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# THE ORIGINAL MEANING OF THE NINTH AMENDMENT

*Thomas B. McAfee\**

## I. INTRODUCTION

"[T]he preliminary debate over the meaning of the ninth amendment is essentially over."<sup>1</sup>

Ten years ago John Hart Ely suggested that the ninth amendment<sup>2</sup> remained a joke in sophisticated legal circles and that only a minority of scholars saw it as providing a textual foundation for modern fundamental rights that have questionable roots in more specific constitutional provisions.<sup>3</sup> If that was true then, it certainly is not true today. Despite the trickle of scholarship that became a steady stream after the debate on the ninth amendment in *Griswold v. Connecticut*,<sup>4</sup> only during the last few years has the ninth amendment fully emerged as a central text in the larger debate over the sources of constitutional rights. The ninth amendment attracts those in this debate who advocate an expansive judicial role in the articulation of fundamental rights because it appears to provide the definitive response to the originalist critique of fundamental rights adjudication.

As Sanford Levinson has observed, the ninth amendment enables critics of originalism to contend that originalists, such as former Attorney General Meese and Judge Bork, ignore the implications of the ninth amendment and thus depart from their own stated commitment to constitutional text and original intent.<sup>5</sup> If the ninth amendment was intended to point toward enforceable fundamental rights that exist apart from the text, then originalists who deny that these rights exist are compelled to resort to a nonoriginalist grounding for their constitutional theory. In doing so, originalists are forced to abandon one of the enduring sources of appeal for their position, the idea that the founders

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1. Sherry, *The Ninth Amendment: Righting an Unwritten Constitution*, 64 *Chi.-Kent L. Rev.* 1001, 1001 (1988).

2. "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.

3. J. Ely, *Democracy and Distrust* 34 (1980).

4. 381 U.S. 479 (1965).

5. Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 *Chi.-Kent L. Rev.* 131, 134-35 (1988). Indeed, Levinson reports that one of the architects of the strategy that led to Bork's defeat had confided to him that the ninth amendment was used to employ Bork's methodology against him. *Id.* at 138.

intended a Constitution of relatively fixed dimensions.<sup>6</sup> As evidenced by the Bork hearings and the latest outpourings in the law reviews, the ninth amendment has become anything but a joke; indeed, the view that the ninth amendment provides a sound basis for the discovery and judicial enforcement of unenumerated individual rights is gaining some new adherents in the judiciary<sup>7</sup> and fast becoming the new orthodoxy in the academy<sup>8</sup> and in Congress.<sup>9</sup>

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6. For examples of originalist theorists who have attempted to construct a theoretical (nonoriginalist) foundation for an originalist framework (though perhaps not in each case as a response to the ninth amendment), see Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 *Nw. U.L. Rev.* 226 (1988); Maltz, *Unenumerated Rights and Originalist Methodology: A Comment on the Ninth Amendment Symposium*, 64 *Chi.-Kent L. Rev.* 981 (1988); Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 *Colum. L. Rev.* 723 (1988). Maltz appears to be the only one of the three, however, who seems prepared to acknowledge that originalism may actually cut against the framers' own conception of constitutionalism.

7. A plurality of the Supreme Court, for example, relied upon the ninth amendment in *Richmond Newspapers v. Virginia*, 448 U.S. 555, 579-80 & n.15 (1980), in support of the right of public access to criminal trials. See also *Grossman v. Gilchrist*, 519 F. Supp. 173, 176-77 (N.D. Ill. 1981) ("[T]he Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments."). Admittedly, however, the lower courts remain slow to embrace the ninth amendment as a source of fundamental rights decision making. This reluctance partly reflects the Supreme Court's tendency to rely on the due process clause in fundamental rights cases. See, e.g., *Hawaii Psychiatric Soc'y v. Ariyoshi*, 481 F. Supp. 1028, 1037 n.7 (D. Haw. 1979) (noting Court's tendency to ground right to privacy in due process clause while observing that "[w]hether it be grounded in the Ninth or Fourteenth Amendment, plaintiffs have a right to privacy."). It also reflects a concern that the floodgates of civil rights litigation not be opened. See, e.g., *Strandberg v. City of Helena*, 791 F.2d 744, 748 (9th Cir. 1986) (conceding acceptance of affirmative rights reading of ninth amendment but rejecting civil rights claim based on ninth amendment in light of Supreme Court's insistence that claims under 42 U.S.C. § 1983 (1988) arise from the deprivation of "a specific constitutional guarantee"). The tendency of some of these courts to acknowledge that the amendment is "a savings clause to keep from lowering, degrading or rejecting any rights which are not specifically mentioned in the document itself," *Charles v. Brown*, 495 F. Supp. 862, 863 (N.D. Ala. 1980), even while rejecting ninth amendment claims, suggests that the revolution in the academy may yet find its way into the courts.

8. In the foreword to a recent symposium on the ninth amendment, Randy Barnett found it significant "that none of the contributors has chosen to defend the [traditional conception] of the ninth amendment that for so long prevailed in the classroom and the courts." Barnett, *Foreword: The Ninth Amendment and Constitutional Legitimacy*, 64 *Chi.-Kent L. Rev.* 37, 65 (1988). There is no reason to think that the participants in this symposium represented an especially atypical sample of thought, though there undoubtedly remain skeptics about the emerging consensus.

9. Levinson suggests "that the most important result of the Bork hearings, beyond their leading to his rejection, was the embrace by many of the Senators of the rediscovered amendment, which thereby gained a public prominence hitherto lacking." Levinson, *supra* note 5, at 135. He observes further that, in reporting affirmatively on Judge Kennedy, the Senate Judiciary Committee noted favorably Judge Kennedy's testimony "'that the first eight amendments were not an exhaustive catalogue of all human rights'" and that the ninth amendment is a "'reserve clause'" for use when other con-

It is the legal academic profession that is largely responsible for the ninth amendment's new respectability, for it is scholars who have provided the evidence and arguments upon which the Senators who participated in the Bork hearings and others have relied<sup>10</sup> in rejecting what John Hart Ely described as the "received account" of the amendment.<sup>11</sup> With each passing year, the list of legal scholars endorsing this modern wisdom grows.<sup>12</sup> The ninth amendment is now heralded by no less a scholar than Laurence Tribe as "a uniquely central text in any attempt to take seriously the process of *construing* the Constitution."<sup>13</sup>

While the controversy over the meaning of the ninth amendment remains active,<sup>14</sup> the growing ranks of those who advocate the ninth

stitutional provisions seem inadequate. *Id.* at 135 n.19 (citing Senate Comm. on the Judiciary, Nomination of Anthony M. Kennedy to be an Associate Justice of the United States Supreme Court, S. Exec. Rep. No. 113, 100th Cong., 2d Sess. 20-21 (1988)).

10. This tendency goes back to Justice Goldberg's citation to scholarly authorities in his concurring opinion in *Griswold v. Connecticut*, 381 U.S. 479, 490 n.6 (1965) (Goldberg, J., concurring). Laurence Tribe based his argument to the Court in *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), in part on the ninth amendment. See Tribe, *On Reading the Constitution*, 1988 *Utah L. Rev.* 747, 790.

