

**LOYOLA LAW SCHOOL
(LOS ANGELES)
PUBLIC LAW AND LEGAL THEORY**

**Research Paper No. 2004-5
February 2004**

**The Lost History of the Ninth Amendment (I):
The Lost Original Meaning**

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THE LOST HISTORY OF THE NINTH AMENDMENT (I): THE LOST ORIGINAL MEANING

KURT T. LASH⁺

Introduction

I. Current Theories of the Ninth Amendment

- A. The Text
- B. The Traditional Story
- C. Theories of the Ninth Amendment

II. The Ninth Amendment's Roots as a Rule of Construction

- A. The Missing Thread
- B. Antifederalists Concerns About the Judiciary In the Ratification Debates
- C. The Proposals of the State Ratifying Conventions
- D. The Rule of Construction: Restricting the Expansion of Delegated Federal Power

III. James Madison and the Constructive Enlargement of Federal Power

- A. Madison's Initial Draft of the Ninth Amendment
- B. The Select Committee
 - 1. Sherman's Draft Bill of Rights
 - 2. The Altered Draft of the Ninth Amendment
 - 3. Popular Sovereignty and the Tenth Amendment
- C. The Missing Virginia Ratification Debate
 - 1. The Letters of Hardin Burnley and James Madison
 - 2. Edmund Randolph's Complaint
 - 3. The Senate Report
 - 4. Burnley and Madison's Response
- D. Madison's Speech Regarding the Bank of the United States
- E. Missing History

IV. Latitudinarian Interpretation of the Constitution: Applying the Rule of Construction

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- A. The Internal Improvements Bill
- B. The Alien and Sedition Acts
- C. Madison v. Marshall; McCulloch v. Maryland
 - 1. The Opinion
 - 2. Reaction to Marshall's Latitudinarian Interpretation
 - 3. Madison's Letter on the Bank Controversy

V. Natural Rights and the Ninth Amendment

- A. Calder v. Bull
- B. Fletcher v. Peck
- C. Society for the Propagation of the Gospel v. Wheeler

Epilogue

Introduction

In the Fall of 1789, Virginia Governor Edmund Randolph brought to a halt the Virginia Assembly's efforts to ratify the Bill of Rights due to his concerns about the Ninth Amendment.¹ State conventions considering the ratification of the Constitution, including the convention in Virginia, had insisted an amendment be added to the document controlling the "constructive enlargement" of federal power.² Madison's original draft of the Ninth Amendment expressly reflected these concerns.³ The final version of the Ninth, however, looked nothing like the version proposed by Virginia and the other state conventions, and concerns about the language led Randolph to oppose the ratification of both the Ninth and Tenth Amendments.⁴ These two amendments being critical to gaining support for the rest of the Bill, the entire Virginia ratification process ground to a halt. Letters flew to James Madison telling him about the trouble in Virginia and Madison dutifully reported the events to President Washington. Madison was baffled: The final draft of the Ninth accomplished exactly what Virginia desired.⁵ Unconvinced, the Virginia assembly

¹ See Ed. Carrington to James Madison, Dec. 20, 1789, *reprinted in* 5 The Documentary History of the Constitution of the United States, 1786 – 1870 at 228. See also Edmund Randolph to George Washington, Nov. 26, 1789, *reprinted in* 5 The Documentary History of the Constitution of the United States, 1786 – 1870 at 216.

² Amendments Proposed by the Virginia Convention, June 27, 1788, *reprinted in* Creating the Bill of Rights: The Documentary Record from the First Federal Congress 21 (Helen E. Veit, Kenneth R. Bowling, Charlene Bangs Bickford, eds.) (1991).

³ James Madison, Speech in Congress Proposing Constitutional Amendments, June 8, 1789, *reprinted in* James Madison, Writings 443 (Jack N. Rakove, ed. 1999).

⁴ Hardin Burnley to James Madison, Nov. 28, 1789, *reprinted in* 5 The Documentary History of the Constitution, *supra* note 1 at 219 (1905).

⁵ James Madison to George Washington, December 5, 1789, *reprinted in* 5 The Documentary History of the Constitution, *supra* note 1 at 221-22.

remained stalled and antifederalists managed to exploit Randolph's concerns about the Ninth and delay Virginia's (and thus the Country's) ratification of the Bill of Rights for two years.⁶ During that time, Madison gave a major speech before the House of Representatives opposing the creation of the Bank of the United States. In that speech, Madison explained the meaning of the Ninth Amendment and its roots in the concerns and proposals of state ratifying conventions.⁷ A few months later, Virginia voted in favor of ratification and the Bill of Rights was added to the Constitution.⁸

This account cannot be found in any history of the Ninth Amendment.⁹ The events themselves are easily verified by consulting the original sources. Those very sources, however, are missing in major compilations of the documentary history of the Ninth Amendment.¹⁰ The precursors to the Ninth Amendment--the proposals submitted by the state ratification conventions upon which Madison based his draft--are missing or mislabeled throughout contemporary scholarship.¹¹ No work on the Ninth

⁶ See Leonard W. Levy, *Origins of the Bill of Rights* 43 (1999).

⁷ James Madison, *Speech in Congress Opposing the National Bank*, reprinted in James Madison, *Writings*, *supra* note 3 at 480.

⁸ See George Washington to the Senate and House of Representatives, December 30, 1791, reprinted in 5 *The Documentary History of the Constitution of the United States, 1786-1870* at 245.

⁹ The following are major scholarly discussions of the Ninth Amendment. None of them analyze the link between the state ratifying conventions, the debate in Virginia, and Madison's speech before the House of Representatives. See Bennett B. Patterson, *The Forgotten Ninth Amendment* (1955); Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (2004); Thomas B. McAfee, *Inherent Rights, the Written Constitution, and Popular Sovereignty: The Founders' Understanding* (2000); Calvin R. Massey, *Silent Rights: The Ninth Amendment and the Constitution's Unenumerated Rights* (1995); Mark C. Niles, *Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights*, 48 *U.C.L.A. L.Rev.* 85 (2000); Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 73 *Va. L. Rev.* 223 (1983); Eric M. Axel, *The Power of the Preamble and the Ninth Amendment: The Restoration of the People's Unenumerated Rights*, 24 *Seton Hall Legis. Journal* 431 (2000); Chase J. Sanders, *Ninth Life: An Interpretive Theory of the Ninth Amendment*, 69 *Ind. L.J.* 759 (1994); Raoul Berger, *The Ninth Amendment*, 66 *Cornell L. Rev.* 1 (1980); Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 183 (1990); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 *U. Chi. L. Rev.* 1127 (1987); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 34 (1980); Norman Redlich, *Are There Certain Rights Retained by the People?*, 37 *N.Y.U.L.Rev.* 787 (1962); Eugene M. Van Loan III, *Natural Rights and the Ninth Amendment*, *B.Y.U.L. Rev.* (1968); Edward Dumbauld, *The Bill of Rights and What It Means Today* (1957); Knowlton H. Kelsey, *The Ninth Amendment of the Federal Constitution*, 111 *Ind. L.J.* 309 (1936).

¹⁰ Two major compilations of historical documents relating to the adoption of the Bill of Rights are *The Founders' Constitution* (vols 1-5) (Philip B. Kurland and Ralph Lerner eds.) (1987) and *The Complete Bill of Rights: The Drafts, Debates, Sources and Origins* (Neil H. Cogan, ed.) (1997). For a discussion of Ninth Amendment omissions in these works see *infra* at notes 212-236 and accompanying text.

¹¹ Kurland & Lerner's *The Founders' Constitution* lists state convention proposals in regard to other provisions in the Bill of Rights, such as the First Amendment Religion and Speech Clauses. 5 *Founders' Constitution*, *supra* note 10 at 89, 185. No such proposals are listed for the Ninth Amendment. See *id.* at 388. In his two volume work *The Rights Retained by the People*, Randy Barnett provides an appendix which lists statements of principle and proposed amendments to the Constitution submitted by the state ratifying conventions. See 1 *Rights Retained by the People: The History and Meaning of The Ninth*

Amendment addresses the debate in the Virginia Assembly.¹² Until recently, Madison's speech before the House of Representatives was not recognized as involving the Ninth at all, and remains missing from compilations of original sources regarding the Ninth Amendment.¹³ No scholar has recognized Madison's full argument in his speech regarding the origin and purpose of the Clause.¹⁴ In fact,

Amendment 353 (Randy Barnett, ed., 1989). The reader is not told, however, which of these numerous provisions relate to the Ninth Amendment. Works which do link certain proposals to the Ninth Amendment often mislabel them, treating provisions which refer to limited federal power as relating to the Tenth Amendment, while labeling declarations of natural rights as relating to the Ninth. See e.g., Cogan, *The Complete Bill of Rights*, *supra* note 10 at 635-36 (listing as state proposals for the Ninth Amendment sections from North Carolina and Virginia's statement of principles, and omitting the actual amendment proposed by those two states), and *id.* at 675 (placing North Carolina's proposed "Ninth" amendment in a list of proposals relating to the Tenth Amendment).

¹² In the last few years, a number of books have been published which contain significant discussions of the Ninth Amendment. These include Randy E. Barnett, *Restoring the Lost Constitution*, *supra* note 9; Charles L. Black Jr., *A New Birth of Freedom* 12-13 (1997); Thomas B. McAfee, *Inherent Rights, the Written Constitution, and Popular Sovereignty: The Founders' Understanding* (2000); and Calvin R. Massey, *Silent Rights: The Ninth Amendment and the Constitution's Unenumerated Rights*, 65-82 (1995). None of these works explore the debate in Virginia, despite an on-going dispute over the meaning a letter written by James Madison to George Washington which *refers* to the debate in Virginia. Compare Thomas B. McAfee, *Inherent Rights*, *supra* note 9 at 145-147, with Leonard Levy, *Origins of the Bill of Rights* 256-59 (1999), and Randy E. Barnett, *Restoring the Lost Constitution*, *supra* note 9 at 249-252.

The most complete account of the Ninth Amendment's origins can be found in Leonard Levy, *Origins of the Bill of Rights* 256-59 (1999). There Levy acknowledges Virginia's concerns about the Ninth and Tenth Amendments, as well as Madison's puzzlement. Levy does not, however, consider what Virginia's concerns actually were, instead characterizing their reasoning as "confused." *Id.* at 257. Levy apparently basis his entire analysis, as do the above authors, solely on the letters of James Madison and Hardin Burnley. Uncharacteristically, Levy fails to follow the clues in these letters. Most critically, Levy was unaware of Madison's speech describing the purpose and effect of the Ninth Amendment.

¹³ Neither Neil Cogan's *The Complete Bill of Rights*, nor Kurland and Lerner's *The Founders' Constitution* include Madison's speech on the Bank of the United States in their sections dealing with the Ninth Amendment. Cogan does not include the Speech in any of his materials, while Kurland and Lerner place it in their section on the Necessary and Proper Clause with Madison's specific reference to the Ninth Amendment edited out. See *3 Founders' Constitution*, *supra* note 10 at 244-45.

¹⁴ Those scholars who do address Madison's speech as relevant to understanding the Ninth Amendment focus on a single sentence and do not discuss Madison's full argument regarding the origins and purpose of the Ninth. The early work of Professor Randy Barnett, for example, highlighted a sentence in Madison's speech that referenced the Ninth Amendment and suggested that Madison was deploying the Ninth in situations where "equal rights" were at stake. See Randy Barnett, *2 Rights Retained by the People*, *supra* note 11 at 15. David Mayer has essentially echoed Barnett's argument. See David N. Mayer, *The Natural Rights Basis of the Ninth Amendment: A Reply to Professor McAfee*, 16 S. Ill. U. L.J. 313, 318-19 (1992). More recently, Barnett has explored Madison's speech as involving the Necessary and Proper Clause. See Randy Barnett, *Restoring the Lost Constitution*, *supra* note 9 at 158. Although Barnett apparently continues to believe Madison's reference supports an unenumerated rights reading of the Ninth Amendment, he does not explain why this is so. *Id.* at 240. Barnett's argument that Madison was making a constitutional argument when speaking about "equal rights" is expressly refuted by Madison's draft veto of the bank bill. See *infra* note 198. Madison's discussion of the Ninth Amendment in his Bank speech also went well beyond the single sentence cited by Professors Barnett and Mayer and involved the retained rights of the states. See *infra* notes 177-200 and accompanying text.

historical compilations of Founding documents regarding the Bill of Rights either omit Madison's speech or place it in a context having nothing to do with the Ninth Amendment and with his specific mention of the Ninth edited out.¹⁵

This missing history reveals the Ninth Amendment as a critical companion to the Tenth. Rendered a mere "truism" at the time of the New Deal,¹⁶ the Tenth Amendment literally accomplishes nothing on its own. It is a simple statement that all powers not delegated or prohibited are reserved to the states or to the people. If delegated powers are construed in a sufficiently broad manner, however, the Tenth Amendment becomes a null set. All power having been delegated, there is nothing left to reserve. The members of the state ratifying conventions who considered the original Constitution understood this and they insisted on adding to the Constitution a rule of construction, a principle limiting the interpreted scope of federal power. As James Madison put it, the purpose of the Ninth Amendment was to "guard against a latitude of interpretation" while the Tenth Amendment "exclude[ed] every source of power not within the Constitution itself."¹⁷ In other words, the Ninth Amendment was meant to prevent the Tenth from *becoming* a mere truism.

Lacking critical evidence regarding the Ninth Amendment's original meaning, contemporary scholarship has attempted to fill in the gaps in the historical record with theoretical assumptions regarding the purpose of the Ninth. The assumption guiding most Ninth Amendment scholarship has been that historical materials referring to "retained rights" must be associated with the Ninth Amendment, while materials referring to "reserved powers" must be associated with the Tenth.¹⁸ This categorical

¹⁵ Kurland & Lerner in *The Founders' Constitution* place a large excerpt from Madison's speech on the Bank Bill in materials relating to the Necessary and Proper Clause. 3 *Founders' Constitution*, *supra* note 10 at 244-45. The excerpt does not include Madison's reference to the Ninth Amendment. Compare *id.* with Madison, *Writings*, *supra* note 3 at 489. The one Constitutional Law textbook to include substantial portions of Madison's speech on the Bank Bill also omits Madison's reference to the Ninth Amendment. See *Processes of Constitutional Decisionmaking* 8-11 (Paul Brest, Sanford Levinson, J. M. Balkin, Akhil Reed Amar, eds., 4th ed. 2000). Gerald Gunther and Kathleen Sullivan's *Constitutional Law* (14th ed. 2001), contains a fairly extensive discussion of the Bank controversy and include excerpts from the "Jefferson-Hamilton debate." *Id.* at 97. They make no mention of Madison's speech. Laurence Tribe's *American Constitutional Law* (3d ed. Vol. 1) follows the same approach, citing the Jefferson-Hamilton debate, but failing to mention Madison's speech, much less his reference to the Ninth Amendment. *Id.* at 799

¹⁶ *United States v. Darby*, 312 U.S. 100, 124 (1941) (The [Tenth] Amendment states but a truism that all is retained which has not been surrendered.").

¹⁷ James Madison, *Writings*, *supra* note 3 at 489.

¹⁸ This assumption is ubiquitous throughout Ninth Amendment scholarship. See Randy E. Barnett, *Restoring the Lost Constitution*, *supra* note 9 at 73 ("The framers of the Constitution were rigorously consistent in referring to the "powers" of government and the "rights" of the people."); Leonard Levy, *Origins of the Bill of Rights*, *supra* note 12 at 256 (criticizing Raoul Berger for linking the Ninth and Tenth Amendment because Berger "speaks of the 'the ninth's retention of rights by the states or the people,' when in fact it is the Tenth, not its predecessor, that speaks of states' rights, that is, of powers retained by the states or the people."); Calvin Massey, *Silent Rights*, *supra* note 9 at 79 ("By the Ninth

assumption has resulted in the mislabeling of key pieces of evidence and the dismissal of a vast corpus of jurisprudence.¹⁹ More than erroneous assumptions, however, have hidden the historical Ninth from our view. Originally the eleventh article on a proposed list of twelve amendments to the Constitution, the Ninth Amendment for decades after its adoption was referred to as “the Eleventh Amendment.” The fact that we no longer use this convention explains why an important speech by James Madison involving the Ninth Amendment remained unnoticed until very recently. It also explains how a major Supreme Court opinion discussing the Ninth Amendment could remain influential for over one hundred years without anyone in the contemporary era recognizing that the discussion was about the Ninth.²⁰

In a second article, *The Lost Jurisprudence*, I reveal the extensive and, until now, completely unknown case law dealing with the Ninth Amendment. That work follows the interpretation and application of Ninth from its earliest articulation in the Supreme Court, through antebellum America, the Progressive Era, and into the New Deal. In addition to revealing the lost jurisprudence of the Ninth, the second article addresses the historical relationship between the Ninth, Tenth, Eleventh and Fourteenth Amendments.

This article, *The Lost Original Meaning*, starts at the beginning. Part I briefly recounts the commonly presented story of the Ninth Amendment, and the two general theories which have emerged regarding its original meaning. Part II revisits the historical record and focuses on the unique text of the Ninth Amendment which controls judicial interpretation or the “construction” of the Constitution. The roots of this “controlled construction” provision are found in the writings of the antifederalists who raised concerns about federal courts engaging in “latitudinarian interpretations” of federal power. These concerns were picked up by the state ratifying conventions, most of which submitted proposed amendments to the Constitution expressly prohibiting the constructive enlargement of federal power.

Part III focuses on James Madison and the drafting of the Ninth Amendment. Fulfilling a promise to his own state convention, Madison’s draft of the Ninth Amendment contained a rule of interpretation limiting the constructive enlargement of

Amendment, [the People] retained unenumerated rights; by the Tenth Amendment, they retained the nondelegated and unprohibited powers.”); Christopher J. Schmidt, *Revitalizing the Quiet Ninth Amendment: Determining Unenumerated Rights and Eliminating Substantive Due Process*, 32 U. Balt. L. Rev. 169, 228 (2003) (“The Tenth Amendment speaks of reserved “powers,” not “rights”—by contrast, the Ninth Amendment speaks only of “rights,” nor “powers.”); John Hart Ely, *Democracy and Distrust* 36 (1980) (“[Madison] wished to forestall *both* the implication of unexpressed powers *and* the disparagement of unenumerated rights.”). There are many similar examples.

¹⁹ See Kurt T. Lash, *The Lost History of the Ninth Amendment (II): The Lost Jurisprudence* (draft on file with the author).

²⁰ *Id.*

federal power. The express language regarding the construction of federal power was removed from the final draft, however, triggering concerns in the Virginia Assembly that Congress had ignored the concerns of the states. Receiving word about the delay in Virginia's ratification, Madison wrote to Washington that Virginia's concerns were "fanciful"—the final draft continued to express the same rule of construction desired by Virginia and the other states. The debate in Virginia, and Madison's reaction, provide important clues to the origins and purpose of the Ninth Amendment. In a speech given before the House of Representatives while the Bill of Rights remained pending in Virginia, Madison opposed the chartering of the Bank of the United States. According to Madison, only an unduly broad interpretation of enumerated federal power could justify the creation of the Bank. Recounting the concerns of the state conventions regarding expansive interpretations of federal power at the expense of the states, Madison argued that the Constitution had been ratified with the understanding that amendments would be added controlling the constructive enlargement of federal authority. The Ninth and Tenth Amendments were added specifically to address these concerns, with the Ninth guarding against "a latitude of interpretation" and the Tenth declaring the principle of delegated power.

Part IV considers the role of the Ninth Amendment in Madison's lifelong struggle against "latitudinous" interpretations of federal power. Vetoing an Internal Improvements Bill, Madison complained that Congress had engaged in a latitudinarian construction of its own power to the injury of the states. When Congress passed the Alien and Sedition Acts, Madison opposed them on the same grounds as the Bank and the Improvements Bill; they unduly enlarged the authority of the federal government and thus intruded on the reserved autonomy of the states. Well into his retirement, Madison continued to oppose latitudinarian constructions of the Constitution, leveling particular criticism at Chief Justice John Marshall's opinion in *McCulloch v. Maryland*.

Part V considers the relationship between natural rights and a Madisonian reading of the Ninth Amendment. The evidence is overwhelming that the Founding generation believed in natural rights "retained by the people." But the identification and protection of such rights were a matter of local concern. Both the Ninth and Tenth Amendments suggest that *all* non-delegated powers and rights are retained by the people who may delegate them to their respective state governments as they see fit. The Ninth Amendment prevents the *nationalization* of these rights through expansive readings of the Constitution. Early natural rights opinions by the Supreme Court follow this approach, with the Court basing its decisions on natural rights as a matter of state law when hearing diversity appeals from lower federal courts, but avoiding natural rights holdings when hearing appeals under Section 25 of the original Judiciary Act.

The title of this article suggests the presentation of something new. As suggested above, some of the materials presented in this article have not previously been discussed in Ninth Amendment Scholarship. In particular, the debate in the Virginia Assembly regarding the Ninth Amendment, including Edmund Randolph's letters and the Virginia Senate's Majority and Minority Report, have gone unnoticed despite the fact that they specifically involve public debates regarding the Ninth Amendment during the critical period of ratification. Also newly presented is James Madison's draft veto of the Bank Bill. Although a few Ninth Amendment scholars recently have noted Madison's reference to Ninth Amendment in his speech opposing the Bank of the United States, it has not been clear whether Madison's reference related to the protection of natural rights or to the preservation of reserved state powers. Madison's draft veto sheds significant light on this question. Other historical materials, such as the state ratifying convention proposals, are generally well known to constitutional historians but have been treated as related to the Tenth Amendment, not the Ninth. Even if not new themselves, this article presents these materials in a new light.

Finally, there is the picture of the Ninth Amendment that emerges from this recovered history. Currently, there are two general competing theories regarding the meaning of the Ninth Amendment. One theory reads the Ninth as supporting the judicial enforcement of unenumerated natural rights. The other theory views the Ninth Amendment as a declaration of enumerated federal power which, when read in conjunction with the Tenth Amendment, reserves all non-delegated power to the States. The evidence presented in this article suggests a third alternative: More than a mere declaration, the Ninth Amendment was understood as a rule of construction limiting the interpretation of enumerated powers in order to preserve wherever possible the retained right of the people to local self-government.

I. The Missing History of the Founding

As an article devoted to recovering the lost original meaning of the Ninth Amendment, its method of analysis falls within standard contemporary originalist scholarship.²¹ After considering the text of the Ninth Amendment, the effort will be to

²¹ Modern theories of originalism tend to distinguish "original meaning" from "original intent." See, e.g., Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 105 (2001); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A Matter of Interpretation: Federal Courts and the Law* (Amy Gutmann ed., 1997); Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (1999); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 Loy. L. Rev. 611 (1999); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: The Objections and Responses*, 82 Nw. U. L. Rev. 226, 233 (1988). The basic approach looks to determine the general public understanding of a text, rather than divining the private subjective intent of the text's framers.

determine, if possible, the original meaning of the Clause to those who framed, debated and ratified the text. As a matter of historical investigation, however, one need not subscribe to an originalist theory of constitutional interpretation to appreciate the value of recovering lost history. Indeed, this article makes no attempt to draw upon this history in order to come to conclusions about any *contemporary* constitutional debate. Much work must be done before any such conclusions can be drawn, including a close consideration of the original meaning and impact of the Fourteenth Amendment's Privileges or Immunities Clause.²² Even to those who consider original meaning as relevant to contemporary understanding, this article addresses only one piece of that particular puzzle.

Most Ninth Amendment scholars regardless of their interpretive theory believe that original understanding is at least relevant to contemporary meaning. Thus, while disagreeing on the conclusions to be drawn from history, scholars tend to refer to a common set of historical materials in describing the origins of the Ninth Amendment. This article begins by considering those materials and the traditional story regarding the events that led to the adoption of the Bill of Rights.

A. The Text

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

U.S. Const. Amend. IX.

Although the Ninth Amendment speaks of rights, it is not itself the source of any particular right. As Laurence Tribe explains, “[the Ninth] is simply a rule about how to read the Constitution.”²³ Read literally, the text of the Ninth Amendment is a guide to constitutional interpretation. This is not to say that the literal meaning contains the full import of the Clause. It is unlikely, however, that the full meaning of the Ninth Amendment would conflict with its literal meaning. So whatever else the Ninth Amendment means, it seems at the very least to be a rule of construction. This makes the Ninth Amendment unique. However strongly constitutional texts might suggest a particular interpretation, no clause prior to the Ninth Amendment *mandated* a particular method of interpretation. In fact, the only other text in the Constitution to use similar language is the Eleventh Amendment. Adopted only four years after the Ninth, the Eleventh states that “[t]he judicial power of the United States *shall not be construed* to extend” to suits against a state by a citizen of another state.²⁴ Before

²² For a discussion of the impact of the Fourteenth Amendment on the Ninth, see Lash, *The Lost Jurisprudence*, *supra* note 19 at notes 149-186 and accompanying text.

