



2006

## The Ninth Amendment: It Means What It Says

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85 Tex. L. Rev 1-82 (2006)

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# Texas Law Review

Volume 85, Number 1, November 2006

## Articles

### The Ninth Amendment: It Means What It Says

Randy E. Barnett\*

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 appears on its face to protect unenumerated individual rights of the same sort as those that were enumerated in the Bill of Rights, courts and scholars have long deprived it of any relevance to constitutional adjudication. With the growing interest in originalist methods of interpretation since the 1980s, however, this situation has changed. In the past twenty years, five originalist models of the Ninth Amendment have been propounded by scholars: the state law rights model, the residual rights model, the individual natural rights model, the collective rights model, and the federalism model. This Article examines thirteen crucial pieces of historical evidence that either directly contradict the state law and residual rights models, undercut the collective rights model, or strongly support the individual natural rights and federalism models. Evaluating the five models in light of this evidence establishes that the Ninth Amendment actually meant at the time of its enactment what it appears now to say: the unenumerated (natural) rights that people possessed prior to the formation of government, and which they retain afterwards, should be treated in the same manner as those (natural) rights that were enumerated in the Bill of Rights. In short, the Amendment is what it appears to be: a meaningful check on federal power and a significant guarantee of individual liberty.*

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## I. Introduction

The first time one reads the Ninth Amendment, its text is a revelation. Here is a sentence that seems explicitly to affirm that persons have other constitutional rights beyond those enumerated in the first eight Amendments. Given the fierce debates over the legitimacy of enforcing unenumerated constitutional rights, one immediately wonders why one has not heard of the Ninth before. If this first encounter is as a law student in a course on constitutional law, however, one soon learns why: the Supreme Court has long dismissed the Ninth Amendment as a constitutional irrelevance. As Justice Reed wrote in 1947:

The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people. Therefore, when 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.<sup>1</sup>

Not only does Justice Reed's construction render the Ninth Amendment functionless in constitutional adjudication, it rather carelessly runs it together with the Tenth Amendment.<sup>2</sup>

But this passage is not only cavalier about the text, it is also historically incorrect. The evidence of original meaning that has been uncovered in the past twenty years confirms the first impression of untutored readers of the Ninth Amendment and undercuts the purportedly more sophisticated reading that renders it meaningless. The purpose of the Ninth Amendment was to ensure that all individual natural rights had the same stature and force after some of them were enumerated as they had before; and its existence argued against a latitudinarian interpretation of federal powers.

The growth in our understanding of the Ninth Amendment has resulted from the interest in the original meaning of the Constitution that began in the 1980s.<sup>3</sup> As originalism grew in popularity, some originalists became understandably curious about the history and original meaning of the Ninth Amendment.<sup>4</sup> And critics of originalism used the original meaning of the Ninth Amendment to challenge those early originalists who were then

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1. *United Pub. Workers v. Mitchell*, 330 U.S. 75, 95–96 (1947).

2. *See* U.S. CONST. amend. X (“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.”).

3. *See, e.g.*, Edwin Meese III, *Interpreting the Constitution*, in *INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT* 13 (Jack N. Rakove ed., 1990) (discussing the emerging debate involving original intent of the framers of the constitution).

4. *See generally* *Symposium on Interpreting the Ninth Amendment*, 64 *CHI.-KENT L. REV.* 37 (1988) (presenting diverse viewpoints on the proper place of the Ninth Amendment in constitutional theory).

advocating a narrow view of constitutional rights. As a result, having once been largely forgotten by academics, this enigmatic provision has received an outpouring of serious scholarly attention over the past twenty years.

In this Article, I synthesize the developing modern scholarly debate about the original meaning of the Ninth Amendment and demonstrate that the cumulative evidence of public original meaning supports a view of the Amendment as a meaningful check on federal power and a significant guarantee of individual liberty. The synthesis begins with the mapping of the intellectual terrain. Even most constitutional scholars do not realize that five distinct originalist models of the Ninth Amendment have emerged since 1983: (1) the state law rights model, (2) the residual rights model, (3) the individual natural rights model, (4) the collective rights model, and (5) the federalism model.

The first two of these models—the state law and residual rights models—lead to the conclusion that the Ninth Amendment is a constitutional truism with no practical significance in constitutional adjudication. In the collective rights model, unless combined with another model, the Amendment has a very limited scope. The individual natural rights and federalism models—both of which I have long advocated—accord to the Ninth Amendment a significant role in constitutional interpretation, operating to preserve unenumerated individual rights and to negate latitudinarian constructions of Congress’s enumerated powers. The last three of these models are not mutually exclusive. Although the evidence supporting the collective rights model is thin, were this model to be established, it could be used to supplement rather than supplant the individual natural rights and federalism models.

The fact that there have been five distinct models of the Ninth Amendment in no way supports a claim that originalism generally, or the original meaning of the Ninth Amendment in particular, is indeterminate. To the contrary, as this body of scholarship developed—often through sharp debate—it produced an increasingly closer, careful, and comprehensive examination of the relevant sources.<sup>5</sup> The more we investigated, the more we learned. We now know much more about the Amendment’s original meaning than we used to, and what we know is both internally consistent and generally persuasive.

Progress in originalism is not only possible, it has occurred.<sup>6</sup> Because originalism is driven by the evidence, progress is made as the evidence accumulates, disconfirming some models and providing support for others.

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5. See Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 *LOY. L. REV.* 611, 616–20 (1999) (outlining the incorporation by constitutional scholars of new theories of originalism, the demise of the initial, less sophisticated arguments against originalism, and the diverse approaches to originalist theory currently embraced by different constitutional scholars).

6. See *id.* at 613–14 (discussing the resiliency of originalism despite harsh criticism in the 1980s, as well as the resurgence of originalism as the “prevailing approach to constitutional interpretation”).

Although the final word on the Ninth Amendment is yet to be written, a compelling pattern has emerged. In this Article, I describe this emerging pattern and show how the cumulative effect of the available historical evidence suggests strong support for the individual rights and federalism models.

This is not to imply that the original meaning of this or any provision tells us all we need to know to apply it to current cases and controversies. Even for a committed originalist, the determination of specific doctrines or rules of law is required to put the original meaning of the Constitution into effect, and these “constitutional constructions” are not reducible to the original meaning of the text itself. Instead, competing constructions must be assessed to see if they are consistent with this original meaning, though not logically deducible from it.<sup>7</sup> And for those nonoriginalists for whom original meaning provides a starting point or “modality” of constitution interpretation,<sup>8</sup> it nevertheless remains important to get that original meaning correct before moving on to other modalities or to “translate” original meaning into today’s application.<sup>9</sup>

The meat of this Article will be comparing and contrasting the arguments of particular scholars who have written extensively on the Ninth Amendment—especially arguments by Russell Caplan, Thomas McAfee, Akhil Amar, and most recently by Kurt Lash. While I strongly disagree with the conclusions of Caplan and McAfee, it is worth noting that Professor Lash and I end up in a nearly identical place: the Ninth Amendment justifies a narrow or “strict” construction of federal powers, and especially implied federal powers.<sup>10</sup> On both of our accounts, the Ninth Amendment undermines what Madison called a “latitudinarian” interpretation of the enumerated powers—including the Necessary and Proper Clause.<sup>11</sup> While

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7. For a seminal discussion of constitutional construction, see KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION* 14–15 (1999), which distinguishes constitutional construction from interpretation. See also RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 118–30 (2004) (discussing how constitutional construction differs from constitutional interpretation). See generally Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 51 (2004) (arguing that there is a distinction between constitutional meaning and constitutional decision rules, which direct the application of that meaning).

8. See PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 13 (1991) (identifying a “historical modality” as one of six modalities of constitutional interpretation). See generally PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982) (referring to modalities such as text, history, precedent, and structure).

9. See Lawrence Lessig, *Fidelity in Translation*, 71 TEXAS L. REV. 1165, 1182 (1993) (suggesting that the first step to maintaining fidelity to constitutional or statutory texts is to “read the text in its originating context, finding its meaning there first”).

10. See Kurt Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEXAS L. REV. 331, 394–99 (2004) [hereinafter Lash, *Lost Original Meaning*] (arguing that the founders’ understanding of the Ninth Amendment supports a narrow construction of federal power).

11. *Id.* at 392–93 (describing Madison’s argument that “[a]lthough implied in the original Constitution, an express rule against latitudinarian constructions found its ultimate expression in the Ninth Amendment”).

Professor Lash also defends the collective rights model, he does not deny that the Ninth Amendment refers, at least in part, to individual natural rights.<sup>12</sup> So readers should not take away from our disagreement about particular items of evidence any inference that some great difference turns on the outcome of our dispute. Professor Lash's and my approaches largely overlap and, where they differ, are not necessarily mutually inconsistent.

In Part I of this Article, I begin by identifying the version of originalism I will be employing: original public meaning originalism. Part II consists of a very brief description of the origins of the Ninth Amendment. This legislative history is entirely noncontroversial, and all five competing models rely upon it. In Part III, I neutrally describe each model using the label employed by its proponents. In this Part, I also offer some preliminary critical comments on the plausibility of the state law rights, residual rights, and collective rights models.

Part IV is the heart of the analysis. There I present a series of key pieces of originalist evidence that are inconsistent with some of these models and strongly supportive of others. On the basis of this evidence, the state law rights and residual rights models can be eliminated from consideration as best describing the original meaning of the Ninth Amendment, while the plausibility of the collective rights model is seriously undermined.

In contrast, all of this evidence either supports or is not inconsistent with the individual natural rights and federalist models. In the end, we shall see that the way a member of the public would today read the Ninth Amendment—before being exposed to a more “sophisticated” interpretation—was also its original public meaning at the time of its enactment. Given that the English language has not changed so much in two hundred years, that the Ninth Amendment actually meant then what it now appears to say should not come as a surprise.

## II. Originalist Methodology

The methodology employed in this Article is originalist, but that label is ambiguous because there are at least three distinctive originalist approaches: original framers' intent, original ratifiers' understanding, and original public meaning. Original framers' intent focuses on the intentions of those who wrote the Constitution.<sup>13</sup> Original ratifiers' understanding looks for the intentions and expectations of those who voted to ratify the text.<sup>14</sup> Original public meaning looks to how a reasonable member of the public (including, but not limited to, the framers and ratifiers) would have understood the words

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12. *See id.* at 401 (“[T]here is no textual reason and little historical reason to believe that the ‘other rights’ of the Ninth Amendment did not include natural rights.”).

13. *See* BARNETT, *supra* note 7, at 92.

14. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 888 (1985).

of the text (in context) at the time of its enactment.<sup>15</sup> The form of originalism I will employ is based on the original public meaning of the text.

I will not recapitulate here the strengths and weaknesses of each of these approaches, as I have done so elsewhere.<sup>16</sup> Original framers' intent was the version of originalism first advocated by Attorney General Edwin Meese in the 1980s in a series of influential lectures that sparked a voluminous academic critique.<sup>17</sup> Though, for a brief time, some originalists shifted to original ratifiers' understanding, most originalists have come to adopt original public meaning, which is now the dominant mode of originalist scholarship.<sup>18</sup>

This evolution in originalist methodology is worth mentioning because the timing of academic interest in the Ninth Amendment corresponds to the introduction of original framers' intent originalism in the 1980s.<sup>19</sup> As a result, we may see early Ninth Amendment scholarship focusing on framers' intent to a degree one would not witness today. Having said this, these different originalist methods are not always easy to distinguish in practice. Evidence of framers' intent or ratifiers' understanding is also typically good evidence of original public meaning. Still, it does happen that particular items of evidence assume a greater or lesser importance depending upon which version of originalism is being employed.

A good example of this is Roger Sherman's draft of a bill of rights that will be discussed in Part IV.<sup>20</sup> Notwithstanding evidence that Sherman himself opposed the provisions therein, his use of language in this draft is highly pertinent to the original meaning of the words that are also used in the Ninth Amendment. The bearing of this document on the original meaning of the Ninth Amendment has nothing whatsoever to do with the intentions of Roger Sherman—apart from his intention to use the English language in a manner that would be understood by his audience. The same can be said of evidence of word usage by participants at the Constitutional Convention and in private correspondence. It is no accident that these discussions about the language used in the text would be pertinent to ascertaining its meaning, wholly apart from the intentions or expectations of those who used these words to communicate their thoughts to others.

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15. BARNETT, *supra* note 7, at 92.

16. *See id.* at 89–117.

17. *See* Meese, *supra* note 3, at 16 (arguing that the framers set forth principles, the meaning of which “can be found, understood, and applied”); Jack N. Rakove, *Introduction* to INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT, *supra* note 3, at 3, 3 (noting that Meese’s speech “sparked—or rather rekindled—a debate about the proper norms of constitutional interpretation”).

18. BARNETT, *supra* note 7, at 92–93.

19. *See, e.g.*, Thomas McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1215 (1990) (acknowledging the emergence of the Ninth Amendment as a point of contention in the debate over constitutional rights).

20. *See infra* notes 157–61 and accompanying text.



Unfortunately, the debate over the original meaning of the Ninth Amendment cannot be settled with the same sort of quantitative evidence that can be used to interpret, for example, key portions of the Commerce Clause.<sup>21</sup> Unlike the word “commerce,” which can be shown to have a discernable meaning distinct from such other economic activities as agriculture and manufacturing, the phrase “other rights retained by the people” cannot be established by a systematic study of general usage. Instead, to establish its public meaning, it becomes necessary to examine the publicly known purpose for which the Ninth Amendment was added. This is not to revert to an original framers’ intent approach, however. We consult the publicly known purpose for which the Ninth Amendment was conceived because the public understanding of its text was shaped by this purpose.

Because the words of the Ninth Amendment could have been used in different ways at the time of its enactment depending on the context, the Ninth Amendment is open to more possible interpretations than other provisions of the text. The challenge is to identify a conceptual model that best fits the available evidence. The term “model” seems apt because an originalist inquiry is empirical in nature. To the extent that these models are mutually exclusive—as the last three models are from the first two, and the first two from each other—the challenge is to choose the model (or compatible models) that best fits the available evidence of original public meaning. Before describing the models and presenting the key evidence, however, I will briefly summarize the legislative history of the Ninth Amendment for those who are not familiar with how this pregnant passage came to be included in the text.

### III. The Legislative History of the Ninth Amendment

During the ratification debates over the Constitution, the principal objection made by its opponents that resonated with the public was the absence of a bill of rights.<sup>22</sup> In response to this objection, supporters of the Constitution offered two arguments. First, they argued that a bill of rights was *unnecessary*. Because the Constitution was one of limited and enumerated powers, these enumerated limits constituted a bill of rights.<sup>23</sup> Second,

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21. See Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847, 856, 865 (2003) (comprehensively surveying the meaning of the word “commerce” in the *Philadelphia Gazette* from 1728 to 1800 and also providing “a selection of typical uses of the term ‘commerce’ to . . . give readers a sense of the cumulative weight of the evidence”); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 143, 146 (2001) (comprehensively surveying the use of the word “commerce” in the notes of the constitutional convention, the ratification conventions, and the federalist papers, as well as in contemporary dictionaries).

22. LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 12 (1999).

23. See THE FEDERALIST NO. 84, at 513–14 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?”).



they argued that a bill of rights would be *dangerous*. By attempting to enumerate any rights to be protected, it would imply that all that were not listed were surrendered. And it would be impossible to enumerate all the rights of the people.<sup>24</sup>

Critics of the Constitution—labeled by its supporters as “Antifederalists”—offered two telling rejoinders to these arguments. As to the lack of necessity, they questioned the effectiveness of enumerated powers as a limitation of federal powers, especially in light of the existence of the Necessary and Proper Clause,<sup>25</sup> which was then known as the Sweeping Clause.<sup>26</sup> As to the issue of dangerousness, they pointed to the rights already protected in Article I, Section 9, such as the guarantee of the writ of habeas corpus.<sup>27</sup> If enumerating any rights was dangerous, then this very short list invited the same danger, which would only be ameliorated, however imperfectly, by expanding the list of protected rights.

Opponents of the Constitution, it should be noted, were more interested in advancing an argument that would defeat ratification than in actually obtaining a bill of rights.<sup>28</sup> Their insistence on a bill of rights was offered with the objective of recommitting the Constitution to a convention for further consideration, during which time it could effectively be killed.<sup>29</sup> For this reason, supporters of the Constitution countered the popular demand for a bill of rights with a pledge to offer amendments to the Constitution after its ratification. This pledge won the day for the Constitution by tipping the political balance sufficiently to obtain ratification.<sup>30</sup> Several ratification conventions thereafter accompanied their ratification with a list of proposed amendments or changes to the Constitution along with proposals for a bill of rights.<sup>31</sup>

In the first Congress, it fell to Virginia Representative James Madison to insist, over both indifference and vocal opposition, that the House take up the issue of amendments. In a now famous and much-analyzed speech, he introduced a list of amendments that he proposed be inserted within the text of the Constitution. At the end of the list of rights to be added to Article I, Section 9 (where the individual right of habeas corpus was located) was the following precursor of what eventually became the Ninth Amendment:

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24. See *infra* notes 110–13 and accompanying text.

25. CALVIN R. MASSEY, *SILENT RIGHTS: THE NINTH AMENDMENT AND THE CONSTITUTION'S UNENUMERATED RIGHTS* 64–65 (1995).

26. Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 *DUKE L.J.* 267, 270 (1993).

27. MASSEY, *supra* note 25, at 65.

28. LEVY, *supra* note 22, at 30–31.

29. See *id.* (stating that the Antifederalists sought to use the absence of a bill of rights to defeat the Constitution or to promote a second ratification convention in hopes that this second convention would revise the Constitution to decrease the power of the national government).

30. *Id.* at 31–32.

31. *Id.*

The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people; or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.<sup>32</sup>

By contrast, Madison proposed that the provision that eventually became the Tenth Amendment be inserted after Article VI as a new Article VII.<sup>33</sup>

In his speech, Madison explained this proposed precursor of the Ninth Amendment in terms that connect it directly with Federalist objections to the 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 may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the 4th resolution.<sup>34</sup>

All of Madison's proposals were then committed for consideration to a Select Committee of which he was a member, along with other members such as Connecticut Representative Roger Sherman.<sup>35</sup> Although the Select Committee proposed integration,<sup>36</sup> what eventually emerged from the House was a list of amendments to be appended to the end of the Constitution,<sup>37</sup> rather than integrated within the text so as literally to amend or change it.<sup>38</sup> The eleventh of this list was the amendment that we know as the Ninth Amendment. The numbering changed when the first two proposed amendments failed to be ratified, though the one covering congressional pay

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32. James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), in JAMES MADISON, WRITINGS 437, 443 (Jack N. Rakove ed., 1999).

33. Madison Resolution (June 8, 1789), reprinted in CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 13–14 (Helen E. Veit et al. eds., 1991) [hereinafter CREATING THE BILL OF RIGHTS].

34. James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), in JAMES MADISON, WRITINGS, *supra* note 32, at 437, 448–49.

35. CREATING THE BILL OF RIGHTS, *supra* note 33, at 5–6 (indicating that Madison and Sherman were among those appointed to the Select Committee on July 21, 1789).

36. House Committee Report (July 28, 1789), reprinted in CREATING THE BILL OF RIGHTS, *supra* note 33, at 29, 29–33.

37. House Resolution and Articles of Amendment (Aug. 24, 1789), reprinted in CREATING THE BILL OF RIGHTS, *supra* note 33, at 37, 37–41.

38. See The Congressional Register (Aug. 13, 1789), reprinted in CREATING THE BILL OF RIGHTS, *supra* note 33, at 112, 117–26 (recounting the debate between members of the committee of the whole House concerning whether to integrate or append the amendments).

increases was eventually ratified in 1992 becoming the Twenty-Seventh Amendment.<sup>39</sup>

After a period of time, the numbers used to refer to the amendments were altered to reflect the absence of the first two proposals, but, for a time, the Ninth Amendment was called the Eleventh Amendment.<sup>40</sup> This change in numbering initially inhibited a proper understanding of the Ninth Amendment by concealing an important use of the Ninth Amendment in a constitutional argument by none other than then-Representative James Madison.<sup>41</sup> Ever since the rediscovery of Madison's use of the Ninth Amendment, the debate has moved towards substantial convergence, as we shall see.

#### IV. Five Originalist Models of the Ninth Amendment

The modern debate over the original meaning of the Ninth Amendment was triggered by the testimony of Judge Robert Bork during the hearings over his Supreme Court nomination. After extensive grilling in which he was asked to reconcile his originalism with the text of the Ninth Amendment, he offered the following analogy:

I do not think you can use the ninth amendment unless you know something of what it means. For example, if you had an amendment that says "Congress shall make no" and then there is an ink blot and you cannot read the rest of it and that is the only copy you have, I do not think the court can make up what might be under the ink blot . . . .<sup>42</sup>

Coming from someone committed to originalism, this statement was controversial to say the least. Within months, an extensive literature on the Ninth Amendment began to accumulate.<sup>43</sup>

Just as interesting as his Senate testimony was how Judge Bork treated the Ninth Amendment in his later book, *The Tempting of America*. There, he

39. Compare Articles of Amendment, as Agreed to by the Senate (Sept. 14, 1789), reprinted in *CREATING THE BILL OF RIGHTS*, *supra* note 33, at 47, 47–49 (stating the amendments as proposed to the legislatures of the several states), with U.S. CONST. amends. I–X, XXVII (stating the amendments as ratified by the several states).

40. Amendments to the Constitution (Sept. 28, 1789), reprinted in *CREATING THE BILL OF RIGHTS*, *supra* note 33, at 3, 3–4.

41. See *infra* subpart V(I).

42. *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 249 (1989) (statement of Robert H. Bork).

43. For example, see Randy E. Barnett, *Foreword: The Ninth Amendment and Constitutional Legitimacy*, 64 CHI.-KENT L. REV. 37 (1988) and the symposium issue in which it appeared. The Chicago-Kent Symposium became the core of 2 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT (Randy E. Barnett ed., 1993). See also 1 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT (Randy E. Barnett ed., 1989); Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1 (1988).

switched his inkblot metaphor to the Privileges or Immunities Clause of the Fourteenth Amendment.<sup>44</sup> As his interpretation of the Ninth Amendment, he offered instead the theory proposed by Russell Caplan in his 1983 *Virginia Law Review* article, *The History and Meaning of the Ninth Amendment*.<sup>45</sup> In this manner, Caplan's thesis was elevated to become the first of five distinct models of the Ninth Amendment considered by those seeking its original meaning. So it is to his approach that I first turn.

*A. The State Law Rights Model*

Russell Caplan's article may have been the first article on the original meaning of the Ninth Amendment to gain a wide audience. As such, it received considerable attention and it is unsurprising that his approach would have been adopted by Robert Bork. Caplan's thesis was that the "other rights" to which the Ninth Amendment refers were state constitutional and common law rights. The effect of the Ninth Amendment, he contended, was to prevent any suggestion that the adoption of the Constitution displaced or supplanted these rights. Here is how he stated his thesis:

[T]he ninth amendment is not a cornucopia of undefined federal rights, but rather . . . is limited to a specific function, well-understood at the time of its adoption: the maintenance of rights guaranteed by the law of the states. These state rights represented entitlements derived from both natural law theory and the hereditary rights of Englishmen, but ninth amendment protection did not transform these unenumerated rights into constitutional, that is, federal, rights. . . . [The amendment] simply provides that the individual rights contained in state law are to continue in force under the Constitution until modified or eliminated by state enactment, by federal preemption, or by a judicial determination of unconstitutionality.<sup>46</sup>

According to Caplan, states were free to change their own constitutional or common law rights without violating the Ninth Amendment, and—under the Supremacy Clause—national legislation that affected these state law rights, but which was within the powers of the federal government, would also not violate the Ninth Amendment.<sup>47</sup> Under this reading, the Ninth Amendment had no practical application in constitutional adjudication. Apart from its conflict with crucial pieces of evidence as we shall see in Part IV, Caplan's thesis also suffers from his inability to produce any

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44. See ROBERT H. BORK, *THE TEMPTING OF AMERICA* 166 (1990) (calling the Privileges or Immunities Clause "a mystery since its adoption" and comparing it to "a provision that is . . . obliterated past deciphering by an ink blot").

45. *Id.* at 184; see also Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223 (1983).

46. Caplan, *supra* note 45, at 227–28.

47. See *id.* at 228.

contemporary statement that clearly interprets the Ninth Amendment the way he does. His evidence, such as it is, is entirely circumstantial.