11. J. Ely, *supra* note 3, at 34. For a description of the "received account" to which Ely referred, see *infra* notes 19-21 and accompanying text.

12. The most prominent recent works include C. Black, *Decision According to Law* (1981); L. Levy, *Original Intent and the Framers' Constitution* 267-83 (1988); Barber, *The Ninth Amendment: Inkblot or Another Hard Nut to Crack?*, 64 *Chi.-Kent L. Rev.* 67, 76-87 (1988); Barnett, *Reconceiving the Ninth Amendment*, 74 *Cornell L. Rev.* 1 (1988); Black, *Further Reflections on the Constitutional Justice of Livelihood*, 86 *Colum. L. Rev.* 1103, 1104-05 (1986); Grey, *The Original Understanding and the Unwritten Constitution*, in *Toward a More Perfect Union: Six Essays on the Constitution* 145, 162-67 (N. York ed. 1988); Kaminski, *Restoring the Declaration of Independence: National Rights and the Ninth Amendment*, in *The Bill of Rights* 141 (J. Kukla ed. 1987); Levinson, *supra* note 5, at 143-61; Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 *Hastings L.J.* 305 (1987); McIntosh, *On Reading the Ninth Amendment: A Reply to Raoul Berger*, 28 *How. L.J.* 913 (1985); Mitchell, *The Ninth Amendment and the "Jurisprudence of Original Intention"*, 74 *Geo. L.J.* 1719 (1986); Sager, *You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth. But What on Earth Can You Do with the Ninth Amendment?*, 64 *Chi.-Kent L. Rev.* 239 (1988); Sherry, *The Founders' Unwritten Constitution*, 54 *U. Chi. L. Rev.* 1127, 1161-67 (1987); Tribe, *Contrasting Constitutional Visions: Of Real and Unreal Differences*, 22 *Harv. C.R.-C.L. L. Rev.* 95 (1987).

13. Tribe, *supra* note 12, at 100; accord, Sager, *supra* note 12, at 261 (ninth amendment is "central to the meaning of the rights-bearing provisions").

14. Relatively recent works that are critical of the modern trend in ninth amendment scholarship include: Office of Legal Policy, U.S. Dep't of Justice, *Report to the Attorney General: Wrong Turns on the Road to Judicial Activism: The Ninth Amendment and Privileges or Immunities Clause* (1987) [hereinafter *Justice Department Report*]; Berger, *The Ninth Amendment*, 66 *Cornell L. Rev.* 1 (1980); Caplan, *The History and Meaning of the Ninth Amendment*, 69 *Va. L. Rev.* 223 (1983); Cooper, *Limited Government and Individual Liberty: The Ninth Amendment's Forgotten Lessons*, 4 *J.L. & Pol'y* 63 (1987); McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 *Chi.-Kent L. Rev.* 89, 94-95 (1988). For relatively recent works that express skepticism about at least some claims of modern ninth amendment scholarship but do not supply a comprehensive historical critique, see Hamburger, *The Constitution's Accommodation*

amendment as a tool to rebut originalists' claims has inspired increasing confidence in the position. In a response to a 1988 symposium on interpreting the ninth amendment, Suzanna Sherry offered this appraisal:

As the recent symposium in these pages indicated, the preliminary debate over the meaning of the ninth amendment is essentially over. Despite the diversity of views expressed in the Symposium, all but one contributor agreed that the ninth amendment does protect judicially enforceable unenumerated rights. The real question now must be how to identify those rights.<sup>15</sup>

The king is dead! Long live the king!

A. *The "Old" and "New" Orthodoxies*

Before we hail the new orthodoxy in ninth amendment scholarship, though, we ought to be certain that the old one has really outlived its usefulness. The older orthodoxy saw the amendment as part of a scheme for preserving the basic framework of the federal Constitution and, in particular, for preserving the concept of a national government of limited and enumerated powers. The unenumerated rights, by this reading, are the rights of the people reserved by the device of listing granted powers. If the nonoriginalist strategy is to work other than as a public relations ploy during judicial confirmation hearings, its proponents must demonstrate that this traditional view less plausibly accounts for the textual and historical materials than does the modern reading they espouse. The place to begin exploring whether or not the rumors of the demise of this view of the amendment's meaning are greatly exaggerated might be a determination of whether those proclaiming its demise really understood the view in the first place.

After a steady diet of fundamental rights adjudication, the modern mind is naturally disposed to assume that the ninth amendment's reference to unenumerated "rights" alludes to specific limitations on government power that preserve aspects of personal liberty. This pronounced tendency has led many not only to adopt a particular reading of the text,<sup>16</sup> but also to characterize the traditional view as an obvi-

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of Social Change, 88 Mich. L. Rev. 239, 315-17 (1989); Kay, *supra* note 6, at 269-73; Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. Rev. 353, 365-67 (1981); Rapaczynski, *The Ninth Amendment and the Unwritten Constitution: The Problems of Constitutional Interpretation*, 64 Chi.-Kent L. Rev. 177 (1988); Van Alstyne, *Slouching Toward Bethlehem with the Ninth Amendment* (Book Review), 91 Yale L.J. 207 (1981) (reviewing C. Black, *Decision According to Law* (1981)).

15. Sherry, *supra* note 1, at 1001. Sherry concludes that only Michael W. McConnell's contribution, see *supra* note 14, stood outside this consensus, but the claim is slightly overstated inasmuch as the endorsement provided by Rapaczynski, see *supra* note 14, at 190, falls short of acknowledging that the amendment ensures "judicially enforceable unenumerated rights."

16. See *infra* notes 94-99 and accompanying text.

ously nontextual insistence that the amendment is a mere "federalism" provision that serves only to define the division of power between the national government and the states.<sup>17</sup> This tendency may well have been reinforced by statements such as Justice Black's that the provision was "enacted to protect state powers against federal invasion"<sup>18</sup> and the tendency of proponents of the traditional view to be less than lucid in describing the nature and status of the rights retained by the people under this scheme.<sup>19</sup>

But the traditional view does not lack a meaningful "rights" focus. It simply holds that, for the drafters of the Constitution, the scheme of limited government embodied in the system of enumerated powers was a means of reserving rights to the people.<sup>20</sup> On this reading, the purpose of the ninth amendment is to ensure these reserved rights—what

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17. See, e.g., J. Ely, *supra* note 3, at 35; L. Levy, *supra* note 12, at 280; Levinson, *supra* note 5, at 142; Mitchell, *supra* note 12, at 1728; Sager, *supra* note 12, at 245–50; Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review* (Book Review), 59 *Tex. L. Rev.* 343, 352 (1981) (reviewing J. Ely, *Democracy and Distrust* (1980)). In seeing the enumerated powers device as related solely to retaining power within the states, commentators miss the point that the device was conceived as a way to reserve to the people as "rights" all that was not granted to the national government as powers. See *infra* notes 123–127 and accompanying text.