²³ Laurence H. Tribe, *American Constitutional Law* 776 n. 14 (2d ed. 1988) (“It is a common error, but an error nonetheless, to talk of ‘ninth amendment rights.’ The ninth amendment is *not* a source of rights as such; it is simply a rule about how to read the Constitution.”).

²⁴ Ratified on February 7, 1795, the full text of the Eleventh Amendment states:

1791, no text in the Constitution spoke to the issue of constitutional interpretation. After 1795, no other text would.

Between the Ninth and Eleventh Amendments resides the Tenth which declares “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.”²⁵ At first glance, there appear to be significant differences between the Ninth and Tenth Amendments. The Ninth speaks of rights, while the Tenth speaks of powers. Also the Tenth refers to the states, while the Ninth refers only to the “people.” As we shall see, this textual difference has led many scholars to sharply distinguish the meaning and purpose of the Ninth and Tenth Amendments.²⁶ Despite these differences, however, there are some similarities between the two amendments. Like the Ninth, the Tenth speaks of protecting *the people*. This phrase is linked to the Founding theory of popular sovereignty, and it is echoed elsewhere in the Bill and opens the Constitution itself.²⁷ The Tenth also speaks of “powers reserved.” These words seem related to, if distinct from, language in the Ninth Amendment that speaks of “rights retained.” Placed side-by-side, the texts of the Ninth and Tenth Amendments protect “the powers and rights of the people.”

As the history of the Ninth Amendment unfolds, we will return to the Ninth’s relationship to its neighbors the Tenth and Eleventh Amendments. First, however, we shall address the traditional story of how the unique language of the Ninth Amendment came to be added to the Constitution.

B. The Traditional Story

As one of the original ten amendments to the Constitution, the Ninth Amendment shares its origin with that of the Bill of Rights. When the Philadelphia Convention circulated its proposed draft of the Constitution, criticism quickly arose regarding the document’s lack of specifically listed freedoms, such as were common in state constitutions. The omission was seized upon by antifederalist pamphleteers with names like “Federal Farmer” and “Brutus” who circulated flyers throughout the states demanding the addition of a Bill of Rights.²⁸

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.”

U.S. Const. Amend. XI (1795).

²⁵ U.S. Const. Amend. X.

²⁶ *Infra* note 212 and accompanying text.

²⁷ See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 *Yale L.J.* 1131, 1199-1201 (1991)

²⁸ See Herbert J. Storing, *The Complete Anti-Federalist* (1981).

Madison and the Federalists defended the document's lack of such a Bill on two grounds. First, the principle of enumerated powers would sufficiently protect the people from federal invasion of their rights.²⁹ Secondly, adding a Bill of Rights might be construed in a manner that would undermine the principle of limited enumerated power.³⁰ As "Publius" wrote in the Federalist Papers:

I go further, and affirm that the bill of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?"³¹

²⁹ As James Madison wrote in the Federalist Papers:

The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will for the most part be connected. The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.

The Federalist No. 45 (Madison) (Jan 26, 1788), *reprinted in* The Federalist Papers, *supra* note 71 at 292-93.

³⁰ See remarks of Mr. Jackson, Congressional Register (June 8, 1789), vol. 1, p. 437, *reprinted in* Complete Bill of Rights, *supra* note 10 at 642:

There is a maxim in law, and it will apply to bills of rights, that when you enumerate exceptions, the exceptions operate to the exclusion of all circumstances that are omitted; consequently, unless you except every right from the grant of power, those omitted are inferred to be resigned to the discretion of the government.

³¹ The Federalist, No. 84, May 28, 1788. According to James Wilson in the Pennsylvania Convention:

[I]n a government consisting of enumerated powers, such as is proposed for the United States, a bill of rights would not only be unnecessary, but in my humble judgment, highly imprudent. In all societies there are many powers and rights which cannot be particularly enumerated. A bill of rights annexed to a constitution is *an enumeration of the powers* reserved. If we attempt an enumeration, everything that is not enumerated is presumed to be given.

James Wilson, Pennsylvania Convention, *reprinted in* The Complete Bill of Rights, *supra*, note 10 at 648. See also Remarks of James Madison, Virginia Convention, June 14, 1788, *reprinted in* The Complete Bill of Rights, *supra* note 10 at 655 ("If an enumeration be made of our rights, will it not be implied that every omitted is given to the general government?"); James Iredell, North Carolina Convention, July 29, 1788, *reprinted in* The Complete Bill of Rights, *supra* note 10 at 649 ("But when it is evident that that the exercise of any power not given up would be a usurpation, it would be not only useless, but dangerous, to enumerate a number of rights which are not intended to be given up; because it

The antifederalists had a stinging response: If the principle of enumerated power was sufficient in itself to control the actions of the federal government, then why did the Philadelphia drafters themselves add Article I, Section Nine, which listed a number of specific restrictions on federal power?³² Unable to provide a convincing reply, and threatened with calls for a second constitutional convention to redraft the entire document,³³ James Madison and the Federalists ultimately agreed to propose a Bill of Rights in the first Congress.

In his speech introducing draft amendments to the House of Representatives, Madison addressed concerns regarding the addition of a Bill of Rights:

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution.³⁴

As Supreme Court Justice and influential treatise writer Joseph Story later would write:

This clause [The Ninth] was manifestly introduced to prevent any perverse or ingenious misapplication of the well known maxim, that an affirmation in particular cases implies a negation in all others.³⁵

would be implying, in the strongest manner, that every right not included in the exception might be impaired by the government without usurpation; and it would be impossible to enumerate every one.”)

³² See Leonard Levy, *Origins of the Bill of Rights*, *supra* note 12 at 28-29.

³³ See Kurt T. Lash, *Rejecting Conventional Wisdom, Federalist Ambivalence in the Framing and Implementation of Article V*, 38 *Am. Legal Hist.* 197 (1994).

³⁴ James Madison, *Speech in Congress Proposing Constitutional Amendments*, *reprinted* in Madison, *Writings*, *supra* note 3 at 448-49. The “last clause of the fourth resolution” referred to by Madison was an early draft of the Ninth:

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

Id. at 443.

³⁵ Joseph Story, *Commentaries on the Constitution of the United States* 711 (reprint Carolina Academic Press 1987).

This much of the story is generally agreed upon. The antifederalists prevailed in their demand for a Bill of Rights and the Ninth Amendment was adopted (at the least) to prevent the application of the maxim *expressio unius est exclusio alterius*³⁶—the implication that enumerated “exceptions” to power suggested otherwise unlimited federal power. This story, however, leaves much unexplained. Was the purpose of the Ninth merely to prevent the implied expansion of federal power, or was the Ninth also intended to protect unenumerated rights? What are the “other rights” referred to by the Ninth? How might they be “denied or disparaged?”

Theories of the Ninth Amendment have emerged to fill in these gaps.³⁷ Written against an assumed blank slate of historical interpretation, they are attempts to grapple with the incomplete historical record and identify the most likely original meaning, and best modern application, of the Ninth Amendment. Although they provide important insights into the meaning and effect of the Ninth, as we shall see, they adopt interpretive presumptions that critically limit their understanding of the historical record.

C. Theories of the Ninth Amendment

Contemporary theories of the Ninth Amendment fall into two general categories. One approach reads the Ninth as referring to unenumerated rights.³⁸ This can be called a Libertarian reading of the Ninth Amendment. A common counter-theory reads the Ninth in *pari materia* with the Tenth as maintaining limited enumerated federal power.³⁹ This can be called a Federalist reading of the Ninth Amendment. Both Libertarian and Federalist theories come in “Active” or “Passive” forms, as will be explained below.

Advocates of the Libertarian approach claim the text literally supports their position. The Ninth speaks of “other rights” beyond those enumerated in the Constitution.

³⁶ The expression of the one is the exclusion of the other.

³⁷ Major works discussing the meaning of the Ninth Amendment are cited in footnote 2.

³⁸ See Randy E. Barnett, James Madison's Ninth Amendment, *in* 1 *The Rights Retained by the People*, *supra* note 11 at 7; Thomas C. Grey, *The Original Understanding and the Unwritten Constitution*, in *Toward a More Perfect Union: Six Essays on the Constitution* 145, 162-67 (N. York ed., 1988); John Kaminski, *Restoring the Declaration of Independence: Natural Rights and the Ninth Amendment*, in *The Bill of Rights* 141 (1987); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 *U. Chi. L. Rev.* 1127 (1987); Lawrence G. Sager, *You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth. But What on Earth Can You Do with the Ninth Amendment?*, 64 *Chi-Kent L. Rev.* 239 (1988); Mark C. Niles, *Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights*, 48 *U.C.L.A. L. Rev.* 85 (2000); Calvin Massey, *Silent Rights* (1995).

³⁹ See, e.g., Thomas B. McAfee, *The Bill of Rights, Social Contract Theory, and the Rights “Retained” by the People*, 16 *S. Ill. U.L.J.* 267 (1992); Raoul Berger, *The Ninth Amendment as Perceived by Randy Barnett*, 88 *Nw. U. L. Rev.* 1508 (1994); Charles J. Cooper, *Limited Government and Individual Liberty: The Ninth Amendment's Forgotten Lessons*, 4 *J.L. & Pol.* 63 (1987). See also Russell Caplan, *The History and Meaning of the Ninth Amendment*, 73 *Va. L. Rev.* 223 (1983).

These rights, it is claimed, include natural rights that run against state and federal governments. In support of this reading, Libertarian scholars point out that the Founders' conception of rights went well beyond those few listed in the first eight amendments to the Constitution. Steeped in the legal theory of eminent philosophers like John Locke, many Founders referred to the "natural rights retained by the people" throughout the process of drafting the Constitution and the Bill of Rights.⁴⁰ Such rights, declared James Iredell in the North Carolina ratifying convention, were incapable of exhaustive enumeration:

[I]t would be not only useless, but dangerous, to enumerate a number of rights which are not intended to be given up; because it would be implying, in the strongest manner, that every right not included in the exception might be impaired by the government without usurpation; and it would be impossible to enumerate every one. Let any one make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it.⁴¹

Members of Congress who participated in the drafting of the Ninth Amendment also declared their belief in "natural rights retained by the people." James Madison, in the notes for his speech introducing the Bill of Rights, referred to "natural rights retained as speech."⁴² Roger Sherman, who served with Madison on the House drafting committee, suggested an amendment declaring that "[t]he people have certain natural rights which are retained by them when they enter society."⁴³ Relying on such evidence, prominent Ninth Amendment theorists like Randy Barnett and Calvin Massey conclude that the "retained rights" of the Ninth refer to unenumerated natural rights.⁴⁴

⁴⁰ See generally, See Edward Corwin, *The Higher Law Background of American Constitutional Law*, 42 Harv. L. Rev. 149 (1928), *reprinted in* 1 *Rights Retained by the People* *supra* note 11 at 67; Jeff Rosen, Note: Was the Flag Burning Amendment Constitutional?, 100 Yale L.J. 1073, 1076 (1991); John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 Emory L.J. 967 (1993).

⁴¹ 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*, at 167 (Jonathan Elliot ed., 2d ed. 1891) [hereinafter *Elliot's Debates*] (statement of James Iredell).

⁴² James Madison, *Speech to the House Explaining His Proposed Amendments*, *reprinted in* 1 *Rights Retained by the People*, *supra* note 11 at 64.

⁴³ 1 *The Rights Retained by the People*, *supra* note 11 at 351. Sherman's draft and its implications for the Ninth Amendment are discussed *infra* notes 108-137 and accompanying text.

⁴⁴ *Id.* at 13; Calvin Massey, *Silent Rights*, *supra* note 9 at 213 ("The Ninth Amendment provides the best textual justification for recognition of unenumerated liberties."). See also Charles Black, *A New Birth of Freedom 39* (tying together the Declaration of Independence, The Ninth Amendment and the Fourteenth Amendment's Privilege or Immunities Clause). There are variations on each of these theories. For example, Calvin Massey argues that the original Ninth Amendment had "dual" functions: One to cabin the constructive enlargement of federal power, the other to insuring that the "catalogue of constitutional rights did not stop with the enumerated rights." Massey, *Silent Rights*, *supra* note 9 at 94. Massey

The Libertarian reading of the Ninth Amendment can take one of two forms: Passive or Active. A Passive Libertarian position does not view the Ninth itself as judicially enforceable. Instead, the Ninth is seen simply as a declaration that the lack of enumeration in the Constitution is not itself conclusive of whether a right actually exists. For example, in *Griswold v. Connecticut*, Justice Goldberg rejected the idea that the Ninth itself was a source of enforceable rights, but nevertheless read the Clause as suggesting the existence of other rights beyond those expressly mentioned in the Constitution.⁴⁵ In contrast with the Passive approach, the *Active* Libertarian Position views the Ninth Amendment itself as a judicially enforceable rule of construction limiting the power of the federal government to interfere with unenumerated rights.⁴⁶ Professor Randy Barnett, for example, argues that the Ninth Amendment creates an enforceable presumption of liberty that limits the interpretation of federal power in order to protect unenumerated natural rights.⁴⁷ Although the Ninth Amendment applies only against the federal government, Libertarian theorists argue that the same rights apply against the states by way of the Fourteenth Amendment's Privileges or Immunities Clause.⁴⁸

The Federalist interpretation of the Ninth Amendment reads the Ninth *in pari materia* with the Tenth, with both Clauses understood as maintaining a balance of state and federal power.⁴⁹ As with the Libertarian approach, there is evidence to support the Federalist reading as well. The drive to adopt a Bill of Rights, for example, was fueled by concerns about federal power overwhelming the states.⁵⁰ The Ninth Amendment itself seems particularly responsive to concerns that the enumeration of certain rights might undermine the theory of limited delegated authority. Early drafts of the Ninth contain language that not only speaks of retained rights, but also of limiting the

believes the former is more associated with the purposes of the Tenth and that the latter purpose became a "lost function," at least until the Court's decisions in *Griswold* and *Roe*. *Id.* at 93-94.

⁴⁵ 381 U.S. 479, 492 (1965) (Goldberg, J., concurring) ("Nor do I mean to state that the Ninth Amendment constitutes an independent source of rights protected from infringement by either the States or the Federal Government. Rather, the Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive.").

⁴⁶ See, e.g., Christopher J. Schmidt, *Revitalizing the Quiet Ninth Amendment: Determining Unenumerated Rights and Eliminating Substantive Due Process*, 32 U. Balt. L. Rev. 169 (2003); Mark C. Niles, *Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights*, 48 U.C.L.A. L. Rev. 85 (2000).

⁴⁷ Randy E. Barnett, *Restoring the Lost Constitution*, *supra* note 9.

⁴⁸ See *id.* at 320. See also *Griswold*, 381 U.S. at 493 (Goldberg, J.) (noting that the Ninth itself does not apply against the states, but that the Fourteenth protects the same set of retained rights).

⁴⁹ See e.g., Raoul Berger, *The Ninth Amendment: The Beckoning Mirage*, 42 Rutgers L. Rev. 951 (1990); Berger, *The Ninth Amendment*, 66 Cornell L. Rev. 1 (1980); Caplan, *The History and Meaning of the Ninth Amendment*, 69 Va. L. Rev. 223 (1983).

⁵⁰ See generally, Storing, *The Complete Anti-Federalist*, *supra* note 28.

construction of federal power.⁵¹ Madison himself described the Ninth’s language regarding the disparagement of rights as amounting to the *same thing* as a rule preventing the enlargement of federal power.⁵² In light of this evidence, Professor Thomas McAfee concludes that the Ninth Amendment was not intended to recognize natural rights as additional restrictions beyond those rights listed in the Bill.⁵³ To McAfee, the Ninth was simply a “hold harmless” provision forbidding the expansion of federal power by implication.⁵⁴

Like the Libertarian view, the Federalist approach can be divided into Active and Passive readings of the Ninth Amendment. The Passive Federalist Approach reads the Ninth as a mere declaration that the enumeration of rights does not imply otherwise unenumerated federal power.⁵⁵ In essence, this reading limits the Ninth to preserving the principle declared in the Tenth Amendment—all powers not delegated are reserved. For example, in his *Griswold* dissent, Justice Potter Stewart claimed that “[t]he Ninth Amendment, like its companion the Tenth, . . . states but a truism that all is retained which has not been surrendered.”⁵⁶ Professor Thomas McAfee advocates this approach to the Ninth Amendment, arguing that the Ninth is not a limitation on federal power, but works in conjunction with the Tenth to preserve the concept of enumerated power.⁵⁷

Finally, the *Active* Federalist approach views the Ninth Amendment as a judicially enforceable rule of construction limiting the power of the federal government to interfere with state autonomy. Under this reading of the Ninth, enumerated provisions in the Constitution must be construed in a manner that preserves the retained right of the people to local self-government. In this way, the rule of construction announced by the Ninth holds back the encroaching tide of federal regulation. As Justice Hugo Black put it in his *Griswold* dissent, the Ninth Amendment was “enacted to protect state powers against federal invasion.”⁵⁸ Just as the Active Libertarian reading creates

⁵¹ See *infra* note 102 and accompanying text.

⁵² See James Madison to George Washington, *reprinted in* Cogan, *The Complete Bill of Rights*, *supra* note 10 at 662 (“If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing whether the latter be secured by declaring that they shall not be abridged, or that the former shall not be extended.”). For a discussion of this letter see *infra* notes 141-176 and accompanying text.

⁵³ Thomas B. McAfee, *Inherent Rights*, *supra* note 9.

⁵⁴ Thomas B. McAfee, *The Bill of Rights, Social Contract Theory, and the Rights “Retained” by the People*, 16 S. Ill. U.L.J. 267, 301 (1992).

⁵⁵ See, e.g., *United Federal Workers of America (C.I.O.) v. Mitchell*, 330 U.S. 75 (1947) (“[W]hen objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail.”).

⁵⁶ *Griswold*, 381 U.S. at 530.

⁵⁷ McAfee, *The Bill of Rights*, *supra* note 54.

⁵⁸ *Griswold*, 381 U.S. at 520.

a presumption in favor of unenumerated rights, so the Active Federalist reading creates a presumption in favor of state or local self-government.

The Libertarian and Federalist readings of the Ninth Amendment have each received their share of criticism, both in terms of original understanding and contemporary application. Libertarian readings can be criticized for failing to fully appreciate the role federalism played in the enactment of the Bill of Rights,⁵⁹ and Federalist theories have been criticized for failing to fully appreciate the Founders' belief in natural rights.⁶⁰ The Passive versions of both Libertarian and Federalist theories can be criticized as rendering the Ninth Amendment without effect,⁶¹ with the Passive Federalist reading of the Ninth in particular seeming to render the Ninth Amendment redundant with the Tenth.⁶² Federalist theories in general have been criticized for equating limits on power with the protection of rights. This conflicts with the contemporary idea that rights and powers occasionally overlap.⁶³

I will address Libertarian and Federalist theories of the Ninth Amendment (both Active and Passive) when appropriate as we move through the historical record. In addition to recovering missing pages in the historical record, this article will address whether that recovered history supports either a Libertarian or Federalist reading of the Ninth Amendment, or whether it suggests another reading altogether. There is one issue, however, that this work does not directly address. The contemporary debate about the Ninth Amendment is itself part of a much larger debate over the place of unenumerated rights in our constitutional tradition. However one reads the Ninth Amendment, a question remains whether the Constitution as a whole, or other provisions in particular, support judicial enforcement of unenumerated rights.⁶⁴ Although aspects of this broader debate will arise, particularly in the final sections of this work, my effort here is to focus on the Ninth Amendment and bring to light those aspects of its history that until now have been lost or unrecognized, and consider how these materials shed light on the historic understanding of the Clause.

II. The Ninth Amendment's Roots as a Rule of Construction

A. The Missing Thread

⁵⁹ See see Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 119-122 (1998).

⁶⁰ See See Suzanna Sherry, *Textualism and Judgment*, 66 *Geo. Wash. L. Rev.* 1148, 1149-50 (1998).

⁶¹ See *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803).

⁶² See e.g., Massey, *Silent Rights*, *supra* note 9 at 73.

⁶³ For example, a law banning certain material from the mails falls within an enumerated power, but nevertheless might run afoul of First Amendment rights.

⁶⁴ For example, the Privileges or Immunities Clause. See Kurt T. Lash, *Two Movements of a Constitutional Symphony*, 33 *U. Rich. L. Rev.* 485, 498-99 (1999).

The debate over the meaning of the Ninth Amendment is inextricably caught up in the modern debate over unenumerated rights and the general concept of substantive due process.⁶⁵ As such, the debate has tended to focus on individual rights versus the power of a state to legally enact policies on contraception, abortion and other matters affecting personal autonomy. This might explain why the most unique aspect of the Ninth Amendment has received relatively little attention. The Ninth Amendment is one of only two texts in the Constitution that control interpretation of the document.⁶⁶ This aspect alone would seem to warrant inquiry into Founding era concerns about constitutional interpretation and the role those concerns played in the drafting of the Ninth. Founding era concerns regarding constitutional interpretation, however, are almost totally absent from scholarly discussions of the Ninth.⁶⁷ This is even more surprising when one considers that the only aspect of the Ninth Amendment which appears in every state proposal and every congressional draft is a demand that “interpretation” or “construction” of the Constitution be controlled.⁶⁸ Despite this unique thread which runs throughout the earliest history of the Clause, it remains the least explored aspect of the historical debate. The lost history of the Ninth Amendment begins with a search for the roots of this missing textual thread.

B. The Antifederalist Concerns about the Judiciary in the Ratification Debates

Antifederalist fears regarding the potential scope of federal power under provisions such as the Necessary and Proper Clause are well known.⁶⁹ Less recognized are

⁶⁵ See Barnett, *Restoring the Lost Constitution*, *supra* note 9 at 334 (presenting his theory as supporting the Supreme Court’s recent decision upholding the right to sexual autonomy in *Lawrence v. Texas*); Thomas B. McAfee, *Inherent Rights*, *supra* note 9 at 169 (presenting his theory as a challenge to readings of the Ninth Amendment such as those presented in *Griswold*); Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, *supra* note 9 at 226-27 (objecting to the use of the Ninth Amendment in support of a substantive due process right of privacy).

⁶⁶ See Bruce A. Ackerman, *Robert Bork’s Grand Inquisition*, 99 *Yale L. J.* 1419, 1431-32 (“The seriousness with which the Founding generation took these words may be inferred from the fact that the Ninth is the only constitutional amendment aimed at proscribing an interpretive technique; all the other parts of the Bill of Rights are concerned with substantive or institutional matters.”). The other clause controlling constitutional interpretation is the Eleventh Amendment.

⁶⁷ There are outstanding discussions of general interpretive positions at the time of the Founding, though not focusing on the Ninth Amendment. See for example, Caleb Nelson, *Originalism and Interpretive Conventions*, 17 *U. Chi. L. Rev.* 519 (2003) (discussing the Founders view of “fixing” the meaning of constitutional provisions). See also Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* 181 (1999) (“Although it is easy to imagine an amendment directing the court to adopt some specific interpretive method, and thus converting an interpretive intent into a substantive directive, no such clause exists in the constitution.”). Whittington notes the possible interpretive limits of the Ninth and Tenth Amendments, but treats these not as all-encompassing rules for interpreting the Constitution, but only as “embody[ing] a structural subjective intent” due to their limited application. See *id.* at 286 n. 59.

⁶⁸ These proposals are presented and discussed at *infra* notes 91-97 and accompanying text.

⁶⁹ According to the Anti-Federalist writer “Brutus”:

antifederalist fears regarding the potentially destructive power of courts under the proposed Constitution.⁷⁰ Federalists claimed that the proposed Constitution granted only certain powers to the federal government, with the expectation that all other powers would remain under the authority of the states.⁷¹ Antifederalists were not convinced. Once the Constitution was adopted, antifederalists argued, the federal government naturally would seek to exercise its powers to the utmost. According to antifederalist “Federal Farmer:”

[M]en usually take either side of the argument, as will best answer their purposes: But the general assumption being, that men who govern, will, in doubtful cases, construe laws and constitutions most favorably for increasing their own powers.⁷²

It would be up to the courts of law to determine whether Congress had transgressed its enumerated boundaries, thus leaving the retained powers of the states at the mercy of judicial construction. Rejecting Federalist assertions that the federal judiciary was the “least dangerous branch,”⁷³ antifederalists argued that judges would interpret the

How far the clause in the 8th section of the 1st article may operate to do away all idea of confederated states, and to effect an entire consolidation of the whole into one general government, it is impossible to say. The powers given by this article are very general and comprehensive, and it may receive a construction to justify the passing almost any law. A power to make all laws, which shall be *necessary and proper*, for carrying into execution, all powers vested by the constitution in the government of the United States, or any department or officer thereof, is a power very comprehensive and definite [indefinite?], and may, for ought I know, be exercised in a such manner as entirely to abolish the state legislatures.

