subjects meant to be left to the control of state majorities—whether in convention or in the state assembly.

Before describing Madison’s speech, however, a little background is in order. The commonly recounted story about the Ninth Amendment is that Madison added the Amendment in order to prevent reading the Bill of Rights as an exhaustive list of individual freedoms.¹⁹ Although this is true, scholars often assume that this means the Ninth Amendment was Madison’s idea, and not a proposal called for by the ratifying states. In fact, Madison’s proposed Ninth Amendment, like the rest of the Bill of Rights, came in response to concerns cited in the state conventions that the Constitution did not contain adequate limits on federal power. Although Madison himself desired greater protections for individual freedoms in the states, the primary purpose of adding a Bill of Rights was to satisfy moderates in the states regarding their desire to articulate the limited

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.”).

18. See 2 ANNALS OF CONG. 1902 (Joseph Gales ed., 1834) (statement of Rep. Madison).

19. See, e.g., LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 246–47 (1999) (explaining that Madison recommended the Ninth Amendment to appease those who feared enumeration of certain rights would “disparage those rights that were not placed in that enumeration”).

nature of federal power, and thus head off calls for a second national convention that might radically alter the proposed national government.²⁰ Madison's bill collected and distilled the most broadly desired proposed amendments from the state conventions, including a commonly suggested declaration that the addition of certain rights not be read in a manner suggesting otherwise unlimited federal power.

In particular, Madison's original Ninth Amendment echoed the Virginia Convention's proposed seventeenth amendment, which declared that the addition of certain rights not be construed to deny others retained by the people or enlarge the construction of delegated federal power.²¹ To Madison, these two concepts—retained rights and enlarged power—were closely related. As he put it in his speech introducing the bill to the House of Representatives, the goal of this amendment was to prevent a list of rights from implying that all other rights were “assigned” into the hands of the national government—thus enlarging the interpretation of their enumerated powers.²² His handwritten notes for his speech also indicated that the Ninth Amendment was to both preserve retained rights and prevent “enlarged” construction of federal power.²³ Ultimately, Madison's language regarding enlarged power was removed from the final version of the Ninth Amendment.

According to Madison, however, retaining rights amounted to the same thing as limiting the scope of federal power; preserving a right, by

20. See Kurt T. Lash, *On Federalism, Freedom, and the Founders' View of Retained Rights: A Reply to Randy Barnett*, 60 STAN. L. REV. 969, 974–76 (2008).

21. See THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 675 (Neil Cogan ed., 1997) (listing proposed amendments from the state conventions; Virginia's seventeenth proposed amendment stated: “Seventeenth, That those clauses which declare that Congress shall not exercise certain powers be not interpreted in any manner whatsoever to extend the powers of Congress. But that they may be construed either as making exceptions to the specified powers where this shall be the case, or otherwise as inserted merely for greater caution.”) (citing Certificates of Ratification of the Constitution and Bill of Rights and Related Correspondence and Rejections of Proposed Amendments, Record Group 11, General Records of the United States Government, National Archives, Washington, D.C.). James Madison was a member of the committee that drafted the Virginia proposal and he later noted the role the Virginia proposals played in his proposed draft of the Bill of Rights. Letter from James Madison to George Washington (Nov. 20, 1789), in 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY, at 1185 (Bernard Schwartz ed., 1971).

22. Madison, *supra* note 14, at 448–49.

23. See James Madison, Madison's Notes for Amendments Speech, 1789 in 2 THE BILL OF RIGHTS, *supra* note 21, at 1043 (“4. disparage other rights—or constructively enlarge”).

definition, meant constraining the scope of delegated power. In this way, the Ninth Amendment responded to the concerns of Virginia and other states that the Constitution would be interpreted in a manner that placed everything within the potential scope of federal power except those matters specifically listed in the Bill of Rights.²⁴

Understanding the link between Madison's Ninth Amendment and the concerns of state conventions helps illustrate why the Ninth Amendment uses the unrestricted term "rights" and not the more limited term "individual rights." The state conventions wanted to preserve their sovereign authority over every matter not delegated to the federal government. To be sure, this included individual rights such as freedom of speech; however, it also included all manner of local concerns that, as of right, were intended to be left under the control of the people in the states. This included all manner of municipal concerns including—as Madison publicly explained—the chartering of a bank.²⁵

III. MADISON'S SPEECH OPPOSING THE BANK OF THE UNITED STATES

Madison's speech in opposition to the Bank of the United States is a remarkable dissertation on the proper rules of constitutional interpretation and the limited construction of federal power.²⁶ It deserves to be read in full, but for now just a few highlights are worth emphasizing. In his speech, Madison explained how the very structure of the Constitution indicates that federal authority is limited by the principle of enumerated power.²⁷ For this principle to have any real effect, those powers that are enumerated must be subject to a limited construction.²⁸ According to Madison, the proponents of the Constitution promised the state conventions that federal power was limited to certain subjects and would be narrowly construed. The states insisted that this promised rule of strict construction be made an express part of the Constitution, and Congress responded by proposing the Bill of Rights. In Madison's view:

The explanatory amendments proposed by Congress themselves, at least, would be good authority with them [the state proposals]; all

24. Lash, *supra* note 10, at 337.

25. *Id.* at 384.