18. *Griswold v. Connecticut*, 381 U.S. 479, 520 (1965) (Black, J., dissenting); see also Berger, *supra* note 14, at 16 n.95 (referring to ninth amendment's retention of rights by the states or the people). Berger's view is criticized by L. Levy, *supra* note 12, at 280. The formulations by Justice Black and Raoul Berger have promoted the idea that the traditional view ensures the reserved powers of the states, but offers no insight as to how the ninth amendment meaningfully preserves the rights of the people. In fairness, Justice Black does not always focus on the states (indeed, this statement is a comment on the irony of applying the amendment to the states), and Berger is elsewhere reasonably clear as to the rights-protective focus of the amendment. For evidence that these formulations are misleading to modern readers, but not necessarily inaccurate, see *infra* notes 108–119 and accompanying text.

19. Berger, for example, occasionally writes as though the unenumerated rights are exceptions to grants of power, but are of a subconstitutional nature and do not "arise" under the Constitution. See, e.g., Berger, *supra* note 14, at 7 (relating unenumerated rights to Madison's stated purpose of "excepting out" cases where government should not act); *id.* at 9 (rights retained are not embodied in Constitution and suit alleging violation of such rights does not "arise" thereunder; nevertheless, these rights exist independently of government and constitute an area beyond government power). Some of Berger's lack of clarity on this point appears to flow from a misinterpretation of Leslie Dunbar's analysis of Madison's descriptive treatment of rights and from a tendency to describe rights ensured by the structure of the Constitution as subconstitutional. Commentators have thus disagreed on whether Berger is even a proponent of the traditional reading. Compare Laycock, *supra* note 17, at 349 (Berger does not hold traditional view) with Sager, *supra* note 12, at 245–46 & n.12 (viewing Berger's work as a reminder that the "Bill of Rights adds nothing to the power of the federal government as delineated in the body of the Constitution proper").

20. See *infra* notes 59–63, 79, 117–118, 144–146 and accompanying text. That this is the traditional view, and not a later revision, is shown by Justice Reed's assurance that 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 . . . was taken. If

Madison called "the great residuum" of rights the people possessed under the unamended Constitution<sup>21</sup>—against any adverse inference that might be drawn from the addition of a bill of rights. According to the traditional reading, moreover, the amendment's purpose is limited to securing these reserved rights and does not extend to securing unenumerated affirmative limitations on the powers the Constitution granted to the federal government.

While there may or may not be compelling textual or historical grounds for rejecting this reading of the ninth amendment, the point here is that the traditional view does not present a senseless or linguistically inconceivable explanation of the amendment's focus on rights. Adherents of this view are not engaged in an originalist conspiracy to destroy the unequivocally expressed intent to grant broad powers to the courts; this was the view taken by the nineteenth-century commentators who considered the question.<sup>22</sup> The first step, then, in a fair treatment of the amendment's focus is to resist the temptation to supply a caricature of the traditional view that denies its connection to any vision of ensuring rights.<sup>23</sup>

granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail.

*United Pub. Workers v. Mitchell*, 330 U.S. 75, 96 (1947). If you are objecting that the tenth amendment does not even refer to "rights," see *infra* note 121. For a refreshing scholarly recognition of the traditional view as a rights-based theory by one of its critics, see Barnett, *supra* note 12, at 4–5 (noting advantages of "rights-powers" conception of ninth amendment, but calling it "a dubious interpretation").

21. 1 *Annals of Cong.* col. 438 (J. Gales ed. 1789).

22. See *infra* notes 358–370 and accompanying text.

23. The complaint here is not that critics of the traditional view fail to account adequately for the total context in which this text is employed, but that when they describe and dismiss the competing interpretation in this manner, they hide from the reader (or fail to grasp themselves) that the view they oppose can readily be cast in ways that makes its connection to ensuring rights of the people quite clear. The view should not be described in terms that drive a wedge between it and the text.

That such attacks have recurred so frequently reflects the preconceptions some commentators have brought to the study of the amendment concerning the nature of rights and what it means to secure them. These preconceptions prompt them to filter the historical materials and to reject any description that strikes them as an inadequate (or meaningless) scheme for protecting human freedom. The danger is that this mindset will also blind such commentators to the potentially different perspective of the *founders*, who perhaps did not foresee the growth of the doctrine of judicial review or the fate of the system of enumerated powers as a device of limited government.

This is a temptation that all too many advocates of the new orthodoxy have been unable to resist, perhaps because some of them seem more interested in refuting than in understanding the traditional view. Indeed, for some commentators the use of "rights" language in describing the traditional view by one of its proponents prompts the suggestion that the proponent has abandoned that view. See, e.g., Laycock, *supra* note 17, at 349 (claiming that Raoul Berger shifted from "conventional federalism" reading to acknowledgment of rights of subconstitutional nature). But see *supra* note 19 (arguing that Berger advocates a residual rights reading notwithstanding his sometimes confusing language).

To concentrate attention on the rights-protective focus of the traditional view, this Article will generally refer to it as the “residual rights” reading—underscoring that on this reading the other rights retained by the people are defined residually from the powers granted to the national government. The residual rights reading is characterized by a focus on preserving against any adverse inference the mechanism of a government of limited powers whereby these rights are retained. The conception of “rights” thus ensured is inclusive enough to extend to a broad range of privileges and prerogatives that modern thinkers would not typically identify as moral or legal rights, as well as collective rights held by the people as a whole, rights held under state law, and those individual rights that we might call “fundamental” and which the framers might have called “natural.”

It is important to understand, then, that the rights secured residually are not an exclusive category of interests distinct from the rights that might be secured by affirmative limitations on government power. For example, according to those who opposed a bill of rights, if the first amendment had been omitted from the Bill of Rights, freedom of the press still would have been secured residually because the limited powers granted to the national government did not extend to impinging on this freedom.<sup>24</sup> Indeed, positive legal rights, rooted in common law, statutes or state constitutions, are secured by the ninth amendment, but only to the extent that it prevents an inference of national powers by which the federal government might render those positive rights nugatory.<sup>25</sup> The residual rights reading sees the ninth amendment as

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24. Strictly speaking, it might be more accurate to refer to the unenumerated rights protected by the ninth amendment as “rights secured residually,” rather than as “residual rights,” given that the purpose is to refer to the mechanism for securing the right—the granting of government powers limited in such a way as to prevent government from invading certain powers, prerogatives and privileges held by the people, collectively or individually—rather than to the nature of the interests thus secured. “Residual rights” should be thus understood as a shorthand way of referring to all of the interests secured by means of a reservation from enumerated powers.

25. It might be objected that the “rights” thus secured are essentially meaningless and unenforceable inasmuch as they are defined only derivatively and do not give rise to any claim on behalf of a right that can be specifically named in a complaint. Obviously, the rights thus secured may also be defeated to the extent that the powers granted to the federal government are stated indefinitely enough to permit a broad construction that permits the invasion of the intended rights. It is thus not surprising that Antifederalists argued that a bill of rights was needed, and that reliance on enumerated powers was insufficient, by insisting that basic freedoms “ought not to depend on constructive, logical reasoning.” 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 313, 317 (J. Elliot 2d ed. 1866) (Patrick Henry, Virginia Ratifying Convention, June 12, 1788) [hereinafter *Elliot’s Debates*].