Brutus No. 1 (Oct. 18, 1787), *reprinted in* 2 The Complete Anti-Federalist, *supra* note 28 at 367.

⁷⁰ An excellent discussion of Anti-Federalist concerns regarding the judiciary can be found in Jack Rakove’s *Original Meanings* 186 (1996).

⁷¹ According to James Madison in the Federalist Papers:

The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will for the most part be connected. The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State

The Federalist No. 45 (Madison), *reprinted in* The Federalist Papers 292 (Clinton Rossiter ed. 1961).

⁷² Federal Farmer, No. 4, October 12, 1787, *reprinted in* 2 The Complete Anti-Federalist, *supra* note 28 at 247.

⁷³ As Hamilton wrote:

Whoever attentively considers the different departments of power must perceive, that in a government in which they are separated from each other, the judiciary, from the nature of its

scope of federal power according to the “spirit of the Constitution.” The “spirit” being altogether national in nature, “latitudinous” judicial interpretation would make short work of the retained powers of the states. According to “Brutus:”⁷⁴

“They are authorised to determine all questions that may arise upon the meaning of the constitution in law. This article vests the courts with authority to give the constitution a legal construction, or to explain it according to the rules laid down for construing a law. These rules give a certain degree of latitude of explanation. . . . They [the courts] will give the sense of every article of the constitution, that may from time to time come before them. And in their decisions they will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution.”⁷⁵

To the antifederalists, federal courts might well be the *most* dangerous branch. The federal legislature, after all, would be bound by the decisions of the federal courts.⁷⁶ This meant that the true arbiter of federal power would be the judicial branch. However carefully one might fix the limits of power, “we must leave a vast deal to the discretion and interpretation” to the courts.⁷⁷ Accordingly “we are more in danger of sowing the seeds of arbitrary government in this department than in any other.”⁷⁸ As “Brutus” wrote, courts “will not confine themselves to any fixed or established

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

Federalist No. 78 (Hamilton), *reprinted in* The Federalist Papers, *supra* note 71 at 465.

⁷⁴ According to Herbert Storing, the discussion of judicial power by “Brutus” was “the best in Anti-Federalist literature.” See III The Complete Anti-Federalist, *supra* note 28 at 358.

⁷⁵ The Essays of Brutus No. XI, Jan. 31, 1788, *reprinted in* 2 The Complete Anti-Federalist, *supra* note 28 at 419-20.

⁷⁶ *Id.* at 420. See also The Essays of Brutus No. XII, Feb. 7, 1788, *reprinted in* 2 The Complete Anti-Federalist, *supra* note 28 at 424 (“the judgment of the judicial, on the constitution, will become the rule to guide the legislature in their construction of their powers.”).

⁷⁷ Letters from the Federal Farmer XV, *reprinted in* 2 The Complete Anti-Federalist, *supra* note 28 at 315.

⁷⁸ *Id.* at 316.

rules,”⁷⁹ but instead would adopt “certain principles, which being received by the legislature, will enlarge the sphere of their power beyond all bounds.”⁸⁰

The judicial power will operate to affect . . . an entire subversion of the legislative, executive and judicial powers of the individual states. Every adjudication of the supreme court, on any question that may arise upon the nature and extent of the general government, will affect the limits of the state jurisdiction. In proportion as the former enlarge the exercise of their powers, will that of the latter be restricted. . . . Not only will the constitution justify the courts in inclining to this mode of explaining it, but they will be interested in using this latitude of interpretation.⁸¹

Guided by the broad principles articulated in the Constitution’s Preamble, antifederalists claimed that courts would read provisions such as the Necessary and Proper Clause to justify the extension of federal power “to almost everything about which any legislative power can be employed. But if this equitable mode of construction is applied to this part of the constitution; nothing can stand before it.”⁸² According to Federal Farmer “the rigid systems of the law courts naturally become more severe and arbitrary, if not carefully tempered and guarded by the constitution.”⁸³ Accordingly, Federal Farmer suggested that “we might advantageously enumerate the powers given, and then in general words, according to the mode adopted in the 2d art. of the confederation, declare all powers, rights and privileges, are reserved, which are not explicitly and expressly given up.”⁸⁴

Although the Federalists denied that the Constitution authorized the courts to construe the “spirit” of the Constitution,⁸⁵ they conceded that there needed to be limits to the

⁷⁹The Essays of Brutus No. XI, Jan. 31, 1788, *reprinted in* 2 The Complete Anti-Federalist, *supra* note 28 at 420.

⁸⁰ The Essays of Brutus No. XII, Feb. 7, 1788, *reprinted in* 2 The Complete Anti-Federalist, *supra* note 28 at 423.

⁸¹ The Essays of Brutus No. XI, Jan. 31, 1788, *reprinted in* 2 The Complete Anti-Federalist, *supra* note 28 at 420, 421.

⁸² The Essays of Brutus No. XII, Feb. 7, 1788, *reprinted in* 2 The Complete Anti-Federalist, *supra* note 28 at 425.

⁸³ Letters from the Federal Farmer XV, *reprinted in* 2 The Complete Anti-Federalist, *supra* note 28 at 316. Others have noted the widespread suspicion of judicial interpretation during this period. See Powell, The Modern Misunderstanding of Original Intent, 54 U. Chi. L. Rev 1513, 1537 (1987); Raoul Berger, The Ninth Amendment: The Beckoning Mirage, 42 Rutgers L. Rev. 951, at notes 55-60 (1990).

⁸⁴ Letters from the Federal Farmer XVI, *reprinted in* 2 The Complete Anti-Federalist, *supra* note 28 at 324.

⁸⁵ According to Hamilton in the Federalist Papers:

In the first place, there is not a syllable in the plan under consideration, which *directly* empowers the national courts to construe the laws according to the *spirit of the constitution*, or which gives them any greater latitude in this respect, than may be claimed by the courts of

interpretive power of the courts. According to Alexander Hamilton in the Federalist Papers, "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents."⁸⁶

The Constitution as it stood, however, had no "strict rules." It had no express rules of interpretation at all. Following the suggestion of Federal Farmer, the state ratifying conventions suggested amendments to remedy this deficiency.

C. The Proposals of the State Ratifying Conventions

The Constitution very nearly failed to achieve the requisite number of votes for ratification. Despite the best efforts of the federalists, the vote in a number of key states remained close. Antifederalists claimed that the document threatened to annihilate the states, and called for a second constitutional convention to remedy the Constitution's deficiencies. At the very least, the document required the addition of provisions limiting the power of the federal government and securing the reserved rights of the states. In the Virginia ratifying convention, Patrick Henry demanded "a general positive provision should be inserted in the new system, securing to the states and the people every right which was not conceded to the general government."⁸⁷ George Mason, who had refused to sign the Constitution, agreed that the Constitution needed "some express declaration . . . asserting that rights not given to the general government were retained by the states."⁸⁸ According to Mason, "[w]e wish only our rights to be secured. We must have such amendments as will secure the liberties and happiness of the people on a plain, simple construction, not on doubtful ground."⁸⁹

In order to avoid a second constitutional convention which might result in dismantling the entire document,⁹⁰ the Federalists agreed to add a Bill of Rights to the ratified Constitution as soon as was practicable. A number of states ratified on the assumption that such amendments would be proposed and they enclosed suggested amendments

every state. I admit however, that the constitution ought to be the standard of construction for the laws, and that wherever there is an evident opposition, the laws ought to give place to the constitution. But this doctrine is not deducible from any circumstance peculiar to the plan of the convention; but from the general theory of a limited constitution; and as far as it is true, is equally applicable to most, if not to all the state governments. There can be no objection therefore, on this account, to the federal judicature, which will not lie against the local judicatures in general, and which will not serve to condemn every constitution that attempts to set bounds to the legislative discretion.

The Federalist No. 81 (Hamilton), *reprinted in* The Federalist Papers, *supra* note 71 at 482.

⁸⁶ The Federalist, No. 78, *supra* note 71 at 471.

⁸⁷ 3 Elliot's Debates, *supra* note 41 at 150.

⁸⁸ *Id.* at 444.

⁸⁹ *Id.* at 271.

⁹⁰ See Lash, *Rejecting Conventional Wisdom*, *supra* note 33 at 221.

along with their notice of ratification. Most of these proposals included provisions controlling the interpretation of the Constitution in order to preserve the principle of a limited federal government. Although worded in different ways, these proposals share a common dual approach to limiting power: The included *both* a declaration of enumerated federal power *and* an ancillary rule of construction which *preserves* the principle of enumerated power. New York's proposed amendment, for example, contained a declaration of limited enumerated power followed by a rule of construction:

That every power, jurisdiction and right, which is not by the said constitution clearly delegated to the Congress of the United States, or the departments of the government thereof, remains to the people of the several states, or to their respective state governments to whom they may have granted the same; 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.⁹¹

The first half of New York's proposal begins by declaring the principle of delegated "powers, jurisdictions and rights." This principle, originally contained in the Articles of Confederation,⁹² distinguished the limited enumerated powers of the federal government from the unenumerated police powers of the States. Thus, all "powers and rights" not delegated to Congress are reserved to the people of the several states who, in turn, may grant their own state government any of these "powers, jurisdictions or rights" they choose.

The second half of New York's proposal reflects the concerns raised by both federalist and antifederalist regarding the potential dangers of "construction." Federalists claimed that a Bill of Rights might be construed to imply a government of otherwise unenumerated power.⁹³ Antifederalists likewise warned against a judiciary that would construe federal power so broadly as to overwhelm the independent rights of the states. Both concerns are met by laying down a rule of constitutional construction: "Clauses . . . which declare, that Congress shall not have or exercise certain powers" shall not be read to "imply" any additional powers beyond those delegated, but instead "are to be construed" to the contrary.

⁹¹ New York, July 26, 1788, *reprinted in* Creating the Bill of Rights, *supra* note 2 at 21-22 (emphasis added).

⁹² See Articles of Confederation, Article II.

⁹³ See *supra* note 30 and accompanying text.

Together, these provisions contain two related but distinct propositions: A declaration of constitutional principle (delegated federal power) and a rule of construction to preserve that principle. Other states echoed these twin provisions. North Carolina's convention proposed:

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

. . .
18. That those clauses which declare that Congress shall not exercise certain powers, *be not interpreted in any manner whatsoever* to extend the powers of Congress; but that they be construed either as making exceptions to the specified powers where this shall be the case, or otherwise, as inserted merely for greater caution.⁹⁴

Once again, a statement of reserved state power is followed by a rule of interpretation. Notice also that North Carolina repeats New York's statement regarding the protected *rights* of state government, this time in language which speaks of the *retained* rights of the states. These state rights are "retained" by a rule of construction prohibiting any interpretation that extends the powers of Congress.

Pennsylvania's proposal declared the principle of enumerated power, followed by a provision explicitly prohibiting the courts from "assuming" "any authority, power or jurisdiction" "under color or pretense of construction or fiction."⁹⁵ South Carolina's proposal combined both the rule of construction and the principle of enumerated power in a single phrase:

⁹⁴ North Carolina, August 1, 1788, *reprinted in* The Complete Bill of Rights, *supra* note 10 at 674-75 (emphasis added).

⁹⁵ The full text reads:

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

1 Rights Retained by the People, *supra* note 11 at 371.

[T]hat no section or paragraph of the said constitution *warrants a construction* that the states do not retain every power not expressly relinquished by them and vested in the general government of the Union.⁹⁶

Finally, Virginia’s proposal insisted

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 be *construed* either as making exceptions to the specified powers where this shall be the case, or otherwise, as inserted merely for greater caution.⁹⁷

Following the example of other states, Virginia’s 1st provision declares a principle of delegated power by which states *retained* “powers and rights.” The 17th provision then prevents the enlargement of these delegated powers through a rule of construction which controls the interpretation of the Constitution.

D. The Rule of Construction: Restricting the Expansion of Delegated Federal Power

A debate over the Ninth and Tenth Amendments which focuses on the language of “powers” and “rights” might tend to categorize these proposed amendments depending on whether they included the key word.⁹⁸ Draft proposals that refer to

⁹⁶ 4 Elliot’s Debates, *supra* note 41 at 325.

⁹⁷ Virginia, June 27, 1788, *reprinted in* The Complete Bill of Rights, *supra* note 10 at 675 (emphasis added). 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 Madison to Washington (Nov. 20, 1789), in 2 The Bill of Rights: A Documentary History 1185 (Bernard Schwartz, ed. 1971). See also Proceedings of the Meeting at Harrisburg, In Pennsylvania, September 3, 1788, *reprinted in* Complete Bill of Rights, *supra* note 10 at 648:

That Congress shall not exercise any powers whatever, but such as are expressly given to that body by the Constitution of the United States; nor shall any authority, power, or jurisdiction, be assumed or exercised by the executive or judiciary departments of the Union, under color or pretence of construction or fiction; but all the rights of sovereignty, which are not by the said Constitution expressly and plainly vested in the Congress, shall be deemed to remain with, and shall be exercised by, the several states in the Union, according to their respective constitutions.

⁹⁸ This approach to categorizing historical documents related to the Ninth and Tenth Amendments can be found repeatedly in Ninth Amendment Scholarship. See sources cited in note 18. Most significantly, it

“powers” thus would be associated with the Tenth Amendment (which also speaks of “powers”). Proposals that speak of rights, on the other hand, would tend to be associated with the Ninth (which speaks of the “retained rights of the people”).

A quick glance at the state proposals listed above show that this would be a mistake. These provisions cannot be categorized according to “powers” and “rights.” Many clauses refer to “powers, jurisdiction and rights” in the same sentence. In most, the retained power of the states is declared in one clause, and then protected *again* by a rule of construction contained in a second clause. It is not the language of powers and rights that distinguishes these provisions but something else, one that equally distinguishes the Ninth and Tenth Amendments: One declares the principle of enumerated power, the other announces a rule of constitutional interpretation.⁹⁹

Given that so many states proposed two different provisions, it is apparent they were not considered redundant. But at first glance, they seem to state the same principle. For example, New York’s first proposal declares the principle of enumerated power, while its second proposal seems to repeat the same idea, insisting that adding power restrictions like those in the Bill of Rights “do not imply that Congress is entitled to any powers not given by the said constitution.” This could be read as simply making clear that adding a Bill of Rights did not negate the general principle of unenumerated power. If so, it adds nothing to the first proposal beyond insisting it not be negated by implication. It is possible, however, to read the second proposal as doing something more. Literally, the proposal addresses the concern of adding power by implication. If this refers to the implied *expansion* of delegated power, then it would not be redundant with New York’s first proposal. This second provision would address a separate concern that adding a Bill of Rights might be read to expand the scope of otherwise delegated power beyond that intended by the delegation.

has been adopted by major secondary sources purporting to present materials relating to each Clause. See *infra* notes 212-236 and accompanying text.

⁹⁹ Rhode Island’s declaration of principles contained similar provisions:

III: That the Powers of Government may be reassumed by the People, whensoever it shall become necessary to their Happiness; that every Power, Jurisdiction and right, which is not by the said Constitution clearly delegated to the Congress of the United States, or the departments of the Government thereof, remains to the People of the several States, or to their respective State Governments to whom they may have granted the same; 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.

1 Rights Retained by the People, *supra* note 11 at 374.

This prohibition on the undue expansion of delegated power is expressly articulated in other state convention proposals. For example, North Carolina proposed an amendment declaring the principle of enumerated power, and then proposed a second provision insisting that restrictions on congressional power “be not interpreted in any manner whatsoever to *extend* the powers of Congress.”¹⁰⁰ Likewise, Virginia’s 1st proposal declared the principle of unenumerated power, while its 17th proposal insisted that restrictions on federal power “be not interpreted in any manner whatsoever to *extend* the powers of Congress.”

The concern about extending the powers of Congress is separate from but related to the concern about enumerated federal power. State proposals declaring the principle of delegated powers invariably were coupled with statements that all non-delegated powers remained with the states. It was not just that the federal government lacked power over certain matters, it was that those same matters were to remain under the control of the states. But a declaration of enumerated federal power by itself would not ensure that these matters would remain under the control of the states. It was possible that adding a Bill of Rights might imply that delegated power could expand to cover every subject except those expressly denied to Congress by the Bill. Under the Supremacy Clause, state law would have to give way before this implied expansion of federal authority. In such a situation, states would still have all powers not delegated to the federal government, but those powers would be a null set, federal authority having occupied the field.

Preserving both the doctrine of delegated power and the reserved powers of the states required *two* provisions: One declaring the doctrine, the other controlling expansive interpretations of federal power. When Madison drafted his version of the Ninth and Tenth Amendments, he echoed the two-pronged approach of the state conventions.

III. James Madison and the Constructive Enlargement of Federal Power

A. Madison’s Initial Draft of the Ninth Amendment

Fulfilling his promise to his constituents in Virginia,¹⁰¹ Madison drafted and presented to the House of Representatives a list of proposed amendments to the Constitution.

¹⁰⁰ North Carolina, August 1, 1788, *reprinted in* The Complete Bill of Rights, *supra* note 10 at 674-75 (emphasis added).

¹⁰¹ Madison explained his obligation to introduce amendments in a letter to Richard Peters:

In many States the Const. was adopted under a tacit compact in favr. of some subsequent provisions on this head. In Virg[ini]a. It would have been certainly *rejected*, had no assurances been given by its advocates that such provisions would be pursued. As an honest man *I feel* my self bound by this consideration.

Following the example of the state convention proposals, Madison included both a provision declaring the principle of enumerated federal power, and a rule of construction:

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

. . .

The powers not delegated by this constitution, nor prohibited by it to the states, are reserved to the states respectively.¹⁰²

Madison’s Ninth begins with language preserving the retained rights of the people, and then adds a clause prohibiting the enlargement of delegated powers. As noted above, this is a separate issue from simply preserving the doctrine of delegated power and, in fact, Madison places that principle in a separate provision.¹⁰³ Having traced the concerns about the expansion of delegated power from the state conventions to Madison’s draft of the Ninth Amendment, consider again Madison’s speech introducing the Ninth Amendment to the House of Representatives:

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

James Madison to Richard Peters, Aug. 19, 1789, *reprinted in* *Creating the Bill of Rights*, *supra* note 2 at 282.

¹⁰² House of Representatives, Amendments to the Constitution, June 8, 1789, *reprinted in* *5 Founders’ Constitution*, *supra* note 10 at 25, 26.

¹⁰³ He also addresses his draft of the Tenth Amendment in a separate part of his speech:

I find from looking into the amendments proposed by the State conventions, that several are particularly anxious that it should be declared in the constitution, that the powers not therein delegated should be reserved to the several States. Perhaps words which may define this more precisely than the whole of the instrument now does, may be considered as superfluous. I admit they may be deemed unnecessary; but there can be no harm in making such a declaration, if gentlemen will allow that the fact is as stated. I am sure I understand it so, and do therefore propose it.

Id. at 63. There are no specific references to the Tenth in Madison’s notes for his speech.

assigned into the hands of the General Government, and were consequently insecure.¹⁰⁴

Madison is not here addressing the need to limit Congress to its enumerated powers. Madison addressed that issue in his draft of the Tenth Amendment. Instead, the concern is that by enumerating certain rights, an implication might be drawn that other rights, which ought to be retained by the people, would be “assigned into the hands of the General Government.” This assignment, of course, would expand delegated power beyond its intended scope. As Madison wrote in his notes for this part of his speech, enumerating certain rights might “disparge other rights—or constructively enlarge” delegated federal power.¹⁰⁵ Thus, as had his home state of Virginia had proposed, Madison introduced to the House two provisions, one declaring the principle of delegated power, the other a rule of construction limiting the “constructive enlargement” of that delegation.

B. The Select Committee

On July 21, 1789, the House appointed a Select Committee to “consider the subject of amendments.”¹⁰⁶ The committee consisted of eleven members, one from each state that had ratified the Constitution,¹⁰⁷ and included James Madison and Roger Sherman.

1. Sherman’s Draft Bill of Rights

Roger Sherman originally opposed the adoption of a Bill of Rights.¹⁰⁸ When it became clear that a Bill would be proposed despite his objections, Sherman suggested that they be added at the end of the document, rather than incorporated into Article I, Section 9, as Madison proposed.¹⁰⁹ Recently, a draft Bill of Rights penned by

¹⁰⁴ James Madison, Speech in Congress Proposing Constitutional Amendments, *reprinted* in Madison, Writings, *supra* note 3 at 448-49. The “last clause of the fourth resolution” referred to by Madison was an early draft of the Ninth:

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

Id. at 443.

¹⁰⁵ See James Madison, Notes for Amendments Speech, *reprinted in* 1 Rights Retained by the People, *supra* note 11 at 64.

¹⁰⁶ 2 Schwartz, The Bill of Rights, A Documentary History, *supra* note 97 at 1050.

¹⁰⁷ North Carolina and Rhode Island at this point had not yet ratified. *Id.*

¹⁰⁸ Leonard Levy, Origins of the Bill of Rights, *supra* note 12 at 103.

¹⁰⁹ Roger Sherman to Henry Gibbs, August 4, 1789, *reprinted in* Creating the Bill of Rights, *supra* note 2 at 271. See also Levy, *supra* note 12 at 146.

Sherman¹¹⁰ has been discovered, arguably representing his vision of how the Bill might appear if appended as a separate Bill of Rights.¹¹¹ His draft includes a provision declaring that “the people have certain natural rights which are retained by them when they enter into Society.”¹¹² This draft, along with Madison’s notes for his speech introducing the Bill of Rights, are given special prominence by Libertarian scholars as establishing a link between the Ninth Amendment and the Founders’ intention to protect natural rights.¹¹³ The provision quoted above has been characterized as either an early draft of the Ninth Amendment,¹¹⁴ or as “reflect[ing] the sentiment that came to be expressed in the Ninth”¹¹⁵

Finding an example of “natural rights” language in conjunction with the Ninth Amendment would provide significant support for the Libertarian unenumerated rights position. Although most Ninth Amendment scholars generally concede there was widespread belief in natural rights at the time of the Founding, this alone does not establish that protecting such rights was the purpose of the Ninth Amendment. A simple illustration of this can be seen in the statements by the North Carolina ratifying convention. The convention began by declaring

“That there are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity, among which are the enjoyment of life and liberty, with the means of acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.”¹¹⁶

North Carolina then went on to propose the following two amendments:

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

...

¹¹⁰ There is some question regarding whether this draft reflects the views of Sherman himself, or stands only as report of a congressional committee of which Sherman was secretary. See Christopher Collier, *The Common Law and Individual Rights in Connecticut Before the Federal Bill of Rights* 76 Conn. B.J. 1 (2002).

¹¹¹ See Roger Sherman’s Proposed Committee Report, 21-28 July, 1789, *reprinted in*, *Creating the Bill of Rights: The Documentary Record From the First Congress 266-68* (Helen E. Veit, Kenneth R. Bowling, Charlene Bangs Bickford, eds., 1991) (editors notes suggesting this is Sherman’s vision of an appended Bill of Rights).

¹¹² *Id.*

¹¹³ See e.g., Barnett, *Restoring the Lost Constitution*, *supra* note 9 at 55.

¹¹⁴ See Yoo, *Our Declaratory Ninth Amendment*, *supra* note 35 at 993.

¹¹⁵ 1 Rights Retained by the People, *supra* note 11 at 7 n.16.

¹¹⁶ North Carolina Ratifying Convention, *reprinted in* 1 Rights Retained by the People, *supra* note 11 at 164.

18. That those clauses which declare that Congress shall not exercise certain powers, be not interpreted in any manner whatsoever to extend the powers of Congress; but that they be construed either as making exceptions to the specified powers where this shall be the case, or otherwise, as inserted merely for greater caution.¹¹⁷

The North Carolina convention obviously believed in natural rights—and they also believed that the states retained every right not delegated to the federal government. This is only one of many examples. The above discussion of the state convention proposals shows that “rights” sometimes referred to rights retained by the people, sometimes rights retained by the states, sometimes both.¹¹⁸ The very term “rights” at the time of the Founding had multiple meanings, with some considered inalienable natural rights, others seen as natural rights that could be given up to government control, and others viewed as mere positive rights created by constitution, statute, or common law.¹¹⁹ In other words, the mere fact that the Ninth Amendment protects “rights” does not tell us what *kinds* of rights are protected.¹²⁰ Nor does the fact that Madison believed speech to be a natural right suggest that others rights mentioned in the Bill are natural rights—some clearly are not.¹²¹ The ambiguity regarding Ninth Amendment rights becomes critical when one considers that the state conventions were particularly interested in a clause which prevented construction of the Constitution in a manner that abridged the retained rights of the people who then could delegate the same to the states.¹²²

¹¹⁷ Id. at 674-75 (emphasis added).