*B. The Residual Rights Model*

In 1990, Thomas McAfee put forth what he called the “residual rights” conception of the Ninth Amendment in his article *The Original Meaning of the Ninth Amendment*.<sup>48</sup> According to McAfee, the Ninth Amendment was originally intended *solely* to prevent later interpreters of the Constitution from exploiting the incompleteness of the enumeration of rights to expand federal powers beyond those delegated by the Constitution.<sup>49</sup> “On the residual rights reading, the ninth amendment serves the unique function of safeguarding the system of enumerated powers *against a particular threat* arguably presented by the enumeration of limitations on national power.”<sup>50</sup> So, for example:

If the government contended in a particular case that it held a general power to regulate the press as an appropriate inference from the first amendment restriction on that power, or argued that it possessed a general police power by virtue of the existence of the bill of rights, the ninth amendment would provide a direct refutation.<sup>51</sup>

In sum, according to McAfee, the *exclusive* function of the Ninth Amendment is to protect the scheme of delegated powers by arguing against this specific sort of inference. As he puts it:

The ninth amendment reads entirely as a “hold harmless” provision: it thus says nothing about how to construe the powers of Congress or how broadly to read the doctrine of implied powers; it indicates only that no inference about those powers should be drawn from the mere fact that rights are enumerated in the Bill of Rights.<sup>52</sup>

McAfee denied that what he dubbed the “residual rights” retained by the people “are to be defined independently of, and may serve to limit the scope of, powers granted to the national government by the Constitution.”<sup>53</sup> Instead, he maintained that “the other rights retained by the people are *defined* residually from the powers granted to the national government.”<sup>54</sup>

Both Russell Caplan and Thomas McAfee viewed the Ninth Amendment as having the *sole* purpose of responding to a *single* potential misconstruction of the Constitution, although they differed on the particular misconstruction to which the Ninth Amendment is responding. According to Caplan, the *only* purpose of the Ninth Amendment is to respond to the

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48. McAfee, *supra* note 19, at 1221.

49. *Id.* at 1221–22.

50. *Id.* at 1306–07 (emphasis added).

51. *Id.* at 1307.

52. *Id.* at 1300 n.325 (emphasis added).

53. *Id.* at 1222.

54. *Id.* at 1221 (emphasis added).

argument, should it ever be made, that the Constitution has supplanted state law rights.<sup>55</sup> According to McAfee, the *only* purpose of the Ninth Amendment is to respond to the argument, should it ever be made, that the enumeration of particular rights in the Constitution implies that Congress has broader powers.<sup>56</sup>

As we shall see in Part V, the most telling evidence against both these positions is that James Madison used the Ninth Amendment in a constitutional debate, while it was still pending ratification in the states, outside the only contexts in which Caplan and McAfee claimed it was supposed to be used.<sup>57</sup> In his speech to the House about the National Bank, Madison cited the Ninth Amendment, though there was no issue of supplanting state law rights (as distinct from state powers which were at issue) nor any claim that the Congress had the power to enact a bank because of the enumeration of rights in the Constitution (which had not yet occurred).

### C. *The Individual Natural Rights Model*

In prior work, I have defended the view that the “other rights” protected by the Ninth Amendment are individual natural rights.<sup>58</sup> The purpose of the Ninth Amendment was to ensure that these rights had the same stature and force after enumeration as they had before. Specifically, in the two year interregnum before the enumeration in the Constitution of certain rights, Congress would have acted improperly and unconstitutionally had it infringed upon the natural rights to the freedom of speech, to the free exercise of religion, and to keep and bear arms. It would have also acted unconstitutionally had it taken private property for public use without just compensation. All these individual natural rights existed prior to the Bill of Rights and were added to the Constitution, in Madison’s words, “for greater caution.”<sup>59</sup> In contrast, other positive rights, such as the right of trial by jury in the Fifth Amendment, were not constitutional rights before their enactment. These rights were added, again in Madison’s words, as “actual limitations”<sup>60</sup> on delegated federal powers; unlike natural rights, they did not preexist the enactment of the Bill of Rights.

According to the individual natural rights model, the Ninth Amendment was meant to preserve the “other” individual, natural, preexisting rights that were “retained by the people” when forming a government but were not

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55. Caplan, *supra* note 45, at 227–28.

56. See McAfee, *supra* note 19, at 1226 (“[T]he text of the state proposals that became the ninth amendment reflect the general understanding that its purpose was to prevent the inference of a government of general powers from the provision in a bill of rights for specific limitations on behalf of individual rights.”).

57. See *infra* notes 226–29 and accompanying text.

58. See BARNETT, *supra* note 7, at 54–86, 235–42.

59. James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), in JAMES MADISON, WRITINGS, *supra* note 32, at 437, 443.

60. *Id.*



included in “the enumeration of certain rights.” These other rights retained by the people are as enforceable *after* the enactment of the Bill of Rights as the retained rights of freedom of speech, press, assembly, and free exercise of religion were enforceable *before* the enactment of the Bill of Rights when they too were still unenumerated. In other words, the purpose of the Ninth Amendment was to ensure the equal protection of unenumerated individual natural rights on a par with those individual natural rights that came to be listed “for greater caution” in the Bill of Rights.

On this reading, the Ninth Amendment has the important function of negating any construction of the Constitution that would protect only enumerated rights and leave unenumerated rights unprotected. In this manner, the Ninth Amendment specifically negates the judicial philosophy adopted in the first paragraph of the famous Footnote Four of *United States v. Carolene Products Co.* in which it is asserted that “[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a *specific prohibition* of the Constitution, such as those of the *first ten amendments* . . . .”<sup>61</sup>

It should be stressed that the individual natural rights model does not claim the Ninth Amendment to be a “source” of independent rights—or, as Russell Caplan mistakenly characterized it, “a cornucopia of undefined federal rights”<sup>62</sup>—that are immune from any government regulation. First, natural rights precede the Constitution, and the Ninth Amendment is not their “source.” Instead, according to this model, the Ninth Amendment refers to these preexisting rights and requires that all natural rights be protected equally—not be “disparaged”—whether or not they are enumerated.

Second, this model does not view constitutional rights as necessarily trumping all laws that may affect their exercise. This model does not exclude the *regulation* of natural rights, any more than an individual natural rights model of the First Amendment excludes all time, place, or manner regulations of speech, press, or assembly.<sup>63</sup> A proper regulation is not a prohibition, but instead proscribes the manner by which a particular liberty is to be exercised to protect the rights of others. The individual natural rights model would not end all regulation, but would instead scrutinize a regulation of liberty to ensure that it is reasonable and necessary, rather than an improper attempt by government to restrict the exercise of the retained rights.

In addition, an individual natural rights model would provide no barrier to prohibiting (as opposed to regulating) wrongful behavior that violates the rights of others. Under this approach, while rightful exercises of liberty may only be regulated (not prohibited), wrongful acts that violate the equal rights of others are not exercises of liberty and may be prohibited, not just

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61. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (emphasis added).

62. Caplan, *supra* note 45, at 227.

63. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-3 (2d ed. 1988) (discussing time, place, and manner regulation).



regulated. What adhering to this model would bar is the prohibition—as opposed to the regulation—of rightful exercises of natural rights.

Third, the individual natural rights model does not require that judges identify particular natural rights and then protect them. Instead, the courts could put the burden of justification on the federal government whenever legislation restricts the exercise of liberty. As I have explained,<sup>64</sup> this presumption may be rebutted by a showing that a particular law was a necessary regulation of a rightful act or a prohibition of a wrongful act.<sup>65</sup> What is barred by the Ninth Amendment under this model is the prohibition or unnecessary regulation of rightful acts. According to a presumption of liberty, the unenumerated liberties retained by the people would receive the same presumptive protection as that now accorded some of the enumerated rights.

Lastly, it would be mistaken to characterize the individual natural rights model as entailing federal restrictions on the powers of states. The Ninth Amendment, like the rest of the Bill of Rights, originally applied only to the federal government.<sup>66</sup> True, natural rights could also limit the just powers of state governments, but this would be because of their independent force; the textual existence of the Ninth Amendment would not by itself justify federal protection against the violation of natural rights of individuals by their state governments. It was only with the passage of the Fourteenth Amendment—in particular the Privileges or Immunities Clause—that the federal government obtained any jurisdiction to protect the unenumerated retained natural rights of the people from infringement by state governments.<sup>67</sup>

In sum, the individual natural rights model can be viewed as justifying a rule of construction by which claims of federal power can be adjudicated, rather than as an independent source of rights that automatically trumps any exercise of governmental power. This model does not require that specific natural rights be identified but can work in the same presumptive way that now protects the natural rights of speech, press, and assembly. And this model does not purport to limit state power.

#### *D. The Collective Rights Model*

According to the collective rights model, the “other” rights retained by the people is a reference to the rights that the people possess as a collective

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64. BARNETT, *supra* note 7, at 319–34.

65. The only tricky part of the approach would be the need to distinguish wrongful acts—which are not exercises of *liberty* but rather are acts of *license*—that can be prohibited, from rightful exercises of liberty that can only be regulated reasonably, not prohibited altogether. But this difficulty should not be exaggerated because any liberty may properly be regulated, provided that such regulation can be justified as necessary.

66. *See* Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250–51 (1883) (holding that the Fifth Amendment was not incorporated and was only intended to act as a limitation on the exercise of power by the federal government).

67. BARNETT, *supra* note 7, at 66.

political body, as distinct from the rights they possess as individuals.<sup>68</sup> Although, so far as I am aware, no Ninth Amendment scholar has claimed this to have been the exclusive meaning of the Ninth Amendment, I identify it as a separate model because at least two Ninth Amendment scholars—Akhil Amar and Kurt Lash—have claimed that the purpose of the Ninth Amendment was, at least in part and perhaps even primarily, the protection of the retained rights of the people viewed collectively, as distinct from the rights of particular individuals.<sup>69</sup> Akhil Amar comes very close to claiming an exclusively collective rights reading of the Ninth Amendment, without crossing the line completely:

The conspicuously collective meaning of “the people” in the Tenth Amendment (and elsewhere) should alert us that its core meaning in the Ninth is similarly collective. Indeed, the most obvious and inalienable right underlying the Ninth Amendment is the collective right of We the People to alter or abolish government, through the distinctly American device of the constitutional convention. . . . To see the Ninth Amendment, as originally written, as a palladium of countermajoritarian individual rights—like privacy—is to engage in anachronism.<sup>70</sup>

If taken as the exclusive reading of the Ninth Amendment, the collective rights model would be inconsistent with the individual natural rights model. But the two are not mutually exclusive. It is possible that the “other” rights retained by the people were both individual and collective, in which case the collective rights model identifies a potential application of the Ninth Amendment beyond the protection of individual liberties.

Whatever the merits of the collective rights model of the Bill of Rights in general, there is reason to be skeptical of it as a model of the Ninth Amendment in particular. As was seen above, Antifederalist opponents of the Constitution objected to its lack of a bill of rights.<sup>71</sup> Many of the rights that were eventually included were drawn from recommendations of state ratification conventions and can be viewed as Antifederalist in their nature.<sup>72</sup> By this I mean that these proposals were proposed by and adopted to placate Antifederalist opponents of the Constitution who opposed its ratification. The original public meaning of these amendments reflects, therefore, their

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68. I was tempted to label this model the “collective natural rights” position because the collective political rights that Akhil Amar has in mind—such as the right of revolution—preexist the formation of government and are “natural” in the relevant sense. This label would also have the salutary effect of showing the potential compatibility of the individual natural rights model with the collective rights model. However, to avoid confusion, as well as the risk of misrepresentation, I have retained the term favored by Amar (and by Kurt Lash).

69. See AKHIL REED AMAR, *THE BILL OF RIGHTS* 120 (1998); Lash, *Lost Original Meaning*, *supra* note 10, at 342.

70. AMAR, *supra* note 69, at 120.

71. See *supra* notes 28–29 and accompanying text.

72. See LEVY, *supra* note 22, at 32 (noting that every right in the first ten amendments came from state recommendations, except for the Fifth Amendment’s requirement of just compensation).

Antifederalist source and audience. As Madison explained in his Amendments Speech to the House:

It cannot be a secret to the gentlemen in this house, that, notwithstanding the ratification of this system of government by eleven of the thirteen United States, in some cases unanimously, in others by large majorities; yet still there is a great number of our constituents who are dissatisfied with it; among whom are many respectable for their talents, their patriotism, and respectable for the jealousy they have for their liberty, which, though mistaken in its object, is laudable in its motive. There is a great body of the people falling under this description, who at present feel much inclined to join their support to the cause of federalism, if they were satisfied in this one point: We ought not to disregard their inclination, but, on principles of amity and moderation, conform to their wishes, and expressly declare the great rights of mankind secured under this constitution.<sup>73</sup>

Given the Antifederalist origins of the Bill of Rights—including the Tenth Amendment, a form of which was proposed by every ratification convention that forwarded amendments<sup>74</sup>—it is tempting to interpret the Ninth Amendment as similarly Antifederalist. But the temptation should be resisted. As we shall see, Madison designed the Ninth Amendment by substantially altering state proposals to address the concerns expressed during ratification by *Federalist* supporters of the Constitution.<sup>75</sup> In particular, it was meant to address their concern that enumerating some rights would be dangerous.

In this regard, within the Bill of Rights, the Ninth Amendment is *sui generis*. While the rest of the Bill of Rights was a response to Antifederalist objections to *the Constitution*, the Ninth Amendment was a response to Federalist objections to *the Bill of Rights*. It is very far from clear that the sorts of rights that Federalists feared would be “surrendered up” to a general government were “collective” rather than individual in nature. Evidence of Antifederalist attachments to “collective rights” is beside the point. That Madison’s version of the Ninth Amendment was a departure from, rather than an incorporation of, the public meaning of similarly worded Antifederalist-inspired state proposals will become apparent below.<sup>76</sup>

#### *E. The Federalism Model of the Ninth Amendment*

Chronologically, the final model to emerge within the Ninth Amendment literature of the past twenty years is the federalism model.

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73. James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), in JAMES MADISON, WRITINGS, *supra* note 32, at 437, 439.

74. AMAR, *supra* note 69, at 123.

75. See *infra* notes 110–17 and accompanying text.

76. See *infra* text accompanying notes 160–83.

According to this model, the Ninth Amendment justifies a narrow or strict construction of enumerated federal powers, especially powers implied under the Necessary and Proper Clause. I have come to conclude that, unlike the first four models already discussed, this is not a model of the original meaning of the text. In other words, it does not even purport to tell us what the text originally and literally said to a member of the general public at the time it was enacted. Instead, it is a model of what is properly considered a “constitutional construction” by which the meaning of what the text does say can be put into effect.<sup>77</sup> For this reason, it should not be surprising that this model might well be consistent with both the individual natural rights and collective rights models. By the same token, evidence that the Ninth Amendment was used to justify a narrow construction of federal power is, as we shall see, inconsistent with the state law rights and residual rights models.<sup>78</sup>

This federalism model of the Ninth Amendment was suggested by Akhil Amar shortly after his claim that the “core meaning” of the Ninth Amendment is the protection of collective rights:

The Ninth Amendment also sounds in part in federalism, but many constitutional scholars today have missed the beat. As with our First and Tenth Amendments, the Ninth explicitly sought to protect liberty by preventing Congress from going beyond its enumerated powers in Article I, section 8 and elsewhere in the Constitution. . . . To be sure, on a federalism-based reading, the Ninth and Tenth fit together snugly, as their words and legislative history make clear; but each amendment complements the other without duplicating it. The Tenth says that Congress must point to some explicit or implicit enumerated power before it can act; and the Ninth addresses the closely related but distinct question of whether such express or implied enumerated power in fact exists.<sup>79</sup>

Amar’s initial presentation of this model was fuzzy. For one thing, he presented no originalist evidence of his own, relying solely on Thomas McAfee’s historical analysis.<sup>80</sup> His explanation of the federalism reading of the Ninth Amendment sounds exactly like McAfee’s residual rights approach:

In particular, the Ninth [Amendment] warns readers not to infer from the mere enumeration of a right in the Bill of Rights that implicit federal power in fact exists in a given domain. Thus, for example, we must not infer from our First Amendment that Congress was ever

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77. See *supra* note 7 and accompanying text.

78. See *infra* notes 114–17 and accompanying text.

79. AMAR, *supra* note 69, at 123–24.

80. See *id.* at 123 (“As Professor McAfee has shown, the amendment’s legislative history strongly supports an enumerated-powers, federalism-based reading.”).

given legislative power in the first place to regulate religion in the states, or to censor speech.<sup>81</sup>

He then immediately muddies the water still further by distinguishing the federalism reading from the collective rights reading: “Of course, both the Ninth and the Tenth go beyond pure federalism in their ringing affirmations of popular sovereignty.”<sup>82</sup>

In short, even knowledgeable readers of Amar are likely to be confused into thinking that the “federalism” reading of the Ninth Amendment is both reducible to Thomas McAfee’s residual rights model and entirely distinct from Amar’s own collective rights model. If this is what Amar meant to claim, then this is not the federalism model I am considering in this section. But I think Amar may well have been suggesting a distinctive federalism position that is quite different from the residual rights model and potentially consistent with a concern for collective rights.

The Ninth Amendment scholar who has done the most to clarify and support this sort of distinctive federalism model is Kurt Lash. A federalism model, as he describes it, is one that justifies a strict or narrow construction of federal powers, especially the claim of implied powers under the Necessary and Proper Clause.<sup>83</sup> Lash describes this approach as follows: “Although the Ninth and Tenth Amendments both limited federal power, they did so in different ways. The Tenth insured that the federal government would exercise only those powers enumerated in the Constitution. The Ninth Amendment went further, however, and prohibited an expanded interpretation of those enumerated powers.”<sup>84</sup> Lash distinguishes his account from McAfee’s by use of the helpful distinction between “active” and “passive” federalism approaches:

To date, federalist theories of the Ninth Amendment have been “passive” in that they do not view the Ninth as justifying judicial intervention. This approach reads the Ninth as a mere declaration that enumerated rights do not imply otherwise unenumerated federal power. In essence, a passive, federalist reading limits the Ninth to preserving the principle declared in the Tenth Amendment—all powers not delegated are reserved.<sup>85</sup>

He then accurately characterizes McAfee as “arguing that the Ninth [Amendment] is not a limitation on federal power, but works in conjunction with the Tenth to preserve the concept of enumerated power.”<sup>86</sup> In contrast, Lash allows that it “is possible to take an *active* federalist approach to the

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81. *Id.* at 124.

82. *Id.*

83. See Lash, *Lost Original Meaning*, *supra* note 10, at 355 (noting the concerns of state ratification conventions about the Necessary and Proper Clause).

84. *Id.* at 399.

85. *Id.* at 346.

86. *Id.*

Ninth Amendment. This would view the Ninth as a judicially enforceable rule of construction limiting the power of the federal government to interfere with the retained right of the people to local self-government.”<sup>87</sup>

Here and elsewhere in his two articles, Lash appears to suggest that the active federalism approach is meant to protect *only* collective rights. For example, in the very next paragraph he says that “[j]ust as the active Libertarian reading creates a presumption in favor of unenumerated individual rights, so the active federalist reading creates a presumption in favor of the collective right of the people to state or local self-government.”<sup>88</sup> This sentence implies, wrongly as we shall see, that a “federalist reading” is inconsistent with a presumption in favor of individual rights. Examples of this sort of collective rights rhetoric are numerous throughout his two lengthy articles.<sup>89</sup>

Taken together with his stark distinction between what he calls the “Libertarian reading” and his “federalist” reading, readers are likely to be misled into thinking that an active federalism model is somehow incompatible with an active individual natural rights model.<sup>90</sup> Yet elsewhere, when summing up his approach, Lash describes the federalism model as embracing both individual and collective natural rights:

The text of the Ninth does not limit its application to natural rights. All retained rights, natural or otherwise, were protected from denial or disparagement as a result of the decision to enumerate “certain rights.” Neither the text nor the purpose of the Ninth Amendment was limited to protecting a subcategory of retained rights.<sup>91</sup>

Certainly as a logical matter, an active federalism reading of the Ninth Amendment that effectively limited the scope of congressional powers would serve to protect *both* the natural rights of individuals and any collective right of the people to self-government (Lash) or to alter or abolish their government (Amar). In this sense the federalism model is consistent with both the

87. *Id.*

88. *Id.* at 346–47. Notice how “the collective right of the people to state or local self-government” is an Antifederalist, rather than a Federalist, concern. I use the term “federalism” rather than Lash’s term “federalist” to describe this model because the restrictions on federal powers it recommends potentially serve Antifederalist as well as Federalist objectives.

89. *See id.* at 362 (“One of the principle issues left open by the text of the Ninth Amendment involves the ‘other rights’ protected by the Ninth’s rule of construction. Federalist theories emphasize the collective rights of the people of the several states—the right to local self-government on all matters not assigned to the federal government.”); *see also* Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEXAS L. REV. 597, 609 (2005) [hereinafter Lash, *Lost Jurisprudence*] (“The rarity and universal rejection of attempts to read the Ninth Amendment as a source of libertarian rights tracks the original understanding of the Ninth as a rule protecting the retained collective rights of the people of the several states.”); *id.* at 684 (“Hughes’s opinion in *Ashwander* presents one of the clearest examples of Ninth Amendment rights being read to refer to the collective rights of local self-government.”).

90. *See* Lash, *Lost Original Meaning*, *supra* note 10, at 343 (contrasting the Libertarian and federalist theories of Ninth Amendment understanding).

91. *Id.* at 399.



individual and collective natural rights models. With the Ninth Amendment, as elsewhere in the Constitution, federalism is a means rather than an end in itself. And a principal end of federalism is the protection of the liberties of the people, both personal and political.

Perhaps the biggest mistake of contending Ninth Amendment theorists is to view their favored model as exclusive. Once we distinguish means from ends, evidence supporting a federalism function of the Ninth Amendment can be viewed as logically consistent with *both* the individual and collective rights models. Arguing against a latitudinarian construction of express and implied federal powers is a powerful means of protecting whatever rights were thought retained by the people, whether individual, collective, or both.

That the federalism model is logically compatible with both the individual and collective natural rights models, however, does not entail that all three comprise the actual original meaning of the Ninth Amendment. That question must be settled by evidence. And, even if these three models can be rendered compatible with each other, that does not entail that they are also compatible with the state law rights or residual rights models. Indeed, as will be shown in the next Part, important pieces of evidence of original meaning are incompatible with either of these earlier originalist models.

#### V. Key Evidence of Original Meaning

Most originalist analyses of the Ninth Amendment consist of lengthy renditions of the historical developments leading up to its adoption, the process of its drafting and ratification, and constitutional commentary afterwards.<sup>92</sup> To this, Kurt Lash has added an entire article on the use of the Ninth Amendment by various courts and litigants after its enactment.<sup>93</sup> These presentations are always impressive and tend to be persuasive to those unfamiliar with the terrain.

The difference in their conclusions largely results from differences in how particular items of evidence are placed in a larger context. Further, earlier work failed to consider vital pieces of evidence that only gained wide attention as the scholarly debate evolved. Also, crucial moves are sometimes made without support, though this is often hard to see given that these particular assertions are surrounded by a dense thicket of evidence that does not directly establish the point at issue.

We have already seen one example of the last phenomenon in Akhil Amar's unsupported assertion (apart from his intratextual linkage to other Amendments and a single citation to Thomas McAfee) that "the most obvious and inalienable right underlying the Ninth Amendment is the collective right of We the People to alter or abolish government, through the

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92. See, e.g., *id.* at 348–410.

93. Lash, *Lost Jurisprudence*, *supra* note 89.



distinctly American device of the constitutional convention.”<sup>94</sup> No direct or indirect evidence is provided here or elsewhere that this is the right to which the Ninth Amendment specifically refers. By the time they reach page 120 of Amar’s otherwise well-researched book, however, readers are likely not to notice that this particular claim lacks any evidentiary support.

On the other hand, it is not implausible to think that the right of the people to alter or abolish their governments was among the rights retained by the people. It was affirmed in one form or another in every state constitution that preceded the Constitution.<sup>95</sup> The problem with this reference in Amar’s discussion is that it appears to reduce the Ninth Amendment to this particular collective right as its “core meaning” without any support whatsoever for *this* interpretive claim. Given that only one state ratification convention proposed its addition to the Constitution while the recommendations of all the rest were silent on this right,<sup>96</sup> the lack of any other affirmative evidence for this claim is telling.

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94. AMAR, *supra* note 69, at 120.