On the other hand, to the extent that powers actually were defined narrowly, an enumerated powers scheme could be an effective device for securing rights; no one, after all, had ever complained of the want of a bill of rights in the Articles of Confederation, given the narrowly restricted powers it granted to the national government. Even within a bill of rights, moreover, individual rights may become virtually meaningless to



designed to preserve the scheme of limited powers for securing interests that include, but are not necessarily limited to, traditional sorts of individual rights.

The new orthodoxy, on the other hand, holds that the ninth amendment refers to constitutional rights as we generally think of them today—legally-enforceable, affirmatively defined limitations on governmental power on behalf of individual claimants. This view will be referred to as the “affirmative rights” reading to underscore that the rights its adherents conceive of are to be defined independently of, and may serve to limit the scope of, powers granted to the national government by the Constitution. The proponents of this reading for the most part contend that the ninth amendment embodies the tradition of an unwritten fundamental law of constitutionally enforceable individual rights, most frequently including the right to privacy.<sup>26</sup>

While these two readings do not exhaust the debate concerning the essential thrust of the ninth amendment, the remaining differences among members of the opposing camps seem less central.<sup>27</sup> This Arti-

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the extent that the language of a particular rights provision permits narrow constructions as it has, for example, with the second amendment. See, e.g., *United States v. Miller*, 307 U.S. 174, 178 (1939) (Absent evidence that a weapon has “some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.”). The problem of rights being eviscerated by the vagaries of drafting and interpretation are not unique to the strategy of securing them by the defining of powers. Finally, that the rights secured by a limited powers design are not defined independently does not mean that they are unenforceable. To the extent that they are adequately secured because the powers are sufficiently defined and limited, individuals may secure their claims to rights protected residually by alleging the lack of governmental authority to invade the protected interests. See, e.g., *United States v. Butler*, 297 U.S. 1, 78 (1936) (as Congress lacks authority to enact contested exaction, the challenged Act “does not affect the rights of the parties”). This is why James Iredell argued to the North Carolina ratifying convention that the natural rights of the people were adequately secured under the proposed Constitution because there was a sufficient definition of authority that “any person by inspecting [the Constitution] may see if the power claimed be enumerated.” 4 *Elliot’s Debates*, supra, at 152, 172 (James Iredell, North Carolina Ratifying Convention, July 29, 1788).

26. To argue that the ninth amendment does not seek to secure affirmative rights, however, does not mean that the framers embraced a single, residual rights approach to securing the people’s rights to the exclusion of an affirmative rights approach; to the contrary, it rests on the view that the purpose of the ninth amendment was to preclude the possibility that the enumeration of specific reservations on behalf of affirmative rights in a bill of rights might raise an inference against the general reservation of rights that was thought to exist by virtue of enumerated powers. Obviously, the original Constitution also included enforceable affirmative rights, as for example in its prohibitions on bills of attainder and ex post facto laws. The claim is that the ninth amendment was to clarify that the Constitution embodied both a limited powers/retained rights (residual rights) approach and an affirmative rights approach as a comprehensive system for securing the people’s rights. These claims are defended *infra* in Parts III–V.

27. For example, I do not treat the controversy among affirmative rights advocates as to whether the ninth amendment was intended to be applied to state governments or, alternatively, might be made to fit into the framework of the fourteenth amendment. If

cle will present the case for the residual rights reading of the ninth amendment as against the affirmative rights interpretation. To this end, it will evaluate the merits of these opposing views to determine whether the proponents of the new orthodoxy have really made the case for discarding the received reading. This analysis of the recent literature also raises questions about the way in which constitutional scholarship is conducted.

### B. *From Neglect to Abuse*

Sanford Levinson has recently called the ninth amendment "the stepchild of the Constitution,"<sup>28</sup> a description that echoes a longstanding complaint about the neglect to which this "forgotten" amendment has been subjected.<sup>29</sup> The metaphor is apt, inasmuch as the ninth amendment has been badly treated, particularly by those who should have been its friends and defenders. But its aptness is mainly ironic.

The original claim of neglect was launched mainly against a bench and bar that had largely failed to appreciate the ninth amendment's potential as a source of fundamental rights.<sup>30</sup> Obviously the neglect charge's validity depends on the validity of the affirmative rights reading. If the traditional, residual rights reading is correct, this desuetude is a fitting response to the historical fact that litigants had never relied upon the Bill of Rights to infer that national powers had been enlarged to the detriment of the other rights retained by the people. Indeed, Justice Black argued—quite plausibly—in his *Griswold* dissent that the failure to use the ninth amendment reflected a broad historical consensus in favor of the traditional reading.<sup>31</sup>

Turning to the commentators, the tradition of focusing on Supreme Court adjudication in constitutional scholarship probably ac-

the residual rights reading is the correct one, as this Article seeks to demonstrate, these issues are mooted.

Moreover, among advocates of the affirmative rights reading, some view the ninth amendment as an "incorporation" provision that in effect creates "ninth amendment rights," while others see it as a rule of construction that points us away from the view that the Bill of Rights provides an exhaustive catalogue of fundamental freedoms. See L. Tribe, *American Constitutional Law* § 11-3, at 774-75 (2d ed. 1988) (describing both views). Similarly, among those who reject the affirmative rights reading, there are some who have suggested that the ninth amendment was intended to ensure "the maintenance of rights guaranteed by the laws of the states." Caplan, *supra* note 14, at 227; see also McConnell, *supra* note 14, at 94-95 (framers "thought it useful to express in no uncertain terms that the adoption of a Bill of Rights would not, by negative implication, abolish . . . rights [derived from positive law]"). For differences in analysis between an exclusively "state law" rights focus and the more general residual rights view defended here, see *infra* notes 111, 120 and 239.

28. Levinson, *supra* note 5, at 134.

29. See, e.g., B. Patterson, *The Forgotten Ninth Amendment* 1-3 (1955).

30. See, e.g., *id.* at 56 (ninth amendment "must be given some meaning" and "can only be saved by our courts").

31. 381 U.S. 479, 520 (1965) (Black, J., dissenting).

counts for most of the neglect of the ninth amendment prior to *Griswold v. Connecticut*.<sup>32</sup> Since *Griswold*, of course, there has been something of an avalanche of ninth amendment scholarship, most of it favoring the affirmative rights interpretation. But the increased attention to the ninth amendment has led to neglect of a different kind: a relative lack of careful scholarship setting forth the evidence supporting the traditional, residual rights reading.<sup>33</sup> There has been no defense of the traditional reading that takes account of this entire body of literature to critique the affirmative rights reading.

Meanwhile, affirmative rights advocates have taken ninth amendment scholarship from neglect to abuse. Most modern ninth amendment literature consists of briefs written in defense of a particular viewpoint. There is little sifting or weighing of evidence. Modern commentators typically place great weight on the plain meaning of the ninth amendment's text, without pausing to consider whether its apparent clarity reflects what the modern mind brings to it or the meaning that would have been the most natural to those who framed it.<sup>34</sup>

Similarly, modern commentators have generally assumed that we need no help from the founders in defining the meaning of "rights . . . retained by the people" or the underlying concern that such rights would be endangered by an enumeration of rights in a bill of rights.<sup>35</sup> Indeed, affirmative rights advocates have viewed the ninth amendment through an anachronistic prejudice that all concepts of rights concern specific enforceable limitations on government on behalf of personal rights—a prejudice they maintain despite substantial evidence pointing

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32. A classic example of this scholarly attitude is G. Boutwell, *The Constitution of the United States at the End of the First Century* (1987 ed.). Stating in his preface that his purpose was "to set forth . . . the substance of the leading decisions of the Supreme Court," *id.* at iii, Boutwell—writing in 1895—is true to his word in simply passing over the ninth amendment with the explanation that it "has not been construed by the Court," *id.* at 375 n.1. For useful reflections on this continuing tendency in moderate thought and its impact on ninth amendment study, see Levinson, *supra* note 5, at 132–33.