¹¹⁸ New York’s proposed amendment spoke expressly about “power[s], jurisdiction[s] and *right[s]*” retained to “the people of the several states, or to their *respective state governments* to whom they may have granted the same.” North Carolina’s declared “[t]hat each *state* in the Union shall respectively retain every power, jurisdiction and *right*.” South Carolina sought to prohibit “a construction that the *states* do not *retain every power* not expressly relinquished by them and vested in the general government of the Union.” Virginia’s proposal insisted “[t]hat 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.

¹¹⁹ See Yoo, *Our Declaratory Ninth Amendment*, *supra* note 35 at 972.

¹²⁰ For this reason alone, the copious amount of time spent by unenumerated rights theorists regarding widespread Founding belief in natural rights has but limited relevance to whether protecting such rights was the purpose of the Ninth Amendment.

¹²¹ As can be seen from Madison’s notes for his speech introducing amendments to the House. There, he discusses both natural and positive rights. See *supra* note 92.

¹²² See, for example, New York’s suggested amendment:

That every power, jurisdiction and right, which is not by the said constitution clearly delegated to the Congress of the United States, or the departments of the government thereof, remains to the people of the several states, or to their respective state governments to whom they may have granted the same.

See *Creating the Bill of Rights*, *supra* note 2 at 21-22.

Libertarian theorists believe that Sherman's draft resolves the ambiguity and establishes a link between the phrase "natural rights" and the Ninth Amendment's phrase "other rights retained by the people."¹²³ According to Randy Barnett, the following passage from Sherman's draft Bill of Rights "reflects the sentiment that came to be expressed in the Ninth."¹²⁴

The people have certain natural rights which are retained by them when they enter into Society, Such are the rights of Conscience in matters of religion; of acquiring property and of pursuing happiness & Safety; of Speaking, writing and publishing their Sentiments with decency and freedom; of peaceably assembling to consult their common good, and of applying to Government by petition or remonstrance for redress of grievances. Of these rights therefore they Shall not be deprived by the Government of the united States.¹²⁵

At first glance, Barnett's proposition seems plausible. Both the Ninth Amendment and Sherman's proposal speak of rights retained by the people. That Sherman's draft specifically referred to "natural rights" arguably suggests that at least one member of the Select Committee responsible for drafting the Bill of Rights believed that the "rights" of the Ninth Amendment referred to the "natural rights retained by the people." Before testing Barnett's reading, however, consider another provision in Sherman's draft Bill of Rights which Professor Barnett believes "closely resembles what came to be the Tenth."¹²⁶

And the powers not delegated to the government of the united states by the constitution, nor prohibited by it to the particular states, are retained by the states respectively, nor shall any the exercise of power by the government of the united states particular instances here enumerated by way of caution be construed to imply the contrary.¹²⁷

¹²³ See Barnett, James Madison's Ninth Amendment, in 1 *The Rights Retained by the People*, *supra* note 11 at 7 n.16; Yoo, *Our Declaratory Ninth Amendment*, *supra* note 35 at 993; Calvin R. Massey, *The Natural Law Component of the Ninth Amendment*, 61 *U. Cinn. L. Rev.* 49, 94 (1992). See also Jeff Rosen, *Note: Was the Flag Burning Amendment Unconstitutional*, 100 *Yale L.J.* 1073, 1075-76 (1991).

¹²⁴ 1 *Rights Retained by the People*, *supra* note 11 at 7 n.16. In his most recent work, Professor Barnett continues to link this quote to the Ninth Amendment. See Barnett, *Restoring the Lost Constitution*, *supra* note 9 at 54-55.

¹²⁵ See 1 *Rights Retained by the People*, *supra* note 11 at appendix A.

¹²⁶ *Id.* See also Yoo, *supra* note 35 at 993 ("The predecessor to the Tenth spoke openly about limiting the federal government to its enumerated powers: "And the powers not delegated to the Government of the united states by the Constitution, nor prohibited by it to the particular States, are retained by the States respectively, nor shall the exercise of power by the Government of the united states particular instances here in enumerated by way of caution be construed to imply the contrary.").

¹²⁷ *Creating the Bill of Rights*, *supra* note 2 at 268. Sherman's draft "Eleventh" provision contained gaps which scholars fill in different ways. Although I have reproduced what I believe the "neutral" draft from *Creating the Bill of Rights*, given the context of the provision, and its relationship to other proposals like Virginia's, Thomas McAfee's version may in fact be the best rendering:

Having kept our focus on the Ninth as rule of construction, the reader can probably recognize the above provision as a *combination* of the principles expressed by the Ninth and Tenth Amendments.¹²⁸ Sherman’s “Eleventh Amendment” contains two separate provisions: The first, a declaration of enumerated power; the second, a rule of construction preserving that principle.¹²⁹ The first portion repeats Madison’s draft “Tenth” almost verbatim. The second follows the general approach of every draft of the Ninth Amendment, from the state convention proposals to James Madison’s, by announcing a rule of construction controlling the interpretation of federal power.

Given the common tendency to read “rights” language as referring to the Ninth and “powers” language as referring to the Tenth, it is easy to see how the last portion of Sherman’s draft might be missed. Understanding the Ninth Amendment as a rule of construction, however, reveals Sherman’s draft as following the same approach as the state conventions. In fact, it closely tracks the approach of North Carolina by beginning with a general declaration of natural rights, followed a specific declaration of enumerated power and a rule of construction preserving that principle. Sherman’s draft places these last two principles along side of one another, just as they are in our Bill of Rights.

But, one might argue, even if not a draft of the Ninth Amendment, Sherman’s natural rights language nevertheless places the Bill of Rights in the *context* of natural rights and raises at least an interpretive presumption that whenever the term “rights” is used

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

See Thomas B. McAfee, *The Bill of Rights, Social Contract Theory, and the Rights Retained by the People*, 16 S. Ill. U. L.J. 267, n.98 (1992). How the gaps are filled, however, have no effect on the significance of the text described above.

¹²⁸ As was, for example, South Carolina’s which also combined both the rule of construction and the principle of enumerated power in a single phrase: “that no section of paragraph of the said constitution warrants a construction that the states do not retain every power not expressly relinquished by them and vested in the general government of the Union.” See Cogan, *The Complete Bill of Rights*, *supra* note 10 at 675 (erroneously referring to this as only involving the Tenth).

¹²⁹ In footnotes contained in his earlier work, Thomas McAfee recognizes Sherman’s 11th provision as a combination of the Ninth and Tenth Amendments. See Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 Colum. L. Rev. 1215, 1303 n.333 (1990) (identifying the Ninth and Tenth Amendment aspects in Sherman’s draft); Thomas B. McAfee, *The Role of Legal Scholars in the Confirmation Hearings*, 7 St. John’s Journal of Legal Commentary 211, 227 n.51 (same and noting “[h]ere the Ninth Amendment is drafted as an express guard against a construction that would undercut the effect of the Tenth Amendment”). McAfee’s current position on the Ninth Amendment is that it is a “hold harmless” provision that “says nothing about how to construe the powers of Congress.” See McAfee, *The Original Meaning of the Ninth Amendment*, *supra* this note at 1300 n.325.

in the Bill it refers to “natural rights.” It could be argued that the Ninth Amendment in particular should be read with an eye towards Sherman’s declaration of natural rights because both Sherman’s declaration and the Ninth Amendment speak of “retained rights.” But it is just here that Sherman’s draft boomerangs on attempts to cite it in support of unenumerated individual rights.

Unlike Madison’s draft Ninth Amendment, Sherman’s draft “Ninth” does not speak of “other rights retained by the people.” Instead, Sherman’s draft declares that the rule of construction is expressly meant to protect the “*retained* powers of the *states*.”

And the powers not delegated to the government of the united states by the constitution, nor prohibited by it to the particular states, are *retained by the states* respectively, nor shall any the exercise of power by the government of the united states particular instances here enumerated by way of caution be construed to imply the contrary.¹³⁰

Because Sherman’s draft links the rule of the Ninth Amendment with the retained powers of the states, despite the draft’s opening declaration of “retained natural rights,” this undercuts any argument that the term “retained rights” was especially associated with individual natural rights.¹³¹ More, it rebuts the interpretive presumption suggested above that just because a Founder declared the existence of natural rights, he would have understood (much less intended) the Ninth to protect such rights.

If all of this is not enough to break the link between Sherman’s “natural rights” and the Ninth Amendment, there is the shattering context in which Sherman’s draft was written. Madison’s initial draft of the Ninth Amendment was presented to the House on June 8, 1789. Both Sherman and Madison were members of the House Select Committee appointed to review Madison’s draft. Once again, here are Madison’s original drafts of the Ninth and Tenth Amendments:

The exceptions, here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.¹³²

¹³⁰ Roger Sherman’s Draft of the Bill of Rights, *reprinted* in 1 Rights Retained by the People, *supra* note 11 at 352.

¹³¹ Barnett, Implementing the Ninth Amendment, *in* 2 Rights Retained by the People, *supra* note 11 at 35.

¹³² James Madison, Speech to the House of Representatives, *reprinted in* 1 Rights Retained by the People, *supra* note 11 at 55.

The powers not delegated by this constitution, nor prohibited by it to the states, are reserved to the states respectively.¹³³

Sherman's drafted his provision the next month and presented it either in July or early August.¹³⁴ Again, here is Sherman's actual draft of the Ninth and Tenth Amendments:

And the powers not delegated to the government of the united states by the constitution, nor prohibited by it to the particular states, are retained by the states respectively, nor shall any the exercise of power by the government of the united states particular instances here enumerated by way of caution be construed to imply the contrary.¹³⁵

Sherman's draft *deletes* Madison's reference to "other rights retained by the people," and instead connects the Ninth to the Tenth in a manner that unmistakably has the Ninth preserving the retained powers of the States. Thus, Sherman's draft removed the language in Madison's draft that Libertarian scholars maintain was intended to protect unenumerated natural rights. In its place, Sherman's draft added language that expressly grounds the Ninth as a rule preserving the retained powers of the States.¹³⁶ Sherman's draft is significant, but for a very different reason than Professor Barnett supposes. Instead of providing a link between natural rights and the Ninth Amendment, the draft suggests that at least one member of the Select Committee believed that a better version of the Ninth would remove language regarding retained rights altogether and, instead, expressly declare a rule of construction preserving the retained powers of the States.¹³⁷

2. *The Altered Draft of the Select Committee*

The Select Committee was appointed on July 21. One week later, on July 28, the committee reported back to the House a streamlined version of Madison's

¹³³ Id. at 56.

¹³⁴ See Roger Sherman's Proposed Committee Report (July 21-28, 1789), *reprinted in* Creating the Bill of Rights, *supra* note 2 at 266, 267.

¹³⁵ Roger Sherman's Draft of the Bill of Rights, *reprinted in* 1 Rights Retained by the People, *supra* note 11 at 352.

¹³⁶ In this manner, Sherman's draft apparently reflects the same preference voiced by Randolph for a Ninth closer to the letter and spirit of Virginia's 1st and 17th amendments.

¹³⁷ The House Committee reported its draft of the Bill of Rights on July 28, 1789, with the Ninth having attained its final form. Creating the Bill of *Rights*, *supra* note 2 at 29. On August 4, Roger Sherman wrote that the amendments as drafted by the Committee "will probably be harmless & Satisfactory to those who are fond of Bills of rights." Id. at 271. Sherman had no objection to the Committee's draft of the Ninth, despite his preference for a draft that expressly retained the rights of the states. It is possible that Sherman, like Hardin Burnley, read the final version of the Ninth as expressing the same states rights principle he expressed in his own draft. See *infra* note 159 and accompanying text.

proposals.¹³⁸ The new draft of the Ninth Amendment no longer contained Madison’s reference to constructive enlargement of federal power, but his draft of the Tenth remained unchanged:¹³⁹

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

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

Because the Select Committee’s version of the Ninth speaks only of rights, while the Tenth speaks of powers, some scholars have suggested that the committee “unpacked” Madison’s early draft of the Ninth and moved the “enlargement of powers” aspect to the Tenth while keeping the rights aspect in the Ninth.¹⁴⁰ This is another example of scholars categorizing historical materials relating to the Ninth and Tenth Amendment under the assumption that “rights” go to Ninth while powers go to the “Tenth.”¹⁴¹

We have seen how this categorical assumption has led to mistakes in the handling of historical materials. As before, applying the assumption to Madison’s initial draft distorts the evidence. To begin with, at the same time Madison offered his draft of the Ninth, he also offered his draft of the Tenth. Madison obviously believed his version of the Ninth and Tenth each covered different subjects, despite their both sharing a common reference to government powers. Nor was the language in Madison’s draft Ninth “unpacked” and distributed between the Ninth and Tenth Amendments. When the “enlargement of powers” language disappeared from Madison’s Ninth, it was not placed in the Tenth—it simply disappears.

¹³⁸ According to Bernard Schwartz, “the Committee version was a virtual restatement of the amendments proposed by Madison.” Schwartz, *The Bill of Rights*, *supra* note 97 at 1050.

¹³⁹ Madison himself was ambivalent about the committee’s draft:

The proposed amendments of which I sent you a copy have since been in the hands of a committee composed of a member from each state. . . . [some] of the changes are perhaps for the better, others for the worse.”

James Madison to Wilson Cary Nicholas, Aug. 2, 1789, *reprinted in* *Creating the Bill of Rights*, *supra* note 2 at 271.

¹⁴⁰ See Randy Barnett, Introduction: James Madison’s Ninth Amendment, *in* 1 *Rights Retained by the People*, *supra* note 11 at 13; Massey, *Silent Rights*, *supra* note 9 at 75 (“[T]he House Select Committee used Madison’s fourth resolution, in part, as the raw material for the Tenth Amendment as well as the Ninth.”).

¹⁴¹ See e.g. Massey, *Silent Rights*, *supra* note 9 at 11 (“the Ninth Amendment is pretty clearly concerned with “rights retained by the *people*” while the Tenth is equally explicit that its focus is on governmental powers”) (emphasis in original).

There appear to be three possibilities. First, the Select Committee might have decided to abandon the attempt to limit the constructive enlargement of power. Secondly, the committee may have concluded that the constructive enlargement of powers principle was already expressed by the Tenth. Third, the committee could have concluded that the constructive enlargement of power principle continued to be expressed in the altered language of the Ninth. There are reasons why the first two choices are unlikely,¹⁴² but fortunately we do not have to guess. Madison himself claimed the third explanation was the case and he defended the committee's draft on those grounds. A defense was needed, too. Concerns over the committee's draft of the Ninth Amendment played a role in holding up ratification of the entire Bill for two years.

3. *Popular Sovereignty and the Tenth Amendment*

There is one final change in the last two amendments that deserves mention before we proceed. At the last minute, the phrase "or to the people" was added to the Tenth Amendment. The final version read:

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.¹⁴³

No one questions the fact that the Tenth was meant to declare the principle that all non-delegated powers were reserved to the States. Why then did the Committee add the phrase "or to the people?" The most likely answer lies in the Founders' conception of popular sovereignty. A theory of popular government developed in the period between the Revolution and the adoption of the Constitution,¹⁴⁴ popular sovereignty maintained that sovereign power remains with the people, not with their government.¹⁴⁵ The people delegated powers to their government, but could "alter or abolish" those powers as they saw fit.¹⁴⁶ The delegation of power, however, could occur at either of two levels. For example, powers not delegated to the federal government could be delegated by the people to their own state government. As New York's suggested amendment put it:

¹⁴² As to the first, given the repeated call by the states for such a provision and Madison's decision that such a principle was appropriate, it does not seem likely that the idea would be lightly abandoned. As to the second possibility, it was clear that the states did not read declarations of enumerated power as controlling the constructive enlargement of that power, which is why almost all the states called for two separate provisions. Madison's own initial draft echoed this idea. There is no evidence that any Founder believed that the Tenth by itself controlled the expansive interpretation of delegated power.

¹⁴³ U.S. Const. Amend. X.

¹⁴⁴ See Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, 344 (1969).

¹⁴⁵ For a discussion of the popular sovereignty roots of the phrase "the people" in the Ninth and Tenth Amendments, see Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 64 (1998).

¹⁴⁶ *Id.* at 119-122.

That every power, jurisdiction and right, which is not by the said constitution clearly delegated to the Congress of the United States, or the departments of the government thereof, remains to the people of the several states, or to their respective state governments to whom they may have granted the same.¹⁴⁷

The final version of the Tenth Amendment expresses this idea, that the people retain the right to delegate reserved powers to their respective state governments, or to not delegate them to *either* level of government. This idea links the Tenth Amendment with the Ninth. Like the Tenth, the Ninth reserves non-enumerated matters *to the people*. As St. George Tucker put it in his treatise on the Constitution, “state governments . . . retain every power, jurisdiction, and right not delegated to the United States.”¹⁴⁸

Much has been made of the fact that the Ninth Amendment speaks of the rights of the people, whereas the Tenth speaks of the powers of the states. Any reading of the Ninth Amendment that appears to preserve the autonomy of state government appears to confuse the Ninth with the Tenth. Under the theory of popular sovereignty, however, preserving the retained rights of the people is the *same thing* as preserving the autonomy of the states to the degree that the people have chosen to delegate retained rights and powers to their own state governments. Put another way, if the Ninth follows the same theory as the Tenth, it would have been understood that retained rights “remain to the people of the several states, or to their respective state governments to whom they may have granted the same.”¹⁴⁹ While such a construction may seem foreign to contemporary eyes, the proposed amendments by the states and, as we shall see, the ratification debates in the Virginia Assembly, suggest that this was in fact the understood meaning of the Ninth.

C. The Missing Virginia Ratification Debate

¹⁴⁷ New York, July 26, 1788, *reprinted in* The Complete Bill of Rights, *supra* note 10 at 635 (emphasis added).

¹⁴⁸ St. George Tucker, View of the Constitution of the United States, *in* 1 Blackstone’s Commentaries 141 (1803) (Appendix).

¹⁴⁹ According to antifederalist Federal Farmer:

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

Letters From Federal Farmer, Oct. 12, 1787, *reprinted in* The Complete Anti-Federalist, *supra* note 28 at 247.

The conventions of a number of the states having, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added . . .

Preface to Proposed Amendments to the Constitution, 1789.¹⁵⁰

Almost every state proposing amendments to the Constitution suggested the addition of two separate provisions; one declaring delegated powers, the other forbidding the constructive enlargement of those powers.¹⁵¹ Madison's original draft of the Ninth and Tenth Amendments followed this same approach. His draft of the Tenth contained the declaration of enumerated power and his draft of the Ninth prohibited the constructive enlargement of federal power. However, when the Select Committee removed the "constructive enlargement of powers" language from the Ninth, this resulted in an amendment that, stylistically, bore little resemblance to the rule of construction provisions suggested by the states. True, the Select Committee's version still contained a rule of construction. That rule, however, no longer expressly controlled the constructive enlargement of federal power as called for by the state conventions. Not surprisingly, the committee's modification of Madison's Ninth triggered concern, particularly in Virginia. There, in an episode completely missed in Ninth Amendment scholarship, concerns over Madison's altered draft of the Ninth Amendment brought to a halt the Federalists efforts to ratify the Bill of Rights.

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

On August 21, James Madison wrote to Edmund Randolph reporting on Congress's efforts to finalize a draft of the proposed Bill of Rights. Noting the on-going efforts by antifederalists to delay the process (and thus keep hope alive for a second convention), Madison apologized for not proposing all of Virginia's suggested amendments. "It had been absolutely necessary in order to effect any thing," Madison explained, "to abbreviate debate and exclude every proposition of a doubtful & unimportant nature."¹⁵² There is no indication in his letter that Madison believed Randolph would be troubled by those amendments which *had* made it through the process of drafting.

On August 24th, Congress settled on the final version of the Bill of Rights and submitted the same to the states for ratification. On November 5, Virginia Assembly member Hardin Burnley wrote to James Madison informing him that, although the

¹⁵⁰ 5 Founders' Constitution, *supra* note 10 at 40.

¹⁵¹ See *supra* notes 91-97 and accompanying text.

¹⁵² Letter of James Madison to Edmund Randolph, Aug. 21, 1789, *reprinted in* 5 Documentary History of the Constitution of the United States, *supra* note 1 at 191-92.

assembly committee had voted to ratify the first ten proposed amendments, the “11th and 12th” (the Ninth and Tenth Amendments) had been rejected.¹⁵³ Opposition to these two amendments came from Governor Edmund Randolph himself.¹⁵⁴ A few weeks later, a frustrated Madison wrote to President Washington that the consideration of the proposed amendments likely would be postponed until the next session.¹⁵⁵ Madison grumbled that the postponement would have made more sense “if the amendments did not so much correspond as far as they go with the propositions of the State Convention, which were before the public long before the last election.”¹⁵⁶ From Madison’s perspective, the amendments sent to Virginia were not different in any significant way from their counterparts proposed by the Virginia convention, provisions which had long been open to public comment.

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

“If the house should agree to the resolution for rejecting the two last I am of opinion that it will bring the whole into hazzard again, as some who have been decided friends to the ten first think it would be unwise to adopt them without the 11th and 12th.”¹⁵⁷

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

¹⁵³ Hardin Burnley to James Madison, Nov. 5th, 1789, *reprinted in* 5 The Documentary History of the Constitution, *supra* note 1 at 214. Opposition had been brewing in Virginia from the start. In their letter to Governor Randolph notifying him of the proposed amendments, Richard Henry Lee and William Grayson declared their “grief that we now send forward propositions inadequate to the purpose of real and substantial Amendments.” See *Creating the Bill of Rights*, *supra* note 2 at 300 n.1. See also William Grayson to Patrick Henry, Sept. 29, 1789, *reprinted in* id. at 300 ([the proposed amendments] are so mutilated & gutted that in fact they are good for nothing, & I believe as many others do, that they will do more harm than benefit”).

¹⁵⁴ See Ed. Carrington to James Madison, Dec. 20, 1789, *reprinted in* 5 The Documentary History of the Constitution, *supra* note 1 at 228. See also Edmund Randolph to George Washington, Nov. 26, 1789, *reprinted in* 5 The Documentary History of the Constitution, *supra* note 1 at 216 (“The eleventh and twelfth were rejected 64 against 58. I confess, that I see no propriety in adopting the two last.”).

¹⁵⁵ James Madison to The President of the United States, Nov. 20, 1789, *reprinted in* 5 The Documentary History of the Constitution, *supra* note 1 at 215.

¹⁵⁶ Madison’s point is that there was no reason for Virginia to complain about provisions like the “11th” since it corresponded to Virginia’s “17th,” which had long been before the public, and yet generated no opposition. Madison obviously did not believe there was any significant difference between his 11th and Virginia’s 17th.

¹⁵⁷ *Id.* at 220. Burnley was right. The dispute over the Ninth and Tenth Amendment ballooned into questions regarding the First, Sixth, Ninth and Tenth Amendments. See Levy, *supra* note 12 at 42.

On the two last [the Ninth and Tenth] a debate of some length took place, which ended in rejection. Mr. E. Randolph who advocated all the others [amendments] stood in this contest in the front of the 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 and 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 reducable to no definitive certainty.¹⁵⁸

Burnley himself saw no difference between Randolph's preferred language and the language used in the Ninth's final draft:

But others among whom I am one see not the force of this 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.¹⁵⁹

¹⁵⁸ Hardin Burnley to James Madison, Nov. 28, 1789, *reprinted in* 5 The Documentary History of the Constitution, *supra* note 1 at 219. There is an intriguing possibility that Burnley did not fully grasp Randolph's objections. For example, it seems rather curious that if Randolph was worried about protecting unenumerated powers he would prefer the language of Virginia's 17th proposal, a provision which said nothing at all about the retained rights of the people. Burnley himself seemed unsure that he had accurately grasped Randolph's objections and he was careful to caution that his report was based on Randolph's objection "if I understood it." In fact, there is some indirect evidence that Burnley collapsed what actually were two separate criticisms of the Ninth Amendment, one involving the failure to expressly address constructive enlargement of federal power, and the other referring to the ineffectiveness of the Ninth if it was intended to protect unenumerated rights. See *infra* notes 182-185 and accompanying text (discussing the Senate Report).

¹⁵⁹ Hardin Burnley to James Madison, Nov. 28, 1789, *reprinted in* 5 The Documentary History of the Constitution, *supra* note 1 at 219. Notice that Burnley read the final language of the Ninth as protecting the rights of the people and of the states. So would have others. Retaining rights to the people included the understanding that these rights could be granted back to the respective state governments. See, for example, New York's proposal which declared:

That every power, jurisdiction and right, which is not by the said constitution clearly delegated to the Congress of the United States, or the departments of the government thereof, remains to the people of the several states, or to their respective state governments to whom they may have granted the same.