95. Maryland, Massachusetts, New Jersey, North Carolina, Pennsylvania, South Carolina, Vermont, and Virginia all had state constitutions affirming this right, and each of these state constitutions preceded the U.S. Constitution. See MARYLAND DECLARATION OF RIGHTS OF 1776, art. I, *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 676 (Neil H. Cogan ed., 1997) [hereinafter THE COMPLETE BILL OF RIGHTS] (“That all government of right originates from the people, is founded in compact only, and instituted solely for the good of the whole.”); MASS. CONST. of 1780, pt. 1, art. VII, *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra*, at 677 (“Government is instituted for the common good; for the protection, safety, prosperity and happiness of the people . . . [t]herefore the people alone have an incontest[able], unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity and happiness require it.”); N.J. CONST. of 1776, preamble, *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra*, at 678 (“[Government] was by Compact, derived from the People, and held for them, for the common Interest of the whole Society . . . .”); NORTH CAROLINA DECLARATION OF RIGHTS OF 1776, § 1, *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra*, at 678 (“That all political Power is vested in and derived from the People only.”); PA. CONST. of 1776, preamble, *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra*, at 678 (“[T]he people have a right, by common consent to change [the government], and take such measures as to them may appear necessary to promote their safety and happiness.”); S.C. CONST. of 1790, art. IX, § 1, *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra*, at 680 (“All power is originally vested in the people; and all free governments are founded on their authority, and are instituted for their peace, safety and happiness.”); VT. CONST. of 1777, preamble, *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra*, at 680 (“[T]he People have a Right by common Consent to change [the government], and take such Measures as to them may appear necessary to promote their Safety and Happiness.”); VIRGINIA DECLARATION OF RIGHTS OF 1776, § 2, *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra*, at 680 (“That all power is vested in, and consequently derived from the people; that Magistrates are their trustees and servants, and at all times amenable to them.”).

96. See Amendments Proposed by the New York Convention (July 26, 1788), *in* THE COMPLETE BILL OF RIGHTS, *supra* note 95, at 635, 635 (explaining that New York proposed the following addition to the Constitution: “That the Powers of Government may be reassumed by the People, whensoever it shall become necessary to their Happiness”). Even the proposals by minorities in the state ratification conventions are devoid of references to this right. See, e.g., Amendments Proposed by the Maryland Convention Minority (Apr. 26, 1788), *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra* note 95, at 674; Amendments Proposed by the Pennsylvania

Another example of unsupported claims is in Russell Caplan's article:

For the federalists, the Bill of Rights was a concession to skeptics, merely making explicit the protection of rights that had always been implicit. The unenumerated rights retained under the ninth amendment were to continue in force as before, *as the operative laws of the states. Unenumerated rights were not federal rights, as were the enumerated rights, but represented the persistence of the "legislative regulation" of the states.*<sup>97</sup>

The first of these sentences is unproblematic, as is the second until its concluding phrase "as the operative laws of the states." The third sentence is highly contentious. None of these three sentences is accompanied by footnotes of support.

So too with Caplan's claim that natural rights were subject to the regulation of state laws—especially the common law. So they were thought to be. The question is whether this means that the Ninth Amendment provided no constitutional barrier to federal interference with the exercise of these rights, as did the enumerated natural rights of freedom of speech, press, assembly, and to keep and bear arms—natural rights that were also regulated by state laws. Evidence for *this* interpretive claim is completely lacking.

Still, readers grow understandably impatient over this or that omission of support and may even give up their pursuit of original meaning in frustration over their inability to referee such arcana. This is why, when direct evidence of particular usage is unavailable (unlike, for example, with the Commerce Clause), the formulation of clear models is essential as a first step to adjudicating a dispute over original meaning. With these models in mind, we can then survey a series of highly salient and probative pieces of evidence to see which model or models fits them most closely and which is actually refuted by this evidence.

While each of the models fits the general history of the Ninth Amendment, each does not fit equally well these particular items of evidence. Evaluating the compatibility of these clear models against this body of evidence makes possible the historical equivalent of a "crucial

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Convention Minority (Dec. 12, 1787), *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra* note 95, at 675.

97. Caplan, *supra* note 45, at 243 (emphasis added). One needs to search elsewhere in Caplan's article to discover that the quoted phrase "legislative regulation" in this passage is from *The Federalist No. 83* in which Hamilton explains that, in the then-unamended Constitution, the right of trial by jury was left to the states to protect. THE FEDERALIST NO. 83, at 503 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Not only is Hamilton's reference completely unconnected to the Ninth Amendment, but it precedes the Bill of Rights by three years. Moreover, as we shall see, trial by jury was, according to Madison, a "positive right" that resulted from the compact, rather than a "natural right" that preceded the Constitution. *See infra* note 134. Before the Bill of Rights, *all* natural rights—including the freedom of speech, press, assembly, and the rights to keep and bear arms and to just compensation for public takings—were unenumerated. Caplan does not discuss any aspect of this important nuance.

experiment” in the natural sciences.<sup>98</sup> So I now turn to the particular items of historical evidence that are most telling in supporting or undercutting these five models.

*A. Madison’s Bill of Rights Speech*

Without doubt, to establish the original public meaning of the Ninth Amendment, we should begin with Madison’s speech to the House in which he specifically explains the purpose of his initial proposal that morphed into the Ninth Amendment. As was discussed in Part III, Federalists made two objections to adding a bill of rights to the Constitution.<sup>99</sup> The first was that it was *unnecessary* because Congress was only given specific enumerated powers. Here is how Madison responds to this objection in his speech:

I admit that these arguments are not entirely without foundation; but they are not conclusive to the extent which has been supposed. It is true the powers of the general government are circumscribed; they are directed to particular objects; but even if government keeps within those limits, *it has certain discretionary powers with respect to the means, which may admit of abuse to a certain extent*, in the same manner as the powers of the state governments under their constitutions may to an indefinite extent; because in the constitution of the United States there is a clause granting to Congress the power to make all laws which shall be necessary and proper for carrying into execution all the powers vested in the government of the United States, or in any department or officer thereof . . .<sup>100</sup>

In other words, an enumeration of rights is useful to limit the exercise of enumerated powers, especially given the existence of the Necessary and Proper Clause.<sup>101</sup>

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98. See 4 THE OXFORD ENGLISH DICTIONARY 75 (2d ed. 1989) (“[C]rucial: . . . 2. That finally decides between two rival hypotheses, proving the one and disproving the other; more loosely, relating to, or adapted to lead to such decision. . . . This sense is taken from Bacon’s phrase *instantia crucis*, explained by him as a metaphor from a *crux* or finger-post at a *bivium* or bifurcation of a road. Boyle and Newton used the phrase *experimentum crucis*. These give ‘crucial instance’, ‘crucial experiment’, whence the usage has been extended.”).

99. See *supra* notes 23–24 and accompanying text.

100. James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), in JAMES MADISON, WRITINGS, *supra* note 32, at 437, 447 (emphasis added).

101. In addition, Madison responded to the objection that the existence of state bills of rights made a federal bill of rights unnecessary:

I admit the force of this observation, but I do not look upon it to be conclusive. In the first place, it is too uncertain ground to leave this provision upon, if a provision is at all necessary to secure rights so important as many of those I have mentioned are conceived to be, by the public in general, as well as those in particular who opposed the adoption of this constitution. Beside some states have no bills of rights, there are others provided with very defective ones, and there are others whose bills of rights are not only defective, but absolutely improper; instead of securing some in the full extent which republican principles would require, they limit them too much to agree with the common ideas of liberty.

*Id.* at 448.

The second Federalist objection to a bill of rights was that it would be *dangerous*—or, as Madison stated in his speech,

[T]hat, 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.<sup>102</sup>

Characterizing this objection as “one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system.”<sup>103</sup> Madison then makes the following crucial assertion: “[B]ut, I conceive, that may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the 4th resolution.”<sup>104</sup> The “last clause of the 4th resolution” to which Madison referred was, by all accounts, the precursor of the Ninth Amendment that read (as was previously quoted):

The exceptions here or elsewhere in the constitution, made in favor of particular rights, *shall not be so construed as to diminish the just importance of other rights retained by the people*; or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.<sup>105</sup>

All by itself, Madison’s characterization of the problem for which the Ninth Amendment was his solution substantially undercuts Russell Caplan’s thesis that the Ninth Amendment was added to address the concerns of *Antifederalists* that *the Constitution* would supplant state law rights. According to Madison, the Ninth Amendment was formulated specifically to respond to the completely different objection by *Federalists* to adding a *bill of rights*, which Antifederalists were themselves advocating over Federalist objections. But there is another more subtle implication of Madison’s argument.

Madison first emphasizes the need for enumerating rights to limit the means by which the enumerated powers are exercised, especially under the Necessary and Proper Clause. He then adds the Ninth Amendment to avoid any implication that those rights that were not enumerated were surrendered up to the general government and were consequently insecure. Madison’s reasons for enumerating rights, coupled with his explanation for the Ninth Amendment, strongly suggest the unenumerated rights must likewise limit the means by which federal powers are exercised. Otherwise, the failure to include them expressly in the Constitution would certainly suggest that they had been surrendered up to the general government and were therefore

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102. *Id.* at 448–49.

103. *Id.* at 449.

104. *Id.*

105. *Id.* at 443 (emphasis added). I emphasize here the portion of this proposal that clearly connects it with the final version of the Amendment. We shall consider the other language in the proposal in due time.

insecure, which would serve to deny or disparage them. This suggestion is borne out, as we shall see, by Madison's actual use of the Ninth Amendment in his Bank Speech to the First Congress when arguing against a latitudinarian interpretation of the enumerated powers and, in particular, the Necessary and Proper Clause.<sup>106</sup>

Madison's stated reason for formulating the Ninth Amendment, coupled with his own later usage, undercuts Raoul Berger's contention<sup>107</sup> that the following passage of Madison's Bill of Rights speech proves that unenumerated rights are not to be judicially protected:

If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon *rights expressly stipulated for* in the constitution by the declaration of rights.<sup>108</sup>

Madison's prescient statement about the practical importance of enumerating rights says nothing about how unenumerated rights ought to be treated, much less that they are to be judicially unenforceable. This claimed benefit of enumeration must be read together with Madison's reasons, offered just moments earlier, for including the Ninth Amendment—in particular his denial that “those rights which were not singled out, were intended to be assigned into the hands of the general government, and were consequently insecure.”<sup>109</sup> Because Berger's reading of the Ninth Amendment would have precisely this effect, we cannot attribute his interpretation to Madison based solely on an unstated negative inference from his reference to “rights expressly stipulated for.” And this statement by Madison is the only evidence of which I am aware from the founding that even remotely supports treating unenumerated rights differently from those that were enumerated.

Finally, because the enumerated rights were individual in nature, one may also reasonably conclude that so too would be the unenumerated rights retained by the people. For it was the enumeration of “certain” *individual* rights that might lead to a construction that “other” comparable rights were surrendered up to the general government and were consequently insecure. But this conclusion need not rest solely on inference. It is also supported by how the Federalists formulated their argument that enumerating any rights

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106. See *infra* notes 226–29 and accompanying text.

107. See Raoul Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1, 9 (1980) (suggesting that because unenumerated rights are not “embodied in the Constitution,” suits brought to vindicate such rights cannot arise under the Constitution and thus are not within the jurisdiction of Article III courts).

108. James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), in JAMES MADISON, WRITINGS, *supra* note 32, at 437, 449 (emphasis added).

109. *Id.* at 448–49.

would be dangerous. The precise nature of their objection favors some models of the Ninth Amendment and disfavors others.

*B. The Federalist Objection to the Danger of a Bill of Rights*

In a speech, widely discussed at the time, James Wilson defended the proposed Constitution against those who complained about the absence of a bill of rights. For Wilson, it was the impracticality of identifying all the rights that survive the delegation of powers to Congress that was the source of danger:

All the political writers, from *Grotius* and *Puffendorf* down to *Vattel*, have treated on this subject; but in no one of those books, nor in the aggregate of them all, can you find a complete enumeration of rights appertaining to the people as men and as citizens. . . . Enumerate all the rights of men! I am sure, sir, that no gentleman in the late Convention would have attempted such a thing.<sup>110</sup>

Before the Pennsylvania ratification convention, Wilson clarified the danger still further:

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. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government; and the rights of the people would be rendered incomplete.<sup>111</sup>

The same danger was warned against by Charles Pinckney in the South Carolina House of Representatives:

[W]e had no bill of rights inserted in our Constitution; for, as we might perhaps have omitted the enumeration of some of our rights, it might hereafter be said we had delegated to the general government a power to take away such of our rights as we had not enumerated . . . .<sup>112</sup>

Then there is the even more colorful explanation of the danger by future Supreme Court Justice James Iredell to the North Carolina ratification convention:

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110. The Debates in the Convention of the State of Pennsylvania on the Adoption of the Federal Constitution (Dec. 4, 1781), in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 415, 454 (Jonathan Elliot ed., 2d ed. 1907) [hereinafter ELLIOT'S DEBATES] (remarks of James Wilson).

111. The Pennsylvania Convention (Nov. 28, 1787), in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 378, 388 (Merrill Jensen ed., 1976) (remarks of James Wilson).

112. Debates in the Legislature and in Convention of the State of South Carolina, on the Adoption of the Federal Constitution (Jan. 18, 1788), in 4 ELLIOT'S DEBATES, *supra* note 110, at 253, 316 (remarks of Charles Pinckney).



[I]t would be not only useless, but dangerous, to enumerate a number of rights which are not intended to be given up; because it would be implying, in the strongest manner, that every right not included in the exception might be impaired by the government without usurpation; and it would be impossible to enumerate every one. Let any one make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it.<sup>113</sup>

Given that Madison's Bill of Rights speech to the House directly connects his proposed precursor to the Ninth Amendment to this specific Federalist concern about adding a bill of rights, what does this concern tell us about the merits or demerits of the five models? First, none of these protests make any direct connection to state law rights, or the rights of the people in their respective states. Although such rights might well have been included among the impossible-to-enumerate rights retained by the people, these quotes fail to reveal any hint that the retained rights are *limited* to state constitutional or common law rights. Therefore, while these quotes do not directly contradict the state law rights model, they offer scant support for it.

Second, these quotes undercut the residual rights model of the Ninth Amendment, according to which the rights of the people are defined residually by what remains after the delegation of federal powers *and* these rights play no role whatsoever in the definition or limitation of those powers. The thrust of these Federalist objections is that the people retain myriad rights that may not, in Iredell's words, "be impaired" by Congress "without usurpation."<sup>114</sup> Given that the Federalists were arguing at this juncture against *any* enumeration in the constitution of certain rights, the then-unenumerated rights retained by the people to which they referred included the natural rights of speech, press, assembly and to keep and bear arms.

Federalists were contending that these rights and all others were best protected by leaving them unenumerated. That these rights eventually came to be enumerated did not, therefore, add to their status as rights that may not "be impaired by the government without usurpation."<sup>115</sup> They had this status for the two years after the adoption of the Constitution, and before the ratification of the First and Second Amendments. All other rights retained by the people to which Wilson, Pinckney, and Iredell referred, therefore, retained their power-constraining status after the Ninth Amendment that they held before, and this was the very same status as the rights of speech, press, and assembly.

Indeed, preventing any "implication, that those rights which were not singled out, were intended to be assigned into the hands of the general

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113. Debates in the Convention of the State of North Carolina, on the Adoption of the Federal Constitution (July 29, 1788), in 4 ELLIOT'S DEBATES, *supra* note 110, at 1, 167 (remarks of James Iredell).

114. *Id.*

115. *Id.*



government, and were consequently insecure” was the express purpose offered by Madison for adding the provision that eventually became the Ninth Amendment.<sup>116</sup> In other words, enumerating a right did not somehow elevate its legal status and thereby diminish the just importance, or deny or disparage, the other rights not enumerated. I know of not a single figure from the Founding who asserted clearly that enumerated rights would or did hold an enhanced legal status that unenumerated rights lacked.<sup>117</sup> (And, as discussed above,<sup>118</sup> Madison’s reference in his Bill of Rights speech to the judicial protection of “rights expressly stipulated for” makes no mention of the protection afforded by unenumerated rights that are not, according to the Ninth Amendment, to be denied or disparaged.)

Therefore, the precise nature of this Federalist objection constitutes key evidence strongly supporting the conclusion that the rights retained by the people were neither state law rights that Congress could freely restrict under the Supremacy Clause nor whatever rights were left over after the delegation of powers, the scope of which was defined solely by the delegation itself. The Bill of Rights did not change the legal status of the previously unenumerated rights. The “enumeration in the Constitution, of certain rights” did not make previously unenforceable natural rights enforceable; they were enforceable all along. This entails that those rights that remained unenumerated remained as enforceable as those singled out for enumeration.

What about the individual and collective natural rights models? While these quotes do not definitively establish the precise nature of the rights to which the speakers were referring, they do offer some hints. For example, in Wilson’s speech, he refers to “rights appertaining to the people as men and as citizens” and “the rights of men.”<sup>119</sup> The former formulation’s reference to “rights appertaining to the people *as men*” seems clearly to evoke individual natural rights—a subject on which Wilson lectured at the University of Pennsylvania.<sup>120</sup>

“Government, in my humble opinion,” wrote Wilson in his published lectures, “should be formed to secure and to enlarge the exercise of the natural rights of its members; and every government, which has not this in

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116. James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), in JAMES MADISON, WRITINGS, *supra* note 32, at 437, 448–49 (emphasis added).

117. This is not to claim, however, that attitudes about the judicial protection of either enumerated or unenumerated rights were well articulated. For evidence that judicial nullification of unconstitutional laws was widely accepted, however, and was included in the original meaning of the “judicial power,” see Randy E. Barnett, *The Original Meaning of the Judicial Power*, 12 SUP. CT. ECON. REV. 115 (2004) and Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887 (2003).

118. See *supra* notes 108–09 and accompanying text.

119. The Debates in the Convention of the State of Pennsylvania on the Adoption of the Federal Constitution (Dec. 4, 1787), in 2 ELLIOT’S DEBATES, *supra* note 110, at 415, 454 (remarks of James Wilson).

120. See James Wilson, Of the Natural Rights of Individuals, in 2 THE WORKS OF JAMES WILSON 585 (Robert G. McCloskey ed., 1967).

view, as its principal object, is not a government of the legitimate kind.”<sup>121</sup> Nor for Wilson were these mere “theoretical” or “philosophical” rights with no enforceable bite:

I go farther; and now proceed to show, that in peculiar instances, in which those rights can receive neither protection nor reparation from civil government, they are, notwithstanding its institution, entitled still to that defence, and to those methods of recovery, which are justified and demanded in a state of nature.

The defence of one’s self, justly called the primary law of nature, is not, nor can it be abrogated by any regulation of municipal law.<sup>122</sup>

True, in his speech Wilson refers as well to the “rights appertaining to the people . . . as citizens,” but even here this seems to evoke individual political rights, as opposed to some collective right of the people as a whole.<sup>123</sup> At most, it suggests that both individual and collective rights were retained by the people.

Similarly suggestive of individual natural rights is Iredell’s challenge: “Let any one make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it.”<sup>124</sup> He is obviously not talking about some “core” or primary right of the people collectively to alter and abolish their government or a singular right of the people to govern themselves in their states. Contrary to the arguments of the Federalists, these two rights would be easy to enumerate.

Indeed, if the Ninth Amendment was meant to protect only one or both of these “collective” rights to be exercised collectively, it would have been relatively simple *to enumerate them in the Bill of Rights!* Yet, Iredell nevertheless emphasizes the impossibility of such an enumeration and the literally limitless nature of these retained rights. No matter how long a list anyone might propose, he could name twenty or thirty more. Of what sort of rights could he possibly have been thinking? Because it suggests an answer to this question, I consider the next key piece of evidence outside its chronological appearance.

### C. *The Sedgwick–Benson–Page Exchange in the First Congress*

Before considering the evidence provided by the amendments proposed by state ratification conventions and the drafting history of the Ninth

121. *Id.* at 592.

122. *Id.* at 609 (citations omitted). Wilson’s lectures also undermine the claim that, by the time of the Constitution, Americans had lost their Lockean and revolutionary ardor for natural rights in favor of a more conservative Blackstonian positivism that favored legislative supremacy.

123. The Debates in the Convention of the State of Pennsylvania, on the Adoption of the Federal Constitution (Dec. 4, 1787), in 2 ELLIOT’S DEBATES, *supra* note 110, at 415, 454 (remarks of James Wilson).

124. Debates in the Convention of the State of North Carolina, on the Adoption of the Federal Constitution (July 29, 1788), in 4 ELLIOT’S DEBATES, *supra* note 110, at 1, 167 (remarks of James Iredell).

Amendment itself, it is worth considering an exchange that took place on the floor of Congress during the debate over what eventually became the First Amendment. For this exchange provides an explanation of how Iredell could claim that the rights retained by the people were effectively unenumerable.

During the debate on the proposed inclusion of the right of assembly in what eventually became the First Amendment (but was originally proposed to the states as the third amendment), Representative Theodore Sedgwick objected on the grounds that “it is a self-evident, unalienable right which the people possess; it is certainly a thing that never would be called in question; it is derogatory to the dignity of the House to descend to such minutiae.”<sup>125</sup> Notice that Sedgwick identifies the right of assembly as an “unalienable right,” which is terminology that is used to describe certain natural rights.

This inference is reinforced by the reply to Sedgwick’s objection by Representative Egbert Benson: “The committee who framed this report proceeded on the principle that these rights belonged to the people; they conceived them to be inherent; and all that they meant to provide against was their being infringed by the Government.”<sup>126</sup> That “inherent” rights was a synonym for natural rights can be seen in Sedgwick’s next response to Benson:

[I]f the committee were governed by that general principle, they might have gone into a very lengthy enumeration of rights; they might have declared that a man should have a right to wear his hat if he pleased; that he might get up when he pleased, and go to bed when he thought proper . . . .<sup>127</sup>

Both examples of “inherent,” “self-evident,” and “unalienable” rights offered by Sedgwick could only be described as personal and individual. His examples of these types of rights well illustrate how Iredell could boast that, for every list of rights, no matter how long, he could name twenty or thirty more.

Representative John Page’s reply to Sedgwick defending the inclusion of the right of assembly in the Bill of Rights reinforced the fact that Sedgwick’s examples of personal individual “inherent” liberty rights were on a par with the right of assembly:

[L]et me observe to him that such rights have been opposed, and a man has been obliged to pull off his hat when he appeared before the face of authority; people have also been prevented from assembling together on their lawful occasions, therefore it is well to guard against such stretches of authority, by inserting the privilege in the declaration of rights.<sup>128</sup>

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125. 1 ANNALS OF CONG. 759 (Joseph Gales ed., 1834) (statement of Rep. Sedgwick, Aug. 15, 1789).

126. *Id.* (statement of Rep. Benson).

127. *Id.* at 759–60 (statement of Rep. Sedgwick).

128. *Id.* at 760 (statement of Rep. Page).

Sedgwick's original objection was that the Constitution should not be cluttered with a potentially endless list of trifling rights<sup>129</sup> that "never would be called in[to] question"<sup>130</sup> and were not "intended to be infringed."<sup>131</sup> In a very real sense, he considered the right of assembly to be too fundamental (and unlikely to be infringed) to justify inclusion in a bill of rights. As revealed by his two examples, Sedgwick's argument assumes that the "self-evident, unalienable," inherent and unenumerated rights retained by the people are personal *liberty* rights that are unenumerable because the human imagination is limitless. All the actions one might freely take with what is rightfully his or hers can never be specified or reduced to a list. It includes the right to wear a hat, to get up when one pleases and go to bed when one thinks proper, to scratch one's nose when it itches (and even when it doesn't), to eat steak when one has a taste for it, or to take a sip of Diet Mountain Dew when one is thirsty. Make any list of liberty rights you care to, and one can always add twenty or thirty more.

In choosing among the proposed models of the Ninth Amendment, this exchange is telling, especially when combined with the Federalist objection to enumerating any rights, which is directly linked to Madison's stated rationale for the Ninth Amendment. None of the three congressmen make any reference to state constitutional or common law rights (though, of course, the right to wear a hat and to go to bed when one thinks proper is protected by the common law governing person and property). The state law rights model does not fit well with this exchange, an exchange that goes unmentioned in Caplan's article.

Nor does it square with the residual rights model. Sedgwick and Page both are referring to specific identifiable rights. They are not referring to anything that might simply be left over after an enumeration of powers. And Page's defense of the right of assembly suggests that this right would restrict the exercise of delegated powers. Indeed, his reply even intimates that the inherent, though unenumerated, rights to wear one's hat and go to bed when one thinks proper could also restrict the proper exercise of delegated powers—though he does not propose adding them to the Constitution.

This exchange stands in sharp contrast with the collective rights model. Here the congressmen are clearly talking about personal individual rights, and they do so while invoking the supposedly collective term "the people." Sedgwick specifically characterizes the right of assembly as "a self-evident, unalienable right which the people possess," to which he adds the personal individual inherent rights to wear a hat and go to bed when one thinks

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129. For a discussion of the founding generation's view of "trivial rights," see Philip A. Hamburger, *Trivial Rights*, 70 NOTRE DAME L. REV. 1 (1994).