33. It is difficult to account for the neglect during these years by those who might have responded on behalf of the traditional reading, but several reasons come to mind: First, the ninth amendment continues to receive attention by the Supreme Court only rarely; second, many scholars view the case against an open-ended judicial role in individual rights adjudication as turning more on a philosophy of judicial restraint than on the validity of a particular argument about the original constitutional design; and, finally, the basic outline of the response has appeared along the way, so that the need for a more complete exposition may not have seemed pressing. For earlier scholarly voices of skepticism as to the modern reading, see E. Dunbauld, *The Bill of Rights and What it Means Today* 63–64 (1957); Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 *Sup. Ct. Rev.* 119, 149–55. See *supra* note 14 for more recent examples.

34. See *infra* notes 92–99, 121–130 and accompanying text.

35. For a cogent warning against the tendency to assume that the ease with which we bridge the gap between our thoughts and those of the founders means that there is no gap, see Powell, *Rules for Originalists*, 73 *Va. L. Rev.* 659, 673 (1987).

to another conception of rights at work during the founding period.<sup>36</sup> Modern thinkers have leapt to the conclusion that in drafting the ninth amendment the founders sought to address present-day concerns about the sources for enforceable individual rights limitations rather than the concerns the founders had about creating an integrated scheme for preserving the people's rights, including specific limitations on government and rights reserved by the structural provision for limited powers.<sup>37</sup>

### C. *The Strength of the Traditional Reading*

When the ninth amendment's text is read in its historical context, the originally intended meaning emerges with surprising clarity. After a brief overview of the history surrounding the adoption of the ninth amendment in Part II, Part III will show that the ninth amendment's reference to "rights . . . retained by the people" can plausibly be read as an allusion to the general reservation of rights embodied in the system of enumerated powers made explicit in the tenth amendment. It will show that the founding generation was very comfortable with the idea that structural provisions, including provisions that define governmental powers and clarify that powers not granted are reserved, constitute individual rights provisions of the first order.<sup>38</sup>

Part IV, in turn, will show that it is only against the backdrop of this consensus about the structural protection of rights that the events giving rise to the ninth amendment, namely the Federalist objections to a bill of rights, are properly understood. During the debate over ratification, Federalist proponents of the Constitution confronted an Antifed-

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36. Indeed, despite his cogent warning, Powell himself assumes that it can readily be determined what the founders feared in their concern that unenumerated rights not be denied or disparaged—an assumption that runs counter to his counsel against expecting Madison, Wilson and Hamilton to participate in a contemporary dialogue without careful translation of their language and usage in historical context. See *id.* at 673. In fairness to Powell, he treats the ninth amendment very briefly as a way of illustrating his own larger points about historical analysis; the same cannot be said for others.

37. As to the tendency among constitutional scholars to assume that history addresses the concerns of the interpreter, see *id.* at 677–78. Powell also suggests, however, that those who have turned to history in search of constraint have missed the ninth amendment as the “quintessential case” of the founders’ “flat refusal to restrict that [interpretive] freedom.” *Id.* But Powell, of course, assumes that the founders’ focus was on our concern about interpretive constraint and freedom rather than their own concern to preserve an overall scheme for securing freedom.

38. Thus, in contrast to modern thinking, the participants in the ratification debate saw the tenth amendment as a means of ensuring the people's rights rather than as a mere federalism provision. See *infra* notes 114–125 and accompanying text. While Federalist proponents of the Constitution contended that the system of enumerated powers itself accomplished this rights-protective end, participants in the debate agreed that there was a vast reservoir of rights possessed by the people and protected against encroachment by the national government, and that these rights would best be ensured by limiting the powers granted to the national government and reserving all residual power to the people and the states. See *infra* notes 126–147 and accompanying text.

eralist contention that the Constitution would lead to despotism because it lacked a bill of rights and granted general powers to the national government—an argument buttressed by reference to the omission of a “tenth amendment” provision reserving to the states and people all rights and powers not granted. In addition to arguing that article I’s enumerated powers amounted to just such a general reservation of rights and powers, the Federalists responded that the inclusion of specific reservations of particular rights, as contemplated by the proposed bill of rights, was not merely unnecessary, but positively dangerous. A bill of rights would reverse the Constitution’s premise that all not granted was reserved; instead, the government would hold all power except what was prohibited in the bill of rights.

As Part V will demonstrate, the ninth amendment served an historical face-saving function for many Federalists: while still claiming that a bill of rights was not strictly necessary, they were able to agree to the inclusion of the Bill of Rights on the ground that the feared danger was averted by the ninth amendment’s prohibiting an inference that the Constitution’s general reservation of rights was undermined by inclusion of specific limitations on governmental power. It will be shown that the 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.<sup>39</sup>

Part V will also show that the path from the language of the state proposals, which spoke against an inference of enlarged powers, to the ninth amendment’s language, which prohibits an inference against retained rights, was not intended to alter the meaning of the provision. The logic of the original Federalist objection to a bill of rights had been stated in terms of avoiding both enlarged powers and the elimination of retained rights: in this context, “rights” and “powers” are two sides of the same coin.

The conclusions reached in the treatment of the preratification materials, contained in Parts II through V, are strengthened and reinforced in Part VI by an analysis of the relationship between the ninth and tenth amendments and of the postratification materials bearing on the meaning of the ninth amendment. Finally, Part VII turns to larger questions concerning the implications of these historical findings on the larger debate over originalist methodology and the argument that the Constitution embodies a set of individual rights norms found outside specific constitutional provisions. There this Article concludes that the original meaning of the ninth amendment lends critical sup-

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39. Indeed, the proposals were drafted as prohibitions on the inference of enlarged national powers rather than as prohibitions of an inference against retained rights—a fact which itself lends powerful support to the interpretation of the Federalist objection to a bill of rights as focusing on the preservation of the system of enumerated powers and reserved rights. See *infra* notes 187–192 and accompanying text.

port to the project of originalist jurisprudence in the individual rights area and undercuts modern claims linking the ninth amendment to the general tradition of an unwritten constitution. At the same time, however, the materials discussed in this Article provide no clear verdict as to the historical significance of general theories of constitutionalism that see individual rights as having a legal existence, whether or not embodied in any text.