1 Rights Retained by the People, *supra* note 1 at 356. New York's proposal suggests that when you preserve the "retained rights and powers of the people," the people remain free to "grant" those retained

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

My last information from Richmond is contained in the following extract: [Here Madison quotes Burnley's description of Randolph's objection]. The difficulty started [against] the amendments is really unlucky, and the more to be regretted as it springs from a friend to the Constitution. It is a still greater cause of regret, if the distinction be, as it appears to me, altogether fanciful. If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing whether the latter be secured by declaring that they shall not be abridged, or that the former shall not be extended."¹⁶⁰

This letter helps to explain the Select Committee's decision to omit Madison's language controlling the constructive enlargement of federal power. Recall that one of the possible reasons why Madison's original language was omitted was because the ultimate language expressed the same principle. In this letter, Madison explains that this was in fact the case. Because any extension of delegated power beyond that intended would abridge the people's retained rights, "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."

A rather vigorous debate has erupted over the meaning of Madison's letter to Washington.¹⁶¹ By describing limitations on power as equivalent to the protection of rights, Madison appears to adopt an interpretation of the Ninth Amendment rejected by Libertarian scholars. Indeed, it is hard to understand Madison's reference to "drawing a line between delegated powers and retained rights" any other way.¹⁶² This

powers and rights to their own state government, free from federal interference. Under this view, preserving the retained rights of the people is *the same thing* as preserving the retained "powers, jurisdiction and rights" of the states. The final draft of the Ninth thus preserved the rights of local government every bit as much as the proposals submitted by the States. Madison's views on this matter were express, as the next section shows.

¹⁶⁰ James Madison to George Washington, December 5, 1789, *reprinted in* The Complete Bill of Rights, *supra* note 10 at 661. A number of scholars have objected to this rights-powers distinction as out of sync with modern understanding of personal rights. The modern view is that rights exist even in situations where a government is acting within an enumerated power. This article does not address the merits of the rights-powers point of view, but only notes its role in the minds of those who adopted the Ninth Amendment.

¹⁶¹ Compare Thomas B. McAfee, Inherent Rights, *supra* note 9 at 145-147, with Levy, Origins of the Bill of Rights, *supra* note 12 at 257-59, and Barnett, Restoring the Lost Constitution, *supra* note 9 at 249-252.

¹⁶² Even some unenumerated rights proponents concede that the Founding generation had a different perspective regarding rights and powers than courts generally do today. See Massey, Silent Rights,

is not the language of overlapping powers and rights. It suggests instead that retained rights begin where delegated powers end, so controlling the one protects the other. Some Libertarian scholars have suggested alternate ways to read the letter,¹⁶³ while others have dismissed Madison's statement as incorrect and that "he knew better."¹⁶⁴ Federalist scholars see this letter as a straightforward statement that the Ninth is simply another way of expressing the doctrine of limited federal power.¹⁶⁵

Surprisingly, given the focus of Madison's letter, relatively little attention has been paid to Randolph's particular concern and why he might have preferred Virginia's 1st and 17th proposals over the final draft of the Ninth and Tenth Amendments.¹⁶⁶ Understanding Randolph's concerns illuminates the significance of Burnley's letter and Madison's response. It also explains the reaction of the Virginia Assembly to the final version of the Ninth Amendment.

2. *Edmund Randolph's Complaint*

As a delegate at the Philadelphia Convention, Governor Edmund Randolph had refused to sign the document.¹⁶⁷ Ultimately, however, he became convinced that the document was worth supporting despite his continued concerns. In the Virginia ratification convention, Randolph defended the Constitution against claims that it created a government of unlimited power:

If it would not fatigue the house too far, I would go back to the question of reserved rights. The gentleman supposes that complete and unlimited legislation is vested in the Congress of the United States. This supposition is founded on false reasoning. . . . [I]n the general Constitution, its powers are enumerated. Is it not, then, fairly deducible, that it has no power but what is expressly given it? –for if its powers were to be general, an enumeration would be needless. . . . I persuade myself that every exception here mentioned

supra note 9 at 67 (“To many of the Founding generation it seemed axiomatic that rights began where powers ended, and powers began where rights ended.”).

¹⁶³ See Barnett, *Restoring the Lost Constitution*, *supra* note 9 at 249-52 (suggesting that Madison was referring to dual approaches for protecting unenumerated rights).

¹⁶⁴ See Leslie Dunbar, *James Madison and the Ninth Amendment*, 42 Va. L. Rev. 627, 633 (1956).

¹⁶⁵ See Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 Colum. L. Rev. 1215, 1291 (1990).

¹⁶⁶ In his most recent work on the Ninth Amendment, Randy Barnett discusses the Madison/Burnley correspondence, but never addresses Randolph's concern itself beyond that inferable from the correspondence. See Barnett, *Restoring the Lost Constitution*, *supra* note 9 at 250-52. Thomas McAfee analyzes Randolph's concerns as described by Burnley, but also fails to explore Randolph's view beyond Burnley's letter. See Thomas B. McAfee, *Inherent Rights*, *supra* note 9 at 145-47. See also Massey, *Silent Rights*, *supra* note 9 at 76-79 (same). None of these authors discuss the debate in the Virginia Assembly.

¹⁶⁷ Levy, *Origins of the Bill of Rights*, *supra* note 12 at 104.

is an exception, not from general powers, but from the particular powers therein vested.¹⁶⁸

According to Randolph, the document followed the assumed principle of limited delegated power. This assumed principle assured the “reserved rights” of the states. Despite this general defense, however, Randolph remained concerned about the Necessary and Proper Clause:

My objection is, that the [Necessary and Proper Clause] is ambiguous, and that that ambiguity may injure the states. My fear is, that it will, by gradual accessions, gather to a dangerous length. This is my apprehension, and I disdain to disown it.¹⁶⁹

Randolph’s comments echoed similar sentiments in other states. It was agreed by all that the federal government was to be one of limited enumerated power, with all non-delegated powers reserved to the states.¹⁷⁰ Finding some way to assure the states that their rights were indeed protected was critical to heading off a second convention.¹⁷¹ Not surprisingly, almost every list of proposed amendments contained a declaration of limited delegated power, and so did Madison’s original Bill.

¹⁶⁸ III Elliot’s Debates, *supra* note 41 at 464.

¹⁶⁹ *Id.* at 470.

¹⁷⁰ A number of voices in the states suggested that a provision protecting the reserved power of the states was more important than the rest of the Bill. William R. Davie of North Carolina wrote to James Madison in June of 1789 informing him of the general sentiment of the state convention regarding proposed amendments to the Constitution. Referring to those whose complaints were “honest and serious” (as opposed to the mere strategic objections being raised by the antifederalists), Davie wrote:

Instead of a Bill of Rights attempting to enumerate the rights of the Indi[v]ual 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.

William R. Davie to James Madison, June 10, 1789, *reprinted in* Creating the Bill of Rights, *supra* note 2 at 246. Davie probably was referring to the comment made by Mr. Spencer in the North Carolina Convention:

It appears to me there ought to be such a clause in the constitution as there was in the Confederation, expressly declaring, that every power, jurisdiction and right, which are not given up by it, remain in the states. Such a clause would render a bill of rights unnecessary.

Mr. Spencer, North Carolina State Convention, July 29, 1788, *reprinted in* The Complete Bill of Rights, *supra* note 10 at 646. In the Virginia Convention, Patrick Henry declared “A bill of rights may be summed up in a few words. What do they tell us? –That our rights are reserved.”

¹⁷¹ See Lash, Rejecting Conventional Wisdom: Federalist Ambivalence in the Framing and Implementation of Article V, *supra* note 33 at 221 (discussing the threat of a second convention and the roll of the Bill in heading off the same).

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

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

As Randolph expressed it, something was needed to prevent the “gradual accessions” of federal power. Others in the Virginia assembly shared Randolph’s concern. Although Virginia ultimately voted to ratify the Constitution, the convention recommended adding, among others, amendments that specifically declared the principle of enumerated power *and* provided a rule of construction. Although we have read these provisions before, because of the role they play in this debate, Virginia’s 1st and 17th proposals are presented again:

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 be construed either as making exceptions to the specified powers where this shall be the case, or otherwise, as inserted merely for greater caution.¹⁷²

As explained above, these two provisions are not redundant. One declares the principle of delegated power, while the other prohibits the extension of those delegated powers beyond that intended by the delegation. As we have seen, similar clauses were suggested by other states as well. Given the perceived importance of adding a clause limiting the construction of delegated federal power, we now can understand why Randolph objected to the Select Committee’s decision to *delete* the very language deemed so important. It was not that Randolph rejected Madison’s explanation that the final version continued to prevent the undue extension of federal

¹⁷² State Ratifications, Virginia, June 27, 1788, *reprinted in* The Complete Bill of Rights, *supra* note 10 at 675 (emphasis added).

power. The problem was that this limit on the constructive enlargement of federal power was *implied* rather than express. “The twelfth amendment,” Randolph complained to fellow Virginian George Washington, “is exceptional to me, in giving a handle to say, that Congress have endeavored to administer an opiate, by an alteration, which is merely plausible.”¹⁷³ Instead of this opiate, Randolph preferred “a provision against extending the powers of Congress” (as contained in Madison’s the earlier draft) because it was “more safe, & more consistent with the spirit of [Virginia’s] 1st and 17th amendments.”

Let’s be clear about what Randolph preferred. Virginia’s 17th proposal imposed a rule of construction that prevented the federal government from extending its own power by implication. This rule of construction was combined with a declaration that “each *state* in the Union shall respectively retain *every power, jurisdiction and right*, which is not by this constitution delegated to the congress of the United States.” There is no language here regarding the retained unenumerated rights of the people.¹⁷⁴ These are statements of state autonomy, and it is against this language that Randolph judged the final draft of the Ninth.

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

The twelfth [the Tenth] amendment does not appear to me to have any real effect, unless it be to excite a dispute between the United States, and every particular state, as to what is delegated. It accords pretty nearly with what our convention proposed; but being once adopted, it may produce new matter for the cavils of the designing.¹⁷⁵

This is not a serious objection and it is not presented as one. After all, the Virginia draft that Randolph preferred also contained the same term “delegated.” It’s not that Randolph had any strong objection to the language of the Tenth, it’s just that,

¹⁷³ Edmund Randolph to George Washington, Dec. 6, 1789, *reprinted in* 5 Documents of the Constitution, *supra* note 1 at 223.

¹⁷⁴ Simply reading Virginia’s 1st and 17th proposals closes the door on any attempt to read Madison’s letter as referring to “alternate strategies” for protecting individual natural rights. The language preferred by Randolph had nothing to do with such rights. Instead, Randolph’s preference was for tandem amendments expressly limiting the construction of federal power and reserving all remaining “rights and powers” to the states. Madison and Washington both knew this. But see Barnett, *Restoring the Lost Constitution*, *supra* note 9 at 250 (letter speaks of “two complementary strategies” for protecting individual rights).

¹⁷⁵ Edmund Randolph to George Washington, Dec. 6, 1789, *reprinted in* 5 Documents of the Constitution, *supra* note 1 at 223.

alongside of the Ninth in its current form, it did not “appear to accomplish much.”¹⁷⁶ It required a rule of construction to prevent enumerated federal power from swamping the reserved rights of the states. Thus, the wording of the Ninth was the focus of Randolph’s objections, and these objections were enough to convince Randolph to hold up ratification of the Ninth *and* Tenth Amendments.

3. *The Virginia Senate Report*

In his December 6 letter to George Washington, Edmund Randolph reported that, despite his concerns about the Ninth Amendment, the Virginia House had agreed to ratify all twelve proposed amendments.¹⁷⁷ This left the matter in the hands of the Virginia Senate where antifederalists were more prevalent than in the House.¹⁷⁸ As Madison later reported to Washington, “The House of Delegates got over the objections to the 11 and 12, but the Senate revived them with an addition of the 3 and 8 articles, and by a vote of adherence prevented a ratification.”¹⁷⁹ Antifederalists had thus “revived” Randolph’s good faith objections to the Ninth Amendment in an attempt to derail ratification altogether.¹⁸⁰

A majority of the Senate prepared a report explaining their reasons for objecting to the listed amendments. There is reason to take this report with a grain of salt—the Senate was dominated by antifederalists who had an incentive to invent objections where none might actually be warranted.¹⁸¹ But for precisely that reason, their declared objection to the Ninth Amendment is worth considering. The attempt was to use Randolph’s objections as a screen for adding more partisan objections. Thus, the

¹⁷⁶ Randolph’s failure to seriously object to the Tenth is significant for another reason. He apparently believed it accomplished the same purpose as the Virginia draft which stated:

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.”

Although the language of the federal Tenth is more sedate, Randolph believed it “accords pretty nearly with what our convention proposed.”

¹⁷⁷ Edmund Randolph to George Washington, Dec. 6, 1789, *reprinted in*, 5 Documentary History of the Constitution, *supra* note 1 at 222.

¹⁷⁸ According to Randolph, in the Senate “a majority is unfriendly to the government.” *Id.* See also Levy, *Origins of the Bill of Rights*, *supra* note 12 at 42.

¹⁷⁹ James Madison to George Washington, Jan. 4, 1790, *reprinted in* 5 Documentary History of the Constitution, *supra* note 1 at 230-31.

¹⁸⁰ See Levy, *Origins of the Bill of Rights*, *supra* note 12 at 42.

¹⁸¹ Leonard Levy describes the Senate Report as “grossly misrepresenting the First Amendment (then the third).” *Id.* at 42. Curiously, Levy says nothing at all about the Senate’s characterization of the other amendments, including the Ninth and Tenth. Madison himself was not troubled by the Senate Report because he believed they had gone too far, particularly in regard to the Senate’s purported objections to the First Amendment (which they listed as the 3rd). James Madison to George Washington, Jan. 4, 1790, *reprinted in* 5 Documentary History of the Constitution, *supra* note 1 at 231.

antifederalist's attempt to use the concerns of Randolph (a "friend to the Constitution") was likely to succeed only to the degree that his concerns were accurately represented. Here then is how the Senate described its objections to the "11th proposed amendment":

We do not find that the 11th article is asked for by Virginia or any other State; we therefore conceive that the people of Virginia should be consulted with respect to it, even if we did not doubt the propriety of adopting it; but it appears to us highly objectionable.¹⁸²

The Senate Report here states the truth: No state *had* proposed language such as that adopted by the Select Committee. At the very least, noted the Senate, Congress should "consult" with the states and explain the meaning of the Clause. The Report then continued by comparing the proposed Ninth with Virginia's 17th proposal:

If [the proposed 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.¹⁸³

The Monday after the Senate delivered its report, a *minority* of the Senate published their objections to the Majority Report. According to the minority, even if the "3d, 8th and 12th" amendments were "not fully up to those proposed" by the Virginia convention, they were nevertheless sufficiently "analogous" and secured the people's

¹⁸² Journal of the Senate of the Commonwealth of Virginia, Saturday, December 12, 1789, at 63 (Richmond 1828) (on file with the author).

¹⁸³ *Id.* at 63-64. The Senate's reported objections to the 12th were as follows:

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

Id. at 64.

“political and natural rights.”¹⁸⁴ As for the 11th, the minority weakly noted that “though not called for by any of the adopting States, we consider [it] as tending to quiet the minds of many, and in no possible instance productive of danger to the liberties of the people.”¹⁸⁵

This remarkable exchange between the Senate Majority and Minority reports raises a host of intriguing issues regarding the original understanding of the Ninth Amendment. To begin with, we may now have a clearer understanding of Edmund Randolph’s objections. We know that Randolph led the opposition to the Ninth Amendment in the Virginia House of Delegates. According to Madison, the objections raised in the House were “revived” in the Senate. If the above Senate Report accurately “revives” the concerns that Randolph raised in the House, then this clarifies Randolph’s objection to the Ninth as reported by Hardin Burnley. According to Burnley, Randolph’s objection (if he understood it), was focused on the word “retained” and seemed to argue that because the retained rights could not be enumerated, it would have been better to use the “no extension of power” language from Virginia’s 17th proposal. The Senate Report, however, separates these issues into two distinct points. The Report first argues that if the Ninth was intended to prevent the extension of federal power, then it is defective and should have used the language of Virginia’s proposed 17th amendment. We know, in fact, that this was Randolph’s preferred language for the Ninth. The Report’s second point was that, if the Ninth was intended to protect retained personal rights (something no state asked for), then it was defective because it would not be clear exactly what rights were protected. It is possible that Burnley had a hard time following the distinction between the two objections, and so reported them to Madison as a single complaint against the Ninth. In any event, Burnley accurately reported Randolph’s preference: Virginia’s 17th amendment.

In terms of whether the Ninth was understood as a Federalist or Libertarian provision, the Senate Report suggests that it was possible to read the final language of the Ninth *either* as preventing the extension of federal power *or* as protecting retained “personal rights.” When one adds the minority report, a third possibility arises: The final language of the Clause may have been so ambiguous as to render it without any identifiable meaning beyond not being “danger[ous] to the liberties of the people.” In other words, it is possible that the roots of the Ninth Amendment as a limitation on federal power were sundered by the Select Committee’s ambiguous choice of language—language that rendered the Ninth without *any* identifiable original meaning.

¹⁸⁴ Id. at 66.

¹⁸⁵ Id. at 66-67.

Before going so far as to abandon the search for original understanding, however, a few points are in order. First, no other state besides Virginia raised objections to the language of the Ninth Amendment. Had Virginia ratified, the Bill of Rights, including the Ninth would have been added to the Constitution within a matter of months. Secondly, despite Randolph's objections, the Virginia House overcame whatever doubts they had about the Ninth within a few days. It was only in the Senate, where antifederalist sentiment was strongest, that objections continued to be raised against the Ninth. Also, it is unclear just how great an ambiguity actually had been raised by the Select Committee's choice of language. Madison believed that the Ninth continued to prevent the extension of federal power, and so did Virginia Delegate Hardin Burnley. Finally, we know the preference of Randolph and the Virginia Assembly. Their desire was not for a provision protecting personal rights, but a limitation on the extension of federal power. Although it remained possible to read the final language of the Ninth as adopting the principles of Virginia's 17th, such a reading had been rendered ambiguous and, at least to Randolph, was only "plausible."

The Senate Report called on Congress to remove the ambiguity and explain the purpose and effect of the Ninth Amendment. James Madison did so in his speech on the Bank of the United States, a speech given while ratification of the Bill of Rights remained pending in Virginia.

D. Madison's Speech Regarding the Bank of the United States

The most significant piece of historical evidence relating to the Ninth Amendment is James Madison's speech objecting to the incorporation of the Bank of the United States. In this speech, the drafter of the Ninth Amendment explained its purpose and meaning while actually *applying it* to a specific legal controversy. Although first noticed in a 1968 law review article,¹⁸⁶ until recently Madison's speech remained otherwise overlooked as evidence regarding Madison's views on the Ninth Amendment.¹⁸⁷

Only a few months after the ratification of the Constitution, Secretary of the Treasury Alexander Hamilton submitted a plan to Congress for chartering a national bank. The Senate approved the plan and the matter was debated in the House of Representatives in 1791, while ratification of the proposed Bill of Rights was still pending in Virginia.

¹⁸⁶ Van Loan, *Natural Rights and the Ninth Amendment*, 2 B.U. L. Rev. 1, 15 (1968).

¹⁸⁷ In his 1989 collection of essays on the Ninth Amendment, Randy Barnett reprinted Van Loan's article which mentions Madison's speech, and wrote his own essay discussing the importance of the speech. See 1 *Rights Retained by the People*, supra note 11 at 149 (Van Loan) and 2 *Rights Retained by the People*, supra note 11 at 13-17. His analysis, however, focuses on one particular sentence which he believes is Madison's sole reference to the Ninth in the speech. As this section shows, Madison's argument regarding the Ninth Amendment goes well beyond that single sentence.

Proponents of the Bank argued that the charter was authorized by Congress' enumerated powers to tax and regulate commerce in Article I, section 8, as well as by Congress's authority to "make all needful rules and regulations respecting the territory or other property belonging to the United States" under Article IV.¹⁸⁸ Those who opposed the Bank maintained that only an unreasonably expansive reading of these powers could authorize the charter.

Thomas Jefferson, for example, argued that such a "latitude of construction" would destroy the principle of enumerated powers declared in the Tenth Amendment.

I consider the foundation of the Constitution as laid on this ground: That "all powers not delegated to the United States, by the Constitution, nor prohibited by it to the states, are reserved to the states or to the people. . . . If such a *latitude* of construction be allowed to [the phrase "necessary and proper] as to give any non-enumerated power, it will go to every one, for there is not one which ingenuity may not torture into a convenience in some instance or other, to some one of so long a list of enumerated powers. It would swallow up all the delegated powers, and reduce the whole to one power. . . . The present is a case of a right remaining exclusively with the states."¹⁸⁹

In a written opinion to President Washington, (now) Attorney General Edmund Randolph presented the arguments for and against the constitutionality of the Bank Bill.¹⁹⁰ Noting his agreement with the arguments *opposed* to the Bank, Randolph proceeded to lay out that argument in full. Randolph began by noting that, although governments without constitutions might "claim a latitude of power not always easy to determine," the federal government was one of enumerated power as "confessed by Congress, in the twelfth amendment."¹⁹¹ Addressing the proper interpretation of Congress' enumerated powers, Randolph conceded that constitutions generally should receive a more liberal interpretation than statutes, for "[t]he one comprises a summary of matter, for the detail of which numberless will be necessary; the other is the very

¹⁸⁸ See Edmund Randolph, The Constitutionality of the Bank Bill, Feb. 12, 1791, *reprinted in* H. Jefferson Powell, *The Constitution and the Attorneys General* 7-9 (1999) (presenting arguments by those supporting the bank).

¹⁸⁹ Opinion on the Constitutionality of the Bill for Establishing a National Bank, 19 Papers of Thomas Jefferson, 275, 279-80 (1974) (emphasis added).

¹⁹⁰ Edmund Randolph, The Constitutionality of the Bank Bill, Feb. 12, 1791, *reprinted in* *The Constitution and the Attorneys General*, *supra* note 188 at 3-9.

¹⁹¹ *Id.* at 4. Randolph described state legislatures as governments which are "presumed to be left at large as to all authority which is communicable by the people, and does not affect any of those paramount rights, which a free people cannot be supposed to confide even to their representatives." *Id.* The federal government, on the other hand, was one in which "powers are described." It appears then, that Randolph subscribed to an idea of inalienable rights which not even state governments could violate. As we have seen, however, subscribing to natural rights can exist alongside a reading of the Ninth Amendment as limiting federal power to the injury of the states.

detail.”¹⁹² The United States, however, was comprised of two kinds of governments, each with its own constitution. Under this kind of system, the presumption of liberal construction had to be modified:

When we compare the modes of construing a state and the federal constitution, we are admonished to be stricter with regard to the later, because there is a greater danger of error in defining partial than general powers.¹⁹³

Canvassing the various claimed sources of power for the Bank, Randolph concluded “a similar construction on every specified federal power, will stretch the arm of Congress into the whole circle of state legislation. . . . [L]et it be propounded as an eternal question to those who build new powers on this clause, whether the *latitude* of construction which they arrogate will not terminate in an unlimited power in Congress?”¹⁹⁴

We have heard Edmund Randolph’s concerns about constructive enlargement of federal power before. Randolph objected to the Select Committee’s removal of a provision expressly limiting the construction of federal power from the final draft of the Ninth Amendment, preferring instead the approach of the Virginia ratifying convention which had suggested two separate amendments (the 1st and 17th), one declaring the principle of delegated power, the other declaring a rule of construction preserving that principle. To Randolph (and Jefferson), the doctrine of enumerated power declared by the Tenth was under threat due to a “latitudinarian” construction of federal power. Their arguments echoed those of James Madison who, true to his word, presented the Ninth Amendment as a rule of construction protecting the enumerated power principle of the Tenth.

In his speech before the House of Representatives, James Madison began his discussion of whether Congress had power to establish the Bank by reviewing first principles. The grant of power to the federal government by the Constitution, noted Madison, was limited:

It is not a general grant, out of which particular powers are excepted—it is a grant of particular powers only, leaving the general mass in other hands. So it had been understood by its friends and its foes, and so it was to be interpreted.¹⁹⁵

¹⁹² Edmund Randolph, The Constitutionality of the Bank Bill, Feb. 12, 1791, *reprinted in* The Constitution and the Attorneys General, *supra* note 188 at 4.

¹⁹³ *Id.* at 5.

¹⁹⁴ *Id.* at 7 (emphasis added).