130. 1 ANNALS OF CONG. 759 (Joseph Gales ed., 1834) (statement of Rep. Sedgwick, Aug. 15, 1789).

131. *Id.* at 760.

proper.<sup>132</sup> Page then underscores the equivalence of these personal rights with that of the right of assembly.<sup>133</sup> At least in this exchange, all these personal individual rights were thought to appertain to “the people.” Page even uses the term “people” here to refer to the plural of individual persons, rather than to some mystical corporate body.

To recap: We have now connected Madison’s explanation of the purpose of the Ninth Amendment to Federalist objections that a bill of rights would be dangerous. To appreciate the nature of that danger, we need to appreciate that Wilson and the others were referring to individual natural rights. To see why an enumeration of natural rights must inevitably be dangerously incomplete, we examined the debate in the House about the meaning of inherent rights. But the evidence that the rights “retained by the people” in the Ninth Amendment was a reference to inherent or natural individual rights does not end here. Two additional pieces of evidence suggest the same conclusion and return us to the legislative history leading up to the Ninth Amendment’s enactment into law.

#### *D. Madison’s Notes for His Bill of Rights Speech*

According to the individual natural rights model of the Ninth Amendment, the rights retained by the people refer to natural rights, and the purpose of the Amendment is to ensure that these rights are treated on a par with the natural rights that happen to have been expressly included in the Bill of Rights. This model, then, depends on the claim that at least some of the rights in the Bill of Rights were natural, inherent, or retained rights, as was evidenced by the exchange in the House between Representatives Benson, Sedgwick, and Page.

What of Madison’s Bill of Rights speech to the House? In his speech, Madison describes his proposed amendments as including three categories of rights:

In some instances they assert [1] those rights which are exercised by the people in forming and establishing a plan of government. In other instances, they specify [2] those *rights which are retained* when particular powers are given up to be exercised by the legislature. In other instances, they specify [3] positive rights, which may seem to result from the nature of the compact. Trial by jury cannot be considered as a natural right, but a right resulting from the social compact which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the pre-existent rights of nature.<sup>134</sup>

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132. *Id.* at 759–60.

133. *Id.* at 760 (statement of Rep. Page).

134. James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), in JAMES MADISON, WRITINGS, *supra* note 32, at 437, 445–46 (emphasis added). I have

By distinguishing the “positive rights” in the third category from “natural right[s]” or the “pre-existent rights of nature,” this passage strongly suggests that the second category of “rights which are retained” are indeed natural rights.

Confirmation of this suggestion, along with an example of the rights to which Madison was referring as those “which are retained,” is provided by his notes for this speech in which the following appears:

Contents of Bill of Rhts.

1. assertion of primitive equality &c.
2. do. of rights exerted in formg. of Govts.
3. natural rights retained as speach [illegible].
4. positive rights resultg. as trial by jury.
5. Doctrinl. artics vs. Depts. distinct electn.
6. moral precepts for the administrn. & natl. character—as justice—economy—&c.<sup>135</sup>

These notes provide critical evidence that the other rights “retained by the people” to which Madison’s proposal and the final version of the Ninth Amendment refer are indeed inherent or natural rights. For Madison himself writes in his own hand the term “natural rights retained.” These natural retained rights are to be distinguished from “positive rights” that result from the enactment of the Constitution and its amendments. The Bill of Rights is not the source of these natural rights, but they are added to the text of the Constitution, as his proposal reads, “for greater caution.”<sup>136</sup> In contrast, the positive rights that result from the compact or Constitution provide “actual limitations of such powers”<sup>137</sup> as are delegated to Congress.

Crucially, these natural rights retained “when particular powers are given up to be exercised by the legislature”<sup>138</sup> include the *individual* enumerated right of freedom of speech.<sup>139</sup> In both his notes and speech, such rights are explicitly distinguished by Madison from the political “rights

inserted the numbers in brackets to demarcate the three types of rights that were included in the enumeration.

135. Madison’s Notes for Amendments Speech 1789, in 1 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 64, 64 (Randy E. Barnett ed., 1989) [hereinafter Madison’s Notes]. From the published accounts of his speech, Madison did not get to all six categories on his list—perhaps because he was going long. In the margins of his notes for his speech, we find the following notation: “watch Time”! For an image of the notes (showing the underlining of “natural rights”), see James Madison, Notes for Speech on Constitutional Amendments (June 8, 1789), [http://memory.loc.gov/cgi-bin/ampage?collId=mjm&fileName=04/mjm04.db&recNum=319&itemLink=D?mjm:5:/temp/~ammem\\_pGR4::](http://memory.loc.gov/cgi-bin/ampage?collId=mjm&fileName=04/mjm04.db&recNum=319&itemLink=D?mjm:5:/temp/~ammem_pGR4::)

136. James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), in JAMES MADISON, WRITINGS, *supra* note 32, at 437, 443.

137. *Id.*

138. *Id.* at 445.

139. In the published reports of his speech (as fully quoted above), Madison gives no examples of these rights. This vital information is provided by his notes.



which are exercised by the people in forming and establishing a plan of government” that both Akhil Amar and Kurt Lash refer to as “collective” in their model.<sup>140</sup> When combined with Madison’s explanation of the Ninth Amendment that soon follows in his speech, this is excellent evidence that the rights retained by the people to which the Ninth Amendment refers are individual rights like speech, rather than the political rights he separately lists. For it was the enumeration in the Constitution *of such individual rights as freedom of speech* that threatened to render insecure other comparable rights “which were not singled out.”<sup>141</sup>

I do not wish to make too much of this point. Because I think that the right of the people to establish or alter governments—what Lash calls “political” rights—is both an individual and natural right, I see no problem with its inclusion among the rights retained by the people to which the Ninth Amendment refers. Nevertheless, this passage of Madison’s speech and notes seriously undercuts Akhil Amar’s confident claim—unsupported as it is by any evidence—that the “*core meaning* [of ‘the People’] in the Ninth is . . . collective”<sup>142</sup> and that “the most obvious and inalienable right underlying the Ninth Amendment is the collective right of We the People to alter or abolish government, through the distinctly American device of the constitutional convention.”<sup>143</sup> Also undercut by Madison’s speech and notes is Amar’s conclusion that “[t]o see the Ninth Amendment, as originally written, as a palladium of countermajoritarian individual rights—like privacy—is to engage in anachronism.”<sup>144</sup>

Amar’s accusation of anachronism is further undermined by a different portion of Madison’s notes for his Bill of Rights speech. In the published report of his speech, *immediately after reading his proposed amendments*, Madison said, “The first of these amendments, relates to what may be called a bill of rights . . . .”<sup>145</sup> However, his notes for this part of his speech cast this statement in a more individualistic light:

Read the amendments—

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140. See *supra* notes 68–76 and accompanying text. I am a bit skeptical that the “collective” rights to which Professors Amar and Lash refer were of a different order than the natural individual rights. In a sense, Amar agrees when he tries to treat even individual rights as collective. AMAR, *supra* note 69, at 120. In contrast, I would treat political rights as individual in nature. But I will not try to establish this point in this Article and, for present purposes, merely assume that political rights, such as the right to form and establish governments, are somehow “collective” in nature as Amar and Lash contend.

141. James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), in JAMES MADISON, WRITINGS, *supra* note 32, at 437, 448–49.

142. AMAR, *supra* note 69, at 120 (emphasis added).

143. *Id.*

144. *Id.*

145. James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), in JAMES MADISON, WRITINGS, *supra* note 32, at 437, 444.



They relate 1st. to *private* rights—. <sup>146</sup>

Combining the speech as reportedly delivered with this passage of the notes strongly suggests that the “first of these amendments [that] relates to what may be called a bill of rights” are “private rights.”<sup>147</sup> And the stated purpose of the Ninth Amendment is to protect the “other” retained natural rights from the inference that they were assigned into the hands of the general government and were consequently insecure. There is no indication whatsoever that these other retained natural rights were of a different order than the “private” rights to which Madison referred. Indeed, the most obvious danger posed by enumerating some private rights is that other private rights would be denied or disparaged. Therefore, it is hardly anachronistic to conclude that the unenumerated rights retained by the people were every bit as individual and private as the rights that were included on his list.

Moreover, in a different and much truncated report of his Bill of Rights speech in the *Gazette of the United States*,<sup>148</sup> Madison contrasts the powers of states—which Kurt Lash sometimes identifies with the collective rights of the people<sup>149</sup>—with that of the natural rights retained by the people:

It has been observed, that the Constitution does not repeal the State bills of rights; to this it may be replied, that some of the States are without any—and that articles contained in those that have them, are very *improper*, and infringe upon the *rights of human nature*, in several respects.<sup>150</sup>

146. Madison’s Notes, *supra* note 135, at 64 (emphasis added). There is no “second” that follows. Next in his notes is a different point: “Bill of Rights—useful not essential—fallacy in both sides . . .” *Id.* I have enhanced the positioning of the text by referring directly to the image of Madison’s notes. See *supra* note 135.

147. This sentence also suggests that not all the amendments or proposed changes were conceived by Madison as “what may be called a bill of rights,” by which is meant a list of particular rights. Other provisions, such as the Ninth and Tenth Amendments, were rules by which governmental powers and the enumeration of certain rights were to be construed.

148. Two additional very brief press reports of Madison’s speech in *The Daily Advertiser* (June 9, 1789) and *The New-York Daily Gazette* (June 9, 1789) offer no details of its content, though the former characterizes Madison’s speech as “long and able” while the latter refers to it as “a very lengthy discussion.” THE DAILY ADVERTISER, June 9, 1789, reprinted in 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: 4 MARCH 1789–3 MARCH 1791, at 804 (Charlene Bangs Bickford et al. eds., 1992) [hereinafter 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS] (stating that Madison’s speech was “long and able”); THE N.Y. DAILY GAZETTE, June 9, 1789, reprinted in 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra*, at 804 (stating that Madison’s speech was “a very lengthy discussion”).

149. Lash, *Lost Original Meaning*, *supra* note 10, at 388 (“To those who argued that Congress could act for the ‘general welfare’ so long as it did not interfere with the powers of the States, Madison responded that chartering a bank ‘would directly interfere with the rights of the States, to prohibit as well as to establish banks.’ . . . It was the collective rights of the people of the several states which were threatened by the Bill.”).

150. GAZETTE OF THE UNITED STATES (Phila.), June 10, 1789, reprinted in 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 148, at 808 (emphasis added). In the more commonly used and far more detailed account, the explicit reference to natural rights is omitted:

This passage does not mesh well with the claim that the Ninth Amendment, devised by Madison, merely referred to state bills of rights, as is contended by the state law rights model.<sup>151</sup> Nor is it consistent with the residual rights model.<sup>152</sup> According to Madison here, natural rights are not simply what is left over after a delegation of powers to government. Instead, even constitutional delegations of powers are “improper” when they “infringe upon the rights of human nature.” In this manner, natural rights provide a way of evaluating governmental powers, whether express or implied.

By the same token, this passage of Madison’s speech concerning state bills of rights sheds light on the original meaning of the Necessary and Proper Clause,<sup>153</sup> which elsewhere in his speech Madison cites as a reason why a bill of rights is needed even with a government of enumerated powers.<sup>154</sup> In this passage, Madison explicitly contends that a power contained in an “article” of a state constitution that infringes upon the rights of human nature—which we know also as the rights retained by the people—is “improper.” What is true of a power expressly, though improperly, granted to state governments by their constitutions, is surely equally true of a claim of implied power under the Necessary and Proper Clause. Thus, according to Madison, laws that violate the retained “rights of nature” are improper. As we shall see, Madison did not hesitate to rely on the rule of construction provided by, *inter alia*, the Ninth Amendment to criticize a claim of implied power under what was then derisively known as “the Sweeping Clause.”<sup>155</sup>

Lest there be any methodological confusion, my extensive examination of Madison’s Bill of Rights speech, including his notes, is not a reliance on his private original intent. It is instead strong evidence of the public meaning of the words used in the Ninth Amendment—a provision which, as we have seen, he devised to meet the very public Federalist objections to enumerating any rights in a bill of rights. None of the claims or usages by Madison which I have emphasized here were contradicted by anyone else in Congress after

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Beside some states have no bills of rights, there are others provided with very defective ones, and there are others whose bills of rights are not only defective, but absolutely improper; instead of securing some in the full extent which republican principles would require, they limit them too much to agree with the common ideas of liberty.

THE CONGRESSIONAL REGISTER, June 8, 1789, *reprinted in* 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 148, at 824. Yet combining the two yields a strong association of the “rights of human nature” with the “common ideas of liberty.”

151. *See supra* subpart IV(A).

152. *See supra* subpart IV(B).

153. It is not, but ought to have been, among the evidence I compiled and evaluated in Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183 (2003).

154. James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), *in* JAMES MADISON, WRITINGS, *supra* note 32, at 437, 447–48.

155. For a general discussion of this clause, see Lawson & Granger, *supra* note 26.

his speech (though other congressmen did strongly contest the need for a bill of rights or whether then was the right time to draft one). Moreover, Madison's usages and views were shared by others, as evidenced by the Sedgwick–Benson–Page exchange (and other evidence yet to be discussed).<sup>156</sup>

Even if Madison's speech and notes were relevant only to his private beliefs, they would still undercut the charge by Akhil Amar that it is anachronistic to attribute these views to the founders. To the contrary, what may indeed be anachronistic is some hard distinction between "individual" and "collective" rights, a distinction that does not appear explicitly in the sources. The closest to this distinction is Madison's contention that the first portion of the Bill of Rights refers to "private" rights, as contrasted to the political rights that are first on his list. But I must leave the evaluation of this possible anachronism to the future.

#### *E. Roger Sherman's Draft Bill of Rights*

Madison's speech is not the only evidence we have that the public meaning of rights "retained by the people" is that of natural rights belonging to individuals. Serving with Madison on the Select Committee to draft a bill of rights was Roger Sherman, a representative from Connecticut. In the 1980s, there was found among Madison's papers a draft of a bill of rights that was eventually attributed to Sherman.<sup>157</sup> Sherman's second amendment reads as follows:

*The people have certain natural rights which are retained by them when they enter into Society, Such are the rights of Conscience in matters of religion; of acquiring property and of pursuing happiness & Safety; of Speaking, writing and publishing their Sentiments with decency and freedom; of peaceably assembling to consult their common good, and of applying to Government by petition or remonstrance for redress of grievances. Of these rights therefore they Shall not be deprived by the Government of the united States.*<sup>158</sup>

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156. See *supra* notes 125–31 and accompanying text.

157. See Scott D. Gerber, *Roger Sherman and the Bill of Rights*, 28 POLITY 521, 521, 528 (1996) (describing the draft written by Sherman as a record of the combined effort of members of a select committee). Gerber supplies an itemized comparison of Sherman's draft with both Madison's proposal and the final versions of the amendments. *Id.* at app. B. He also provides evidence that this draft did not represent Sherman's own view, but more likely was a draft showing how a bill of rights could be appended to the end of the Constitution, rather than inserted within as Madison had originally proposed. See *id.* at 527–28. Sherman's sustained opposition to a bill of rights in general, and Madison's draft proposal in particular, has no bearing, however, on the significance of Sherman's draft as evidence of the original meaning of the phrase "rights . . . retained by the people." See *id.* at 530–31. This is a good example of how evidence bearing on private original intent, e.g., Sherman's opposition to the proposed amendments, would be wholly irrelevant to evidence of original public meaning provided by the words he chose to use in his proposal.

158. Roger Sherman, Draft of the Bill of Rights, in 1 THE RIGHTS RETAINED BY THE PEOPLE 351, 351 (Randy E. Barnett ed., 1989) (emphasis added).

Like Madison's notes, this provision explicitly links the term "natural rights" with that of rights "retained" by "The people"—all of which appear in its first sentence. And the examples of these rights that follow—which are not meant to be exclusive ("Such are")—include the undeniably individual rights of conscience, acquiring property, and pursuing happiness and safety, along with the individual rights to speak, write, and publish their sentiments. Although the rights to peaceably assemble and petition government *could* be construed as somehow "collective" because exercised in groups, these rights can just as well be conceived as belonging to individuals who then band together to exercise their individual rights in a common cause. Given that only a portion of these rights were enumerated in the Bill of Rights, the Ninth Amendment appears designed to protect the others, not enumerated, from being ignored or treated in any inferior manner, i.e., denied or disparaged.

Sherman's proposal not only strongly supports an individual natural rights reading of the words "retained" rights but is also incompatible with both the state law rights and residual rights models. None of these rights to which Sherman's proposal refers are state law rights (though they may well have been regulated by state law). Instead they are "natural rights which are retained by [the People] when they enter into Society." Nor are these rights defined residually by the enumeration of powers. Instead, they are identified by name.

Sherman's identification of these natural rights was commonplace.<sup>159</sup> Another example of this list of individual private rights can be found in the first paragraph of another proposed list of amendments as inscribed in the Senate Legislative Journals on September 8, 1789:

"That there are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity, among which are the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety."<sup>160</sup>

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159. See Jeff Rosen, Note, *Was the Flag Burning Amendment Unconstitutional?*, 100 YALE L.J. 1073, 1075–79 (1991) (stating that commentators agree that the Framers and ratifiers of the Bill of Rights believed in natural rights, including the rights of worship, defending life and liberty, property, pursuing happiness and safety, assembly, and freedom of speech).

160. Journal of the First Session of the Senate of the United States, *reprinted in* 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: 4 MARCH 1789 – 3 MARCH 1791, at 160 (Linda Grant De Pauw et al. eds., 1972). This proposal in the Senate echoes those made by some states who proposed amendments. For example, this was proposed as the first amendment by the Virginia convention:

First, 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.

Amendments Proposed by the Virginia Convention (June 27, 1788), *in* THE COMPLETE BILL OF RIGHTS, *supra* note 95, at 636, 636. New York's proposal contained similar natural rights language: "That the enjoyment of Life, Liberty, and the pursuit of Happiness are essential rights which every Government ought to respect and preserve." Amendments Proposed by the New York

What makes Sherman's draft particularly significant is its explicit linkage of the term "*natural rights*" with "*retained by them*"—with "them" referring to "*the People*"—and the individual personal rights it then provides as examples.

To be clear, I do not claim that Sherman's proposed second amendment is a precursor of the Ninth Amendment. Instead, it shows rather dramatically how those in Congress during the drafting process thought of natural rights. First, natural rights were individual, personal, or private rights, as evidenced by the examples enumerated by Sherman. Second, at this level of generality, those who enter into social compacts cannot deprive or divest their posterity of these natural rights regardless of the powers they may delegate to government. They are, in other words, inalienable.<sup>161</sup> For all these reasons, Sherman's draft is inconsistent with the state law rights and residual rights models, as well as any suggestion that the rights retained by the people were exclusively "collective" or "political" in nature.

#### *F. Proposed Rights and Amendments by State Ratification Conventions*

After a bill of rights was promised by supporters of the Constitution to avoid a second constitutional convention, state ratification conventions began accompanying their resolutions ratifying the Constitution with lists of rights (and various other amendments) they proposed be added after ratification. While all Ninth Amendment scholars have discussed these proposals, no one has placed greater stress on their precise nature and scope than Kurt Lash.

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Convention (July 26, 1788), in *THE COMPLETE BILL OF RIGHTS*, *supra* note 95, at 635, 635. Many state constitutions contained similar language as well. See MASS. CONST. of 1780, pt. 1, art. I, reprinted in *THE COMPLETE BILL OF RIGHTS*, *supra* note 95, at 637 ("ALL men are born free and equal, and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness."); N.H. CONST. of 1783, pt. 1, art. II, reprinted in *THE COMPLETE BILL OF RIGHTS*, *supra* note 95, at 637–38 ("All men have certain natural, essential, and inherent rights; among which are—the enjoying and defending life and liberty—acquiring, possessing and protecting property—and in a word, of seeking and obtaining happiness."); N.Y. CONST. of 1777, reprinted in *THE COMPLETE BILL OF RIGHTS*, *supra* note 95, at 638 ("We hold these Truths to be self-evident, that all Men are created equal; that they are endowed by their Creator with certain unalienable Rights; that among these are, Life, Liberty and the Pursuit of Happiness . . ."); PA. CONST. of 1776, ch. I, art. I, reprinted in *THE COMPLETE BILL OF RIGHTS*, *supra* note 95, at 639 ("THAT all men are born equally free and independent, and have certain natural, inherent and unalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety."); VT. CONST. of 1777, ch. I, art. I, reprinted in *THE COMPLETE BILL OF RIGHTS*, *supra* note 95, at 640 ("That all Men are born equally free and independent, and have certain natural, inherent and unalienable Rights, amongst which are the enjoying and defending Life and Liberty; acquiring, possessing and protecting Property, and pursuing and obtaining Happiness and Safety.").

161. Cf. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.").

Professor Lash traces the Ninth Amendment to proposals made by some ratification conventions concerning how the Constitution was to be construed.<sup>162</sup>

He begins with the proposal made by New York:

[T]hat every Power, Jurisdiction and Right, which is not by the said Constitution clearly *delegated to* the Congress of the United States, or the departments of the Government thereof, remains to the People of the several States, or to their respective State Governments to whom they may have granted the same;

And that those Clauses in the said Constitution, which declare, that Congress shall not have or exercise certain Powers, do not imply that Congress is entitled to any Powers not given by the said Constitution; but such Clauses *are to be construed* either as exceptions to certain specified Powers, or as inserted merely for greater Caution.<sup>163</sup>

The first paragraph concerns the reservation to the states of all powers not “delegated” to Congress—as eventually did the Tenth Amendment. The second paragraph concerns how clauses limiting the powers of Congress should “be construed,” which assists us, Lash contends, in interpreting the Ninth Amendment.

He finds a similar parallelism in the proposals from Virginia and North Carolina. Here are two of Virginia’s proposals:

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

. . . .

Seventeenth [sic], That those clauses which declare that Congress shall not exercise certain powers be not interpreted in any manner whatsoever to extend the powers of Congress. But that they *may be construed* either as making exceptions to the specified powers where this shall be the case, or otherwise as inserted merely for greater caution.<sup>164</sup>

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162. Lash, *Lost Original Meaning*, *supra* note 10, at 360.

163. Amendments Proposed by the New York Convention (July 26, 1788), in *CREATING THE BILL OF RIGHTS*, *supra* note 33, at 21, 21–22 (emphasis added).

164. Amendments Proposed by the Virginia Convention (June 27, 1788), in *THE COMPLETE BILL OF RIGHTS*, *supra* note 95, at 675, 675.



North Carolina's identical proposal<sup>165</sup> appears to have been merely copied from Virginia's (just as New Hampshire copied the proposals of Massachusetts<sup>166</sup>). As William Davie of North Carolina wrote James Madison two days after Madison's Bill of Rights speech: "That farrago of amendments borrowed from Virginia is by no means to be considered as the sense of this country; they were proposed amidst the violence and confusion of party heat, at a critical moment in our Convention, and adopted by the opposition without one moment's consideration."<sup>167</sup> North Carolina's 1788 ratification convention adopted the Virginia proposals without ratifying the Constitution; it did not reconvene to actually ratify the Constitution until after Madison's Bill of Rights speech and after Congress had finalized the proposed amendments and referred them to the states for ratification.<sup>168</sup>

Lash correctly observes that both forms of proposed amendments "reflect dual strategies for controlling the expansion of federal power. The primary strategy was to declare the *principle* of enumerated federal power. A secondary strategy was to control the *interpretation* of enumerated federal power."<sup>169</sup> After identifying the dual strategy for limiting federal power

165. The North Carolina proposal stated:

I. 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.

.....

XVIII. 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.

Amendments Proposed by the North Carolina Convention (Aug. 1, 1788), in *THE COMPLETE BILL OF RIGHTS*, *supra* note 95, at 674, 674–75.

166. Amendments Proposed by the Massachusetts Convention (Feb. 6, 1788), in *THE COMPLETE BILL OF RIGHTS*, *supra* note 95, at 674, 674 ("First, That it be Explicitly declared that all Powers not expressly delegated by the aforesaid Constitution are reserved to the several States to be by them exercised."); Amendments Proposed by the New Hampshire Convention (June 21, 1788), in *THE COMPLETE BILL OF RIGHTS*, *supra* note 95, at 674, 674 ("First that it be Explicitly declared that all Powers not expressly & particularly Delegated by the aforesaid Constitution are reserved to the several States to be, by them Exercised.").