26. *Id.* at 337, 392–93.

27. *Id.* at 387.

28. *Id.* (arguing that the power of the federal government to establish a national bank or take other action not expressly enumerated "must be discoverable through a proper interpretation of those [enumerated] powers").

these renunciations of power proceeded on a rule of construction, excluding the latitude now contended for. These explanations were the more to be respected, as they had not only been proposed by Congress, but ratified by nearly three-fourths of the states. He [Madison] 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.²⁹

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:

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.³⁰

Madison's speech removes any doubt concerning his broad view of the people's retained rights. The people in each state determine whether to authorize their local governments to establish business enterprises such as banks. This is not an individual right—it is a collective right in the hands of the people in each state, who decide for themselves the scope of state commercial regulations. The reserved rights and powers of the Ninth and Tenth Amendments thus preserved the autonomy of state government. By limiting the interpreted scope of federal power, the people in each state remained free to decide for themselves how to allocate power to their local governments or preserve other matters as individual rights in their state's bill of rights. Although scholars generally focus on individual retained rights, Madison's speech stands as an inescapable example of how the drafter of the Amendment understood it as going much further—all rights and powers not delegated into the hands of the national government were retained by the people in the states.

IV. THE NINTH AND TENTH AMENDMENTS

Madison's speech shows why he paired the Ninth Amendment with the Tenth, with both serving as guardians of the retained right to local self-

29. James Madison, *Speech in Congress Opposing the National Bank*, in JAMES MADISON: WRITINGS, *supra* note 14, at 489.

30. 2 ANNALS OF CONG. 1902 (Joseph Gales ed., 1834) (statement of Rep. Madison).

government. The Tenth Amendment established the principle of enumerated federal power, with all non-enumerated powers reserved to the people in the states. The Ninth Amendment addressed a separate issue: how broadly should one construe those powers that are enumerated? The danger of adding a Bill of Rights was that federal power would be allowed to expand into all areas except those expressly placed off limits. The Ninth Amendment prevents this from occurring by insisting that federal power must not be construed in a manner that denies or disparages any activity or subject retained as a matter of right by the people. Put into operative effect, the Ninth Amendment requires a narrow construction of federal power in order to preserve these other retained rights. As Madison put it, the Ninth Amendment prevents a “latitude of interpretation” when it comes to enumerated national power.³¹

Madison left no doubt that this strict construction of federal power was meant to preserve a sphere of autonomy for the state governments. Madison was no respecter of states, *per se*. Nevertheless, he deeply believed in the concept of popular sovereignty and the right of the people in the states to decide for themselves how to deal with matters of local concern. For example, when Congress passed the Alien and Sedition Act, Madison argued that the criminalization of political speech violated both individual rights under the First Amendment and state rights under the Tenth Amendment.³² Like many others in the founding generation, Madison believed that the structure of federalism—separation of state and federal power—helped to preserve individual liberty by limiting the scope of delegated federal power. The time would come when Madison would oppose unduly broad conceptions of state autonomy.³³ In 1791, however, Madison recognized an attempt to stretch federal power beyond the scope promised to the ratifiers in the state conventions.

Madison’s linking of the Ninth and Tenth Amendments as dual guardians of state autonomy was shared by his contemporaries and stood as the accepted view of both Amendments for more than one hundred years. Others of the founding generation who shared this view of the Ninth Amendment included members in both the House and Senate who helped

31. Madison, *supra* note 29.

32. See Kurt T. Lash, *James Madison’s Celebrated Report of 1800: The Transformation of the Tenth Amendment*, 74 GEO. WASH. L. REV. 165, 181 (2006).