¹⁹⁵ James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791), *reprinted in* Writings, *supra* note 3 at 482.

Madison then laid out rules for interpreting the Constitution. According to his first principle “an interpretation that destroys the very characteristic of the government cannot be just.”¹⁹⁶ Applying this principle to the claim that the power to “provide for the common defense and general welfare” justified the bank, Madison argued:

To understand these terms in any sense, that would justify the power in question, would give to Congress an unlimited power; would render nugatory the enumeration of particular powers; would supercede all the powers reserved to the state governments.¹⁹⁷

As he would in his Virginia Resolutions against the Alien and Sedition Acts, Madison argued that constructive enlargement of federal power entrenched upon the rights of the states.¹⁹⁸ Moving to specific sources of claimed power, Madison focused much of his speech on the Necessary and Proper Clause. Here, Madison again begins with first principles:

Whatever meaning this clause may have, none can be admitted, that would give unlimited discretion to Congress. Its meaning must, according to the natural and obvious force of the terms and the context, be limited to means *necessary* to the *end*, and *incident* to the *nature* of the specified power. The clause is in fact merely declaratory of what would have resulted by unavoidable implication, as the appropriate, and as it were, technical means of executing those powers. In this sense it had been explained by the friends of the constitution, and ratified by the state conventions.¹⁹⁹

In this passage, Madison sounds a theme that would be repeated in his writings on constitutional interpretation for the rest of his life. The proper construction of federal power should reflect the understanding of the state conventions that ratified the Constitution. Prior to the adoption of the Bill of Rights, it had been the understanding of the states that constructive expansion of federal power by way of “implication” was forbidden by the assumed doctrine of enumerated power:

If, again, Congress by virtue of the power to borrow money, can create the ability to lend, they may by virtue of the power to levy money, create the ability to pay it. The ability to pay taxes depends on the general wealth of the society, and this, on the general prosperity of agriculture, manufactures and commerce. Congress may then give bounties and make regulations on all of these objects. . . .The doctrine of implication is always a tender one. The

¹⁹⁶ Id.

¹⁹⁷ Id. at 483.

¹⁹⁸ See *infra* note 245 and accompanying text.

¹⁹⁹ Id. at 484-85 (emphasis in original).

danger of it has been felt in other governments. The delicacy was felt in the adoption of our own; the danger may also be felt, if we do not keep close to our chartered authorities.²⁰⁰

If implications, thus remote and thus multiplied, can be linked together, a chain may be formed that will reach every object of legislation, every object within the whole compass of political economy. The latitude of interpretation required by the bill is condemned by the rule furnished by the Constitution itself.²⁰¹

Although this rule in the original Constitution was not express, Madison nevertheless argued that it was implicit in way powers were enumerated. For example, Madison cited the numerous places in the Constitution where “great and important” powers were not left to mere plausible implication, but instead were expressly enumerated.²⁰²

As Madison moved to the conclusion of his speech, he recounted the history of how this rule against a latitudinarian construction of federal power moved from implicit to express. He 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.”²⁰³ State conventions had been assured that the Necessary and Proper Clause would not be interpreted to give “additional powers to those enumerated.”²⁰⁴ 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.”²⁰⁵ He then noted

“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.”²⁰⁶

Madison thus reminded his audience of the proposals made by the state conventions seeking to guard against dangerous “latitudinarian” constructions of federal power. Should any have any doubts about this, Madison tells them to “look it up.” Having grounded his theory of interpretation in the state conventions and their calls for “explanatory declarations and amendments” preventing “latitudinarian constructions,”

²⁰⁰ Id. at 485-86.

²⁰¹ Id. at 486.

²⁰² Id. at 487.

²⁰³ Id. at 488.

²⁰⁴ Id. at 489.

²⁰⁵ Id.

²⁰⁶ Id.

Madison then links all this history to the drafting and ultimate ratification of the 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.²⁰⁷ He read several of the articles proposed, remarking particularly on the 11th. and 12th. the former, as guarding against a latitude of interpretation—the latter, as excluding every source of power not within the constitution itself.²⁰⁸

By all rights, Madison’s speech on the Bank of the United States should have a place of honor in the documentary history of the Ninth Amendment. That it has gone unnoticed for so long is nothing short of remarkable.²⁰⁹ In his speech, Madison

²⁰⁷ Ratification was still pending in Virginia.

²⁰⁸ Madison, Writings, *supra* note 3 at 489.

²⁰⁹ Randy Barnett suggests that Madison believed the Bank Bill violated the Ninth Amendment because it abridged the “equal rights” of citizens. See 2 Rights Retained by the People, *supra* note 1 at 15. See also, Barnett, Restoring the Lost Constitution, *supra* note 9 at 241 (Madison’s uses of the Ninth Amendment show that, like the natural rights that were enumerated, the unenumerated rights retained by the people provide a two-fold check on government power. Their existence argues against a latitudinarian interpretation of enumerated powers when those powers are used to restrict the liberties of the people.”). Barnett’s claim is based on a single sentence in Madison’s speech: “It involves a monopoly, which affects the equal rights of every citizen.” Writings, *supra* note 3 at 488. This is Madison’s sole reference to equal rights in a lengthy speech and it occurs wholly outside the context of Madison’s discussion of the Ninth Amendment. Madison himself, in fact, separated his constitutional arguments regarding the Ninth and Tenth Amendments, from policy arguments regarding unequal advantages being given to the bank monopoly. In a previously unnoticed draft Veto of the Bank Bill prepared at President Washington’s request, Madison wrote:

Feb. 21, 1791
Gentlemen of the Senate

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

(if to the Constitutionality)

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

(if to the merits alone or in addition)

I object to the Bill because it appears to be unequal between the public and the Institution in favor of the institution; imposing no conditions on the latter equivalent to the stipulations assumed by the former. (Quer. If this be within the intimation of the President.) I object to the

follows the Ninth from its beginnings in the state conventions, through the drafting process, and into the Virginia Assembly.²¹⁰ Having retraced these steps ourselves, Madison's argument is easy to follow: The federal government is one of limited enumerated power. All non-delegated powers are reserved to the states. Interpretations of undue latitude would destroy this principle by allowing the government to invade areas of law reserved to the states (which, to Madison, included subjects such as mining, agriculture and manufacturing). These interpretations of undue latitude were forbidden by the "rule furnished by the constitution itself." Although implied in the original Constitution, an express rule against latitudinarian constructions was proposed by the state conventions and found its ultimate expression in the Ninth Amendment.

Madison's speech was given while Virginia continued to debate the Bill of Rights—a debate we know was focused in part on Congress' intended meaning of the Ninth Amendment. In the months following Madison's speech, antifederalist efforts in Virginia waned, and, later that same year, on December 15, 1791, Virginia ratified the proposed amendments and the Bill of Rights became part of our Constitution.²¹¹ There is no historical evidence that Madison's speech actually tilted Virginia towards ratification. It is nevertheless significant that Virginia's ratification vote took place

Bill because it is in all cases the duty of the Government to dispense its benefits to individuals with as impartial a hand as the public interest will permit; and the Bill is in this respect unequal to individuals holding different denominations of public Stock and willing to become subscribers.

VI The Writings of James Madison: Comprising His Public Papers and His Private Correspondence, Including Numerous Letters and Documents Now for the First Time Printed (Gaillard Hunt, ed.) (1908), at 42-43.

Professor Barnett also argues that St. George Tucker's Treatise on the Constitution supports his individual rights reading of Madison's speech. See Barnett, Restoring the Lost Constitution, *supra* note 9 at 241. Here, Barnett quotes Tucker's "rule of construction" which he believes refers to the Ninth Amendment: "[I]t follows, as a regular consequence, that every power which concerns the right of the citizen, must be construed strictly, where it may operate to infringe or impair his liberty; and liberally, and for his benefit, where it may operate to his security and happiness, the avowed object of the constitution." *Id.* at 242. Tucker, however, believed that the state governments "retain every power, jurisdiction and right not delegated to the United States, by the constitution, nor prohibited by it to the states." See Tucker, View of the Constitution of the United States," *supra* note 137 at 241. The passage Barnett quotes is part of a larger section in which Tucker pairs the Ninth with the Tenth Amendment, *id.* at 307, and which ends with Tucker embracing a rule of construction which reserves all non-delegated "rights and powers" to the states. See *id.* at 308 ("every power which has been carved out of the states, who, at the time of entering into the confederacy, were in full possession of all the rights of sovereignty, is in like manner to be construed strictly, whenever a different construction might derogate from the rights and powers, which by the latter of these articles [the Tenth] are expressly acknowledged to be reserved to them respectively.").

²¹⁰ The Virginia Assembly was still considering whether to ratify the Ninth and Tenth Amendment at the time Madison gave this speech.

²¹¹ See Levy, Origins of the Bill of Rights, *supra* note 12 at 43.

following this public articulation of the meaning of the Ninth Amendment by Virginia's own congressional representative.

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

E. Missing History

A number of factors may explain why Madison's speech has not played a significant role in contemporary scholarship on the Ninth Amendment. One reason may involve Madison's reference to the Ninth as the "Eleventh" Amendment. By referring to the Ninth according to its position on the original list of *twelve* proposed amendments, Madison was using a convention common in the early years of the Constitution. As the years went by, and it became clear that the first two would not be ratified, the convention changed and the amendments came to be known as one through ten. As we shall see, this "renumbering" has had the effect of obscuring other early references to the Ninth Amendment.²¹² But even Madison's reference to the "Eleventh" is hard to find. The speech is hardly mentioned in most constitutional law textbooks, and in the one textbook that gives serious attention to Madison's speech, his reference to the "Eleventh and Twelfth" Amendments is edited out.²¹³ You can find Madison's speech in the Founders' Constitution under the section relating to the Necessary and Proper Clause.²¹⁴ Almost the entire speech is reproduced . . . except for Madison's reference to the "Eleventh" Amendment.²¹⁵ Jack Rakove devoted an entire book to Founding approaches to constitutional interpretation, and specifically addresses Madison's speech as an example of Madison's approach to construing the Constitution, yet nowhere mentions Madison's reference to the Ninth Amendment.²¹⁶

²¹² See Lash, *The Lost Jurisprudence*, *supra* note 19 at note 66 and accompanying text.

²¹³ See *Processes of Constitutional Decisionmaking*, *supra* note 15 at 8-11.

²¹⁴ *3 Founders' Constitution*, *supra* note 10 at 244-45.

²¹⁵ Compare *id.* with Madison, *Writings*, *supra* note 3 at 489.

²¹⁶ See Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 350-54 (1996).

More than just the speech is missing from many historical accounts. The Virginia dispute over the Ninth and Tenth Amendments has received but scant attention by a few Ninth Amendment scholars.²¹⁷ Of those few scholars who do address the letters by Burnley and Madison, no one to my knowledge has explored the debate in Virginia, or considered the significance Virginia's proposed 1st and 17th amendments in explaining Edmund Randolph's concern. In fact, the state convention proposals in general have received very little attention in Ninth Amendment historical scholarship.²¹⁸ This might seem surprising, given that constitutional historians seeking the original meaning of a particular clause generally concede that state ratification debates are crucial sources of evidence.²¹⁹

Once again, we see the power of the categorical assumption. If one assumes that the precursors to the Ninth would speak the language of rights, while precursors to the Tenth would speak the language of powers, then the state convention proposals for the Ninth literally disappear. None of these proto-Ninth Amendments spoke the language of rights. All of the state proposals used the language of power controlled by a rule of construction. The rights language was a locution Madison himself. The addition was harmless: To Madison it had the same purpose and effect as language suggested by

²¹⁷ In his recent book, Thomas McAfee discusses Burnley's letter and Madison's letter to Washington which reproduces that letter in a section entitled "The Ratification Debate in Virginia." See Thomas McAfee, *Inherent Rights, the Written Constitution, and Popular Sovereignty: The Founders' Understanding* 145-46 (2000). Surprisingly, McAfee does not discuss the events taking place in Virginia at the time of Burnley's letter. McAfee limits his discussion to arguing that (correctly in my mind) Burnley and Madison's letters reflect a view of the Ninth Amendment as preventing an extension of federal power through the language of retained rights. McAfee appears to continue in his belief, however, that the Ninth does no more than preserve the doctrine of enumerated powers. *Id.* at 147.

²¹⁸ Two contemporary Ninth Amendment scholars who have noted the importance of Virginia's 17th proposal are Thomas B. McAfee and Russell L. Caplan. See Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 73 *Va. L. Rev.* 223 (1983); Thomas B. McAfee, *The Federal System As a Bill of Rights*, *supra* note 198 at 147. Neither Caplan nor McAfee, however, read the Ninth as reflecting Virginia's call for a provision controlling the constructive enlargement of federal power. Prior to the contemporary debate over unenumerated rights, the link between the Ninth Amendment and Virginia's seventeenth proposal was seen as obvious. See, e.g., Edward Dumbauld, *The Bill of Rights*, *supra* note 9 at 55 (1957). Similarly, in his 1971 two volume work on the Bill of Rights, Bernard Schwartz lists the "Sources of Bill of Rights." The sole document listed as a source for the Ninth Amendment is "Va. Convention, proposed amendment 17." See II *The Bill of Rights: A Documentary History*, *supra* note 86 at 1204. Akhil Amar in his book *The Bill of Rights* points out the link between New York and Virginia's proposed amendments and the Ninth and Tenth Amendments. See Amar, *The Bill of Rights*, *supra* note 59 at 119-122. Amar does not address these provisions as rules of construction, but rather as statements of popular sovereignty and the right of the people to alter or abolish their form of government. *Id.*

²¹⁹ See Whittington, *Constitutional Interpretation*, *supra* note 56 at 163-64 ("originalism refers to the intentions of the various individuals who composed the ratifying convention and the degree of agreement that they expressed over the meaning of constitutional terms"); Barnett, *Restoring the Lost Constitution*, *supra* note 9 at 98 (advocating original meaning analysis and explaining the importance of ratifying conventions in determining such meaning).

the state conventions, and it had the added value of responding to the Federalists' earlier argument against adding a Bill of Rights.²²⁰ The Select Committee's decision to delete the powers language and keep Madison's personal locution has had the unlucky effect of masking the role state conventions played in the creation and ratification of the Ninth Amendment, a role Madison himself referred to in his discussions regarding the Constitution's rule of construction.²²¹ The mistaken assumption that precursors to the Ninth Amendment must concern "rights" and not "powers" has affected not only scholarship,²²² it has had an impact on the *collection* and presentation of historical materials.

In his outstanding collection of historical materials on the Bill of Rights, Neil Cogan identifies only three proposals for the "Ninth Amendment" suggested by the state ratifying conventions.²²³ One of these is an expanded version of New York's proposal, with Cogan's version including New York's declaration of the "essential rights" of Life, Liberty and the pursuit of Happiness.²²⁴ Cogan's second "proposed Ninth Amendment" is not a proposed amendment at all, but is instead the first two clauses of the North Carolina Convention's submitted "Declaration of Rights:"

1st. That there are certain natural rights of which men, when they form a social compact, cannot deprive or divest their posterity, among which are the enjoyment of life, and liberty, with the means of acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.
2d. That all power is naturally vested in, and consequently derived from the people; that magistrates therefore are their trustees, and agents, and at all times amenable to them.²²⁵

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

²²⁰ See *supra* note 29 and accompanying text. Adding such language would suggest that the prior concerns about a Bill were not contrived.

²²¹ See *supra* note 195 and accompanying text (Madison's speech on the Bank of the United States); *infra* note 279 and accompanying text (Madison's letter on *McCulloch v. Maryland*).

²²² See Massey, *Silent Rights*, *supra* note 9 at 11; Barnett, *Restoring the Lost Constitution*, *supra* note 9 at 248.

²²³ Cogan, *The Complete Bill of Rights*, *supra* note 10 at 635-36.

²²⁴ *Id.* at 635.

²²⁵ *Id.* at 635-36. The critical language distinguishing North Carolina's "Declaration of Rights" from its "Amendments to the Constitution" can be found in 4 Elliot's Debates, *supra* note 41 at 242-47, and 1 Rights Retained by the People, *supra* note 11 at 364-70.

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

This proposal is strikingly close to Madison's draft of the Ninth Amendment which declared "exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed . . . to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution."²²⁶ Despite the similarity to Madison's Ninth, Cogan places North Carolina's proposal with materials relating to the *Tenth* Amendment.²²⁷

Like North Carolina, Virginia separated its "proposed amendments" from a list of broader principles it desired to be added to the Constitution.²²⁸ As his third and final example of a proposed Ninth Amendment, Cogan cites one such provision, an almost a verbatim repeat of the North Carolina's "natural rights" provision cited above.²²⁹ Left out of this section, of course, is Virginia's actual proposal, the 17th, despite its clear similarity to Madison's original draft of the Ninth, and despite Madison's obvious link to the Virginia convention. Once again, Cogan places Virginia's 1st and 17th proposals in his section on the Tenth Amendment.²³⁰ This placement can only be explained as reflecting a powerful Libertarian assumption; provisions speaking of rights relate to the Ninth while provisions limiting federal power relate to the Tenth.²³¹

Another outstanding source of original historical materials relied upon by legal scholars is Kurland and Lerner's five volume set, *The Founders' Constitution*.²³² These volumes bring together a remarkable set of original source materials relating to the principles and texts of every provision in the Constitution. For example, materials relating to the religion clauses of the First Amendment include the Virginia ratifying convention's proposed amendment on the subject of religion.²³³ In the section on the Ninth Amendment, however, the Virginia convention suddenly has nothing to say. In

²²⁶ Madison, Writings, *supra* note 3 at 443.

²²⁷ North Carolina, August 1, 1788, *reprinted in* The Complete Bill of Rights, *supra* note 10 at 674-75.

²²⁸ Compare 1 Rights Retained by the People, *supra* note 1 at 380 ("That there be a declaration or bill of rights asserting, and securing from encroachment, the essential and unalienable rights of the people, in some such manner as the following:--), with *id.* at 383 ("Amendments to the Constitution").

²²⁹ Cogan, Complete Bill of Rights, *supra* note 10 at 636.

²³⁰ *Id.* at 675.

²³¹ *Id.* at 627.

²³² *The Founders' Constitution*, *supra* note 10.

²³³ 5 *Founders' Constitution*, *supra* note 10 at 89.

fact, Kurland and Lerner include not a single proposed amendment from the state conventions in their section on the Ninth.²³⁴

Cogan's Complete Bill of Rights and Kurland & Lerner's Founders' Constitution are both significant sources of historical information. Both are on my bookshelf and I refer to them often. Neither source, however, accurately presents the documentary history of the Ninth Amendment. But neither are they unique in their failure to recognize the roots of the Ninth Amendment. So remarkably erased are the state convention proposals from contemporary scholarship that the great historian Leonard Levy himself quotes Madison's original draft of the Ninth Amendment, *including* the "constructive enlargement of power" language suggested by the state conventions, and yet still claims that "Madison improvised that proposal. No precise precedent for it existed."²³⁵ When it comes to the state conventions and Madison speech, it's as if the history is not there.²³⁶ Unlucky indeed.

IV. Latitudinarian Interpretation of the Constitution: Applying the Rule of Construction

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

John Taylor, "Construction Construed and Constitutions Vindicated"
(1820) (emphasis in original)²³⁷

²³⁴ Id. at 388. Nor do Kurland and Lerner include any proposals from the state conventions relating to the Tenth Amendment. Id. at 403 (citing only James Iredell's personal proposal in the North Carolina Ratifying Convention).

²³⁵ Levy, Origins of the Bill of Rights, *supra* note 12 at 247. As do Cogan and Kurland & Lerner, Levy finds the roots of the Ninth in broad declaration of rights provisions. See id. at 249.

²³⁶ To his credit, Randy Barnett includes a full rendering of state convention proposals for amendments to the Constitution in an appendix to his collection of essays on the Ninth Amendment, 1 The Rights Retained By the People, *supra* note 11 at 353. Barnett does not, however, indicate which of these proposals relate to the Ninth and which relate to the Tenth Amendment. Barnett also emphasizes the importance of the state conventions in attempting to identify the original meaning of the constitution, and he does so in regard to other provisions in the Constitution. See Barnett, Restoring the Lost Constitution, *supra* note 9 at 98. Surprisingly, Barnett does not discuss the state conventions and their proposed "Ninth Amendments" in his discussion of the Ninth in the same work. See id. at pp. 54-60; 234-252. At one point, Barnett links what he believes is Sherman's draft of the Ninth amendment with similar "proposals" from North Carolina and Virginia. Id. at 247, n.85. As explained above, none of these provisions are precursors to the Ninth Amendment.

²³⁷ John Taylor, Construction Construed and Constitutions Vindicated 46 (1820, 1998 reprint) (emphasis in original).

A. The Internal Improvements Bill

Given that Madison gave his speech on the Bank of the United States at the same time ratification of the Ninth and Tenth Amendments was pending in Virginia, one might wonder whether his remarks were made solely with an eye towards an audience in Richmond. As it turned out, his speech expressed principles he continued to articulate throughout his career and into retirement.

As President, James Madison vetoed “an act to set apart and pledge certain funds” for constructing roads and canals on the grounds that the act exceeded the powers of the federal government.²³⁸ In response to the attempt to ground the law in the commerce clause, Madison wrote that doing so required “a latitude of construction departing from the ordinary import of the terms.”²³⁹ Repeating arguments he made in the case of the Bank of the United States, Madison rejected the attempt to ground the law in the power “to provide for the common defense and welfare”

[Doing so] would be contrary to the established and consistent rules of interpretation, as rendering the special and careful enumeration of powers which follow the clause nugatory and improper. Such a view of the Constitution would have the effect of giving to Congress a general power of legislation instead of the defined and limited one hitherto understood to belong to them, the terms “common defense and general welfare” embracing every object and act within the purview of a legislative trust. It would have the effect of subjecting both the Constitution and laws of the several states in all cases not specifically exempted to be superseded by laws of Congress. . . . Such a view of the Constitution, finally, would have the effect of excluding the judicial authority of the United States from its participation in guarding the boundary between the legislative powers of the General and the State Governments, inasmuch as questions relating to the general welfare, being questions of policy and expediency, are unsusceptible of judicial cognizance and decision.²⁴⁰

Expanding on his arguments in the Bank controversy, Madison explores the purpose of the rule of construction. It is meant to prevent latitudinarian readings which break down the “boundary between the legislative powers of the General and the State Governments.” This rule was not only a guide for the legislature, it was the duty of the judicial branch to “guard this boundary” by applying the proper rule.²⁴¹ Nor did it

²³⁸ Writings, *supra* note 3 at 718.

²³⁹ *Id.* at 719.

²⁴⁰ *Id.*

²⁴¹ But see *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 556 (1985) (Blackmun, J.) (the political process, not the courts, protect the autonomy of the states).

matter whether the states favored congressional action in this case. According to Madison, if Congress had not the power “the assent of the States in the mode provided in the bill cannot confer the power.”²⁴² Madison concludes by summing up the rule of construction which, according to his speech on the Bank of the United States, is grounded in the Ninth and Tenth Amendments:

[S]eeing that such a power is not expressly given by the Constitution, and believing that it can not be deduced from any part of it without an inadmissible latitude of construction and a reliance on insufficient precedents; believing also that the permanent success of the Constitution depends on a definite partition of powers between the General and the State Governments, and that no adequate landmarks would be left by the constructive extension of the powers of Congress as proposed in the bill, I have no option but to withhold my signature from it.²⁴³

The subject of latitudinarian interpretations remained close to Madison’s heart throughout his life.²⁴⁴ He never wavered from his initial belief that such constructions threatened the balance of power between the federal government and the states. To Madison, the principles expressed by the Ninth and Tenth Amendments were not simply a matter of “states’ rights.” The success of the Constitution, and the liberties contained therein, depended on restraining the inexorable pressure by the federal government to expand its own authority. The strands of “constructive enlargement of power,” state autonomy, and individual liberty were combined in Madison’s remonstrance against the Alien and Sedition Acts.

D. The Alien and Sedition Acts

²⁴² Madison, Writings, *supra* note 3 at 720. See also, *New York v. United States*, 505 U.S. 144, 182 (1992) (O’Connor, J.) (“Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the “consent” of state officials.”).

²⁴³ *Id.* at 720. See also, *Journal of the House of Representatives of the United States, 1847-1848*, Monday, January 17, 1848:

Mr. Cummins offered the following resolution; which was read, and laid upon the table one day, under the rule:

. . . Resolved, That, by the Constitution of the United States, the power is not conferred upon Congress to appropriate the money of the United States for the construction of works of internal improvement, within the limits of any State in the confederacy, the object of which work is for the regulation of commerce only, and not for national defence; but such power, when assumed and exercised by Congress, is derived, not from a faithful construction of the Constitution itself, nor from its letter or spirit, but by a *latitudinarian* construction of that instrument, and an unwarranted implication of power, dangerous alike in principle and in practice.