167. Letter from William R. Davie to James Madison (June 10, 1789), in 5 *DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786–1870*, at 176, 176–77 (U.S. Dep't of State ed., 1905) [hereinafter *DOCUMENTARY HISTORY OF THE CONSTITUTION*]. Davie, a supporter of ratification, apparently wrote Madison to elicit a progress report on the bill of rights. *See id.* at 177 ("I am extremely anxious to know the progress of this delicate and interesting business . . . [which] might perhaps be of some consequence to this country . . .").

168. *See id.* at 176 (explaining that the convention would meet in November to adopt the Constitution and amendments).

169. Lash, *Lost Original Meaning*, *supra* note 10, at 358. Lash sees a difference between the Virginia and North Carolina proposals and those by New York that I confess I cannot discern. "New York's declarations reflect the primary strategy: The enumeration of rights must not suggest a government of unenumerated power. Proposals like those submitted by North Carolina and Virginia highlight the second, complementary strategy of controlling the interpreted scope of enumerated power." *Id.* To my eyes, New York's proposals embody the same dual strategy that Lash identifies in Virginia and North Carolina.

found in these proposals, Lash explains why a simple reservation of rights not delegated was thought to be inadequate to limiting federal power:

The problem was, as the Antifederalists pointed out, merely declaring the principle of enumerated powers by itself did not control the interpreted scope of federal power. There being no fixed rules of interpretation for the courts to follow, judicial construction of enumerated powers had no limit. Worse, adding a Bill of Rights might imply that the only limits to broad readings of federal power were those specific limits listed in Article I and the Bill of Rights. In such a situation, states still would retain all nondelegated powers, but those powers would be few (if any), with the federal government having occupied the field. Preventing this from coming to pass required the adoption of *two* provisions. One declaring the principle of enumerated power; the second denying the implied expansion of federal power due to the addition of specific rights.<sup>170</sup>

He then notes other state conventions that submitted proposals to address the construction of federal powers. In addition to proposing that Congress “shall not exercise any powers whatever, but such as are expressly given to that body by the Constitution,” Pennsylvania also proposed prohibiting the executive and judicial branches from assuming any “authority, power, or jurisdiction” under any “pretence of construction or fiction.”<sup>171</sup> South Carolina declared that “no section or paragraph of the said Constitution warrants a construction that the states do not retain every power not expressly relinquished . . . .”<sup>172</sup>

Lash summarizes this two-track approach of the states as follows:

*All* of these declarations and proposals share a common dual approach to controlling federal power. First, a declaration must be added that expressly declares the federal government has limited enumerated powers. All powers, jurisdiction, and rights not delegated to the federal government were to be retained *by the states*. Second, the enumeration of certain rights was not to be construed in any manner that expanded the scope of enumerated federal power. Both the declarations and the rules of construction focused on controlling the expansion of federal power and reserving all nondelegated powers *and rights* to the states.<sup>173</sup>

But this summary greatly overstates the commonality of these proposals.<sup>174</sup> True, there certainly appears to have developed a dual strategy

170. *Id.* at 359.

171. Amendments Proposed by the Pennsylvania Convention (Sept. 3, 1788), in THE COMPLETE BILL OF RIGHTS, *supra* note 95, at 648, 648.

172. Ratification of the Constitution by the Convention of the State of South Carolina (May 23, 1788), in 1 ELLIOT’S DEBATES, *supra* note 110, at 325, 325.

173. Lash, *Lost Original Meaning*, *supra* note 10, at 358 (first two emphases added).

174. One page later, Lash offers a more accurate summary: “First, they declared that the federal government had limited enumerated powers, with all nondelegated power, jurisdiction, and rights

that mirrors the Tenth and Ninth Amendments: (a) emphasize the delegated powers scheme as did the Tenth, and (b) propose some rule of construction as did the Ninth. But the rule of construction being recommended varied substantially among these proposals, and this is precisely what is at issue when interpreting the Ninth.

To begin with, there is a major difference between the Virginia and New York proposed rules of construction. Virginia's proposal speaks of the retention of "every power, jurisdiction and right" in "*each State* in the Union."<sup>175</sup> In contrast, New York's speaks of "every Power, Jurisdiction and Right" remaining in "*the People* of the several States, *or* to their respective *State Governments* to whom they may have granted the same."<sup>176</sup> In this manner, New York's proposal distinguishes between "the People" and "State Governments" and reserves rights to the people, as opposed to Virginia's which refers only to reserving rights to the states.

In the passage quoted above, Lash strongly implies that when the Ninth Amendment speaks of "rights" that are "retained by the people," this is a reference to the "powers, jurisdiction, and rights . . . retained *by the states*." Although the Virginia version does bear this construction, New York's does not. According to New York, all power, jurisdiction, and rights are retained by *the people* (who may then allocate powers to their state governments). Moreover, Pennsylvania's proposed rule of construction did not apply to the Congress at all, but only to the executive and judicial branches of the federal government.<sup>177</sup> South Carolina's proposed rule of construction refers only to "powers" not rights.<sup>178</sup>

To round out the survey, while both the Massachusetts and the identical New Hampshire recommendations contain a Tenth Amendment-like reference to delegated powers,<sup>179</sup> neither contains any guide to construing the power of Congress analogous to the Ninth Amendment.<sup>180</sup> Rhode Island accompanied its ratification with a recommended revision similar to New

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retained by the states. Second, the states proposed a rule of construction that preserved the retained powers of the states by preventing the constructive expansion of federal power." *Id.* at 359–60.

175. See *supra* note 164 and accompanying text (emphasis added).

176. See *supra* note 163 and accompanying text (emphasis added).

177. Amendments Proposed by the Pennsylvania Convention (Sept. 3, 1788), in *THE COMPLETE BILL OF RIGHTS*, *supra* note 95, at 648, 648.

178. Ratification of the Constitution by the Convention of the State of South Carolina (May 23, 1788), in 1 *ELLIOT'S DEBATES*, *supra* note 110, at 325, 325.

179. Compare Amendments Proposed by the Massachusetts Convention (Feb. 6, 1788), in *THE COMPLETE BILL OF RIGHTS*, *supra* note 95, at 674, 674 ("That it be explicitly declared that all Powers not expressly delegated by the aforesaid Constitution are reserved to the several States to be by them exercised."), with Amendments Proposed by the New Hampshire Convention (June 21, 1788), in *THE COMPLETE BILL OF RIGHTS*, *supra* note 95, at 674, 674 (same).

180. See *THE COMPLETE BILL OF RIGHTS*, *supra* note 95, at 635–36 (listing the proposals addressing the Ninth Amendment from the state conventions, which included proposals from New York, North Carolina, and Virginia, but not from Massachusetts or New Hampshire).

York's, but only ratified the Constitution nearly a year after the Bill of Rights had been drafted by Congress and submitted to the states for ratification.<sup>181</sup>

So in the end, Lash's contention that the rule of construction proposed by the state ratification conventions reserved *rights* (as distinct from powers) to the several *states* (as distinct from the people) is limited to the proposal by Virginia, which was copied verbatim by North Carolina. Though Lash's claim that "[w]hen James Madison drafted the Bill of Rights, he referred to and relied upon these proposals"<sup>182</sup> is likely correct,<sup>183</sup> Madison had a diversity of proposals from which to draw inspiration.

Reviewing Madison's actual proposal to Congress shows that, while he does indeed appear to be borrowing from those offered by the states, he deviated markedly from Virginia's:

The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people; or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.<sup>184</sup>

Here, like New York, Madison refers only to the "rights retained by the people." He does not refer, as does Virginia, to rights reserved or retained by the states—*he does not refer to "the states" at all*. True, New York's proposal also refers to *powers* retained by the people, but the Tenth Amendment was eventually revised to include this as well—to the consternation of some in Virginia, as will be discussed below.<sup>185</sup> Of course the actual Ninth Amendment as enacted deviates still further from those aspects of the state recommendations that Madison's original proposal resembles. It requires

181. The Bill of Rights was proposed to the states by Congress on March 4, 1789. 1 ELLIOT'S DEBATES, *supra* note 110, at 338. Rhode Island ratified the Constitution on May 29, 1790. Ratification of the Constitution by the Convention of the State of Rhode Island and Providence Plantations (May 29, 1790), in 1 ELLIOT'S DEBATES, *supra* note 110, at 334, 334–35. Lash stresses that "Rhode Island submitted a declaration almost identical to New York's." Lash, *Lost Original Meaning*, *supra* note 10, at 356. But Rhode Island's proposal was made after the Ninth Amendment was drafted in its present form. Indeed, inducing Rhode Island to ratify the Constitution was one of the purposes for proposing a Bill of Rights. See GAZETTE OF THE UNITED STATES (Phila.), June 10, 1798, reprinted in CREATING THE BILL OF RIGHTS, *supra* note 33, at 66 (reporting Madison's recommendation that a select committee be formed to explore "some alteration of the Constitution" to encourage Rhode Island and North Carolina to ratify). If Rhode Island's reassertion of New York's proposal has any interpreted significance (which is doubtful), it is that its convention viewed New York's proposed rule of construction as substantially *different* from the text of the Ninth Amendment that had already been submitted to the states for ratification.

182. Lash, *Lost Original Meaning*, *supra* note 10, at 360.

183. See 1 ANNALS OF CONG. 775 (Joseph Gales ed., 1834) (statement of Rep. James Madison, Aug. 15, 1789) ("I concurred, in the convention of Virginia, with those gentlemen, so far as to agree to a declaration of those rights which corresponded with my own judgment, and the other alterations which I had the honor to bring forward before the present congress.")

184. James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), in JAMES MADISON, WRITINGS, *supra* note 32, at 437, 443.

185. See *infra* notes 194–205 and accompanying text.

great care to interpret the enacted text of the Constitution in light of rejected proposals.

Before turning to the evidence of original meaning provided by the Virginia debate over the enacted text of the Ninth and Tenth Amendments, let me summarize how the wording of these varying state proposals supports or undercuts the five originalist models. None of the proposals discussed supports the state law rights model. However, Pennsylvania also proposed “that every reserve of the rights of individuals, made by the several constitutions of the states in the Union, shall remain inviolate, except so far as they are expressly and manifestly yielded or narrowed by the national Constitution.”<sup>186</sup> While this *is* a clear assertion of state law rights, it addresses the effect of *adopting the Constitution*, not the effect of enumerating certain rights in the Constitution, which is the subject of the Ninth Amendment.

The state proposals described above seriously undercut the residual rights model. That model claims that the Ninth Amendment tells us nothing about the scope of federal powers but merely restates the importance of enumerated powers. Yet each of the rules of construction recommended by the states were proposals for how enumerated powers should be construed: narrowly, so as not to violate the reserved powers, jurisdiction, or rights of the people or states (depending on the particular formulation).

Only the Virginia–North Carolina proposal clearly fits the collective rights model. The proposals by Pennsylvania, South Carolina, and especially New York are consistent instead with the individual natural rights model. As we shall see, the difference in the wording proposed by Virginia from the actual wording of the Ninth Amendment, and Virginia’s reaction to that change, severely undercuts the collective rights model and strongly supports the individual rights model. Finally, all these proposals concerning the construction of federal powers provide strong support for the federalism model, which is compatible with either the collective rights model, or individual natural rights model, or both.

### G. *The Virginia Debates over the Ninth Amendment*

As we have just seen, Madison’s initial proposal looked in form very similar to the rules of construction proposed by several state ratification conventions, though in substance it was more similar to New York’s than to Virginia’s. Here, once more, is Madison’s original formulation:

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

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186. Amendments Proposed by the Pennsylvania Convention (Sept. 3, 1788), in *THE COMPLETE BILL OF RIGHTS*, *supra* note 95, at 648, 648.

powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.<sup>187</sup>

Clearly borrowed from state proposals is the language, “or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.”<sup>188</sup> Also taken from the proposals is the reference to enumerated rights as “exceptions” to granted powers.<sup>189</sup> To the language proposed by the states Madison added a reference to provisions in the Constitution “made in favor of particular rights” that does not appear in the state proposals concerning construction. Crucially, he also added the language, “shall not be so construed as to diminish the just importance of other rights retained by the people.” Unlike New York’s language, this does not read “the People of the several States” but simply “the people.”<sup>190</sup> It does not mention the states at all.

Here, again, is the final form of the Ninth Amendment as it emerged from Congress (as the eleventh proposed amendment) and was transmitted to the states for ratification: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”<sup>191</sup> Gone now is any reference to “exceptions” to the powers of Congress. In place of the states’ proposed reference to “clauses which declare that Congress shall not exercise certain powers” is a reference to the “rights . . . retained by the people.” In place of the earlier draft’s language “shall not be so construed . . . as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers” is the language “shall not be construed to deny or disparage others retained by the people.”

Also absent from the Ninth Amendment is any reference to the states. In the amendments as proposed by Congress and ratified, the only explicit reference to the reserved powers of states came in the Tenth Amendment—originally the twelfth proposed amendment—which reads: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>192</sup> This language is nearly identical to that recommended by every state ratification convention that made proposals, with one difference: the unexplained addition by the Senate of the words “or to the people” at the end.

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187. James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), in JAMES MADISON, WRITINGS, *supra* note 32, at 437, 443.

188. *See, e.g.*, Amendments Proposed by the New York Convention (July 26, 1788), in THE COMPLETE BILL OF RIGHTS, *supra* note 95, at 674, 674 (proposing the text “[does] 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”).

189. *See, e.g., id.*

190. *See id.*

191. U.S. CONST. amend. IX.

192. U.S. CONST. amend. X.



While Virginia's proposal contained no analogue to this additional language, New York had proposed that "*every Power . . . which is not by the said Constitution clearly delegated to the Congress of the United States, or the departments of the Government thereof, remains to the People of the several States, or to their respective State Governments to whom they may have granted the same.*"<sup>193</sup> However, whereas New York refers to "the People of the several States," the final version of the Tenth Amendment, like the final version of the Ninth, refers simply to "the People."

After Congress submitted its version of the amendments to the states for ratification, an interesting debate transpired in the Virginia legislature concerning the Ninth and Tenth Amendments. The principal objection to the Ninth Amendment by Edmund Randolph has been much discussed in the Ninth Amendment literature in the context of Madison's reply to a letter written to him by Hardin Burnley, a member of the Virginia house.<sup>194</sup> On November 28, 1789, Burnley reported to Madison that, while the first ten amendments "were acceded [sic] to with but little opposition," the last two were rejected.<sup>195</sup> He then reported Randolph's objection to the Ninth Amendment:

Mr. E. Randolph who advocated all the others stood in this contest in the front of opposition. His principal objection was pointed against the word retained in the eleventh proposed amendment, and his argument if I understood it was applied in this manner, that as the rights declared in the first ten of the proposed amendments were not all that a free people would require the exercise of; and that as there was no criterion by which it could be determined whither [sic] any other particular right was retained or not, it would be more safe, & more consistant [sic] with the spirit of the 1<sup>st</sup> & 17<sup>th</sup> amendments proposed by Virginia, that this reservation against constructive power, should operate rather as a provision against extending the powers of Congress by their own authority, than as a protection to rights reducable [sic] to no definitive certainty.<sup>196</sup>

On December 5th, Madison related Burnley's report of Randolph's objections to George Washington,<sup>197</sup> but on the very next day, Randolph wrote Washington himself to report that amendments had passed the Virginia

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193. Amendments Proposed by the New York Convention (July 26, 1788), in *THE COMPLETE BILL OF RIGHTS*, *supra* note 95, at 674, 674 (emphasis added).

194. See, e.g., Lash, *Lost Original Meaning*, *supra* note 10, at 333, 375–79; McAfee, *supra* note 19, at 1287–93.

195. Letter from Hardin Burnley to James Madison (Nov. 28, 1789), in *5 DOCUMENTARY HISTORY OF THE CONSTITUTION*, *supra* note 167, at 219, 219.

196. *Id.*

197. Letter from James Madison to George Washington (Dec. 5, 1789), in *5 DOCUMENTARY HISTORY OF THE CONSTITUTION*, *supra* note 167, at 221, 221–22. In this letter, Madison gives his now much-discussed reply to Randolph's objections, which I will examine below.

house and were now before its senate.<sup>198</sup> Nine days later Randolph explained to Washington: “It has been thought best by the mo[mutilated] zealous friends to the constitution to let the whole of them rest. I have submitted to their opinion; not choosing to rely upon my own judgment in so momentous an affair.”<sup>199</sup>

In the Virginia senate, more dominated by Antifederalists, the amendments had a tougher sledding. The senate rejected the third (First), eighth (Sixth), eleventh (Ninth) and thirteenth (Tenth) amendments. The reasons given for rejecting the eleventh (the Ninth Amendment) were similar to the reasons given by Randolph but add a significant statement that pertains to its original public meaning:

*We do not find that the 11th article is asked for by Virginia or any other State; we therefore conceive that the people of Virginia should be consulted with respect to it, even if we did not doubt the propriety of adopting it; but it appears to us highly exceptionable.*<sup>200</sup>

In other words, the public meaning of the Ninth Amendment appeared so different from anything proposed by Virginia’s ratification convention that the Virginians in the Senate do not find it in their proposals. This perceived difference in public meaning is further reflected in their substantive objections to the new language: “If it 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 . . . .”<sup>201</sup> Here they specifically find that the meaning of the Ninth Amendment differs from that of their proposed seventeenth.

This reaction in the Virginia senate is consistent with the reaction of Virginia’s two United States Senators who had previously reported the proposed amendments to the Governor of Virginia accompanied by their stern disapproval.

[I]t is with grief that we now send forward propositions inadequate to the purpose of real and substantial Amendments, and so far short of the wishes of our Country. By perusing the Journal of the Senate, your Excellency will see, that we did, in vain, bring to view the

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198. Letter from Edmund Randolph to George Washington (Dec. 6, 1789), in 5 DOCUMENTARY HISTORY OF THE CONSTITUTION, *supra* note 167, at 222, 222 (“[T]he whole twelve were ratified. They are now with the senate, who were yesterday employed about them.”). Randolph then predicted accurately, “That body will attempt to postpone them; for a majority is unfriendly to the government. But an effort will be made against this destructive measure.” *Id.*

199. Letter from Edmund Randolph to George Washington (Dec. 15, 1789), in 5 DOCUMENTARY HISTORY OF THE CONSTITUTION, *supra* note 167, at 225, 225.

200. Entry of Dec. 12, 1789, in JOURNAL OF THE SENATE OF THE COMMONWEALTH OF VIRGINIA 60, 63 (Richmond, Thomas W. White 1828) [hereinafter VIRGINIA SENATE JOURNAL] (emphasis added). Kurt Lash was the first Ninth Amendment scholar to examine and discuss this source. See Lash, *Lost Original Meaning*, *supra* note 10, at 380–84.

201. Entry of Dec. 12, 1789, in VIRGINIA SENATE JOURNAL, *supra* note 200, at 63 (emphasis added).

Amendments proposed by our Convention, and approved by the Legislature.<sup>202</sup>

Each senator also expressed this opinion even more vociferously in private correspondence with Patrick Henry. In the words of Senator William Grayson, “[T]hey 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: The Virginia amendments were all brought into view, and regularly rejected.”<sup>203</sup> And Senator Richard Henry Lee explained,

As they came from the H. of R. they were very far short of the wishes of our Convention, but as they are returned by the Senate they are certainly much weakened. You may be assured that nothing on my part was left undone to prevent this, and every possible effort was used to give success to all the Amendments proposed by our Country—We might as well have attempted to move Mount Atlas upon our shoulders.<sup>204</sup>

After complaining that the Ninth Amendment was completely new, the majority report in the Virginia senate then identifies the other rights retained by the people as “personal” as opposed to collective, though it finds the protection of these rights deficient:

[A]nd as it respects personal rights, [it] might be dangerous, because, should the rights of the people be invaded or called in question, they might be required to shew by the constitution what rights they have *retained*; and such as could not from that instrument be proved to be retained by them, they might be denied to possess. Of this there is ground to be apprehensive, when Congress are already seen denying certain rights of the people, heretofore deemed clear and unquestionable.<sup>205</sup>

Unfortunately, for our purposes, they provide no examples of such “denials” of rights. Note, however, their use of the term “deny” to connote violation or infringement.

Of course, these Virginians proved prescient about the effectiveness of the Ninth. Under the modern approach to constitutional rights, as embodied in Footnote Four,<sup>206</sup> only enumerated rights shift the presumption of constitutionality,<sup>207</sup> unless a litigant can establish that an unenumerated right

202. Letter from Richard Henry Lee and William Grayson to the Governor of Virginia (Sept. 28, 1789), in 5 DOCUMENTARY HISTORY OF THE CONSTITUTION, *supra* note 167, at 216, 216.

203. Letter from William Grayson to Patrick Henry (Sept. 29, 1789), in CREATING THE BILL OF RIGHTS, *supra* note 33, at 300, 300.

204. Letter from Richard Henry Lee to Patrick Henry (Sept. 14, 1789), in CREATING THE BILL OF RIGHTS, *supra* note 33, at 295, 295.

205. Entry of Dec. 12, 1789, in VIRGINIA SENATE JOURNAL, *supra* note 200, at 63–64.

206. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

207. *Id.* (“There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution . . .”).

is “implicit in the concept of ordered liberty”<sup>208</sup> or “deeply rooted in this Nation’s history and tradition”<sup>209</sup>—and very few unenumerated rights have been protected by this route.

Still, the effectiveness of the Ninth Amendment is one thing; its original meaning is another. The report of the Virginia senate offers powerful evidence that the replacement of the words of the seventeenth proposal by Virginia with that of the actual Ninth Amendment represented a change in its public meaning from the protection of state powers to the protection of “personal rights.” The report of the minority in the Virginia senate who supported ratifying all the amendments, including the Ninth, bears this out insofar as it agreed with the majority that the amendment was not called for by the states. Despite this, the minority disagreed that it was dangerous: “Because the 11th amendment, *though not called for by any of the adopting States*, we consider as tending to quiet the minds of many, and in no possible instance productive of danger to the liberties of the people . . . .”<sup>210</sup> Of course, we know that, in the end, Randolph was convinced to support the Ninth Amendment, despite his reservations, and Virginia ultimately ratified it.<sup>211</sup>

The arguments made about the Ninth Amendment in the Virginia ratification process strongly support the individual natural rights model and severely undercut the collective rights model that would read the Ninth as completely equivalent to Virginia’s seventeenth. This change in meaning does not, however, preclude the federalism model’s rule of construction. Indeed, the Virginia senate considered the possibility that the Ninth Amendment “is meant to guard against the extension of the powers of Congress by implication.”<sup>212</sup> As we shall soon see, this is exactly how James Madison uses the Ninth Amendment in his speech concerning the constitutionality of the national bank.<sup>213</sup>

Finally, by affirming the idea that the Ninth Amendment refers to “personal rights” without any reference to state law rights, this evidence undercuts the state law rights model. It is also inconsistent with the residual rights model insofar as the Virginia senate’s reading of the Ninth Amendment does not even hint at the idea that the “personal rights” to which it refers are to be exclusively defined by the enumerated powers included in the Constitution.

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208. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

209. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

210. Entry of Dec. 14, 1789, in *VIRGINIA SENATE JOURNAL*, *supra* note 200, at 66–67 (emphasis added).

211. See LEVY, *supra* note 22, at 42–43 (discussing the “two years of procrastination” in the Virginia senate prior to ratification).

212. Entry of Dec. 12, 1789, in *VIRGINIA SENATE JOURNAL*, *supra* note 200, at 63.

213. See *infra* subpart V(I).

Before leaving the Virginia debates, it is useful to consider the objection of the majority in the Virginia senate to the wording of the twelfth amendment—what we know as the Tenth Amendment—for it sheds light on the meaning of “the people” in the Ninth. Here is what the majority reports:

We conceive that the 12th article would come up to the 1st article of the Virginia amendments, were it not for the words “or to the people.” It is not declared to be the people of the respective States; but the expression applies to the people generally as citizens of the United States, and leaves it doubtful what powers are reserved to the State Legislatures. Unrestrained by the constitution or these amendments, Congress might, as the supreme rulers of the people, assume those powers which properly belong to the respective States, and thus gradually effect an entire consolidation.<sup>214</sup>

This objection echoes that of Richard Henry Lee:

By comparing the Senate amendments with [those] from below by carefully attending to the m[atter] the former will appear well calculated to enfeeble [and] produce ambiguity—for instance—Rights res[erved] to the States or the *People*—The people here is evidently designed fo[r the] People of the *United States*, not of the Individual States [page torn] the former is the Constitutional idea of the people—We *the People* &c. . . . [T]his mode of expressing was evidently *calculated* to give the Residuum to the people of the U. States, which was the Constitutional language, and to deny it to the people of the Indiv. State—At least that it left room for cavil & false construction—They would not insert after people therof—altho it was moved.<sup>215</sup>

While it is far from dispositive, this objection to the Tenth Amendment severely undercuts the collective rights and the state law rights models, as it indicates that “the People” in both the Ninth and Tenth Amendments was read as referring to the people of the United States, and not the people of each of the several states. And this, in turn, supports the conclusion that the rights and powers of the people, to which both Amendments refer, are the natural rights and powers of the people as individuals, rather than particular rights they may have as citizens of their respective states.