33. See Letter from James Madison to Edward Everett (Aug. 28, 1830), in 9 THE WRITINGS OF JAMES MADISON 383, 397–98 (Galliard Hunt ed., 1910) (rejecting the reasoning of the nullifiers).

frame the Amendment,³⁴ members of the state assemblies who ratified the Amendment,³⁵ the first constitutional treatise writers,³⁶ and the Supreme Court Justices who first discussed the Amendment.³⁷ The commentary began while the bill was being discussed in the states, continued uncontradicted during the first decade of the Constitution, and was consistently repeated by the bench and the bar right up until the time of the New Deal.³⁸

V. THE “PEOPLE” OF THE NINTH AND TENTH AMENDMENTS

A common objection to a federalist reading of the Ninth and Tenth Amendments is that it seems to ignore the Amendments’ differing texts. The Ninth Amendment speaks of the rights of the people. Therefore, it stands to reason that the Tenth Amendment speaks of the rights of the states, right? Well, actually, no. Although it is true that the Tenth Amendment is generally associated with state rights, both the Ninth and Tenth Amendments are about the people. Focusing on this neglected declaration of popular sovereignty in both Amendments illustrates the provisions’ common grounding in the principle of limited federal power.

Popular sovereignty, an idea that arose in England, maintains that ultimate—or sovereign—power in a society lies with its citizens. In revolutionary America, this idea evolved in a manner that drew a sharp distinction between the people and their government. Unlike England, where the people’s representatives were permitted to exercise all sovereign power of the people themselves, the sovereign people of the United States were viewed as existing and acting outside the ordinary institutions of government.³⁹ Governments could exercise no more power than that

34. See Lash, *The Inescapable Federalism of the Ninth Amendment*, *supra* note 11, at 856 (discussing John Page, Representative during the drafting of the Ninth Amendment); Lash, *supra* note 10, at 362–67 (discussing Roger Sherman, Senator during the same session of Congress).

35. See *id.* at 861 (discussing John Overton, member of the second North Carolina Ratifying Convention).

36. See *id.* at 859 (discussing St. George Tucker and the first constitutional treatise; see also Kurt T. Lash, “Tucker’s Rule”: *St. George Tucker and the Limited Construction of Federal Power*, 47 WM. & MARY L. REV. 1343 (2006) (same)).

37. See Lash, *supra* note 9, at 613 (discussing Justice Joseph Story’s dissenting opinion in *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 49 (1820)).

38. See *generally id.* at 603–79 (discussing analyses of the Ninth Amendment during state ratification, the Civil War, and Reconstruction).

39. See *generally* GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, 336–38 (1969) (explaining that the sovereign people of the

delegated to them by the people. All powers not delegated to the government were retained by the people.

As sovereign, the people retained all the prerogatives of sovereignty once associated with the royal head of state. One of these prerogatives involved the proper construction of delegated power. Situations occasionally arose in which a sovereign delegated one or more aspects of sovereignty—for example, in a treaty between sovereign nations. In such a case, it was presumed that each sovereign would delegate no more power than was absolutely necessary.⁴⁰ Therefore, according to the law of nations, all delegated sovereign power was to be strictly construed. This is the original rule of strict construction. It is clear how this idea was translated into the American context. According to the Declaration of Independence, the former colonies were now all free and independent states. Under the Articles of Confederation, all powers, jurisdictions, and rights not expressly delegated to the national congress were reserved to these states.

The proposed federal constitution, however, did not contain a statement of retained sovereign authority. This raised the concern that delegated federal power would be so broadly defined that it would destroy the independent existence of the states and consolidate the country into a single, undifferentiated nation under an all-powerful national government. In response, the defenders of the Constitution promised that Congress would only have limited delegated power. As Alexander Hamilton assured the members of the New York convention, the sovereign people in the states would give up only those sovereign powers expressly delegated away.⁴¹ In fact, throughout the constitutional debates, the Federalists

United States were “once considered to be a legally deficient body because of the absence of the magistrates or rulers”).

40. See EMMERICH DE VATEL, *THE LAW OF NATIONS* (1797) (Joseph Chitty ed., 1834) bk. I, ch. 2, § 16 (commenting on the duty of self-preservation); see also *id.* bk. II, ch. 17, §§ 305, 308 (describing the need to narrowly construe “odious” delegations of sovereign power); ST. GEORGE TUCKER, 1 BLACKSTONE’S COMMENTARIES app. 423 (Philadelphia, William Young Birch 1803) (“For, no free nation can be bound by any law but [its] own will; and where that will is manifested by any written document, as a convention, league, treaty, compact, or agreement, the nation is bound, only according as that will is expressed *in* the instrument by which it binds itself. And as every nation is bound to preserve itself, or, in other words, [its] independence; so no interpretation whereby [its] destruction, or that of the state, which is the same thing, may be hazarded, can be admitted in any case where it has not, in the *most express terms*, given [its] consent to such an interpretation.”).

41. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE

insisted that all powers not expressly delegated to the new national government were retained by the sovereign people in the states.⁴² Doubters in the state conventions, however, were not convinced and agreed to ratify the Constitution only on the understanding that the principle of the people's right to all non-delegated powers and rights would be made an express part of the Constitution through the adoption of a Bill of Rights.