²⁴⁴ See *infra* throughout the remainder of this article.

Passed in 1798, the Alien and Sedition Acts codified the common law offense of seditious libel and made it a crime to disparage the national government and its officials.²⁴⁵ Congress justified the Acts as part of its duty to protect the “general welfare” and also as an exercise of its inherent (unenumerated) power to enforce the common law.²⁴⁶ From the safety of the state legislative assemblies, James Madison and Thomas Jefferson wrote the Virginia and Kentucky Resolutions decrying the Acts as an abuse of federal power. The Acts and the Resolutions both are famous landmarks in the history of freedom of speech. Less well known, however, is the main argument by both Madison and Jefferson that the Acts abridged the rights of the *states*. Madison in particular tied the Acts to previous attempts by Congress to constructively enlarge its powers at the expense of the states, specifically naming the attempt to incorporate the Bank of the United States as a similar “latitudinarian” interpretation of federal power. Some scholars have wondered why, if the Ninth was meant to be a limit on the constructive enlargement of federal power, Madison did not raise the Ninth in the controversy over the Alien and Sedition Acts.²⁴⁷ Not recognizing Madison’s opposition to the Bank as based on the Ninth Amendment, scholars have missed the significance of Madison’s reference to the Bank controversy in his opposition to the Alien and Sedition Acts.

²⁴⁵ 1 Stat. 596 (1798).

²⁴⁶ See Marshall’s Report of the Virginia Minority, *reprinted in* The Founders’ Constitution, *supra* note 10 at 137:

What are cases arising under the constitution, as contradistinguished from those which arise under the laws made in pursuance thereof? They must be cases triable by a rule which exists independent of any act of the legislature of the union. That rule is the common or unwritten law which pervades all America, and which declaring libels against government to be a punishable offence, applies itself to and protects any government which the will of the people may establish. The judicial power of the United States, then, being extended to the punishment of libels against the government, as a common law offence, arising under the constitution which create the government, the general clause gives to the legislature of the union the right to make such laws as shall give that power effect.

Marshall apparently believed that subjects within the jurisdiction of the federal courts were equally within the jurisdiction of Congress. G. Edward White has described this as the theory of “coterminous power.” See G. Edward White, III-IV History of the Supreme Court of the United States: The Marshall Court and Cultural Change, 1815-35 (1988) at 538. We will return to this issue again in Lash, The Lost Jurisprudence, *supra* note 19.

²⁴⁷ See Mark C. Niles, Ninth Amendment Adjudication : An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights, 48 U.C.L.A. L. Rev. 85, 96 n.30 (2000); Leslie Dunbar, James Madison and the Ninth Amendment, 42 Va. L. rev. 627, 635-37 (1956). Others have tried to argue that the Ninth Amendment was irrelevant to the issues raised by the Acts. See e.g., Russell L. Caplan, The History and Meaning of the Ninth Amendment, 69 Va. L. Rev. 223, n.159 (1983). It’s clear from Madison’s reference to the Bank controversy, and his complaint regarding “latitudinarian” construction, that he believed the principles of the Ninth were deeply at issue in the Acts.

In his Virginia Resolutions, Madison wrote that “the powers of the federal government as resulting from the compact to which the states are parties” were “limited by the plain sense and intention of the instrument constituting that compact, as no further valid than they are authorized by the grants enumerated in that compact.”²⁴⁸ It was the duty of the states to “interpose” in order to maintain “the authorities, rights and liberties” of the states.²⁴⁹ Madison then referred to Congress’s recent habit of making unduly expansive interpretations of its own power:

“[T]he General Assembly doth also express its deep regret, that a spirit has, in sundry instances, been manifested by the federal government to enlarge its powers by forced constructions of the constitutional charter which defines them . . . and so as to consolidate the states, by degrees, into one sovereignty.”²⁵⁰

In his Report on the Alien and Sedition Acts, Madison expanded on the statement above.²⁵¹ He began by noting that the Constitution had been adopted with the understanding that the federal government was one of enumerated powers, and that this principle was expressly declared by the Tenth Amendment.²⁵² Determining whether Congress had exceeded its powers was not a matter to be left solely to the courts. According to Madison, “dangerous powers not delegated, may not only be usurped and executed by the other departments, but that the Judicial Department also may exercise or sanction dangerous powers beyond the grant of the Constitution.”²⁵³

Madison then turned to the claim in his Resolutions that “a spirit has in sundry instances, been manifested by the Federal government, to enlarge its powers by forced constructions of the Constitutional charter.”²⁵⁴ In support of this claim, Madison cited the chartering of the Bank of the United States, as well as the internal improvements bill:

²⁴⁸ James Madison, Virginia Resolutions, Dec. 21, 1798, *reprinted in* 4 Elliot’s Debates, *supra* note 41 at 528-29.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ See James Madison, Writings, *supra* note 3 at 608.

²⁵² According to Madison:

“[I]n all the contemporary discussions and comments, which the Constitution underwent, it was constantly justified and recommended on the ground, that the powers not given to the government, were withheld from it; and that if any doubt could have existed on this subject, under the original text of the Constitution, it is removed as far as words could remove it, by the 12th amendment, which expressly declares, “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.”

Id. at 610.

²⁵³ *Id.* at 613.

²⁵⁴ *Id.* at 614.

“[T]he resolution may be presumed to refer particularly to the bank law, which from the circumstances of its passage as well as the latitude of construction on which it is founded, strikes the attention with singular force; and the carriage tax, distinguished also by circumstances in its history having a similar tendency.”²⁵⁵

Given Congress’ appetite for expanding its own powers, it was “incumbent in this, as in every other exercise of power by the federal government, to prove from the constitution, that it grants the particular power to be exercised.”²⁵⁶ If the law was based on the unenumerated power to enforce the common law, this was a test Congress could not possibly meet. Not only was there no single “common law” embraced by all the states,²⁵⁷ the very idea of inherent power to enforce the common law destroyed the concept of enumerated power:

“Should . . . the common law be held, like other laws, liable to revision and alteration, by the authority of Congress; it then follows, that the authority of Congress is co-extensive with the objects of common law; that is to say, with every object of legislation: For to every such object does some branch or other of the common law extend. The authority of Congress would therefore be no longer under the limitations, marked out in the constitution. They would be authorized to legislate in all cases whatsoever.”²⁵⁸

Later in his Report, Madison would argue that the Act abridged freedom of speech and press. The argument he leads with, however, involves the autonomy of the states. The constructive enlargement of federal power would extend the reach of Congress to “every object of legislation” justly belonging to the states:

“[T]he consequences of admitting the common law as the law of the United States, on the authority of the individual states, is as obvious as it would be fatal. As this law relates to every subject of legislation, and would be paramount to the constitution and laws of the states; the admission of it would overwhelm the residuary sovereignty of the states, and by one constructive operation new model the whole political fabric of the country.”²⁵⁹

In passing the Alien and Sedition Acts, Congress had engaged in a latitudinarian enlargement of its own powers, just as it had in chartering the Bank. In both cases, the expansion of federal power came at the expense of the states. As Madison put it in

²⁵⁵ Id. at 615.

²⁵⁶ Id. at 621.

²⁵⁷ Id. at 633.

²⁵⁸ Id. at 639.

²⁵⁹ Id. at 640.

his Address to the People of Virginia, “[T]he sedition act is the offspring of these tremendous pretensions, which inflict a death-wound on the sovereignty of the States.”²⁶⁰ Latitudinous constructions upset the balance between federal and state power, a balance meant to be maintained by the Ninth and Tenth Amendments.

Although Madison’s reference to the Bank controversy and “latitudinarian constructions” implicitly echoed his Ninth Amendment arguments, both he and Jefferson focused their attention on the Tenth.²⁶¹ This focus highlights a distinction between the Ninth and Tenth Amendments. If one of the prime justifications for the Alien and Sedition Act was the inherent (unenumerated) power of Congress to enforce the common law, this is an issue falling primarily under the Tenth, not the Ninth Amendment. The Ninth controlled construction of enumerated powers. It is the Tenth that insists all federal action fall within one of these powers.²⁶² As we shall see, some constitutional controversies seemed mainly to involve the Ninth (such as determining the scope of concurrent state power),²⁶³ while others seemed mainly to involve the Tenth (such as unenumerated emergency economic power).²⁶⁴

E. Madison v. Marshall; McCulloch v. Maryland

1. The Opinion

Although the charter for the first Bank of the United States was allowed to lapse in 1811, Congress voted to establish the second bank in 1812. At that time, now President, James Madison vetoed the bill, although he deferred on the issue of whether the Bank was a constitutional exercise of federal power. When the Bank bill came up again in 1816, however, he finally signed it. Despite doing so, Madison never relinquished his doubts about the method of interpretation required to justify federal power to charter the Bank.

In protest, the Maryland Assembly in 1818 enacted an annual tax of \$15,000 on any bank not chartered by the state. When cashier J.W. McCulloch refused to pay the tax,

²⁶⁰ James Madison, Address of the General Assembly to the People of the Commonwealth of Virginia, Jan. 23, 1799, *reprinted in*, 5 Founders’ Constitution, *supra* note 10 at 139.

²⁶¹ See Kentucky Resolutions (Thomas Jefferson), *reprinted in* 5 Founders’ Constitution, *supra* note 10 at 131; Report on the Virginia Resolutions (James Madison), *reprinted in* Writings, *supra* note 3 at 610.

²⁶² You can find Madison’s Report on the Virginia Resolutions in the Founders’ Constitution under the section on Speech and the Press. See 5 Founders’ Constitution, *supra* note 10 at 141. Omitted, however, are the first two thirds of the speech in which Madison links the “latitudinous” Alien and Sedition Acts with prior intrusions upon state sovereignty such as the incorporation of the Bank of the United States. The full speech is reproduced in James Madison, Writings, *supra* note 3 at 608-62. The point at which the Founders’ Constitution picks up the speech occurs at approximately page 36 of a 54 page speech. Compare *id.* at 644 with 5 Founders’ Const. *supra* note 10 at 141.

²⁶³ See Lash, The Lost Jurisprudence, *supra* note 19 at 66 and accompanying text.

²⁶⁴ *Id.* at 309 and accompanying text.

he was sued in state court and fined. Under the leadership of Chief Justice John Marshall, the United States Supreme Court heard his appeal and, in *McCulloch v. Maryland*,²⁶⁵ upheld the constitutionality of the Bank.

In his original speech on the Bank of the United States, Madison had argued that construing Congress's powers to encompass the bank was to engage in an improper latitude of construction, in violation of the Ninth and Tenth Amendments. In his opinion, Marshall says nothing about the Ninth Amendment, and mentions the Tenth only in passing. In regard to claims that the Tenth Amendment limits the federal government to only those powers specifically *expressed* in the Constitution, Marshall points out that the Tenth, unlike the Articles of Confederation, does not limit Congress to those powers "expressly" delegated. The Tenth itself, argued Marshall, did not restrict the powers of Congress but merely "was framed for the purpose of quieting the excessive jealousies which had been excited." Whether this was the *only* purpose of the Tenth, Marshall was right that the Tenth of itself did not forbid Congress from exercising implied power.²⁶⁶ The issue was the proper construction of enumerated power, an issue for which the Ninth was especially designed. Marshall not only ignores the Ninth, he deploys a rule of construction that seems to conflict with literal terms of the Ninth.

One purpose of the Ninth was to prevent the enumeration of certain rights from implying otherwise expansive federal power. Consider in this light Marshall's argument in favor of broad federal power:

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

²⁶⁵ 17 U.S. (4 Wheat) 316 (1819).

²⁶⁶ As Justice Story put it in his Commentaries:

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

Joseph Story, Commentaries on the Constitution, *reprinted in* 5 Founders' Constitution, *supra* note 10 at 406.

This passage is significant for a number of reasons. First, Marshall reads the enumeration of certain rights (those in Article 1, section 9) as implied support for his broad reading of federal power. If nothing else, the Ninth Amendment was intended to warn against just such an implication arising out of an enumeration of rights. This does not mean that Marshall was wrong to suggest Congress had implied powers, but it seems at least to call for an explanation reconciling his theory with the rule of construction (literally) declared by the Ninth. Instead of providing such an explanation, Marshall claims in the very next sentence that the framers “omitted” “any restrictive term” preventing “a fair and just interpretation.” This sentence, of course, is a bit of a cheat. Of *course* Congress did not include a restrictive term requiring an “unfair” and “unjust” interpretation of the Constitution. Congress *did*, however add a provision restricting the interpretation of federal power, a provision which a former President had argued applied in just this situation. It is possible Marshall was totally unaware of Madison’s speech against the Bank of the United States, but it is not likely.²⁶⁷

Free from any “restrictive term,” Marshall goes on to articulate a broad understanding of federal power as justifying any means fairly related to accomplishing an enumerated end.²⁶⁸ Deploying the Necessary and Proper Clause as a reverse Ninth Amendment, Marshall declared that the Founders could not have been expected to enumerate every possible means for advancing legitimate ends in the manner of a legal code. We must never forget,” after all, “it is a *constitution* we are expounding.”²⁶⁹ Perhaps anticipating objections that unlimited means results in unlimited power, Marshall provided a caveat:

“Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not to be entrusted to the government; it would become the painful duty of this tribunal . . . to say that such an act was not the law of the land.”²⁷⁰

²⁶⁷ John Marshall is generally regarded as the author of the Minority Report of the Virginia Assembly on the Alien and Sedition Acts. 5 Founders’ Constitution, *supra* note 10 at 136 (attributing authorship to Marshall). If so, he would have been fully aware of Madison’s arguments regarding “latitudinarian” constructions of federal power such as those deployed in the Bank controversy. In fact, in letters published following the decision, Marshall defended himself against claims of “latitudinarian construction” of the Constitution. See *infra* note 281 and accompanying text. Most of all, it simply is not likely that the Chief Justice of the United States Supreme Court would not have been aware of a former President’s argument against the constitutionality of the Bank of the United States.

²⁶⁸ See *McCulloch v. Maryland*, 17 U.S. at 421 (“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”).

²⁶⁹ *Id.* at 407.

²⁷⁰ *Id.* at 423.

This left judicial review restricted to two situations: Those where Congress had violated a specific prohibition, and those actions intended by Congress to accomplish objects not entrusted to the government. Given Marshall's disclaimer about second-guessing Congress's determination regarding the reasonableness of a law, this came close to declaring that Congress had all power *except* that specifically prohibited by the Constitution. This, at least, is how Marshall's critics understood his opinion.

2. Reaction to Marshall's "Latitudinarian" Interpretation

Criticism of Marshall's opinion was swift and voluminous. Ardent Republican John Taylor, who had himself delivered Madison's Virginia Resolutions,²⁷¹ ridiculed Marshall's opinion in his colorfully entitled book, "Construction Construed and Constitutions Vindicated."²⁷²

"As ends may be made to beget means, so means may be made to beget ends, until the cohabitation shall rear a progeny of unconstitutional bastards, which were not begotten by the people."²⁷³

To Taylor, Marshall had violated the proper rule of construction presented by the Ninth and Tenth Amendments:

The eleventh amendment prohibits a *construction* by which the rights retained by the people shall *be denied or disparaged*; and the twelfth "reserves *to the state respectively or to the people* the powers not delegated to the *United States*, nor prohibited *to the states*. The precision of these expressions is happily contrived to defeat a construction, by which the origin of the union, or the sovereignty of the states, could be rendered at all doubtful."²⁷⁴

²⁷¹ See John Taylor, *Tyranny Unmasked* xiii (1992 reprint)(forward by F. Thornton Miller).

²⁷² John Taylor, *Construction Construed and Constitutions Vindicated*, 1820 (1998 reprint).

²⁷³ *Id.* at 84.

²⁷⁴ *Id.* at 46 (emphasis in original). Taylor goes on:

In one other view, highly gratifying, these two amendments correspond with the construction I contend for. Several previous amendments had stipulated for personal or individual rights, as the government of the union as the government of the union was invested with a limited power of acting upon persons; these stipulate for political conventional rights. But different modes are pursued. By the first, certain specified aggressions are forbidden; by the second, all the rights and powers not delegated are reserved. The first mode is imperfect, as the specified aggressions may be avoided, and yet oppression might be practiced in other forms. By the second, specification is transferred to the government of the union; and the states, instead of being the grantees of limited rights, which might have been an acknowledgement of subordination, are the grantors of limited powers; and retain a supremacy which might otherwise have been tacitly conceded. . . . Thus the powers reserved are only exposed to specified deductions, whilst those delegated are limited, with the injunction that that the

Joining Taylor's criticism of *McCulloch*, the editor of the *Richmond Enquirer*, Thomas Richie, published a series of pseudonymous papers written by "Amphictyon" and "Hampden" both of whom castigated Marshall's "latitudinarian" interpretation of federal power.²⁷⁵ The criticism was serious enough to prompt John Marshall to write his own anonymous defense of *McCulloch*. In a remarkable exchange of essays, unique in constitutional history, the Chief Justice of the United States Supreme Court defended his opinion against claims which he had brushed off in the opinion itself—that his construction of the Constitution was just as latitudinarian as Madison warned about years earlier.

In his essays, Amphictyon accused the Chief Justice of having adopted a "liberal and latitudinous construction" of the Necessary and Proper Clause.²⁷⁶ "[S]o wide is the latitude given to the words "general welfare," in one of these clauses, and to the word "necessary" in the other, that it will, (if the construction be persisted in) really become

enumeration of certain rights shall not be construed to disparage those retained though not specified, by not having been parted with. The states, instead of receiving, bestowed powers; and in confirmation of their authority, reserved every right they had not conceded, whether it is particularly enumerated, or tacitly retained. Among the former, are certain modes by which they can amend the constitution; among the latter, is the original right by which they created it.

Id. at 48-49.

²⁷⁵ The essays are reproduced in *John Marshall's Defense of McCulloch v. Maryland* (Gerald Gunther, ed) (1969). As the essays and letters in this section show, the very phrase "latitudinarian construction" was widely used to condemn readings of the constitution which unduly expanded federal power at the expense of the states. See e.g., *Commercial Bank of Cincinnati v. Buckingham's Ex'rs*, 46 U.S. 317, 332-33 (Mem) U.S., 1847 (argument of Mr. Convers):

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

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

²⁷⁶ See A Virginian's "Amphictyon" Essays, March 30, 1819, *reprinted in John Marshall's Defense*, *supra* note 275 at 53. Gerald Gunther suggested that the essays were "probably written by Judge William Brockenbough." Id. at 1.

a government of almost unlimited powers.”²⁷⁷ This, argued Amphictyon, conflicted with the proper vision of federal power.

“The government of the U.S. is one of specified and limited powers. . . . The state governments have all residuary power; every thing necessary for the protection of the lives, liberty and property of individuals is left subject to their control.”²⁷⁸

This “residuary power was left in possession of the states for wise purposes. It is necessary that the laws which regulate the daily transactions of men should have a regard to their interests, their feelings, even their prejudices.”²⁷⁹ If the rule of *McCulloch* prevailed, the judiciary would be unable to control federal expansion into the powers reserved to the states. Scoffing at his pretext paragraph, Amphictyon wrote “[t]he latitude of their construction will render it unnecessary for them to discharge a duty so “painful” to their feelings.”²⁸⁰

John Marshall published his first set of essays defending *McCulloch* in the Philadelphia Union under the pseudonym “A Friend to the Union.”²⁸¹ In these essays, Marshall took umbrage at the allegation of latitudinous construction. “The court does not, in a single instance” huffed Marshall, “claim the aid of a ‘latitudinous,’ or ‘liberal’ construction; but relies, decidedly and confidently, on the true meaning, ‘taking into view of the subject, the context, and the intention of the framers of the constitution.’”²⁸² To Marshall, “[t]he contest then, so far as profession goes, is between the fair sense of the words used in the constitution, and a restricted sense.”²⁸³ The sting of the claim, however, must have been sharp. Throughout his essays, Marshall repeatedly denies the opinion deploys a latitudinous interpretation of the Constitution:

It is a palpable misrepresentation of the opinion of the court to say, or to insinuate that it considers the grant of a power “to pass all laws necessary and proper for carrying into execution” the powers vested in the government, as augmenting those powers, and as one which is to be construed “latitudinously,” or even “liberally.”²⁸⁴

²⁷⁷ Id. at 65.

²⁷⁸ Id. at 70.

²⁷⁹ Id. at 71.

²⁸⁰ Id. at 75.

²⁸¹ Id. at 78.

²⁸² Id. at 92. See also id. at 81 (“To expose the reasoning of the court to still greater odium, if it be possible, we are told that “the liberal and latitudinous construction” he has attached to a term in the constitution, had been attached to it before him, “by Mr. Secretary Hamilton.”).

²⁸³ Id. at 93.

²⁸⁴ Id. at 97.

Following the publication of Marshall's defense, a new series of essays critical of *McCulloch* were printed in the Richmond Enquirer under the pseudonym "Hampden." The author was the Federalists' great nemesis and Chief Justice of the Virginia Supreme Court, Spencer Roane. Referring repeatedly to the odious precedent of the Alien and Sedition Acts and Madison's now famous report,²⁸⁵ Roane argued that Congress, and the Court, had once again invaded the reserved powers of the States:

It has been our happiness to believe, that in the partition of powers between the general and state governments, the former possessed only such as were expressly granted . . . while all residuary powers were retained by the latter. . . . This, it is believed, was done by the constitution, in its original shape; but such were the natural fears and jealousies of our citizens, in relation to this all important subject, that it was deemed necessary to quiet those fears, by the 10th amendment to the constitution.²⁸⁶

Tying the hated Sedition Acts to Marshall's opinion in *McCulloch*, Hampden argued "[t]he latitude of construction now favored by the supreme court, is precisely that which brought the memorable sedition act into our code."²⁸⁷ In a memorable paragraph, Hampden declared "[t]hat man must be a deplorable idiot who does not see that there is no earthly difference between an *unlimited* grant of power, and a grant limited in its terms, but accompanied with *unlimited* means of carrying it into execution."²⁸⁸ It was not simply the Bank Act that drew Hampden's ire, it was method of interpretation used by the Supreme Court that threatened the reserved powers of the states. To Hampden, Marshall's opinion was "the 'Alpha and Omega,' the beginning and the end, the first and the last—of federal usurpations."²⁸⁹

3. *Madison's Letter on the Bank Controversy*

Roane sent James Madison his "Hampden" essays and received a congratulatory reply. "I have found their latitudinary mode of expounding the Constitution, combated in them with the ability and the force which were to be expected."²⁹⁰ Picking up where his speech on the Bank of the United States left off, twenty eight

²⁸⁵ See *id.* at 109 n.5; 113 (referring to Madison's speech as "his political bible"); 115.

²⁸⁶ *Id.* at 108. See also *id.* at 114; 149; others (referring to the 10th amendment).

²⁸⁷ *Id.* at 134. Madison, of course, had tied the Alien and Sedition Acts to the *earlier* controversy over the Bank of the United States. See *supra* note 244 and accompanying text.

²⁸⁸ Marshall's Defense, *supra* note 275 at 110.

²⁸⁹ *Id.* at 114. Marshall's Responses to Hampden's essays are reprinted in *id.* at 153-214. See also Jack N. Rakove, William and Mary Law Review March, 2002 Symposium: The Legacy of Chief Justice John Marshall, Judicial Power in the Constitutional Theory of James Madison.

²⁹⁰ James Madison to Spencer Roane, Sept. 2, 1819, *reprinted in* Writings, *supra* note 3 at 733.

years in the past, Madison once again decried “latitudinous” constructions of the Constitution.”²⁹¹

But what is of most importance is the high sanction given to a latitude in expounding the Constitution which seems to break down the landmarks intended by a specification of the Powers of Congress, and to substitute for a definite connection between means and ends, a Legislative discretion as to the former to which no practical limit can be assigned. In the great system of Political Economy having for its object the national welfare, everything is related immediately or remotely to every other thing; and consequently a Power over any one thing, if not limited by some obvious and precise affinity, may amount to a Power over every other.²⁹²

Madison rejected Marshall’s attempted defense of the “pretext paragraph.” All Congress would have to do is make a plausible claim of advancing a permitted end. Once justified in this manner “by what handle could the Court take hold of the case?”²⁹³ In this letter, Madison sums up his understanding of the rule of construction desired by so many at the dawn of the Constitution—a rule meant to protect the people’s sovereign right to decide whether certain matters should be controlled at national or local level:

It could not but happen, and was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding the terms & phrases necessarily used in such a charter; more especially those which divide legislation between the General and local Governments . . . But it was anticipated I believe by few if any of the friends of the Constitution, that a rule of construction would be introduced as broad & as pliant as what has occurred. And those who recollect, and still more those who shared in what passed in the State Conventions, thro’ which the people ratified the Constitution, with respect to the extent of the powers vested in Congress, cannot easily be persuaded that the avowal of such a rule would not have prevented its ratification.²⁹⁴

Having fought on behalf of these principles his entire life, Madison could not help but wax on.