## 11. AN HISTORICAL OVERVIEW OF THE NINTH AMENDMENT

“[A] page of history is worth a volume of logic.”<sup>40</sup>

The ninth amendment is the only one of the provisions contained in the Bill of Rights that has no antecedent in the English constitution, the common law, the revolutionary period or the Articles of Confederation.<sup>41</sup> It is the unique product of the struggle to ratify the Constitution and, more specifically, the ratification-period debate over the omission of a bill of rights from the Constitution drafted by the Philadelphia convention. The objection that the Constitution should include a bill of rights was first raised near the end of the Convention, in August and September of 1787.<sup>42</sup> Even after the Convention had rejected the call to form a committee to draft a bill of rights, on September 14, just three days before the Convention adjourned, Charles Pinckney and Elbridge Gerry moved to insert a provision for freedom of the press.<sup>43</sup> But Roger Sherman, who had helped facilitate some of the key compromises at the Convention, argued that the proposal was “unnecessary” because “[t]he power of Congress does not extend to the Press.”<sup>44</sup>

The lack of sustained debate on the inclusion of a bill of rights suggests that the leading members of the Convention underestimated the effect of the decision not to include a more complete set of rights provisions on the prospects for ratification of the new Constitution. The omission of a bill of rights quickly became the center-piece of arguments made by the Constitution’s opponents.<sup>45</sup> Indeed, from the close of the Convention until the end of the ratification period the demand

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40. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.).

41. B. Schwartz, *The Great Rights of Mankind* 198–99 (1977).

42. See Sherry, *supra* note 12, at 1161 n.144. Indeed, on August 20, 1787, Charles Pinckney of South Carolina submitted a number of rights provisions that he proposed be added to the Constitution as drafted. 2 J. Madison, *Debates in the Federal Convention of 1787*, at 427–29 (G. Hunt & J. Scott eds. 1987). On September 12, the Convention rejected Elbridge Gerry’s motion to create a committee to draft a bill of rights. *Id.* at 557.

43. *Id.* at 565.

44. *Id.*

45. As one commentator put it, “[t]here can be little doubt that if a bill of rights had been included in the original draft, the Constitution would have encountered much less opposition.” Pole, Introduction, in *The American Constitution: For and Against* 3, 18 (J. Pole ed. 1987).

for a bill of rights became the rallying cry of those with reservations about the proposed form of government. The national debate that resolved this issue involved well-organized proponents and opponents in all of the states, for the most part grouped around two ideological poles and sharing the arguments developed by their allies in other parts of the nation.<sup>46</sup>

The opponents of the Constitution, the Antifederalists, were united by the view that the consolidated power vested in the national government by the Constitution threatened both state and individual autonomy.<sup>47</sup> Among the Antifederalists were many ardent patriots, including such notables as Samuel Adams and Patrick Henry. While many of the Constitution's critics had acknowledged the need to amend the Articles of Confederation to strengthen the national government,<sup>48</sup> they nevertheless believed that the Convention had gone too far in granting power to the federal authority, and that the failure to provide explicitly for the fundamental rights of the people exhibited insensitivity to the need to set limits on what they feared would be an avaricious government.<sup>49</sup>

The Antifederalists contended that a bill of rights was an absolute

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46. The widespread circulation of many of the published commentaries of the ratification period is described in the introductory notes to the many commentaries included in volumes 13 through 16 of *The Documentary History of the Ratification of the Constitution* (M. Jensen ed. 1976) [hereinafter *Ratification of the Constitution*]. These four volumes are denominated "Commentaries."

Merrill Jensen observes that the Federalist proponents of the Constitution were especially well-organized, and that there is therefore "a remarkable similarity of arguments used for adoption in the state conventions all the way from South Carolina to New Hampshire." M. Jensen, *The Making of the American Constitution* 139 (1964).

47. See 2 *Ratification of the Constitution*, supra note 46, at 617, 639 (Dissent of the Minority, Pennsylvania Ratifying Convention, Dec. 18, 1787) (the Constitution is "inconsistent with the liberty and happiness of the people, as its establishment will annihilate the state governments, and produce one consolidated government that will eventually and speedily issue in the supremacy of despotism"). Patrick Henry argued that the Constitution "is radical in this transition; our rights and privileges are endangered, and the sovereignty of the states will be relinquished." 3 *Elliot's Debates*, supra note 25, at 35, 44 (Patrick Henry, Virginia Convention on the Adoption of the Federal Constitution, June 5, 1788).

48. Jensen observes that the Antifederalists labored under the disadvantage that many of them were publicly "committed to the proposition that the central government needed more power, and hence they were in at least a superficially untenable position in opposing a Constitution which provided for such power." M. Jensen, supra note 46, at 139.

49. Not all the Antifederalist arguments were, however, directed toward improving the product of the 1787 convention: Antifederalists pushed for a bill of rights for its own sake as well as to force a more complete reconsideration of the work product of the federal Convention. This point is most dramatically illustrated by the fact that many Antifederalists opposed Madison's efforts to pass a bill of rights in the first Congress and viewed the passage of a bill of rights as a political defeat inasmuch as it stalled their drive for a second constitutional convention. See L. Levy, supra note 12, at 165; M. Jensen, supra note 46, at 149.

necessity for a government like the one proposed. Because the federal government had been granted powers far exceeding those given to the national authority by the Articles of Confederation, it could in many ways directly affect the rights and interests of the people.<sup>50</sup> The broad grants of power contained in article 1, read in conjunction with the supremacy clause, would permit the national government to override state law, including the fundamental rights secured by declarations in the various state constitutions.<sup>51</sup> In explicating their apprehensions, Antifederalists invoked what they described as the basic constitutional principle that rights and powers not expressly reserved by the people are thereby granted to government, implying that the Constitution granted out of existence the most basic rights of the people.<sup>52</sup>

Supporting the Constitution as it emerged from the Philadelphia

50. Cecelia Kenyon observes that the heart of the Antifederalist position was “the belief that the proposed constitution would establish a ‘consolidated’ government.” Kenyon, Introduction, *in* *The Antifederalists* xlii (C. Kenyon ed. 1966). Among the powers that prompted this description of the new government were the powers to tax and spend and the exclusive power to wage war. *Id.* at xlii–xliii.

51. The extent of the federal government’s power was inferred not only from the broad language of the specific grants of power and the potentially far-reaching necessary and proper clause, but also from the lack of any limiting language as to the supremacy of national treaties. See, e.g., 2 *The Complete Anti-Federalist* 245, 246–47 (H. Storing ed. 1981) (letters from the Federal Farmer, Oct. 12, 1787). As to the relevance to the ninth amendment of the Antifederalist concern that state constitutional protections would be effectively overridden by national law because of the supremacy clause, see *infra* note 111.

52. In Virginia, Patrick Henry argued “that all nations have adopted this construction—that all rights not expressly and unequivocally reserved to the people are impliedly and incidentally relinquished to rulers, as necessarily inseparable from the delegated powers.” 3 *Elliot’s Debates*, *supra* note 25, at 410, 445 (Patrick Henry, Virginia Ratifying Convention, June 14, 1788). The author of the Letters of Agrippa similarly contended that “when people institute government, they of course delegate all rights not expressly reserved.” 1 B. Schwartz, *The Bill of Rights: A Documentary History* 515 (1971); see also 5 *The Complete Anti-Federalist*, *supra* note 51, at 172, 176 (Essays by the Impartial Examiner, Virginia Independent Chronicle, Feb. 20, 1788).