Madison's original versions of the Ninth and Tenth Amendments both responded to the need to limit federal power, but each in a different way. The Ninth Amendment prohibited any implied enlargement of federal power resulting from the addition of a Bill of Rights. Madison's version of the Tenth Amendment echoed a similar provision in Article II

ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, 362–63 (Jonathan Elliot ed., 1891). According to Hamilton, the sovereign people of the states “have already delegated their sovereignty and their powers to their several governments; and these cannot be recalled, and given to another, without an *express* act.” *Id.* (reporting the remarks of Alexander Hamilton to the Ratifying Convention of New York on June 28, 1788) (emphasis added). The principle of “expressly delegated powers” allowed for the exercise of those incidental powers necessarily or clearly related to the express delegation. In the Federalist Papers, Hamilton insisted that “State Governments would clearly retain all the rights of sovereignty which they before had and which were not by [the Constitution] *exclusively* delegated to the United States.” THE FEDERALIST NO. 32 at 152 (Alexander Hamilton) (Buccaneer Books 1992) (emphasis in original). Madison likewise assured the state conventions that the Constitution “leaves to the several States a residuary and inviolable sovereignty over all [non-delegated] objects.” THE FEDERALIST NO. 39 at 194 (James Madison) (Buccaneer Books 1992). As Maryland Supreme Court Justice Samuel Chase wrote only a few years after the adoption of the Bill of Rights: “All power, jurisdiction, and rights of sovereignty, not granted by the people by that instrument, or relinquished, are still retained by them in their several States, and in their respective State Legislatures, according to their forms of government.” *Campbell v. Morris*, 3 H. & MCH. 535, 554–55 (Md. 1797).

42. According to Roger Sherman, a member of the Philadelphia Convention from Connecticut, “The powers vested in the federal government are clearly defined, so that each state still retain [sic] its sovereignty in what concerns its own internal government, and a right to exercise every power of a sovereign state *not particularly delegated* to the government of the United States.” A Citizen of New Haven, II, *Observations on the New Federal Constitution*, NEW HAVEN GAZETTE, Dec. 25, 1788, reprinted in *ESSAYS ON THE CONSTITUTION OF THE UNITED STATES* at 238 (Paul L. Ford ed., Burt Franklin 1970) (1892) (emphasis added). This letter was ascribed to Roger Sherman by Simeon Baldwin, former owner of the New Haven Gazette and intimate friend of Sherman. *See id.* at 213. According to Herbert Storing, this was a “rather typical description of the Constitution.” *See* Herbert J. Storing, *The ‘Other’ Federalist Papers: A Preliminary Sketch*, 6 POL. SCI. REVIEWER 215, 222 (1976) (discussing Sherman’s statement).

of the Articles of Confederation, but referred only to the reserved power of the states.⁴³ Unlike the Ninth Amendment, Madison's Tenth Amendment did not refer to the people. This triggered an objection from the anti-Federalist Thomas Tucker, who, among other things, insisted on adding language declaring that all power is derived from the people.⁴⁴ Ultimately, his efforts were successful and the Tenth Amendment now reserves all non-delegated power to the states respectively, or to the people.

Today, most people probably read "the people" as a reference to the single, undifferentiated people of the United States. Indeed, the words almost seem to conflict with a states' rights reading of the Tenth Amendment (perhaps explaining why they are generally ignored).⁴⁵ In

43. Madison, *supra* note 14, at 444 ("The powers not delegated by this constitution, nor prohibited by it to the states, are reserved to the States respectively.").

44. This is best expressed through the statements of Tucker and Carroll:

MR. TUCKER proposed to amend the proposition, by prefixing to it "all powers being derived from the people." He thought this a better place to make this assertion than the introductory clause of the Constitution, where a similar sentiment was proposed by the committee. He extended his motion also, to add the word "expressly," so as to read "the powers not expressly delegated by this Constitution."

....

MR. TUCKER'S motion being negatived,

MR. CARROLL proposed to add to the end of the proposition, "or to the people;" this was agreed to.

1 ANNALS OF CONG. 761 (Joseph Gales ed., 1834). There is a discrepancy here among different reporters. The Annals of Congress reports Carroll making the motion to add "or to the people." The Gazette of the United States, on the other hand, reports that Elbridge Gerry made the motion and that Carroll opposed it on the grounds that "it tended to create a distinction between the people and their legislatures." GAZETTE OF THE UNITED STATES, Aug. 22, 1789, *reprinted in* CREATING THE BILL OF RIGHTS 193 (Helen E. Veit, Kenneth R. Bowling & Charlene Bangs Bickford eds., Johns Hopkins Univ. Press 1991).