On the other hand, it also must be remembered that these are all objections made by and to other Antifederalist opponents of the new Constitution.<sup>216</sup> It was never clear that these opponents really wanted an

214. Entry of Dec. 12, 1789, in VIRGINIA SENATE JOURNAL, *supra* note 200, at 64.

215. Letter from Richard Henry Lee to Patrick Henry (Sept. 14, 1789), in CREATING THE BILL OF RIGHTS, *supra* note 33, at 295, 296 (alterations in the original). *But cf.* Letter from Edmund Randolph to George Washington (Dec. 6, 1789), in 5 DOCUMENTARY HISTORY OF THE CONSTITUTION, *supra* note 167, at 222, 223 (“The twelfth 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.”).

216. *See supra* notes 28–29 and accompanying text.

effective bill of rights, and were not simply using its absence as a political weapon to defeat the new Constitution itself. This opposition comes through clearly both in the statements of those who objected to the proposed amendments<sup>217</sup> and in the reactions to these protests by supporters of the Constitution and amendments.<sup>218</sup>

So we need consider these objections by Virginian Antifederalists, heartfelt as they were, with some measure of skepticism. Still, had these not seemed like reasonable interpretations of the public meaning of the text, citing them would not have advanced the Antifederalist cause of undercutting the amendments being offered to bolster the perceived legitimacy of the new Constitution. Whatever is the appropriate discount to be applied to this evidence, it cuts in favor of the individual natural rights and federalism models, and against the state law rights, residual rights, and collective rights models.

#### H. *Madison's and Burnley's Replies to Randolph's Objections*

Madison's immediate reply to Randolph's objection suggests that the protection of retained rights and a rule of construction limiting the extensions of federal power amounted *in practice* to the same thing. In his letter to Washington, Madison writes:

The difficulty started ag<sup>st</sup> 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, ["whether" stricken out] by declaring that they shall not be abridged ["be violated" stricken out], or that the former shall not be extended. If no line can be drawn, a declaration in either form would amount to nothing.<sup>219</sup>

This passage has been much debated by Ninth Amendment scholars. While it is inconsistent with a state law rights model, Thomas McAfee has claimed

217. See, e.g., Letter from Richard Henry Lee to Patrick Henry (Sept. 14, 1789), in *CREATING THE BILL OF RIGHTS*, *supra* note 33, at 295, 295 ("The most essential danger for the present System arises, [in my] opinion, from its tendency to a Consolidated government, instead of a Union of Confederate States—The history of the world and reason concurs in proving that so extensive a Territory [as the] U. States comprehend never was, or can be governed in freed[om] under the former idea."). Other examples abound.

218. Letter from Edmund Randolph to George Washington (Nov. 26, 1789), in *5 DOCUMENTARY HISTORY OF THE CONSTITUTION*, *supra* note 167, at 216, 216 (referring to letter by Senators Lee and Grayson as "printed by the enemies to the constitution").

219. Letter from James Madison to George Washington (Dec. 5, 1789), in *5 DOCUMENTARY HISTORY OF THE CONSTITUTION*, *supra* note 167, at 221, 221–22. Madison concludes: "If the distinction were just it does not seem to be of sufficient importance to justify the risk of losing the amend<sup>s</sup> of furnishing a handle to the disaffected, and of arming N. C. with a pretext, if she be disposed, to prolong her exile from the Union." *Id.* at 222.



that it implies his residual rights model.<sup>220</sup> Yet the residual rights model insists that the Ninth Amendment tells us *nothing* about how the powers of Congress are to be construed.<sup>221</sup> In contrast, Madison insists that the protection of the rights retained by the people is a means by which “the powers granted . . . not be extended.” Remember that the provision in his original proposal, which borrowed from the language proposed by Virginia and other states, was that express exceptions to federal power “*not be so construed . . . as to enlarge the powers delegated by the constitution.*”<sup>222</sup>

One way to unpack Madison’s typically complex phraseology is by distinguishing between means and ends. In this letter, Madison explains that the single end of the provision is that “the latter be secured,” referring to the “rights retained.” He then identifies two means to this end that might have been included in the text: an expressed declaration of “rights retained . . . that shall not be abridged” or an expression that “powers granted . . . shall not be extended.” As means to the end that “the rights retained . . . be secured,” both of these textual formulations amount to “the same thing.” Which is not to say that either formulation is the same as an explicit protection of the rights *of states* as was proposed by Virginia.

This difference between means and ends is even clearer in Hardin Burnley’s response to Randolph’s objections:

But others among whom I am one see not the force of the distinction, for by preventing an extension of power in that body from which danger is apprehended safety will be insured if its powers are not too extensive already, & so by protecting the rights of the people & of the States, an improper extension of power will be prevented & safety made equally certain.<sup>223</sup>

As I have discussed elsewhere,<sup>224</sup> even more clearly than Madison, Burnley is here assessing two competing means to the end of protecting the rights of the people. According to Burnley, “*by protecting* the rights of the people & of the States, an improper extension of power will be prevented & safety made equally certain.” That is, Burnley advocates *protecting rights* as a means of preventing an *improper extension of power*—exactly how Madison used the Ninth Amendment in his bank speech, as we shall see. The other method of ensuring safety is “*by preventing* an extension of power.” True, Burnley wrote of the “rights of the people & of the States,” which might suggest that he thought the actual Ninth Amendment protected

220. McAfee, *supra* note 19, at 1290.

221. See *supra* text accompanying note 52.

222. James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), in JAMES MADISON, WRITINGS, *supra* note 32, at 437, 443 (emphasis added).

223. Letter from Hardin Burnley to James Madison (Nov. 28, 1789), in 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1188, 1188 (Bernard Schwartz ed., 1971).

224. BARNETT, *supra* note 7, at 250–52 (responding to Thomas McAfee’s interpretation of Madison’s letter to Washington).

both. Yet by this very language Burnley himself clearly distinguishes between “the people” and “the states” and the actual words of the Ninth Amendment refer only to the former.

Madison’s reply to Randolph’s concerns can be viewed as endorsing a restrictive construction of federal power as a means to the end of protecting the natural individual rights retained by the people. It is, therefore, consistent with both the federalism and natural individual rights models of the Ninth Amendment. Madison’s letter offers no support whatsoever for the collective rights model. For while Madison equates the protection of the rights retained by the people with construing the federal powers narrowly, he—unlike Burnley—does not even intimate any protection of powers of states, or that the rights to be protected were collective in nature. The fact that Madison equates the Ninth Amendment with that aspect of Virginia’s seventeenth proposal that would narrowly construe federal power in no way supports an equivalence between the Ninth Amendment and that part of Virginia’s proposal that would have protected the reserved rights of the states, rather than the retained rights of the people.

### *I. Madison’s Bank Speech*

If Madison’s explanation of the purpose of the Ninth Amendment in his Bill of Rights speech is the most important evidence of its original meaning, then how he actually used the Ninth Amendment in a constitutional argument in his speech to the House opposing a national bank is a close second. In this speech, Madison contended that a national bank was unconstitutional because it was beyond the power of Congress to establish.<sup>225</sup> Because he actually used the Ninth Amendment in a constitutional argument, this speech is very useful to understanding its role in constitutional adjudication. The implications of his usage are so obvious that they do not take long to explain.

Near the end of his speech—in which he was arguing that the power to incorporate a bank, and grant it a monopoly, were beyond those granted to Congress under the Necessary and Proper Clause—Madison observed, “The *latitude of interpretation* required by the bill is condemned by the rule furnished by the Constitution itself.”<sup>226</sup> As one authority for this “rule” of interpretation, Madison cited the Ninth Amendment:

The explanatory amendments proposed by Congress themselves, at least, would be good authority with them; all these renunciations of power proceeded on a rule of construction, excluding the latitude now contended for. . . . He read several of the articles proposed, remarking particularly on the 11th [the Ninth Amendment] and 12th [the Tenth Amendment], *the former, as guarding against a latitude of*

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225. 2 ANNALS OF CONG. 1944 (1791) (statement of Rep. Madison, Feb. 2, 1791).

226. *Id.* at 1949 (emphasis added).

*interpretation*; the latter, as excluding every source of power not within the Constitution itself.<sup>227</sup>

Thus, Madison viewed the Ninth and Tenth Amendments as playing the distinct roles that, Kurt Lash has rightly emphasized, can be found in different proposals by the states.<sup>228</sup> Madison viewed the Tenth Amendment as authority for the rule that Congress could only exercise a delegated power. For example, Congress could not establish a post office or raise and support armies without a delegation of power to pursue these ends. In contrast, Madison viewed the Ninth Amendment as providing authority for a rule against the loose construction of these powers—especially the Necessary and Proper Clause—when legislation affected the rights retained by the people. As Madison concluded in his Bank Speech, “In fine, if the power were in the Constitution, the immediate exercise of it cannot be essential; if not there, the exercise of it involves the guilt of usurpation.”<sup>229</sup>

Madison’s use of the Ninth Amendment in his Bank Speech substantiates the inference raised by his Bill of Rights speech that the unenumerated individual rights retained by the people provide the same sort of check on latitudinarian constructions of federal power as do the enumerated individual rights. This strongly confirms the federalism model, in which the Ninth Amendment argues against a latitudinarian construction of federal powers. This is hardly surprising as the modern federalism model was devised largely on the strength of Madison’s usage in this speech.

In contrast, Madison’s speech comprises a virtual refutation of the residual rights model, as Madison is using the Ninth Amendment as means of construing the power of Congress—which Thomas McAfee (who advanced that model) expressly denied was a purpose of the Ninth Amendment.<sup>230</sup> In other words, Madison himself used the Ninth Amendment in a manner that is completely outside the only function that the residual rights model claims it has. Nor is Madison’s usage consistent with the state law rights model. Although the national bank was opposed, in part, as an interference with the power of states to have their own banks, the state law rights model concerns the rights *of individuals* as protected by state bills of rights or the common law.<sup>231</sup> In making his Ninth Amendment argument, Madison referred to neither sort of individual state law rights.

Whether this speech supports the individual rights or collective rights models is disputed. Kurt Lash has fervently claimed that it supports the latter and not the former, but his presentation of the evidence is erroneous in two important respects. First, Lash relies heavily upon a statement by Madison that, at first blush, looks like it does indeed support Lash’s claim:

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227. *Id.* at 1951 (emphasis added).

228. See Lash, *Lost Original Meaning*, *supra* note 10, at 355–58.

229. 2 ANNALS OF CONG. 1951 (1791) (statement of Rep. Madison, Feb. 2, 1791).

230. McAfee, *supra* note 19, at 1300 & n.325.

231. See *supra* subpart IV(A).

To those who argued that Congress could act for the “general welfare” so long as it did not interfere with the powers of the States, Madison responded that chartering a bank “would directly interfere with the rights of the States, to prohibit as well as to establish banks.” Here, Madison sounds a theme that would continue throughout his speech: Chartering the bank would violate the rights of the states.<sup>232</sup>

But immediately after the quoted statement, Madison says this: “3. Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, altho it should interfere with the laws, or even the constitution of the States.”<sup>233</sup>

How are these two seemingly contradictory statements to be reconciled? Easily, as it turns out. As Lash notes, Madison is here responding to an argument by supporters of the bank that the “general welfare” clause means that “a general power might be exercised by Congress, without interfering with the *powers* of the States; and that the establishment of a National Bank was of this sort.”<sup>234</sup> In other words, the only prohibition on congressional lawmaking for the general welfare is when such laws interfere with the powers of the states.<sup>235</sup> Madison then replies to this purported interpretation with four alternative counterarguments including the second, that this power *does* interfere with the powers of the states, and the third, that it does not matter whether it does or not if the power was really delegated to Congress, in which case it would supersede state powers.<sup>236</sup>

232. Lash, *Lost Original Meaning*, *supra* note 10, at 388. The entire sentence from the report of Madison’s speech reads: “2. It would directly interfere with the rights of the States, *to prohibit* as well as to establish Banks, and the circulation of Bank Notes. He mentioned a law of Virginia, actually prohibiting the circulation of notes payable to bearer.” GAZETTE OF THE UNITED STATES (Phila.), Feb. 23, 1791, *reprinted in* 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 148, at 370. The entire quote is needed to identify the location of a similar statement in a different report of Madison’s speech. *See infra* note 236.

233. GAZETTE OF THE UNITED STATES (Phila.), Feb. 23, 1791, *reprinted in* 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 148, at 370.

234. *Id.* (emphasis added).

235. This argument has the same structure as today’s Tenth Amendment doctrine by which the laws enacted by Congress are improper when they directly commandeer state governments. *See* *Printz v. United States*, 521 U.S. 898, 919–20 (1997) (“[T]he Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and Federal Governments would exercise concurrent authority over the people.”).

236. A more truncated report of Madison’s speech in *The General Advertiser* reports his argument based on the example of Virginia’s law, without catching that it was a response in the alternative to a particular interpretation of the General Welfare Clause:

To exercise the power included in the bill was an infringement of the rights of the several states; for they could establish banks within their respective jurisdictions and prohibit the establishment of any others: a law existed in one of the states prohibiting the passing of cash notes of hand payable on demand: The power of making such a law could not, he presumed be denied to the states; and if this was granted and such laws were in force, it certainly would effectually exclude the establishment of a bank.

THE GENERAL ADVERTISER (Phila.), Feb. 7, 1791, *reprinted in* 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 148, at 379–80. The subtle distortion of Madison’s

Lash's second error is to dismiss my contention that Madison's constitutional argument was based, in part, on the fact that the bank would violate individual rights—in particular, when Madison argues that “[i]t involves a monopoly, which affects the equal rights of every citizen.”<sup>237</sup> Lash argues to the contrary that “[a]t no point did Madison argue that chartering a bank violated an individual right.”<sup>238</sup> Lash then claims that “Madison’s argument about the unequal treatment of citizens went to his understanding of the effects of the monopoly and were separate from his views regarding the constitutionality of the bank.”<sup>239</sup>

To support this reading, Lash reproduces a veto statement that Madison had drafted for President Washington, which I too now present in its entirety:

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 lie within the intimation of the President]

I object to the Bill because it is in all cases the duty of the Government to dispense its benefits to individuals with as impartial a hand as the public interest will permit; and the Bill is in this respect unequal to individuals holding different denominations of public Stock and willing to become subscribers.<sup>240</sup>

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argument in this report (at least as compared with the fuller context provided by *The Gazette of the United States*) suggests the need to exercise some degree of caution against too heavily relying upon the precise wordings of reported speeches.

237. GAZETTE OF THE UNITED STATES (Phila.), Feb. 23, 1791, reprinted in 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 148, at 373.

238. Lash, *Lost Original Meaning*, *supra* note 10, at 388.

239. *Id.* at 390.

240. James Madison, Proposed Veto Statement (Feb. 21, 1791), in 6 THE WRITINGS OF JAMES MADISON 42, 42–43 n.1 (Gaillard Hunt ed., 1906).

From this, Lash contends that Madison's reference to "equal rights" went "to the merits alone" rather than "to the Constitutionality."<sup>241</sup>

This is mistaken. First, the veto statement does not mention the problem of monopoly. The specific inequalities to which it does refer did indeed appear in Madison's speech in his "general review of the advantages and disadvantages of banks."<sup>242</sup> There, Madison is reported to have made the precise objection found in the draft veto statement:

The plan was unequal to the public creditors—it gave an undue preference to the holders of a particular denomination of the public debt, and to those at and within reach of the seat of government. If the subscriptions should be rapid, the distant holders of paper would be excluded altogether.<sup>243</sup>

However, the very next sentence reads: "In making these remarks on the merits of the bill, he had reserved to himself, he said, the right to deny the authority of Congress to pass it."<sup>244</sup>

Madison's reference to "a monopoly, which affects the equal rights of every citizen" appears some five pages later amid the heart of his constitutional objections.<sup>245</sup> And in considering this to be a constitutional argument, Madison was not alone. That same day, Representative James Jackson of Georgia "urged the unconstitutionality of the plan—called it a monopoly—such an one as contravenes the spirit of the constitution."<sup>246</sup> Representative Hugh Williamson of North Carolina (who supported the bill) "adverted to the *objections deduced from the constitution*, and explained the clause respecting monopolies as referring altogether to commercial monopolies."<sup>247</sup>

In sum, the full context reveals that the sentence on which Lash principally relies for his claim that it "was the collective rights of the people of the several states which were threatened by the Bill"<sup>248</sup> is completely misinterpreted. And his claim that Madison was not adverted to an infringement of an individual right when making his constitutional objections is also in error.<sup>249</sup> However, Lash overlooks two other statements that come closer to lending support for his claim.

In Madison's discussion of the Necessary and Proper Clause, he makes the following argument:

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241. Lash, *Lost Original Meaning*, *supra* note 10, at 390.

242. GAZETTE OF THE UNITED STATES (Phila.), Feb. 23, 1791, *reprinted in* 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 148, at 367.

243. *Id.* at 368.

244. *Id.*

245. *Id.* at 373.

246. *Id.* at 363–64.

247. *Id.* at 365 (emphasis added).

248. Lash, *Lost Original Meaning*, *supra* note 10, at 388.

249. *Id.* at 390.



The States have, it is allowed on all hands, a concurrent right to lay and collect taxes. This power is secured to them not by its being expressly reserved, but by its not being ceded by the constitution. The reasons for the bill cannot be admitted, because they would invalidate that right . . . .<sup>250</sup>

And Madison also argues that the overbroad interpretation of the General Welfare Clause “would give to Congress an unlimited power; would render nugatory the enumeration of particular powers; would supercede all the powers reserved to the state governments.”<sup>251</sup> There is nothing exceptional about these arguments, but to see why, we need to take a step back from the minutia of particular statements.

Madison is arguing here against a latitudinarian interpretation of various enumerated powers. There is no question but that an overly broad interpretation of enumerated powers can *both* interfere with the reserved political powers of the states, as well as violate the individual rights retained by the people. In his speech he offers pages of different types of authority for his claim that “[t]he latitude of interpretation required by the bill is condemned by the rule furnished by the constitution itself.”<sup>252</sup> His reference to the Ninth Amendment comes two pages later, after the introductory statement (quoted above) that “[t]he explanatory amendments proposed by Congress themselves, at least, would be good authority with them; all these renunciations of power proceeded on a rule of construction, excluding the latitude now contended for.”<sup>253</sup> The fact that a particular claim of implied power might trench upon the powers of states referenced by the Tenth Amendment was a consideration arguing against such a claim. That the Ninth Amendment referred only to individual rights would not entail that a latitude of construction was therefore warranted when the powers of states were being restricted.

In other words, Madison’s use of an argument based on state powers in this speech does not directly tell us that the original meaning of the Ninth Amendment included states rights. Rather, Madison’s specific use of the Ninth Amendment tells us only that it argues against “a latitude of interpretation” with respect to enumerated powers. On this important point, Kurt Lash and I agree.<sup>254</sup> Madison’s other statements elsewhere in his speech that refer to restrictions on state powers may not connect at all to the Ninth Amendment but may simply be a part of his general collection of arguments against this use of implied powers to justify the Bank.

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250. GAZETTE OF THE UNITED STATES (Phila.), Feb. 23, 1791, reprinted in 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 148, at 372.

251. *Id.* at 369.

252. *Id.* at 372.

253. *Id.* at 375.

254. Lash, *Lost Original Meaning*, *supra* note 10, at 391–93.

Here is another way to understand this point. The other evidence we have examined to this point show that the Ninth Amendment was intended to handle a particular problem created by a bill of rights: to ensure that, when particular natural rights of the people were enumerated (which were all individual personal rights), other natural rights of the people should not be construed to have been surrendered up to the general government and consequently left insecure. That the Ninth Amendment is a textual argument against such an improper construction of federal power does not preclude the different claim that it is *also* improper to invoke an implied federal power that would interfere with a reserved power of the states.

For the Ninth Amendment to read as proponents of the collective rights model would have it, the rest of the Bill of Rights would have to have primarily concerned protecting the powers of states. It would have to mean, in effect, “The enumeration in the Constitution of certain powers/rights of states shall not be construed to deny or disparage other powers/rights of states.” But claims by those who would read the Second Amendment otherwise notwithstanding,<sup>255</sup> the other Amendments were not about states’ rights. We can be certain, therefore, that this was not the meaning of the Ninth Amendment because this was not the problem for which the Ninth Amendment was devised by Madison to be the solution. While Akhil Amar puts forth a collective rights reading of the Bill of Rights as a whole, this interpretation is at odds with the evidence presented here and elsewhere.<sup>256</sup> Kurt Lash does not make such a claim, and even Amar does not claim that the Bill of Rights was exclusively collective.

Finally, we ought not make too much of Madison’s two uses of the word “rights” when referring to the powers of states.<sup>257</sup> The Constitution is far more scrupulous about using the terms “rights” only when speaking of the people or citizens or persons, and “powers” when speaking of either the government or the people. In everyday discourse, speakers were not so punctilious. Overwhelmingly, however, Madison refers in his speech to the powers of states, rather than to their rights.<sup>258</sup>

Despite the fact that the Constitution speaks only of governmental powers and not rights, however, there is nothing inaccurate about referring to the “rights of states” *within the federal system* established by the

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255. See generally Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEXAS L. REV. 237 (2004); Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139 (1996).

256. See AMAR, *supra* note 69, at 215–16. A general critique of Amar’s collective rights reading of the Bill of Rights is beyond the scope of this Article.

257. James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791), in JAMES MADISON, WRITINGS, *supra* note 32, at 480, 485.

258. Madison refers to the powers of states four times. *Id.* at 483, 490. One reason it is so hard to stick religiously to this terminological distinction—I slip up myself on occasion—is indicated by Madison’s statement that a power “not being included could never be rightfully exercised.” *Id.* at 488. When speaking of the *rightfully exercised* powers of states, it is easy to refer simply to the rights of states.

Constitution. But this does not mean that the “rights . . . retained by the people” is a reference to *these* rights that may be either explicit or implicit in a federal scheme of delegated powers. But even if it was, as was noted in the Introduction, this is not logically inconsistent with a reading of the Ninth Amendment as protecting both individual and states’ rights from a latitudinarian interpretation of the enumerated powers.<sup>259</sup> Were states’ rights included in the meaning along with individual rights, it would simply broaden the scope of the Ninth Amendment to include situations where no individual liberty rights were at issue.

So the only claim that contradicts the individual natural rights model would be that the collective rights model is the *exclusive* interpretation of the Ninth Amendment. By now I trust that readers can see how nonexistent is the evidence to support such a claim of exclusivity and how powerful is the evidence against it. While Kurt Lash denies this is his position,<sup>260</sup> there are places in his article, such as those discussed in this section, that give readers this misimpression.<sup>261</sup> To the extent that Kurt Lash’s use of Madison’s Bank Speech is meant to suggest that Madison had only collective and not individual rights in mind when he invoked the Ninth Amendment, I have explained here why the evidence cited by Lash is mistakenly interpreted.

#### *J. Madison’s Whiskey Rebellion Speech*

Generally overlooked in the literature on the Ninth Amendment is another apparent reference by Madison to individual rights retained by the people when construing the powers of Congress, though the significance of this reference is fuzzier than the others. Three years after his Bank Speech, in 1794, Madison would again argue in Congress that the unenumerated rights retained by the people directly constrained congressional power. When Congress sought to censure the activities of certain self-created societies for their participation in the Whiskey Rebellion earlier that year, Madison contended that: “When the people have formed a Constitution, they retain those rights which they have not expressly delegated.”<sup>262</sup> Here Madison was asserting that the unenumerated retained right of the people to hold opinions constrained the power of Congress to issue a censure in the same manner as “the liberty of speech, and of the press.”<sup>263</sup> Indeed, “the censorial power is in the people over the Government, and not in the Government over the people.”<sup>264</sup>

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259. See *supra* text accompanying notes 10–12.

260. See Lash, *Lost Original Meaning*, *supra* note 10, at 363 (“At the time of the Founding, it was possible to embrace both natural rights and a strong belief in the collective right of the people to local self-government.”).

261. See *supra* notes 232, 238, 239, 241.

262. 4 ANNALS OF CONG. 934 (statement of Rep. Madison, Nov. 27, 1794).