There is certainly a reasonable medium between expounding the Constitution with the strictness of a penal law, or other ordinary statute, and expounding it

²⁹¹ Id.

²⁹² Id. at 734.

²⁹³ Writings, *supra* note 3 at 735.

²⁹⁴ Id. at 735.

with a laxity which may vary its essential character, and encroach on the local sovereignties with whc. it was meant to be reconcilable. . . .

The very existence of these local sovereignties is a controul on the pleas for a constructive amplification of the powers of the General Govt. Within a single State possessing the entire sovereignty, the powers given to the Govt. by the People are understood to extend to all the Acts whether as means or ends required for the welfare of the Community, and falling within the range of just Govt. To withhold from such a Govt. and power necessary or useful in itself, would be to deprive the people of the good dependent on its exercise; since the power must be there or not exist at all. In establishing that Govt. the people retained other Govts. capable of exercising such necessary and useful powers as were not to be exercised by the General Govt. No necessary presumption therefor arises from the importance of any particular power in itself, that it has been vested in that Govt. because tho' not vested there, it may exist elsewhere, and the exercise of it elsewhere might be preferred by those who alone had a right to make the distribution.²⁹⁵

Madison then closes with an apology:

Altho' I have confined myself to the single question concerning the rule of interpreting the Constitution, I find that my pen has carried me to a length which would not have been permitted by a recollection that my remarks are merely for an eye to which no aspect of the subject is likely to be new. I hasten therefore to conclude with assurances &c &c.²⁹⁶

Madison's original arguments against the Bank of the United States were not creations of mere political expediency. Madison's views on latitudinarian construction of the Constitution remained constant throughout his life. The Constitution was based on the principle of delegated power. As a matter of personal freedom, the people retained the right to leave certain matters under local control. This principle and its attendant freedom were placed at risk absent some kind of restraint on the construction of enumerated power. The antifederalists anticipated the need for such a rule and Madison sought to provide it through the adoption of the Ninth Amendment. To Madison, fears that such a rule would become necessary were born out in the struggles over the Alien and Sedition Acts and the Bank of the United States. Whether Madison was correct or not regarding the constitutionality of the Bank (or, for that matter, the Alien and Sedition Acts), his writings over the years reveal that his speech on the Bank of the United States was not simply a matter of playing to the crowd. To Madison, without a rule of construction protecting the principle of delegated powers,

²⁹⁵ Id. at 736-37.

²⁹⁶ Id. at 737.

the inexorable pressure by Congress to enlarge its own authority threatened the very character of the Union.²⁹⁷

V. Natural Rights and the Ninth Amendment

Because so much of the debate over the original meaning of the Ninth Amendment has involved the issue of natural rights, it seems appropriate to close this discussion by considering the relationship of such rights with the Madisonian Federalist reading of the Ninth Amendment. Libertarian scholars have criticized Federalist readings of the Ninth for ignoring the Founders' commitment to protect natural rights.²⁹⁸ In fact, evidence that many Founders embraced the idea of natural rights is broad and deep.²⁹⁹ Madison himself referred to natural rights in his speech introducing the Bill of Rights.³⁰⁰ Most state constitutions referred to natural rights.³⁰¹ Prior to the adoption of the Constitution, state courts referred to natural rights, as did some early Supreme Court cases.³⁰² There is no textual reason, and little historical reason to believe that the "other rights" of the Ninth Amendment *did not* include natural rights. But understanding the Founders' embrace of natural rights is not the same thing as understanding the Founders' view of the Ninth Amendment. The story of the Ninth clearly moved along the lines of a rule of construction protecting the autonomy of

²⁹⁷ Madison's arguments regarding the Bank continued to appear as long as the Bank remained an issue. See Journal of the House of Representatives of the United States, 1840-1841, Dec. 9, 1840. "A communication, in writing, was received from the President of the United States, by Mr. Abraham Van Buren, his private secretary; which was read, and is as follows:"

Fellow-citizens of the Senate
and House of Representatives:

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

²⁹⁸ See Suzanna Sherry, Textualism and Judgment, 66 Geo. Wash. L. Rev. 1148, 1149-50 (1998).

²⁹⁹ As Professor Sanford Levinson puts it, "even moral skeptics . . . do not deny that the founding generation, as a general matter, accepted the idea of natural rights." Sanford Levinson, Constitutional Rhetoric and the Ninth Amendment, 64 Chi-Kent L. Rev. 131, 155 (1988).

³⁰⁰ See *supra* note 42 and accompanying text (Madison's notes for his speech introducing the amendments to the House).

³⁰¹ For a list of such provisions, see Cogan, The Complete Bill of Rights, *supra* note 10 at 636-41.

³⁰² See, generally, Suzanna Sherry, The Founders Unwritten Constitution, 54 U.Chi. L. Rev. 1127 (1987).

local government. The evidence in this regard is as broad and deep as evidence regarding natural rights. How then are we to reconcile natural rights with the historical Ninth Amendment?

The answer lies in determining the manner in which natural rights were to be protected. The Ninth and Tenth Amendments drew and maintained the boundary between the jurisdictions of federal and local authorities. This line can be perceived in other amendments as well. For example, it is *Congress* that “shall make no law respecting an establishment of religion,” not the *states*. The states continued to establish religion for a great many years after the adoption of the Bill of Rights.³⁰³ The concern animating the Bill was how to limit *federal* power without simultaneously suggesting that federal authority reached all matters not expressly prohibited. Such a reading would swamp the rights of the people to decide on a local level how they wished to approach “natural rights” such as freedom of speech. While this kind of “home rule” approach to individual liberty may seem strange to us, it was a matter of first principles to the Founders. For example, when Congress passed the Alien and Sedition Acts, the primary claim made by Madison and Jefferson was that this law abridged the retained rights of the *states* to regulate on matters of speech, even though speech to Madison was a natural right.³⁰⁴ The very presumption of the Bill of Rights is that personal rights will be better protected if left to the states. As Samuel Adams wrote to Richard Henry Lee:

I mean my friend, to let you know how deeply I am impressed with a sense of the Importance of Amendments; that the good People may clearly see the distinction, for there is a distinction, between the *federal* Powers vested in Congress, and the *sovereign* Authority belonging to the several States, which is the Palladium of the private, and personal rights of the Citizens.³⁰⁵

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

That *every power, jurisdiction and right*, which is not by the said constitution clearly delegated to the Congress of the United States, or the departments of

³⁰³ See Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Non-Establishment Principle*, 27 *Ariz. St. L. J.* 1085 (1995).

³⁰⁴ Compare Madison’s Report on the Alien and Sedition Acts, *supra* note 248 and accompanying text (Act abridges sovereignty of the states), with his notes introducing the First Amendment to the House of Representatives, *supra* note 92 and accompanying text (freedom of speech is a natural right).

³⁰⁵ Samuel Adams to Richard Henry Lee, August 24, 1789, *reprinted in* *Creating the Bill of Rights*, *supra* note 2 at 286.

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.³⁰⁶

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

A. **Calder v. Bull**

*Calder v. Bull*³⁰⁷ involved an act by the Connecticut legislature granting a new trial in a probate case. The plaintiffs alleged that this act violated the Ex Post Facto Clause of the federal Constitution. The United States Supreme Court heard the appeal under Section 25 of the Judiciary Act which granted the Court authority to review cases arising in state court involving questions of federal law. After recounting the facts, Justice Samuel Chase begins his opinion with a sentence generally omitted from scholarly accounts of the case:

It appears to me a self-evident proposition, that the several State Legislatures retain all the powers of legislation, delegated to them by the State Constitutions; which are not EXPRESSLY taken away by the Constitution of the United States. The establishing courts of justice, the appointment of Judges, and the making regulations for the administration of justice, within each State, according to its laws, on all subjects not entrusted to the Federal Government, appears to me to be the peculiar and exclusive province, and duty of the State Legislatures: All the powers delegated by the people of the United States to the Federal Government are defined, and NO CONSTRUCTIVE powers can be exercised by it.³⁰⁸

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

Justice Chase's opinion is often cited as an early example of natural rights jurisprudence and is included in general discussions of the meaning of the Ninth

³⁰⁶ New York, July 26, 1788, *reprinted in* The Complete Bill of Rights, *supra* note 10 at 635.

³⁰⁷ 3 Dallas 386 (1798).

³⁰⁸ 3 Dallas at 387 (CAPS in original).

Amendment.³⁰⁹ All of these discussions omit the paragraph quoted above, however, and focus on Chase’s dicta regarding natural rights. This, of course, is yet another example of the categorical mistake which reads discussions about the *construction* of federal power as related to the Tenth, not the Ninth Amendment, as well as the presumption that passages dealing with the Tenth are irrelevant to understanding the meaning of the Ninth. Having disabused ourselves of these presumptions, we are now in a position to appreciate *all* of Chase’s opinion.

After declaring the fundamental principle of delegated power and the rule that such power is not to be enlarged by “construction,” Justice Chase next addressed whether the state law violated the Ex Post Facto Clause. In an extended rumination on an issue, “not necessary now to be determined,” regarding whether a state legislature can revise a decision of one of its state courts,³¹⁰ Justice Chase announced:

I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the Constitution, or fundamental law, of the State. . . . There are acts which the Federal, or State, Legislature cannot do, without exceeding their authority. There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof of the government was established. An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.³¹¹

In this passage, Justice Chase repeats the broadly held view that certain fundamental principles of law limited the legitimate authority of the state. Founders such as Edmund Randolph shared the same view. In his report to President Washington regarding the constitutionality of the Bank of the United States, Attorney General Randolph described state legislatures as governments which are “presumed to be left at large as to all authority which is communicable by the people, and does not affect any of those paramount rights, which a free people cannot be supposed to confide even to their representatives.”³¹² We know, however, that Randolph also preferred a draft of the Ninth Amendment which limited constructive enlargement of federal

³⁰⁹ See e.g., Barnett, Restoring the Lost Constitution, *supra* note 9 at 126; Massey, Silent Rights, *supra* note 9 at 49, 158-59; Suzanna Sherry, The Founders’ Unwritten Constitution, 54 U. Chi. L. Rev. 1127, 1166-73; Processes of Constitutional Decisionmaking, *supra* note 15 at pp. 109-114.

³¹⁰ 3 Dallas at 387 (emphasis in original).

³¹¹ *Id.* at 387-88.

³¹² Edmund Randolph, The Constitutionality of the Bank Bill, Feb. 12, 1791, *reprinted in* The Constitution and the Attorneys General, *supra* note 188 at 4.

power and protected the autonomy of the states. The beliefs in natural rights and in the reserved powers of the states are reconciled under the Madisonian reading of the Ninth Amendment. The people retain all non-delegated powers and rights, which they then may delegate to state authorities if they choose.

Justice Chase's dicta in *Calder* does not contradict this view. Nor would we expect it to, given Chase's opening declaration of the retained powers of the states.³¹³ Chase merely insisted that the presumed existence of fundamental principles should raise a *presumption* that the legislature did not intend to violate such principles:

A law that punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a Judge in his own cause; or a law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it.³¹⁴

This reconciles Chase's opening declaration with his belief in natural law. Following the principle of the Tenth Amendment, all powers not delegated are reserved to the states or to the people. The people have the retained right to delegate those powers to their respective governments.³¹⁵ Chase believed that the powers the people have granted their state governments should be read against the presumed background of natural rights. The people may invest their government with any power they choose, but, Chase argued, when it comes to laws in conflict with natural rights they will not be *presumed* to have done so.

In his concurring opinion, Justice Iredell addressed the situation where Chase's presumption is overcome and it appears that a law does in fact transgress the Court's understanding of natural rights. In such a case, argued Iredell, the court would have no authority to invalidate the law.³¹⁶ Iredell does not deny the existence of natural rights, but he nevertheless maintained that such rights remained in the hands of the people of the state:

1st. If the Legislature pursue the authority delegated to them, their acts are valid. 2nd. If they transgress the boundaries of that authority, their acts are

³¹³ That same year, while riding circuit, Justice Chase repeated his assertion of the limited enumerated powers of the federal government—and the concomitant limited jurisdiction of the federal courts in *U.S. v. Worrall*, 28 F.Cas. 774 (Pa. Dist. 1798) (rejecting the idea that the laws of the United States include the common law).

³¹⁴ 3 Dallas at 388.

³¹⁵ See, e.g., *supra* note 80 and accompanying text (New York's proposed amendment).

³¹⁶ 3 Dallas at 399.

invalid. In the former case, they exercise the discretion vested in them by the people, to whom alone they are responsible for the faithful discharge of their trust: but in the latter case, they violate a fundamental law, which must be our guide, whenever we are called upon as judges to determine the validity of a legislative act.³¹⁷

Although Ninth Amendment scholars (from all points of view) believe that Justice Chase's opinion in *Calder* ignored the Ninth Amendment,³¹⁸ Chase's opening statement declares the principles of both the Ninth and Tenth Amendments, and his articulation of natural rights fits perfectly with those principles. Iredell's concurrence emphasized that natural rights are matters best left to the people of a state to decide for themselves. Both Chase's and Iredell's opinions fit within the Madisonian vision of the Ninth and Tenth Amendments as retaining such rights to the people of the several states to deal with as they see fit.

B. Fletcher v. Peck

Another case commonly cited in support of natural rights readings of the Ninth Amendment is *Fletcher v. Peck*.³¹⁹ *Fletcher* involved the Georgia legislature's corrupt sale of land to speculators. A subsequent legislature invalidated the sale, and the original purchasers sued in federal court claiming a violation of the Contract Clause of Article I, section 9 of the United States Constitution. Had the case come to the Supreme Court on appeal from the state supreme court, under section 25 of the Judiciary Act the Court would have been limited to consideration of federal questions. This was a diversity case, however, arising in federal court, and so the Supreme Court remained free to consider issues of both state and federal law.³²⁰ Accordingly, counsel raised arguments relating both to contract law and "first principles of natural justice."³²¹

Marshall's opinion addresses the legislature's rescission of the prior sale first under general rules of contract law, itself a matter of state law, and then secondly under the restrictions of the Contract Clause of the United States Constitution. Although Marshall began his analysis of contract law by citing "certain great principles of

³¹⁷ *Id.*

³¹⁸ See, e.g., Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment*, reprinted in *2 Rights Retained by the People*, *supra* note 11 at 129; Steven J. Heyman, *Natural Rights, Positivism and the Ninth Amendment: A Response to McAfee*, 16 *S. Ill. U.L.J.* 327, n.26 (1992); Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 *Hastings L.J.* 305, n.49 (1987); Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 *Va. L. Rev.* 223, n.158 (1983).

³¹⁹ 10 U.S. 87 (1810).

³²⁰ For a discussion of *Fletcher* and the jurisdictional issues in these cases, see G. Edward White, *History of the Supreme Court of the United States, The Marshall Court and Cultural Change, 1815-1835* at 597-612.

³²¹ *Id.* at 604.

justice,” such language disappeared when he turned to the construction of the Contract Clause of the Constitution.³²²

The most express declaration of natural law in *Fletcher* came in Justice Johnson’s concurrence:

I do not hesitate to declare that a state does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things: a principle which will impose laws even on the deity.³²³

To Johnson, “[w]hen the legislature have once conveyed their interest or property in any subject to the individual, they have lost all control over it; have nothing to act upon.”³²⁴ Given his striking invocation of natural law, from a contemporary perspective one might expect Justice Johnson to fall into the camp of Unenumerated Rights advocates of the Ninth Amendment. This would be a mistake. Although his

³²² Compare Marshall’s discussion of state law at 135-36 (“It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power”), with his discussion of the federal Constitution at 136 “does the case now under consideration come within this prohibitory sections of the constitution? In considering this very interesting question, we immediately ask ourselves what is a contract?”). In another case, *United States v. Fisher*, 6 U.S. 358 (1805), Marshall appears to invoke natural law in his construction of the Bankruptcy Code.

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

See *id.* at 389-90. At the outset of his opinion, however, Marshall lays out his principles of statutory construction, including “where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain; in which case it must be obeyed.” *Id.* at 386. Rather than a statement of natural rights binding the government, at most this is a plain statement rule. But see Sherry, *The Founders’ Unwritten Constitution*, *supra* note 9 at 1170 (linking this opinion to a natural rights jurisprudence of the Supreme Court).

³²³ 10 U.S. at 143.

³²⁴ *Id.*

embrace of judicially enforceable natural rights could not be clearer, just as clear was his belief that the enumeration of certain rights in the constitution not be construed to disparage the retained rights *of the states*.

Johnson carefully distinguished his analysis of natural rights from his interpretation of the federal Constitution:

I have thrown out these ideas that I may have it distinctly understood that my opinion on this point is not founded on the provision in the constitution of the United States, relative to laws impairing the obligation of contracts.³²⁵

To Johnson, the court needed to be extremely careful not to unduly expand the reach of the federal contract clause:

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

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

Justice Johnson limited his construction of the federal Contract Clause in order to avoid unduly interfering with “the right which every community must exercise” regarding the taking of private property for public use. Johnson’s opinion is a perfect example of how both a state rights protective rule of constitutional interpretation could coexist with a strong embrace of natural rights. Although neither Marshall nor

³²⁵ Id. at 144.

Johnson cited the Ninth Amendment, both opinions fit comfortably with the Federalist account of the Ninth envisioned by James Madison and the ratifying conventions.

C. Society for the Propagation of the Gospel v. Wheeler

There is one example of a case decided in this period which expressly raised both natural rights and Ninth Amendment claims. While riding circuit in New Hampshire only two years after joining the Supreme Court, Justice Joseph Story decided *Society for the Propagation of the Gospel v. Wheeler*.³²⁶ In *Wheeler*, one of the issues was whether a state law allowing tenants to recover the value of improvements was void due to its retroactive effect. The claim was that the law was:

[I]n contravention of the 2d, 3d, 12th, 14th and 20th articles of the bill of rights, in the constitution of New Hampshire; and of the 10th section of the first article, and the 9th article of the amendments, of the constitution of the United States; and is also repugnant to natural justice; and is therefore void.³²⁷

Justice Story quickly dismissed the constitutional claim:

In respect also to the constitution of the United States, the statute in question cannot be considered as void. The only article which bears on the subject, is that which declares, that no state shall pass 'any ex post facto law, or law impairing the obligation of contracts.' There is no pretence of any contract being impaired between the parties before the court. The compensation is for a tort, in respect to which the legislature have created and not destroyed an obligation. Nor is this an ex post facto law within this clause of the constitution, for it has been solemnly adjudged, that it applies only to laws, which render an act punishable in a manner, in which it was not punishable, when it was committed. *Calder v. Bull*, 3 Dall. 386; *Fletcher v. Peck*, 6 Cranch 87. The clause does not touch civil rights or civil remedies. The remaining question then is, whether the act is contrary to the constitution of New Hampshire. . .³²⁸

Story ignored the Ninth Amendment claim, despite the alleged violation of natural rights. *Calder* and *Fletcher* are discussed as relevant to the Ex Post Facto and Contract Clause Claims, not the Ninth. Story does go on to consider principles of “natural justice,” but only after he concludes his discussion of the federal constitution and moves on to the issue of state law.³²⁹ On that issue, the Ninth Amendment was

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

³²⁷ Id. at 766.

³²⁸ Id. at 767.

³²⁹ Id. at 768.

irrelevant. This is precisely what we would expect under the Madisonian reading of the Ninth. It was not that natural rights did not exist, nor was it they were not subject to judicial enforcement, even by federal courts. Such rights did exist as matters of state law, and were discussed as such when addressed by the Supreme Court.

Although Justice Story found the Ninth Amendment irrelevant in *Wheeler*, this was not the only case in which he faced a Ninth Amendment issue. In the first Supreme Court case to discuss the Ninth Amendment, Justice Story interpreted the Ninth Amendment to be a rule of construction preventing the constructive enlargement of federal power to the injury of the states.³³⁰ That case, until now, had been completely lost. It is just one of countless lost or forgotten judicial applications of the Ninth Amendment discussed in *The Lost History of the Ninth Amendment (II): The Lost Jurisprudence*.

Epilogue

Once we understand the Ninth Amendment as a constitutionally unique rule of construction, previously obscured aspects of the Ninth's history come into focus. One of the demands leading to the Bill of Rights was the need for a clause preventing judicial construction of the Constitution in a manner entrenching upon the retained rights of the states. The states submitted proposed amendments along these lines, and both Madison and Sherman—two members of the drafting committee—proposed an amendment for just this purpose, with Sherman's unambiguously linking the purpose of the Ninth to the retained powers of the states. Madison described the purpose and effect of the final draft of the Ninth Amendment on not one, but two occasions. On both occasions he described the Ninth as a restraint on the construction of federal power and, in his bank speech, he follows Sherman in linking this rule of construction to the reserved powers of the states.

Madison's vision was not of a passive (or redundant) Ninth Amendment, but an Active Federalist provision guarding the construction of federal power. Given the dramatic constitutional disputes over federal power which have occurred over the last two hundred years, it would be somewhat astonishing if the Ninth Amendment played no role. In fact, such a silence might suggest that Madison's view was but a minority among the Founders and disappeared with the passing of his generation. As we shall see in *The Lost History of the Ninth Amendment (II): The Lost Jurisprudence*, it was not and it did not.

In his later years, Madison looked back on how the Supreme Court had fared in its fledgling efforts to interpret the Constitution. With disputes such as the Bank of the

³³⁰ *Houston v. Moore*, 18 U.S. 1 (1820).

United States, the Alien and Sedition Acts, and Marshall's opinion in *McCulloch v. Maryland* still fresh in his mind, Madison had reason to be melancholy:

It is to be regretted that the Court is so much in the practice of mingling with their judgments pronounced, comments & reasonings of a scope beyond them; and that there is often an apparent disposition to amplify the authorities of the Union at the expense of those of the States. It is of great importance as well as of indispensable obligation, that the constitutional boundary between them should be impartially maintained. Every deviation from it in practice detracts from the superiority of a Chartered over a traditional Govt. and mars the experiment which is to determine the interesting Problem whether the organization of the Political system of the U.S. establishes a just equilibrium; or tends to a preponderance of the National or the local powers.³³¹

Responding to Spencer Roane's concerns about the Supreme Court's decision in *Cohens v. Virginia*³³² limiting the scope of the Eleventh Amendment, Madison wrote "whatever may be the latitude of Jurisdiction assumed by the Judicial Power of the U.S. it is less formidable to the reserved sovereignty of the States than the latitude of power which it has assigned to the National Legislature."³³³ Still, Madison conceded, the Court had failed to consider the Constitution's own directions regarding the construction of federal judicial power:

On the question relating to involuntary submissions of the States to the Tribunal of the Supreme Court, the Court seems not to have adverted at all to the expository language when the constitution was adopted; nor to that of the Eleventh Amendment, which may as well import that it was declaratory, as that it was restrictive of the meaning of the original text.³³⁴

Despite his many disappointments, however, Madison never lost faith:

I am not unaware that the Judiciary career has not corresponded with what was anticipated. At one period the Judges perverted the Bench of Justice into a rostrum for partizan harangues. And latterly the Court, by some of its decisions, still more by extrajudicial reasonings & dicta, has manifested a propensity to enlarge the general authority in derogation of the local, and to

³³¹ James Madison to Spencer Roane, May 6, 1821, *reprinted in* Writings, *supra* note 3 at 773.

³³² 6 Wheat. (19 U.S.) 264 (1821).

³³³ *Id.* at 774.

³³⁴ *Id.* at 776-77. As the reader now knows, the "expository language" referred to by Madison included the Ninth and Tenth Amendments. Madison's link between the Ninth, Tenth, and Eleventh Amendments will be explored in *The Lost Jurisprudence*.

amplify its own jurisdiction, which has justly incurred the public censure. But the abuse of a trust does not disprove its existence.³³⁵

The problem addressed by Madison’s thoughtful meditations—the need to maintain a “just equilibrium” between “the National or the local powers”—would continue to be a thorn in the country’s side for the next one hundred and fifty years. The “expository language” meant to help guide the Court in this endeavor may have forgotten, but our forgetfulness is only recent. The meaning of the Ninth Amendment did not pass with James Madison. It was cited, quoted, discussed and deployed in countless cases throughout the nineteenth and early twentieth centuries in precisely the manner Madison and the ratifying conventions would have expected.

³³⁵ James Madison to Thomas Jefferson, June 27, 1823, *reprinted in* Writings, *supra* note 3 at 802.