It is important to understand, however, that the Antifederalist argument requiring an “express” reservation of rights and powers did not of itself mean that such a reservation had to be in the form of an enumeration of specific rights. One of their central concerns was precisely that there was no express provision reserving as rights everything not granted to the government. The need for specific provisions limiting the powers of the government stemmed from Antifederalist arguments concerning the nature of the proposed Constitution as a consolidated government (not a mere confederation) to which had been granted broad powers to act directly upon the people’s rights and interests. See, e.g., 13 *Ratification of the Constitution*, *supra* note 46, at 399–400 (An Old Whig II, Philadelphia Independent Gazetteer, Oct. 17, 1787) (argument from delegated powers could work in theory “unless the powers which are expressly given to Congress are too large”). Indeed, it was the lack of an express provision reserving what had not been granted that was an important piece of evidence of the intent to move from confederation to a consolidation of power where all power inhered in the general government. See, e.g., 14 *Ratification of the Constitution*, *supra* note 46, at 346 (Centinel V, Philadelphia Independent Gazetteer, Dec. 4, 1787) (omission “manifests the design of consoli-



Convention was the other pole in the ratification debate, the Federalists. The Federalist position can best be described through the words of one of its leading proponents. On October 6, 1787, just three weeks after the federal Convention adjourned, James Wilson provided the classic defense of the Constitution and its omission of a bill of rights in a speech in the state house yard in Philadelphia.<sup>53</sup> Wilson's speech became the focal point for debate over the absence of a bill of rights in Pennsylvania, but was also widely circulated throughout the nation.<sup>54</sup> He was a fitting defender of the Convention's work product. Along with fellow Pennsylvanian Gouverneur Morris, Wilson gave more speeches than any other member of the Philadelphia Convention.<sup>55</sup> He also played a prominent role on the Committee of Detail that wrote the first draft of the Constitution.<sup>56</sup> At least one latter-day observer has contended that Wilson's influence at the Convention was second only to that of James Madison.<sup>57</sup>

In his speech, Wilson began by refuting claims that the absence of a bill of rights was a defect in the Constitution by arguing that the Antifederalists had failed to perceive the distinctive nature of the federal Constitution. Under the state constitutions from which the Antifederalists had drawn their theory about implicitly granted powers, the people had "invested their representatives with every right and authority which they did not in explicit terms reserve."<sup>58</sup> Because the federal government was designed as a means to accomplish specific national objects,

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dating the states"); 13 *id.* at 399-401 (An Old Whig II, Philadelphia Independent Gazetteer, Oct. 17, 1787).

Moreover, a number of Antifederalists emphasized, to a greater extent than Henry and others, that the reservation by the people of specific, affirmative rights was only essential as to governments to which the people have granted broad legislative powers. On the other hand, if the Constitution had actually formed a confederation with carefully defined powers "[t]here would be no need of a bill of rights . . ." 5 *The Complete Anti-Federalist*, *supra* note 51, at 260, 263 (Denatus, Virginia Independent Chronicle, June 11, 1788); see *id.* at 172, 179 (Independent Examiner, Virginia Independent Chronicle, Feb. 20, 1788); 14 *Ratification of the Constitution*, *supra* note 46, at 255, 274-75 (A Federal Republican, Nov. 28, 1787). Indeed, some Antifederalists even suggested that an express general reservation of all powers not granted might suffice for a bill of rights under the proposed Constitution. See *infra* note 118.

53. 2 *Ratification of the Constitution*, *supra* note 46, at 167, 167 (James Wilson, Speech in the State House Yard, Oct. 6, 1787).

54. See *id.* at 172.

55. See *id.* at 30, 34 (Introduction).

56. See *id.*

57. See, e.g., L. Levy, *supra* note 12, at 153.

58. 2 *Ratification of the Constitution*, *supra* note 46, at 167, 167 (James Wilson, Speech in the State House Yard, Oct. 6, 1787). Federalists consistently contrasted the federal Constitution with the state constitutions in defending the omission of a bill of rights. See, e.g., *id.* at 465, 470 (James Wilson, Pennsylvania Ratifying Convention, Dec. 4, 1787); 4 *Elliott's Debates*, *supra* note 25, at 106, 149 (James Iredell, North Carolina Ratifying Convention, July 28, 1788). See generally Caplan, *supra* note 14, at 241 n.72 ("Hamilton accurately distinguished the Constitution, in which the public retains all powers not surrendered to the federal government, from the bill of rights that Eng-

however, "the reverse of the proposition prevails, and everything which is not given, is reserved."<sup>59</sup> Several weeks later, at the Pennsylvania state ratifying convention, Wilson more fully identified this theory of the federal Constitution as rooted in a uniquely American idea of popular sovereignty that envisioned that the people held all power and could grant or reserve that power to secure both effectual government and their rights.<sup>60</sup> According to Wilson, it was thus superfluous to specify that the people would continue to enjoy privileges of which they had not divested themselves.<sup>61</sup>

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lish kings had granted to their subjects, in which the monarch retained all prerogatives not conceded.").

59. 2 Ratification of the Constitution, *supra* note 46, at 167, 167–68 (James Wilson, Speech in the State House Yard, Oct. 6, 1787). Wilson and other Federalists also contrasted the proposed Constitution's limited powers scheme with the need for specific reservations of rights under the British Constitution. See *id.* at 382, 389 (James Wilson, Pennsylvania Ratifying Convention, Nov. 28, 1787); 4 Elliott's Debates, *supra* note 25, at 106, 148 (James Iredell, North Carolina Ratifying Convention, July 28, 1788); The Federalist No. 84, at 579 (A. Hamilton) (J. Cooke ed. 1961). In Virginia, George Nicholas observed that in England disputes over power are determined by reference "to the enumerated rights of the people," with the absence of any provision leaving power in the monarch's hand. He continues: "In disputes between Congress and the people, the reverse of the proposition holds. Is the disputed right enumerated? If not, Congress cannot meddle with it." 3 Elliott's Debates, *supra* note 25, at 194, 246 (Virginia Ratifying Convention, June 10, 1787). See generally Caplan, *supra* note 14, at 241 n.72 (citing additional spokesperson).

60. See 2 Ratification of the Constitution, *supra* note 46, at 388–91. For a treatment of Wilson's argument at the convention, see *infra* notes 138–147 and accompanying text. Property law references to "grants" and "reservations" were used pervasively by both sides in the dialogue over ratification. At one point, Wilson even argued that the Antifederalists were pointlessly demanding a few reservations when, under the Constitution as drafted, the people held the fee simple. See 2 Ratification of the Constitution, *supra* note 46, at 382, 389 (James Wilson, Pennsylvania Ratifying Convention, Nov. 28, 1787); cf. 4 Elliott's Debates, *supra* note 25, at 139, 141 (Archibald Maclaine, North Carolina Ratifying Convention, July 28, 1788) (analogizing federal Constitution to a will in which a "sixth part" of testator's property is devised while the balance remains in the estate). For Patrick Henry's criticism of such arguments, see *infra* note 216 and accompanying text.