263. *Id.*

264. *Id.*

By directly referring to an unenumerated individual right as constraining the powers of Congress, Madison's usage here strongly supports the individual natural rights and federalism models but is inconsistent with the state law rights model. Although referring to the enumerated powers, this statement is inconsistent with the residual rights model's claim that the residual rights of the people are defined by the enumerated powers. To the contrary, Madison is referring to an unenumerated right of the people to censure their government as an argument against the exercise of federal power.

This statement also undercuts any claim that the "rights . . . retained by the people" were exclusively "collective" and that to speak of them as individual is to engage in anachronism. The rights to which Madison referred were held by individuals who organized themselves into private associations or "societies." The rights of these associations of "insurgents" could hardly be equated with the "collective rights" of the people *as a whole*, unless the concept of "collective right" is stretched to the breaking point.<sup>265</sup>

On the other hand, this statement by Madison is not crystal clear. Most importantly, Madison does not explicitly refer to the Ninth Amendment. Just as "retained those rights" evokes the Ninth Amendment, Madison's reference to "which they have not expressly delegated" seems to evoke the Tenth Amendment. But if he had the Tenth Amendment in mind, it is that portion of the Tenth that refers to the reserved powers of the people, not the states. If so, these powers too are individual and not collective. Moreover, these reserved powers are closely connected to the retained rights. Madison more clearly invokes the reserved powers of the people in the context of the Tenth Amendment in his famed *Report on the Virginia Resolutions* to which we now turn.

#### K. Madison's Report on the Virginia Resolutions

In 1798, Congress enacted the Alien and Sedition Acts empowering the President to deport aliens deemed dangerous—though these aliens were not from an enemy nation—and making it a federal crime to disparage the federal government and its officials.<sup>266</sup> That same year, James Madison drafted the Virginia Resolutions declaring the Acts to be unconstitutional. In 1800, his lengthy *Report on the Alien and Sedition Acts*<sup>267</sup> was approved by

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265. *See id.* at 935 ("[T]he whole Continent reprobates the conduct of the insurgents . . ."). Indeed, I find that the slippery concept of "collective rights" lacks a rigorous definition.

266. An Act for the Punishment of Certain Crimes against the United States (Sedition Act), ch. 74, 1 Stat. 596 (1798) (expired 1801); An Act Respecting Alien Enemies (Alien Enemies Act), ch. 66, 1 Stat. 577 (1798) (current version at 50 U.S.C. §§ 21–24 (2000)); An Act Concerning Aliens (Alien Enemies Act), ch. 58, 1 Stat. 570 (1798) (expired 1800); An Act to Establish an Uniform Rule of Naturalization (Naturalization Act of 1798), ch. 54, 1 Stat. 566 (1798) (repealed 1802).

267. James Madison, Report on the Alien and Sedition Acts (Jan. 7, 1800), in JAMES MADISON, WRITINGS, *supra* note 32, at 608, 608.

the Virginia assembly.<sup>268</sup> Madison's report received wide attention. As late as 1819, it was described as "the *Magna Charta*" of the Republicans "after the great struggle in the year 1799."<sup>269</sup>

Because it does not discuss the Ninth Amendment—and perhaps also because it comes nine years after the Bill of Rights was adopted—Madison's *Report* has not often been the subject of Ninth Amendment scholarship.<sup>270</sup> But as Kurt Lash now contends that the Ninth Amendment, and not the Tenth, was meant to protect the rights of states against a latitude of construction of federal powers, Madison's *Report* becomes relevant. For, in contesting the constitutionality of the Alien and Sedition Acts, Madison relies on both the First and Tenth Amendments, but does not rely on the Ninth. Therefore, given that Madison is arguing against a latitude of interpretation of enumerated federal powers because it interferes with the reserved rights and powers of the states, Madison's *Report* is powerful evidence that the Tenth Amendment, and not the Ninth, is the source of a "federalism" rule of construction protecting the rights and powers of the states, as well as the powers of the people. Since we know from his Bank Speech that Madison also viewed the Ninth Amendment as arguing against a latitude of construction,<sup>271</sup> its "federalism" rule of construction would protect the individual natural rights retained by the people, rather than the reserved (rights and) powers of states protected by the Tenth.

To his credit, Kurt Lash discusses Madison's *Report*. His reason for dismissing its relevance is short:

Congress based its authority to pass the Acts on its inherent unenumerated power to enforce the common law. According to the Virginia Resolutions, the Acts "exercise[] in like manner, a power not delegated by the constitution, but on the contrary, expressly and positively forbidden by one of the amendments thereto." *This case did not involve the construction of enumerated power*. It involved a power derived from unenumerated common law and stood in clear violation of the positive denial of power contained in the First Amendment. . . . Given the common law basis of arguments

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268. *Id.* at 662; see Jack N. Rakove, *Chronology* to JAMES MADISON, WRITINGS, *supra* note 32, at 893, 903 (describing the report as having been written in 1799 and approved by the Virginia assembly on January 7, 1800).

269. Spencer Roane, *Hampden Essays*, RICHMOND ENQUIRER (June 11, 1819), reprinted in JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 106, 113 (Gerald Gunther ed., 1969); see also *id.* ("The principles of this report equally consult the rights and happiness of the several states, and the safety and independence of the union."). Roane refers to Madison's report as "the celebrated report of 1799." *Id.* at 116.

270. *But see* Leslie W. Dunbar, *James Madison and the Ninth Amendment*, 42 VA. L. REV. 627, 635–37 (1956) (pondering the significance of Madison's failure to raise the Ninth during discussion of the Alien and Sedition Acts); Mark C. Niles, *Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights*, 48 UCLA L. REV. 85, 96 n.30 (2000) (discussing Madison's failure to mention the Ninth).

271. See *supra* subpart V(I).

supporting the Alien and Sedition Acts, if ever there was a *Tenth* Amendment issue, this was it.<sup>272</sup>

By this reasoning, if the case *did* involve “the construction of enumerated power,” then, on Lash’s theory, Madison should have invoked the Ninth. If Madison nevertheless invoked the Tenth instead of the Ninth, this would be significant evidence against Lash’s theory. In essence, it would pit Madison against Lash.

As it happens, although Madison’s *Report* did focus on the claim that the Sedition Act was authorized by federal common law,<sup>273</sup> various latitudinarian constructions of enumerated powers were also offered on behalf of the Alien Act. In particular, Madison discussed claims based on the enumerated powers to “grant letters of marque and reprisal,”<sup>274</sup> the “power of war,”<sup>275</sup> and the power “to protect each state against invasion.”<sup>276</sup> As to the claim that Congress has the power over all means that may tend to prevent an invasion, Madison replied, “Such a *latitude of construction* would render unavailing, every practicable definition of particular and limited powers.”<sup>277</sup>

With respect to the Sedition Act, Madison responded to the claim that the federal codification of the common law was justified by the enumerated Judicial Power of Article III, Section 2. To this he responded, “Never perhaps was so broad a construction applied to a text so clearly unsusceptible of it.”<sup>278</sup> Later he observed:

It is indeed distressing to reflect, that it ever should have been made a question, whether the constitution, on the whole face of which is seen so much labour to enumerate and define the several objects of federal power, could intend to introduce in the lump, in an indirect manner, *and by a forced construction of a few phrases*, the vast and multifarious jurisdiction involved in the common law; a law filling so many ample volumes; a law overspreading the entire field of legislation; and a law that would sap the foundation of the constitution as a system of limited and specified powers.<sup>279</sup>

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272. Lash, *Lost Original Meaning*, *supra* note 10, at 413 (first emphasis added) (citations omitted).

273. James Madison, Report on the Alien and Sedition Acts (Jan. 7, 1800), in JAMES MADISON, WRITINGS, *supra* note 32, at 608, 632.

274. *Id.* at 626. To this claim Madison replied: “It must be considered as an abuse of words to call the removal of persons from a country, a seizure or reprisal on them . . . .” *Id.*

275. *Id.* To this claim, Madison replied “that the removal of alien enemies is an incident to the power of war; that the removal of alien friends, is not an incident to the power of war.” *Id.* at 626–27.

276. *Id.* at 627.

277. *Id.* (emphasis added).

278. *Id.* at 636; *see also id.* at 637 (“[E]ven if this part of the constitution could be strained . . .”).

279. *Id.* at 641 (emphasis added).



Therefore, it is simply inaccurate to claim that the “case did not involve the construction of enumerated power[s].”<sup>280</sup> In each of these instances, Madison discusses an overbroad construction of an enumerated power that impairs the rights and powers of states. That Madison does not mention the Ninth Amendment is evidence that he did not think the Ninth Amendment applied to this situation. The only fair reading of this fifty page report is that it is grounded on the First and Tenth Amendments, and not at all on the Ninth.

References to the principle articulated in the Tenth Amendment pervade the opinion.<sup>281</sup> Moreover, Madison refers to “the authorities, rights, and liberties, reserved to the states respectively, or to the People,”<sup>282</sup> and “the rights reserved to the states, or to the people.”<sup>283</sup> While Lash contends that the “rights” of states must be included in the Ninth Amendment’s reference to “rights . . . retained by the people” whenever federal powers are being construed, Madison clearly considers these “rights reserved to the states”<sup>284</sup> to be embraced by the Tenth rather than by the Ninth.

We have already seen how Madison’s Bank Speech demolishes the residual rights model.<sup>285</sup> In that speech, Madison uses the Ninth Amendment outside the only context in which, according to that model, it was applicable. Similarly, Madison’s failure to cite the Ninth Amendment when these latitudinarian constructions of particular federal powers jeopardize the “rights” and powers of states both undercuts the collective rights model of the Ninth Amendment and explodes the claim that the federalism model applies exclusively to the Ninth and not also to the Tenth Amendment.

To this point I have confined myself to examples of enumerated powers because of Lash’s claim that it is only in such a case that a rule of construction protecting the rights and powers of states based on the Ninth Amendment would have been invoked. But on his reading, why would the invocation of an *implied* power that threatens the rights and powers of states not also be rejected under his interpretation of the Ninth Amendment? After all, according to his theory, only the Ninth Amendment, and not the Tenth, provides a rule of construction against a latitudinarian interpretation of federal powers. Therefore, I see no reason why *any* construction of federal power that violated the reserved “rights and powers” of states, including a latitudinarian claim of implied power, should not also be handled by the Ninth Amendment instead of the Tenth under Lash’s account.

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280. Lash, *Lost Original Meaning*, *supra* note 10, at 413.

281. See, e.g., James Madison, Report on the Alien and Sedition Acts (Jan. 7, 1800), in JAMES MADISON, WRITINGS, *supra* note 32, at 608, 621 (citing the Tenth Amendment); *id.* at 648 (“[A]ll powers not given by it . . . were reserved.”).

282. *Id.* at 659.

283. *Id.* at 660.

284. *Id.* (emphasis added).

285. See *supra* text accompanying notes 230–31.

Yet in his *Report*, Madison repeatedly rejects claims of implied powers as overbroad without invoking the Ninth Amendment. For example, he considers whether the Necessary and Proper Clause could be used to justify the Sedition Act and offers the same argument concerning the meaning of “necessary” as he did in his Bank Speech:

[T]he first question is, whether the power be expressed in the constitution. If it be, the question is decided. If it be not expressed; the next enquiry must be, whether it is properly an incident to an express power, and necessary to its execution. If it be, it may be exercised by Congress. If it be not; Congress cannot exercise it.<sup>286</sup>

As he did in his Bank Speech, Madison ties this rule of construction to assertions made by Federalists in the ratification conventions, and then adds that “it is a construction absolutely necessary to maintain their consistency with the peculiar character of the government, as possessed of particular and defined powers only; not of the general and indefinite powers vested in ordinary governments.”<sup>287</sup>

As he was to do later when criticizing John Marshall’s opinion in *McCulloch v. Maryland*,<sup>288</sup> Madison also justifies his construction of the Necessary and Proper Clause on the ground that it is justiciable:

If it be understood that the powers implied in the specified powers, have an immediate and appropriate relation to them, as means, necessary and proper for carrying them into execution, *questions on the constitutionality of laws passed for this purpose, will be of a nature sufficiently precise and determinate for Judicial cognizance and controul*. If, on the other hand, Congress are not limited in the choice of means by any such appropriate relation of them to the specified powers; but may employ all such means as they may deem fitted to *prevent* as well as to *punish*, crimes subjected to their authority; such as may have a *tendency* only to *promote* an object for which they are authorized to provide; every one must perceive that questions relating to means of this sort, must be questions of mere policy and expediency; on which legislative discretion alone can decide, *and from which the judicial interposition and controul are completely excluded*.<sup>289</sup>

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286. James Madison, Report on the Alien and Sedition Acts (Jan. 7, 1800), in JAMES MADISON, WRITINGS, *supra* note 32, at 608, 642.

287. *Id.* at 643.

288. 17 U.S. (4 Wheat.) 316 (1819).

289. James Madison, Report on the Alien and Sedition Acts (Jan. 7, 1800), in JAMES MADISON, WRITINGS, *supra* note 32, at 608, 608, 643–44 (first and last emphases added). Compare Letter from James Madison to Spencer Roane (Sept. 2, 1819), in JAMES MADISON, WRITINGS, *supra* note 32, at 733, 734 (“Does not the Court also relinquish by their doctrine, all controul on the Legislative exercise of unconstitutional powers? . . . [A] question, the moment it assumes the character of mere expediency or policy, being evidently beyond the reach of Judicial cognizance.”).

Yet this rule of construction against a latitudinarian interpretation of federal powers is based on the Tenth Amendment not the Ninth, presumably because it is the rights and powers of states, rather than of individuals, that are jeopardized.

Of course, the Sedition Act also violated the individual natural rights retained by the people: viz. the rights of freedom of speech and press. There was no need for Madison to cite the Ninth Amendment in this context, however, because these rights were enumerated in the First Amendment, as Madison takes pains to explain. In other words, because a latitude of construction is not being used here to infringe upon an unenumerated individual right retained by the people, the Ninth Amendment would not pertain.

Madison also connects the enumerated right protected by the First Amendment with powers not delegated to the federal government:

If no such power be expressly delegated, and it be not both necessary and proper to carry into execution an express power; above all, if it be expressly forbidden by a declaratory amendment to the constitution, the answer must be, that the federal government is destitute of all such authority.<sup>290</sup>

In other words, where Congress is expressly denied a power, this power is reserved to the people, as affirmed by the Tenth Amendment. As Madison explained in his earlier discussion of the Aliens Act, “there are powers exercised by most other governments, which, in the United States are withheld by the people, both from the general government and from the state governments.”<sup>291</sup> This reservation of powers in the people negates any “inference . . . that the powers supposed to be necessary which are not so given to the state governments, must reside in the government of the United States.”<sup>292</sup>

How then can we reconcile Madison’s repeated use of the Tenth Amendment in his *Report* to argue against a “latitude of construction”<sup>293</sup> with the statement in his Bank Speech that the Ninth Amendment guards against a “latitude of interpretation”?<sup>294</sup> The explanation cannot be, as Lash proposes, that the Ninth Amendment provides a rule of construction and the Tenth Amendment does not.<sup>295</sup> After all, even a constitutional provision that does

290. James Madison, Report on the Alien and Sedition Acts (Jan. 7, 1800), in JAMES MADISON, WRITINGS, *supra* note 32, at 608, 650.

291. *Id.* at 628. Madison cites an example of this: “A tax on exports can be laid by no Constitutional authority whatever.” *Id.*

292. *Id.* at 629.

293. *Id.* at 627.

294. James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791), in JAMES MADISON, WRITINGS, *supra* note 32, at 480, 489.

295. See Lash, *Lost Original Meaning*, *supra* note 10, at 410 (asserting that the Ninth Amendment’s “rule of construction” must be distinguished from the Tenth Amendment’s declaration of the “principle of enumerated federal power”).

not include the phrase “shall not be construed” could potentially support a rule of construction, depending on its meaning.

The obvious way to reconcile these two vital Madisonian clues is to distinguish between the *differing source of the danger* posed by any particular latitude of interpretation. The Ninth Amendment can be viewed as aimed at the danger of latitudinarian constructions of federal power that threaten the (individual natural) rights retained by the people. The Tenth Amendment can be viewed as aimed at the danger of latitudinarian constructions of federal power that threaten the powers (and rights) reserved by the Constitution to the states, as well as the powers reserved to the people.<sup>296</sup> As it turns out, within three years of Madison’s *Report*, this very interpretation of the Ninth and Tenth Amendments was offered by a distinguished Virginia professor and jurist.

*L. St. George Tucker’s Notes on the Constitution*

St. George Tucker was a professor of law at the College of William and Mary, one of the leading judges of the General Court in Virginia, and the American editor of *Blackstone’s Commentaries*, the most influential and authoritative legal work of the period.<sup>297</sup> In the 1803 edition of the *Commentaries* he attached an appendix entitled *Notes of Reference to the Constitution and Laws of the Federal Government of the United States; and of the Commonwealth of Virginia*, in which he provides the first scholarly gloss on the meaning of the Constitution.<sup>298</sup> Though published after 1800, Tucker’s treatise was based on notes of his lectures given throughout the 1790s and contemporaneous with the earliest years of the Constitution.<sup>299</sup>

In his treatise on the Constitution, Tucker offered an interpretation of the Ninth Amendment very similar to that provided by Madison in his Bank Speech and an interpretation of the Tenth Amendment very similar to that provided by Madison in his *Report*. Tucker begins his explanation of the Ninth and Tenth Amendments (still referred to as the “eleventh” and “twelfth”) by discussing them together in the following passage:

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296. This distinction between rules of construction attending different dangers adds some support for the conclusion that Madison did indeed think that the bank bill threatened individual rights, as he asserted: “It involves a monopoly, which affects the equal rights of every citizen.” *GAZETTE OF THE UNITED STATES (Phila.)*, Feb. 23, 1791, *reprinted in* 14 *DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS*, *supra* note 148, at 373.

297. *See* BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA (St. George Tucker ed., Augustus M. Kelley 1969) (1803) [hereinafter TUCKER, BLACKSTONE’S COMMENTARIES].

298. St. George Tucker, *Note D to 1 TUCKER, BLACKSTONE’S COMMENTARIES*, *supra* note 297, app. at 140 [hereinafter Tucker, *Note D*] (expounding upon the nature, structure, and organization of the Constitution).

299. 1 TUCKER, BLACKSTONE’S COMMENTARIES, *supra* note 297, at v–xviii (explaining the origins of his treatise in lectures prepared for courses at the College of William and Mary).

All the powers of the federal government being either expressly enumerated, or necessary and proper to the execution of some enumerated power; and it being one of the rules of construction which sound reason has adopted; that, as exception strengthens the force of a law in cases not excepted, so enumeration weakens it, in cases not enumerated; it follows, as a regular consequence, that [1] *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: and, in like manner, [2] *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, wherever a different construction might derogate from the *rights and powers, which by the latter of these articles*, are expressly acknowledged to be reserved to them respectively.<sup>300</sup>

I have inserted numbers in brackets to indicate the distinct treatment given the Ninth and Tenth Amendments respectively.

According to Tucker, the Ninth Amendment provides a rule of construction when the “right[s] of the citizen”—to which he refers also as “his liberty”—are at stake. Notice his use of the singular tense (“the citizen,” “his liberty,” “his benefit,” and “his security”). The Tenth Amendment (“the latter of these articles”), in contrast, argues for a strict construction of federal powers when a “different construction” (as distinct from the text of the Constitution itself) might derogate from the rights and powers of states. Tucker shared with Madison the view that the Ninth Amendment provided an argument against a latitudinarian interpretation of the delegated powers, but he also made even clearer that its purpose is the protection of individual liberty, which justifies both a “strict construction” of powers and “liberal construction” of rights.

Earlier in his *Notes*, Tucker provides another description of the two constructions that further emphasizes the personal nature of the liberties protected by the Ninth Amendment. “*As federal* it is to be construed strictly, in all cases where the *antecedent rights of a state* may be drawn in question . . . .”<sup>301</sup> This sentence is followed by a footnote citing the Tenth (twelfth) Amendment. The passage then continues:

[A]s a *social compact* it ought likewise to receive the same strict construction, wherever the *right of personal liberty, of personal security, or of private property* may become the subject of dispute; because every person whose liberty or property was thereby rendered subject to the new government, was antecedently a member of a civil society to whose regulations he had submitted himself, and under

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300. Tucker, *Note D*, *supra* note 298, app. at 307–08 (emphasis added).

301. *Id.* app. at 151 (emphasis added).

whose authority and protection he still remains, in all cases not expressly submitted to the new government.<sup>302</sup>

This passage is followed by a footnote reference to the Ninth (eleventh) and Tenth (twelfth) Amendments.

Reading Tucker lays to rest any contention that an individual rights reading of the Ninth Amendment is anachronistic. A “federal” system is the source of the reserved powers (and rights) of states. But the “social compact” is the source of the retained natural rights (and powers) of individuals. Notice that Tucker specifically notes that “the rights and powers” of the states are expressly acknowledged in the Tenth Amendment (“the latter of these articles”) rather than the Ninth.<sup>303</sup> He then provides a lengthy paragraph about the rule of construction he says is provided by the Tenth Amendment.<sup>304</sup>

Of particular interest is the observation, portions of which are copied nearly verbatim from Madison’s *Report*,<sup>305</sup> that the Tenth Amendment acknowledges that the people, as well as the states, have reserved powers:

[T]here are powers, exercised by most other governments, which in the United States are withheld by the people, *both from the federal government and from the state governments*: for instance, a tax on exports can be laid by no constitutional authority whatever, whether of the United States, or of any state; no bill of attainder, or *ex post facto* law can be passed by either; no title of nobility can be granted by either.<sup>306</sup>

Tucker then explains that the power of regulating liberty lies with the states,

such as the power of regulating the course in which property may be transmitted by deed, will, or inheritance; the manner in which debts may be recovered, or injuries redressed; the right of defining and punishing offences against the society, other than such as fall under the express jurisdiction of the federal government; all which, and all others of a similar nature are reserved to, and may be exercised by the state governments.<sup>307</sup>

302. *Id.* (emphasis added).

303. *Id.* app. at 308.

304. *Id.* app. at 308–09.

305. James Madison, Report on the Alien and Sedition Acts (Jan. 7, 1800), in JAMES MADISON, WRITINGS, *supra* note 32, at 608, 628 (“[T]here are powers exercised by most other governments, which, in the United States are withheld by the people, both from the general government and from the state governments. Of this sort are many of the powers prohibited by the Declarations of right prefixed to the Constitutions, or by the clauses in the Constitutions, in the nature of such Declarations.”).

306. Tucker, *Note D*, *supra* note 298, app. at 308–09 (emphasis added).

307. *Id.* app. at 308. As an aside, Tucker endorses the “negative” or “dormant” Commerce power:

From those powers, which are in express terms granted to the United States, and though not prohibited to the states respectively, are not susceptible of a concurrent exercise of authority by them, the states, notwithstanding this article, will continue to



As was mentioned in Part III, it is important to remember that reading the Ninth Amendment as protecting individual liberty rights no more precludes their reasonable regulation than does reading the First Amendment to protect an individual right preclude “time, place and manner” regulations or the law of libel or slander.<sup>308</sup> What is needed is a way to ensure that laws restricting liberties are genuine regulations providing for the manner of exercising one’s rights, or the prohibition of wrongful acts. What is improper is imposing restrictions that prohibit rightful acts.<sup>309</sup>

But in making this point, one should not lose sight of the fact that originally the Ninth Amendment, like the rest of the Bill of Rights, was applicable only to the federal government. To evaluate federal constitutional restrictions on infringements of natural rights by state governments requires consideration of the Fourteenth Amendment—especially the Privileges or Immunities Clause—that substantially altered the constitutional structure.

The two rules of construction provided by Tucker’s distinction between the Ninth and Tenth Amendments are devastating both to Amar’s claim that reading the Ninth Amendment as protecting individual rights is anachronistic and Lash’s claim that *only* the Ninth and not the Tenth Amendment provides a rule of construction narrowing federal power.<sup>310</sup> Indeed, in the beginning of his *Notes*, Tucker states the proposition (that originated in the Articles of Confederation<sup>311</sup>), so emphasized by Lash,<sup>312</sup> that “[t]he state governments not only retain every power, jurisdiction, and right not delegated to the United States, by the constitution, nor prohibited by it to the states.”<sup>313</sup> This is followed by a footnote citation to the Tenth (twelfth) Amendment, not the Ninth (eleventh). Tucker then says that the construction “that in the new government, as in the old, the general powers are limited, and that the states, in all unenumerated cases, are left in the enjoyment of their sovereign and independent jurisdictions . . . has since been fully confirmed by the *twelfth* article of amendments.”<sup>314</sup>

Kurt Lash’s discussion of Tucker’s apparently telling “personal rights” gloss on the Ninth Amendment is brief and confined to a footnote: “As the

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be excluded; such is the power to regulate commerce, . . . from which the states, respectively, are by necessary and unavoidable construction excluded from any share or participation.