45. Those few scholars who have focused on the addition of the "or to the people" provision have, in fact, moved in precisely the opposite direction of that envisioned by Tucker, attempting to read the clause in tandem with the Ninth Amendment as guarding individual natural rights. *See, e.g.,* David N. Mayer, *The Natural Rights Basis of the Ninth Amendment: A Reply to Professor McAfee*, 16 S. ILL. U. L.J. 313, 316-17 n.13 (1992); Norman Redlich, *Are There "Certain Rights . . . Retained by the People"?*, 37 N.Y.U. L. REV. 787, 806-07 (1962). For a critique of this view, see Lash, *supra* note 10, at 374 (suggesting that the Ninth Amendment is best

1798, however, Thomas Tucker knew that adding these words would support his efforts to narrowly construe federal power. The theory of popular sovereignty presumed that all delegated power must be strictly construed. By adding a reference to the reserved powers of the people to the Tenth Amendment, the Bill of Rights closed with dual expressions of the people's preserved rights and powers. This amounted to a double-barreled declaration that, despite the broad delegations of power in the federal Constitution, the people remained sovereign and retained all powers and rights not expressly given away. This is, by the way, exactly how Madison described the limits of federal power in his bank speech, citing the Ninth and Tenth Amendments as declaring the principle of strict construction.⁴⁶ Far from expressing conflicting ideas, the Ninth and Tenth Amendments jointly enforce the principle of federalism by reserving all non-delegated powers to the people of the states and insisting that those powers that are delegated be strictly construed.

VI. THE NINTH AMENDMENT WAS NOT "FORGOTTEN"

Beginning with Bennett Patterson's *The Forgotten Ninth Amendment*, a common theme among modern judges and legal historians is that the Ninth Amendment fell into obscurity following its enactment in 1791.⁴⁷ Recent books by Daniel Farber and Randy Barnett repeat this common assumption that the Ninth Amendment was widely ignored prior to Justice Arthur Goldberg's opinion in *Griswold v. Connecticut*.⁴⁸ This myth is so

read as an independent check on the expansion of federal power through judicial "constructive enlargement"), and Thomas B. McAfee, *The Federal System as Bill of Rights: Original Understandings, Modern Misreadings*, 43 VILL. L. REV. 17, 21 (1998) (arguing that "the purpose of the Ninth Amendment is to preserve the federal structure against a unique threat posed by enumeration of significant limits on federal power").

46. See 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, 414 (Jonathan Elliot ed., 1891) ("In confirmation of his sentiments, [Madison] adduced certain passages from *speeches* made in several of the *state conventions* by those in favor of adopting the Constitution. These passages were fully in favor of this idea—that the general government could *not* exceed the *expressly*-delegated powers. In confirmation also of this sentiment, he adduced the amendments proposed by Congress to the Constitution.").

47. See, e.g., BENNETT B. PATTERSON, *THE FORGOTTEN NINTH AMENDMENT: A CALL FOR LEGISLATIVE AND JUDICIAL RECOGNITION OF RIGHTS UNDER SOCIAL CONDITIONS OF TODAY* 2–3 (1955).

48. See, e.g., FARBER, *supra* note 4, at 45 ("the Ninth Amendment went into hibernation almost as soon as it was created"); ABRAMS, *supra* note 8, at vii ("For all

easily disproven that it is remarkable that modern scholars continue to discuss the Ninth Amendment as if they are the first generation to have noticed it in the Bill of Rights.

In fairness, there are reasons why modern scholars generally missed the early history and traditional application of the Ninth Amendment. To begin with, during the first decades of the Constitution the Ninth Amendment was referred to as the "Eleventh Article of Amendment."⁴⁹ This reflected the fact that the Ninth Amendment was eleventh on an original list of twelve proposed amendments. Over time, it appeared that only the last ten amendments would be ratified and the convention changed to our current terminology of Amendments One through Ten. But this changed convention has had the effect of obscuring the early references to the "eleventh amendment." For example, Madison's bank speech referred to the Ninth Amendment as the "11th;" thus, his reference to the Ninth Amendment was missed in the early post-*Griswold* scholarship on the subject.⁵⁰ Now that the early convention is better known, a great number of early references to the Ninth Amendment have been uncovered, all of which indicate that the Amendment received far more discussion than previously thought.