*Id.*

308. See *supra* note 63 and accompanying text.

309. See Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 493 (2004) (contending that the original meaning of the Fourteenth Amendment limits the states’ police power to prohibiting wrongful and regulating rightful behavior that may injure the rights of others).

310. See AMAR, *supra* note 69, at 120; Lash, *Lost Original Meaning*, *supra* note 10, at 399.

311. See ARTICLES OF CONFEDERATION art. II (“Each state retains . . . every power, jurisdiction and right, which is not . . . expressly delegated . . .”).

312. Lash, *Lost Original Meaning*, *supra* note 10, at 360, 363, 376 n.213.

313. Tucker, *Note D*, *supra* note 298, app. at 141.

314. *Id.* app. at 142–43 (emphasis added).

above shows, Tucker places both the Ninth and Tenth Amendments in a decidedly federalist context. Tucker could not possibly have been referring to individual natural rights if the Ninth was meant to avoid interfering with or adding to an individual's prior obligations to the state."<sup>315</sup>

The first of these sentences is nonproblematic. Tucker contends that both the Ninth and Tenth Amendments supported "federalism" rules of construction limiting federal power.<sup>316</sup> The second claim that Tucker "could not possibly have been referring to individual natural rights" is hyperbole. Not only is the natural rights reading a "possible" meaning of Tucker's words, it is the most obvious and natural one. One would have to present a pretty persuasive case to deprive "the right of personal liberty, of personal security, or of private property" of its then-commonplace individual natural rights meaning.

Lash bases his claim on Tucker's statement (quoted above) that "every person whose liberty or property was thereby rendered subject to the new government, was antecedently a member of a civil society to whose regulations he had submitted himself, and under whose authority and protection he still remains, in all cases not expressly submitted to the new government."<sup>317</sup> To begin with, this statement is Tucker's *justification* for the "strict construction" of federal power when "personal" rights are "the subject of dispute." The purported justification does not in any way change the personal nature of the rights being protected. Tucker is simply saying *why* the potential infringement of personal rights justifies strict construction of federal powers. But we are looking to Tucker's *Notes* to discern the original public meaning of the Ninth Amendment, not his justification for that provision, and his description of the Amendment strongly supports the individual natural rights model.

Second, Tucker's justification is not in conflict with the rights protected by the Ninth Amendment being individual natural rights. Tucker is merely saying that the fundamental natural rights of individuals were, before the Constitution, subject to the protection and regulation of state governments. For the jurisdiction over these rights to be transferred to the new national government would have required an express delegation of power, which was lacking. This amounts merely to the uncontroversial claim that the Constitution did not grant the federal government a general police power. In other words, these natural rights may not be regulated by the federal

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315. Lash, *Lost Original Meaning*, *supra* note 10, at 397 n.317. Lash then cites Joseph Story as "evidently read[ing] Tucker's interpretation of the Ninth as a states' rights interpretation, despite Tucker's language of personal liberty." *Id.* Reading Tucker through the eyes of the opinionated Story writing thirty years later, however, may obscure as much as illuminate the original, more contemporary source. Lash also notes that others read "Tucker's work" as "representing a states' rights perspective of constitutional interpretation," as no doubt it was in most respects. *Id.*

316. Tucker, *Note D*, *supra* note 298, app. at 307–08.

317. Lash, *Lost Original Meaning*, *supra* note 10, at 397 (quoting Tucker).

government unless such regulation is incident to an enumerated federal power.

In sum, in the absence of a delegation of powers, the federal government lacks the power to deny or disparage the other natural liberty rights retained by the people. The power to protect and regulate individual rights remains with the states to whom citizens did and still do owe a duty of obedience in return for the protection of their rights. But a police power to protect and regulate the exercise of individual natural rights does not include the power to abridge or violate them. Nevertheless, with some exceptions—for example the Contracts Clause<sup>318</sup>—there was no federal jurisdiction to protect the rights retained by the people from infringement by state governments until the enactment of the Fourteenth Amendment.

The only reason given by Lash for depriving Tucker's words of their most obvious and natural meaning, then, falls far short—especially in light of the myriad other evidence supporting the individual natural rights model we have surveyed in this Article. If all the other evidence lined up in favor of a collective rights reading of the Ninth Amendment, perhaps there would be some warrant for rejecting the natural reading of Tucker's words or to reject the distinguished St. George Tucker himself as an aberration. But the other evidence that lines up in support of the individual rights and federalism models is completely consistent with Tucker's words, which in turn adds weight to those models. After all, Tucker was simply asserting that the Ninth Amendment provides a narrowing rule of construction of federal power to protect the rights of individuals (which rights should be liberally construed), while the Tenth Amendment protects the reserved powers of both states and individuals (and justifies a narrowing rule of construction of federal power to accomplish this). But is this not exactly what the two Amendments appear to say?

Finally, Lash completely overlooks the other respect in which his thesis is directly contradicted by Tucker's *Notes*. Lash claims that the Ninth Amendment, and not the Tenth, provides a narrowing construction of federal power.<sup>319</sup> This is why he interprets any argument made by Madison or others concerning the reserved or retained rights and powers of states as references to the Ninth Amendment and supportive of the collective rights model of the Ninth. But Tucker clearly and explicitly says that *both* Amendments justify the strict construction of federal power, albeit in response to different dangers. And Tucker's reading of the Tenth Amendment relies upon and is wholly consistent with Madison's lengthy analysis in his *Report*. If Tucker (and Madison) are correct that the Tenth Amendment also supports a narrowing construction of federal powers, then much of Lash's attempt to

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318. U.S. CONST. art. I, § 10, cl. 1.

319. Lash, *Lost Original Meaning*, *supra* note 10, at 399.

link various references to the rights, powers, and jurisdiction of states to the Ninth Amendment is severely undercut.

St. George Tucker's treatment of the Ninth Amendment sharply contradicts both the state law rights and residual rights models. Nowhere in his account is the protection of state law rights mentioned as the object of the Amendment (though state law can be used to regulate these rights, as we have seen). And Tucker in no way says or implies that the rights retained by the people are to be defined "residually" by the enumerated powers of Congress. To the contrary, he asserts that the Ninth Amendment provides a rule of construction by which powers should be strictly construed and rights liberally construed—exactly what Thomas McAfee denies is the purpose of the Ninth Amendment under the residual rights model.<sup>320</sup>

Tucker's endorsement of the strict construction of federal powers strongly supports the federalism model, though his "liberal construction" of individual liberty rights goes beyond it. And it is hard to imagine more telling direct evidence on behalf of the individual natural rights model than Tucker's discussion of personal rights. Tucker's explicit distinction between the Ninth Amendment protecting personal rights and the Tenth Amendment protecting the reserved rights of states is nothing short of a repudiation of a collective rights interpretation of the rights "retained by the people" to which the Ninth Amendment refers. Anyone who could read "the right of personal liberty, of personal security, or of private property" collectively could read anything collectively, rendering the collective rights model nonfalsifiable.

#### *M. Adoption of Ninth Amendment-Like Provisions by States*

After the Ninth Amendment was invented by James Madison as a means of protecting unenumerated rights, the idea caught on. Several states eventually adopted similar provisions in their state constitutions.<sup>321</sup> For

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320. See *supra* text accompanying notes 48–56.

321. See ALA. CONST. of 1819, art. I, § 30 ("This enumeration of certain rights shall not be construed to deny or disparage others retained by the people . . ."); ARK. CONST. of 1836, art. II, § 24 ("This enumeration of rights shall not be construed to deny or disparage others retained by the people . . ."); CAL. CONST. of 1849, art. I, § 21 ("This enumeration of rights shall not be construed to impair or deny others retained by the people."); IOWA CONST. of 1846, art. II, § 24 ("This enumeration of rights shall not be construed to impair or deny others, retained by the people."); KAN. CONST. of 1859, Bill of Rights, § 20 ("This enumeration of rights shall not be construed to impair or deny others retained by the people . . ."); ME. CONST. of 1820, art. I, § 24 ("The enumeration of certain rights shall not impair nor deny others retained by the people."); MD. CONST. of 1850, Declaration of Rights, art. 42 ("This enumeration of rights shall not be construed to impair or deny others retained by the people."); MINN. CONST. of 1857, art. I, § 16 ("The enumeration of rights in this Constitution, shall not be construed to deny or impair others retained by and inherent in the people."); N.J. CONST. of 1844, art. I, § 19 ("This enumeration of rights and privileges shall not be construed to impair or deny others retained by the people."); OHIO CONST. of 1851, art. I, § 20 ("This enumeration of rights shall not be construed to impair or deny others retained by the people . . ."); OR. CONST. of 1857, art. I, § 33 ("This enumeration of rights, and privileges shall not be construed to impair or deny others retained by the people."); R.I. CONST. of

example, in Section 21 of its Declaration of Rights, the founding California Constitution of 1849 read: “This enumeration of rights shall not be construed to impair or deny others retained by the people.”<sup>322</sup> This copy of the Ninth Amendment followed twenty enumerated rights including Section 2, which enumerates the precise right that Akhil Amar identifies as the core of the Ninth Amendment<sup>323</sup>:

All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people; and they have the right to alter or reform the same, whenever the public good may require it.<sup>324</sup>

Whatever “other” rights “retained by the people” to which Section 21 refers do not include the right to alter and abolish government that was enumerated in Section 2.

The implications of this development for the five models is reasonably obvious. It flatly contradicts the claim that the Ninth Amendment is a reference to state constitutional and common law rights, at least in the sense that such rights may freely be altered by state legislation. Nor is it compatible with the residual rights analysis, as most state constitutions did not contain specific enumeration of state legislative powers. It seems strongly to suggest an individual natural rights reading. After all, such rights were thought to constrain all persons, including persons who serve as state officials.

Although a Ninth Amendment-like provision in a state constitution could include protection of rights to alter or abolish state governments or of collective self-governance, there is no reason to think that this was its exclusive reference, and the California Constitution of 1849 is evidence that the rights retained by the people include other rights besides. While the existence of such provisions in state constitutions is neutral with respect to the federalism model, such provisions may well have meant that state powers should be strictly construed, as Madison and Tucker urged with respect to federal powers.<sup>325</sup>

## VI. The Ninth Amendment and Judicial Review

The evidence presented in this Article is offered solely to establish the original meaning of the text of the Ninth Amendment. It addresses the question: To what does “rights . . . retained by the people” originally refer? This evidence is not offered as direct proof that such rights, whatever they may be, merit judicial protection. The question of judicial review in general,

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1842, art. I, § 23 (“The enumeration of the foregoing rights shall not be construed to impair or deny others retained by the people.”).

322. CAL. CONST. of 1849, art. I, § 21.

323. AMAR, *supra* note 69, at 120.

324. CAL. CONST. of 1849, art. I, § 2.

325. 2 ANNALS OF CONG. 1949 (1791) (statement of Rep. Madison, Feb. 2, 1791); Tucker, *Note D*, *supra* note 298, app. at 308.

or with respect to unenumerated rights in particular, implicates other arguments and additional evidence.<sup>326</sup> This question is beyond the scope of this Article.

Still, the evidence favoring the individual rights model of original meaning interpretation and the federalism model of constitutional construction would seem to have real practical implications for constitutional interpretation, whoever is doing the interpreting. If the federalism construction is accepted, both expressed and implied federal powers should be “strictly” or narrowly construed—whether by legislators or by courts—whenever they restrict the exercise of personal liberty, which is another term for natural rights. For this reason, the judicial protection of liberty described in Footnote Four of *United States v. Carolene Products Co.*, which reverses the presumption of constitutionality only when enumerated rights are infringed, is unconstitutional, as is the “Footnote Four-Plus” approach that similarly privileges certain unenumerated rights that are deemed by the Court to be “fundamental.”<sup>327</sup> Indeed, *Footnote Four would seem to be the epitome of a constitutional construction that is expressly barred by the original meaning of the Ninth Amendment.*

In contrast, were either the state law rights or residual rights models correct, the Ninth Amendment would have no role to play whatsoever in constitutional adjudication—hence the appeal of these models to some judicial conservatives.<sup>328</sup> Were the amendment limited to a collective rights reading, a strict construction of federal powers would be warranted only when the exercise of those powers interferes with the powers of the several states, and not when laws restrict personal liberty. Kurt Lash agrees that the Ninth Amendment has a broader scope than this.<sup>329</sup>

Nevertheless, this debate over original meaning and its potential implication for judicial review should be placed in perspective. One source of fears about allowing courts to take the Ninth Amendment seriously is the assumption that if natural liberty rights are acknowledged to be constitutionally protected, they may never be regulated under any circumstances.<sup>330</sup> Since a great many laws touch upon liberty in some manner or other, it is assumed that we must therefore limit any constitutional protection to a handful of truly “fundamental” rights meriting so absolute a protection. Otherwise all laws would be constitutionally suspect. But the individual natural rights and federalism models, if accepted, do not preclude all necessary and proper regulations of liberty. Nor can these models automatically

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326. See *supra* note 117.

327. For a discussion of the infirmities of both approaches, see BARNETT, *supra* note 7, at 224–52.

328. E.g., BORK, *supra* note 44, at 184–85 (endorsing the “state law rights model”).

329. See Lash, *Lost Original Meaning*, *supra* note 10, at 401–10.

330. See Randy E. Barnett, *Who’s Afraid of Unenumerated Rights?*, 9 U. PA. J. CONST. L. (forthcoming 2006) (describing the reasons why courts and scholars have shied away from the judicial protection of unenumerated rights).



tell us whether a particular exercise of federal power is truly necessary and proper. This would depend on the specifics of the statute in question and its purported justification.

The individual natural rights model does not posit that the unenumerated rights retained by the people are any more absolute (in the sense that their exercise may never be regulated) than are the enumerated rights retained by the people. Even enumerated rights may be regulated, though not prohibited, provided such regulations are proper insofar as they are incident to an enumerated power and truly necessary.<sup>331</sup> An individual natural rights interpretation of the Ninth Amendment would entail simply that the rights retained by the people may be regulated by the federal government pursuant to an enumerated power, such as the power to regulate commerce among the several states. The regulation of natural rights for other purposes may only be done by states, but regulated they may be.<sup>332</sup> It is improper, however, to completely prohibit the rightful exercise of a natural right, but this too is beyond the scope of this Article.<sup>333</sup>

To appreciate the implication of accepting the natural rights model, it bears emphasis that under this model the Ninth Amendment provides no restriction on state power, notwithstanding the belief of the founders that state governments were also bound to respect natural rights. In this regard, the original scheme was substantially altered by the adoption of the Fourteenth Amendment. There is substantial evidence that the original meaning of “privileges or immunities of citizens” does include natural rights, as well as the positive individual rights or privileges enumerated in the Bill of Rights.<sup>334</sup> This too, like most other issues discussed in this section, is beyond the scope of this Article.

Quite obviously, then, there is much more to be said about the proper role of judges in protecting unenumerated rights against either federal power under the Ninth Amendment or state power under the Privileges or Immunities Clause of the Fourteenth Amendment. But the fact that the Ninth Amendment provides the only explicit rule of construction in the text of the Constitution (“shall not be construed”) strongly suggests that unenumerated rights deserve no less protection from courts than those that were enumerated. To do any less would be to “disparage” if not to “deny” them, in violation of the Ninth Amendment.

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331. See BARNETT, *supra* note 7, at 302–12 (discussing the distinction between regulation and prohibition).

332. See Barnett, *supra* note 309, at 478–87 (elaborating a theory of state power that includes an ability to regulate individual liberty in order to prevent one person from intruding upon the liberty of another).

333. See *id.* at 487–90.

334. See *id.* at 456–64 (contending that, by its original meaning, the Privileges or Immunities Clause of the Fourteenth Amendment protects both the enumerated rights contained in the Bill of Rights and unenumerated natural rights).

## VII. Conclusion: Federalism Not Confederalism

When evaluating historical evidence to decide among conflicting models of original meaning, it is sometimes possible for individual items to be consistent with more than one model. Other evidence may make a model more or less likely without establishing it definitively as accurate or inaccurate. A choice among originalist models, therefore, should be based on the cumulative weight of the evidence. The more items that support a particular model, the more likely that model is to be correct, especially when little or no evidence is inconsistent with it.

As illustrated by the chart in the appendix, the evidence considered in this Article, taken cumulatively, strongly supports the individual natural rights model of the original meaning of the Ninth Amendment as well as the federalism model that protects these individual natural rights by construing federal power strictly. Many items of evidence support one or both of these models, and none directly contradict either. At the same time, this evidence refutes the state law rights and residual rights models and, taken cumulatively, severely undercuts the collective rights model of the Ninth (as opposed to the Tenth) Amendment.

Those who, like Akhil Amar and Kurt Lash, seek to interpret the Ninth Amendment as protecting, at least in part or perhaps even entirely, the collective rights of “the people” as embodied in their state governments,<sup>335</sup> rather than of individuals, are adopting a view of the Amendment that does not appear to have been shared by its author or by its principal proponents. Yet this collective rights reading of the Ninth and Tenth Amendments did come to be widely held sometime later in our history.<sup>336</sup> Eventually, it was formally adopted by the Confederate States of America in the following provisions:

5. The enumeration, in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people *of the several States*.
6. The powers not delegated to the Confederate States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people *thereof*.<sup>337</sup>

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335. See *supra* notes 70, 89 and accompanying text. If this is indeed what Amar and Lash are claiming. It is not always clear.

336. The rise of the Calhounian states’ rights position in the run up to the Civil War makes any effort to discern the original meaning of the Ninth Amendment from antebellum nineteenth century cases and other authorities, as Kurt Lash attempts, likely to be misleading. See Lash, *Lost Jurisprudence*, *supra* note 89, at 604–09. In the end, it is impossible to tell whether a particular much-later interpretation of the Ninth Amendment represents its original meaning or a deviation therefrom. The evidence that would answer *this* crucial question is to be found in the sources identified in this Article, and not in the later sources that would be at issue. In other words, reliance on later sources is bootstrapping at best.

337. CONSTITUTION OF THE CONFEDERATE STATES OF AMERICA art. VI, §§ 5–6 (March 11, 1861) (emphasis added). The addition of “thereof” to the Tenth Amendment is reminiscent of

The collective rights model of the Ninth Amendment literally reads the italicized language into both the Ninth and Tenth Amendments. But the fact that the Confederate States thought it necessary to add this language to the original language of the Ninth Amendment is significant. It strongly suggests that adding this extra language to the Ninth and Tenth Amendments as actually enacted would be to deviate from, rather than to respect, their original public meaning.

When Robert Bork compared the Ninth Amendment to an inkblot, he violated John Marshall's famous dictum that "[i]t cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it."<sup>338</sup> Still, Bork was on to something, for until quite recently the Ninth Amendment has been the Rorschach test of constitutional theory. The question "What does the Ninth Amendment mean?" has frequently elicited interpretations that tell us more about the constitutional visions of the interpreters than about the words of the amendment. But the Ninth Amendment is not an inkblot; it consists of English words that are simple and direct:

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

The historical evidence presented here supports an unremarkable, almost mundane, conclusion: The Ninth Amendment's public meaning in the founding era is identical to what ordinary readers take it to mean today (until they enter law school and are told otherwise). No elaborate theory or hidden code is required to decipher its words. The Ninth Amendment prohibits constitutional constructions—like that propounded by the Supreme Court in Footnote Four of *Carolene Products*<sup>339</sup>—that infringe upon the unenumerated, natural, and individual rights retained by the people. In other words, it means what it says.

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Richard Henry Lee's objection to the Tenth Amendment discussed in the text accompanying *supra* note 215. It is logically possible that this language was added to restore an original meaning that had been distorted by a well-known consensus of authorities—as, for example, I contend *The Slaughter-House Cases* distorted the meaning of the Privileges or Immunities Clause. BARNETT, *supra* note 7, at 192–203. But there is no evidence that any such distortion had occurred. Moreover, if Kurt Lash is right in his claims about the original *and continued* interpretation of the Ninth Amendment, there would have been no need for the Confederacy to have altered the wording the way it did.

338. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).

339. See BARNETT, *supra* note 7, at 229–34, 253–54 (illustrating how Footnote Four of *Carolene Products* is inconsistent with the Ninth Amendment, which "mandates that unenumerated natural rights be treated the same as those that were enumerated").

Appendix: Summary of key pieces of evidence of original meaning<sup>340</sup>

	State-Law Rights Model	Residual Rights Model	Individual Natural Rights Model	Collective Rights Model	Federalism Model
Madison's Bill of Rights Speech	Directly Contradicts	Neutral	Neutral <sup>341</sup>	Neutral	Neutral
Federalist Objections to a Bill of Rights	Directly Contradicts	Directly Contradicts	<b>SUPPORTS</b>	Somewhat <sup>342</sup> WEAKENS	Neutral
Sedgwick–Benson–Page Exchange	Directly Contradicts	Directly Contradicts	Greatly <b>SUPPORTS</b>	Somewhat WEAKENS	Neutral
Madison's Notes for Bill of Rights Speech	Directly Contradicts	Directly Contradicts	<b>SUPPORTS</b>	Somewhat WEAKENS	Neutral
Sherman's Draft Bill of Rights	Directly Contradicts	Directly Contradicts	Greatly <b>SUPPORTS</b>	Somewhat WEAKENS	Neutral
State Proposals	Directly Contradicts	Directly Contradicts	Somewhat <b>SUPPORTS</b> (New York)	Somewhat <b>SUPPORTS</b> (Virginia)	<b>SUPPORTS</b>
Virginia Debates	Directly Contradicts	Directly Contradicts	Greatly <b>SUPPORTS</b>	Greatly WEAKENS	Somewhat <b>SUPPORTS</b>
Madison & Burnley's Replies	Directly Contradicts	Somewhat <b>SUPPORTS</b>	Somewhat <b>SUPPORTS</b>	Neutral	Somewhat <b>SUPPORTS</b>
Madison's Bank Speech	Directly Contradicts	Directly Contradicts	Neutral <sup>343</sup>	Neutral	Greatly <b>SUPPORTS</b>

340. By “support,” I mean makes the model more likely. By “weaken,” I mean makes the model less likely. “Neutral” means makes the model neither more nor less likely. “Directly contradicts” speaks for itself.

341. Taken alone, Madison's speech is neutral with respect to all models except the state-law rights model which it directly contradicts. But when combined with the Federalist objections to a bill of rights, to which it refers, and Madison's notes for his speech, it provides indirect support for the individual natural rights model and indirectly weakens the residual rights and collective rights models, while remaining neutral with respect to the federalism model.

342. Madison's Bill of Rights speech, Federalist objections to a bill of rights, the Sedgwick–Benson–Page exchange, Madison's notes for his speech, and Sherman's draft bill of rights weaken the collective rights model because collective rights are not mentioned in these contexts and natural rights are, which is circumstantial evidence that collective rights were not included. These items only somewhat weaken its support, however, because they do not directly prove that individual natural rights were the only rights which were retained by the people. On the other hand, these items are not consistent with the suggestion that collective rights were the only rights to which the Ninth Amendment refers. They also contradict the claim that reading the Ninth Amendment as including a reference to individual rights is anachronistic.

Madison's Whisky Rebellion Speech	Directly Contradicts	Greatly WEAKENS	<b>SUPPORTS</b>	Somewhat WEAKENS	Somewhat <b>SUPPORTS</b>
Madison's Report on Va. Resolution	Directly Contradicts	Directly Contradicts	Neutral <sup>344</sup>	Indirectly <sup>345</sup> WEAKENS	Neutral
St. George Tucker's Notes	Directly Contradicts	Directly Contradicts	Greatly <b>SUPPORTS</b>	Directly Contradicts	Greatly <b>SUPPORTS</b>
Similar Clauses in State Constitutions	Directly Contradicts	Directly Contradicts	<b>SUPPORTS</b>	Somewhat WEAKENS	Neutral

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343. By directly contradicting the state-law rights and residual rights models, Madison's Bank speech increases the likelihood that either the individual natural rights model or the collective rights model or both are correct, while offering little to favor one over the other. While offering strong support for the federalism model, Madison does not clearly specify the nature of the rights that warrant the strict construction of federal power he finds in the Ninth Amendment.

344. Madison's *Report*, by itself, is neutral with respect to the individual natural rights model, but by contradicting the state-law rights and residual rights models and indirectly weakening the collective rights model, it makes the individual natural rights model somewhat more likely.

345. Madison's *Report* indirectly weakens the collective rights model by supporting the thesis that the Tenth Amendment provides its own federalism rule of strict construction when state powers and rights are abridged, thereby undercutting the claim that other statements in support of such a rule of construction must necessarily be about the Ninth Amendment.