There is a more telling reason why the history of the Ninth Amendment has been missed. Modern scholars have long known about numerous twentieth century opinions that cite the Ninth Amendment.⁵¹ Despite these precedents, however, scholars insisted that there had been no significant judicial use of the Ninth Amendment since its enactment.⁵² These twentieth century cases invariably cited the Ninth Amendment in tandem with the Tenth Amendment in cases involving issues of federalism and limited federal power. Since almost all modern scholars assume that the Tenth Amendment—not the Ninth Amendment—addresses issues of federalism, all of these earlier discussions of the Ninth Amendment were

but the last quarter of a century the amendment lay dormant, rarely discussed and justifiably described as 'forgotten' in the one book devoted to it."). Justice Goldberg's concurring opinion in *Griswold* argues that the right to marital privacy exists in the Ninth Amendment, rather than in the Fourteenth Amendment, as the opinion of the Court held. *Griswold v. Connecticut*, 381 U.S. 479, 487-499 (1965).

49. See Lash, *A Textual-Historical Theory of the Ninth Amendment*, *supra* note 11, at 931 n.136.

50. See Madison, *supra* note 29.

51. See PATTERSON, *supra* note 47, at 29-32 (discussing fifteen cases decided between 1908 and 1952 that cite the Ninth Amendment).

52. See Lash, *supra* note 9, at 598 n.2 (listing sources embracing the "languished" theory of the Ninth Amendment).

dismissed as really being about the Tenth Amendment; the citation of the Ninth Amendment was simply judicial error.⁵³

Both historical accident and modern assumptions about the Ninth and Tenth Amendments had the effect of clouding our appreciation of the historical understanding and use of the Ninth Amendment. The recent dramatic increase in historical evidence regarding the Ninth Amendment, however, not only clarifies the original meaning of the Ninth Amendment, but also justifies the longstanding tradition of pairing the Ninth and Tenth Amendments. It is not just the Ninth Amendment that has been forgotten—we have also forgotten the role federalism played in our nation's founding and in the drafting of the final two amendments in the Bill of Rights.

VII. THE NINTH AND FOURTEENTH AMENDMENTS

Even if the Ninth Amendment originally played a role in preserving the retained right to local self-government, much has happened since 1791. In particular, the adoption of the Fourteenth Amendment modified the Constitution's original division of national and local power and expanded the category of individual rights protected from both state and federal abridgment. Because a number of these rights were presumably reserved to state control by the original Ninth Amendment (for example, the right to establish religions on a state level), the question becomes what, if anything, is left of the original Ninth Amendment after the adoption of the Fourteenth Amendment?

This question cannot be fully answered without determining the scope of the Fourteenth Amendment—specifically, the Privileges or Immunities Clause. There is a long-standing debate regarding the meaning of this Clause. But, without having to join that particular debate, the historical evidence allows for at least some tentative conclusions regarding the impact of the Fourteenth Amendment on the Ninth Amendment.

To begin, the evidence suggests there was no intention to include the Ninth Amendment as one of the “privileges or immunities” incorporated against the states by the Fourteenth Amendment. Throughout the pre-Civil War period, the Ninth Amendment was treated as a states' rights provision, and abolitionists pointedly omitted the Amendment from their

53. See, e.g., PATTERSON, *supra* note 47, at 32–33 (noting several cases that identified both Ninth and Tenth Amendment violations actually only discussed the violation and applicability of the Tenth Amendment).

list of constitutional provisions calling for the end of slavery.⁵⁴ Even more pointedly, John Bingham, the drafter of Section 1 of the Fourteenth Amendment, omitted the Ninth Amendment from his list of freedoms in the original Bill of Rights, which were now guarded against state action by the Fourteenth Amendment.⁵⁵

Even if not incorporated into the Fourteenth Amendment, the Ninth Amendment must nevertheless be reconciled with the Fourteenth Amendment. To the degree that rights once left to the states were now protected against infringement by the states, the scope of the original Ninth Amendment has been limited. But those aspects of the original Ninth Amendment that did not involve individual privileges or immunities remain, as a matter of right, “retained rights” under the control of the people in the states. This could include everything from local control of education to medicinal use of marijuana to physician-assisted suicide. Areas of local self-governance are not distributed along political lines; depending on the subject, both liberals and conservatives can probably identify areas in which they would prefer a degree of autonomy from national control. However, whether one agrees with these particulars, the Constitution as originally understood announced a government of enumerated powers that were to be narrowly construed in order to preserve the people’s right to local self-government. This was Madison’s view and it remains an important and viable aspect of our modern federalist Constitution.

In a time when individuals are once again concerned that national power is being stretched in a manner dangerous to individual liberty, the forgotten history of the Ninth and Tenth Amendments reminds us that we already have constitutional tools in place to preserve the delicate balance of power between the state and national governments. These Amendments remind us that we—the sovereign people—have a federal government and a federalist Constitution.

54. See Lash, *supra* note 9, at 647 (noting that if the Ninth Amendment truly supported individual rights, “its omission from abolitionist arguments is inexplicable”).

55. CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866) (statement of Sen. Bingham).

DISCUSSION

PROFESSOR MICHAEL KENT CURTIS: One comment I have is that, if you look at the levelers in England and their agreement of the people and their rhetoric and so on, it is very much like the agency/popular sovereignty thing you were talking about. The question I have is: do you find some tension between James Madison's discussion of the Ninth Amendment when he was presenting the Bill of Rights to Congress, and James Madison's discussion of the Ninth Amendment in the later Bank of the United States controversy? My recollection of James Madison presenting it to the Congress was that he said a big objection to a Bill of Rights is that if we don't list a right, it will mean that this right does not exist. I thought that this was one of the most plausible arguments against the Bill of Rights. But I have taken care of that because this indicates that there are other rights that are not listed. Do you find some tension between this?

PROFESSOR KURT LASH: As you read historians' analyses of James Madison, you'll often read about Madison's early nationalist visions and maybe later on it becomes more states' rights oriented, but I think the most recent biographers reject that dual analysis of Madison and so do I. I actually do not find a conflict between his speech when he first introduced the Bill of Rights to the House of Representatives and his later speech against the Bank of the United States. The particular quote you are talking about is the worry that we might have left some rights out from the Bill of Rights. What Madison said at that particular point is that, if we didn't list all of the rights, the ones which were unlisted would be assigned to the hands of the national government. It would be an enlargement of federal power. In his notes—and this is important because the vision I am giving you of the Ninth Amendment is one of protecting rights by constraining power—he said that if we do not preserve these rights, the federal government will end up assuming everything not listed in the Bill of Rights is in its control, and therefore its power has been enlarged. Writing about the Ninth Amendment in his actual speech notes, James Madison wrote “retained rights, enlarged powers.” This again indicates that the Ninth Amendment was meant to accomplish both. It preserves local rights, as well as individual, collective, and majoritarian rights, by constraining the reach of federal power. I think that this vision ultimately, of course, becomes developed in the Bank of the United States speech as well.

PROFESSOR REBECCA ZIETLOW: I could talk about Madison, but we can talk about Madison later. More interestingly, what about the Fourteenth Amendment? To the extent that the Ninth Amendment reserves states' sovereignty, didn't the Fourteenth Amendment alter it? It is an interesting idea you hold that this would impose an additional external limit on Congressional power—the Tenth Amendment imposes the internal limit. The power is not delegated and Congress does not have the power to begin with. The Ninth Amendment imposes an external limit, but then the federal government does not have much to say on individual rights. The Fourteenth Amendment gives that power to the government.

PROFESSOR KURT LASH: Yes, the Fourteenth Amendment is critical. I do come from an originalist perspective in terms of what I view as a proper approach to constitutional interpretation. But I think the originalists have to be more comprehensive; more things have happened, and more have spoken than just the founders. The people who spoke in 1868 of Imperial Reconstruction also have sovereign authority that has to be respected. I'm looking for the whole panel discussion of Privileges or Immunities. The Fourteenth Amendment did take a number of issues and responsibilities that have been left under the control of the states and transformed them into individual rights, which now are particularly enforced against state action. So yes, there is an obvious impact on the Fourteenth Amendment, but the Fourteenth Amendment did not transform everything about the Ninth Amendment. It did limit its scope, but innumerable issues and subjects remain which could not be incorporated against the states; for example, the idea of local control of noncommercial activities, the idea of being able to consume home grown wheat, and other things along those lines. These are all about local regulatory control, and they were not impacted by the Fourteenth Amendment. I think individual rights, to a great deal, were transformed by the Fourteenth Amendment; however, the Fourteenth Amendment left vast areas of federalism still protected against federal intrusion as a matter of right.

PROFESSOR REBECCA ZIETLOW: I just can't resist reminding you that Madison himself proposed such an amendment that would have limited the states' jurisdiction over individual rights, and that Madison proposed a legislative veto which would have given Congress the power to veto a state legislature in order to protect individual rights.

PROFESSOR KURT LASH: The vision of the Ninth Amendment that I am talking about is not one against individual rights, and certainly my vision of Madison would have to include his very deep commitment—some would say a prescient commitment—to individual rights. He proposed something that looked a lot like the Fourteenth Amendment, and it was successful in the House, but ultimately got rejected in the Senate. He did believe in individual rights, and he also pursued individual rights at the state level in terms of his remonstrance against religious taxation. But one of the ways to protect individual liberty, which Madison embraced, is limiting the power of the federal government. It was a key aspect of how individual liberty was to be protected. The best illustration of this is the Alien and Sedition Act, which was enacted before the end of the first decade of the Constitution, where the federal government actually criminalized criticism of the federal government. That, according to Madison, not only violated the First Amendment, but also intruded upon matters that were meant to be left under state control. So, he did believe in individual rights, but he also embraced a view of the founding which we perhaps have lost a little bit. The idea is that one way to protect individual rights is by constraining federal power.

PROFESSOR RANDY BARNETT: Up until now I thought Kurt used Madison's Bank of the United States speech to establish very clearly the proposition that the Tenth Amendment talked about how Congress can only exercise delegated power, and that the Ninth Amendment, and only the Ninth Amendment, generates a rule of strict construction of those powers and that is why he thought the speech was so significant. Do I understand from your remarks today and your future publication in the *Drake Law Review*, that both the Ninth Amendment and the Tenth Amendment establish rules of strict construction—one with respect to rights and the other with respect to state powers? Have you actually changed your position on this issue?

PROFESSOR KURT LASH: Some of this comes up in my discussion in the *Stanford Law Review*, and I am coming out with an additional piece on the Tenth Amendment which is going to be published by Notre Dame, which develops a lot of these ideas. One of the criticisms of the federalist interpretation of the Ninth Amendment is that it appears to render redundant the protection of the Ninth and Tenth Amendments. You seem to be collapsing the two amendments into the same thing, and

that violates the rule that each text of the Constitution was meant to be given independent effect. In my writing, I have discussed how you escape that particular criticism of the federalist analysis of the Ninth Amendment. By focusing on Madison's speech, where he talks about how the Ninth Amendment controls the latitudes of interpretation, it keeps you from having unduly elastic interpretations of delegated power. The Tenth Amendment does something completely separate—it says if you are not given the power in the Constitution, then you do not have it. It is reserved for the states or to the people within the states. The Ninth Amendment says, "Don't stretch the powers that you are given too far; don't think you can stretch them into every single area except those which were placed off limits by the Bill of Rights."

There are additional restrictions on federal power, and that provides a very neat distinction between the two amendments. I still embrace that distinction as a matter of the specific textual content because the Tenth Amendment, in many ways, does state the better truism—all that is not given away is reserved. It is the Ninth Amendment that says it shall not be construed in terms of the construction of federal power. However, in terms of the implications of the amendments, I think that by stating popular sovereignty language in both amendments—talking about how rights are reserved to the people and powers are reserved to the people—that necessarily meant that both of those amendments invoked ideas that stretched back into the law of nations and a number of understandings of sovereign power. This suggests that any time powers or rights are delegated away, then those delegations have to be strictly construed. I think it is perfectly appropriate to read both as implying the rules of strict construction. I think that explains why both of them were treated as implying the rules of strict construction from a very early period, and certainly that thought accelerated after Madison's report of 1800.

PROFESSOR DANIEL FARBER: What do you make of the fact that the Ninth Amendment and the Tenth Amendment were discussed in different parts of Madison's speech, and the fact that he wanted to put them into different parts of the Constitution? Do you think *McCulloch v. Maryland* was decided wrongly? Do you think that the President's executive authority should be strictly construed, and therefore are the Bush Administration's views of the war on terrorism consistent with the Ninth and Tenth Amendments?

PROFESSOR KURT LASH: No, yes, and I do not know. Part of the analysis, the originalist analysis, is to glean what you can from the historical record to see if you can come out with possible and less possible understandings of what was understood at the time of the founding. One of the aspects of the historical record that Daniel's book talks about is how, when Madison first proposed the Ninth and Tenth Amendments, he proposed them to be placed in different parts of the Constitution, with the Ninth being placed alongside other individual rights. Doesn't that suggest that the two amendments were meant to play very different roles and were not meant to be conjoined? The idea that the Ninth Amendment protected individual rights is something that I can see. So, I am not surprised that it would be placed alongside other individual rights. But, once again, protecting those individual rights meant leaving them under local control, and we know that Madison also understood that as the same thing as far as the First Amendment was concerned. The federal government was constrained, but that area was reserved to the states. The fact that they [the Ninth and Tenth Amendments] were placed in different parts of the Constitution does not mean that they could not both have federalist aspects to them. And, of course, Madison comes right out and says that in his speech against the Bank of the United States.

Moving from there, I don't want to jump too quickly to the Bush Administration. There's something in the middle—do I think that *McCulloch* was wrongly decided? Oh yes, oh absolutely. It was just astonishingly incorrect in its rationale. I would cite in support of that particular position a gentleman by the name of James Madison who, in his detached memoranda, goes out of his way to partake in the *McCulloch* decision. One last point, as far as executive power: Yes, Madison did believe the limitations of the federal government would extend to both the executive and legislative branches.