61. See 2 Ratification of the Constitution, *supra* note 46, at 167, 168 (James Wilson, Speech in the State House Yard, Oct. 6, 1787). A separate approach was to argue that the Antifederalist insistence on an "express" reservation of rights was already met, either by the specific text of the necessary and proper clause or by article 1 read as whole. See 4 Elliott's Debates, *supra* note 25, at 139, 141 (Archibald Maclaine, North Carolina Ratifying Convention, July 28, 1788) ("[t]here is an express clause [the necessary and proper clause] which . . . demonstrates that [Congress is] confined to those powers which are given"); 2 Elliott's Debates, *supra* note 25, at 151, 153 (Dr. Charles Jarvis, Massachusetts Ratifying Convention, Feb. 4, 1788) ("the first article proposed . . . is an explicit reservation of every right and privilege which is nearest and most agreeable to the people"). The argument appears to be sound, particularly given that the Antifederalist theory insisted on an "express" reservation of rights, but did not deny that a general reservation of all rights not granted by the delegation of powers could potentially suffice. See *supra* note 52. It is interesting to speculate whether or not Wilson preferred to object to the demand for an express reservation of rights precisely so that he could characterize the Federalist and Antifederalist positions as mutually exclusive, the

Wilson's "necessity" argument, based on the premise that the Constitution's enumerated powers design adequately protected the rights of the people, became a refrain in the Federalist defense of the Constitution against those who insisted on the need for a bill of rights. It was often summarized in the theme that, under the proposed Constitution, the people had reserved everything which was not given. This was the slogan relied upon by Washington, Madison, Hamilton and James Iredell—all leading statesmen who attended the federal Convention and, with the exception of Washington, played central roles in defending the Constitution at their respective state ratifying conventions.<sup>62</sup> It was, in turn, echoed in many of the Federalist speeches and writings occasioned by the state ratifying conventions in 1787 and 1788.<sup>63</sup>

Even more central to the purpose of this Article, Wilson's October 6 speech also introduced what Robert Whitehill, a prominent Pennsylvania Antifederalist, called the "argument of danger."<sup>64</sup> Wilson first contended that the limited powers granted the national government posed no threat to freedom of the press, so that "a formal declaration upon the subject" would be "merely nugatory." He then introduced his "danger" argument, noting that, since there was no federal power to reach the press, the "very declaration" that a right to a free press existed "might have been construed to imply that some degree of power was given, since we undertook to define its extent."<sup>65</sup> Wilson's example illustrated his fear that, because specific rights provisions limit the scope of a granted power or create an "exception" to a granted power in favor of a specified right, the insertion of rights provisions would raise the inference of implied powers from which enumerated exceptions must be carved.<sup>66</sup>

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first relying on limited grants of powers and an implied reservation of rights and the second attempting to substitute a scheme based exclusively on the reservation of specific rights in an enumeration of rights.

62. George Washington, who chaired the federal Convention, wrote that "the people evidently retained every thing which they did not in express terms give up." Letter from Washington to Lafayette, in 29 *The Writings of George Washington* 475, 478 (J. Fitzpatrick ed. 1939). Madison and Iredell used the "necessity" argument in speeches advocating ratification in Virginia and North Carolina, and Hamilton used it in the *Federalist Papers*. See 3 *Elliot's Debates*, supra note 25, at 616, 620 (James Madison, Virginia Ratifying Convention, June 24, 1788); 4 *Elliot's Debates*, supra note 25, at 164, 167 (James Iredell, North Carolina Ratifying Convention, July 29, 1788). For Hamilton, see *infra* note 66.

63. See, e.g., 4 *Elliot's Debates*, supra note 25, at 139, 141 (Archibald Maclaine, North Carolina Ratifying Convention, July 28, 1788) (the people "retain all those rights which we have not given away to the general government"); *infra* note 123.

64. 2 *Ratification of the Constitution*, supra note 46, at 425, 427 (Robert Whitehill, Pennsylvania Ratifying Convention, Nov. 30, 1787).

65. 2 *Ratification of the Constitution*, supra note 46, at 167, 168 (James Wilson, Speech in the State House Yard, Oct. 6, 1787).

66. This is roughly the formulation of the same argument found in Hamilton's critique of the demand for a bill of rights in *The Federalist No. 84*. *The Federalist No. 84*,

But the point that the listing of specific rights posed a threat to the ordinary inferences of the limited powers scheme embodied in the Constitution was also applied to the Bill of Rights considered as a whole, and not merely to the specific provisions such a bill might contain. Wilson and other Federalists argued that, if rights were enumerated, those amending the Constitution would be seen to have reversed the originally intended effect of the enumerated powers design by introducing the implication that the only rights left with the people would be those explicitly secured by the Bill of Rights. At the Pennsylvania state ratifying convention, Wilson himself referred to the federal Convention and asserted that “[a] proposition to adopt a measure that would have supposed that we were throwing into the general government every power not expressly reserved by the people would have been spurned at, in that house, with the greatest indignation.”<sup>67</sup>

The Federalist “danger” argument was thus repeatedly cast in terms of fears that the original premise that everything not granted to the national government was reserved to the people would be reversed.<sup>68</sup> Federalists stressed, moreover, that it would not be possible to enumerate all the rights which the people required vis-à-vis the national government and which they had retained by virtue of the enumerated powers; this claim served as a minor premise in the Federalist argument as to the consequences to be feared from reversing the constitutional design of limited powers and reserved rights. But, as will be more fully developed in Part IV, the Federalist concern with the problem of imperfect enumeration can only be understood alongside the major Federalist premise that a bill of rights would reverse the implications of the original limited powers scheme for securing rights.

The backdrop of the Federalist assumption that the original consti-

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supra note 59, at 579. Hamilton’s argument is treated more fully infra notes 171–177 and accompanying text.

67. 2 Ratification of the Constitution, supra note 46, at 387–88 (James Wilson, Pennsylvania Ratifying Convention, Nov. 28, 1787). Wilson’s argument rests on the assumption that to do what is not strictly necessary in the face of the claim that it is necessary logically implies acceptance of that claim—in this case the claim that a bill of rights was essential because the national government had been effectively granted general powers. There is no reason, however, to conclude that the inclusion of specific limitations on power to safeguard liberty, to provide a second layer of protection for important rights, logically implies abandonment of limited powers as another, perhaps sufficient, security for rights or the existence of a broad power from which a particular exception is being carved. Significantly, specific language in several drafts of the ninth amendment reinforce the conclusion that its purpose was to establish this very point. See infra notes 187–195 and accompanying text.

68. E.g., 3 Elliot’s Debates, supra note 25, at 616, 620 (James Madison, Virginia Ratifying Convention, June 24, 1788); 4 Elliot’s Debates, supra note 25, at 164, 167 (James Iredell, North Carolina Ratifying Convention, July 29, 1788). As will be more fully developed later in this Article, the significance of the essential connection between the “necessity” and “danger” arguments has been lost on modern commentators, but is a key to understanding the rights-protective scheme embodied in the ninth amendment. See infra notes 150–152 and accompanying text.

tutional design secured a wide range of rights by retaining a significant amount of sovereign power in the hands of the people explains why the Federalists made the problem of “imperfect enumeration” a shorthand way of expressing their fear that a bill of rights would become the exclusive means for securing the people’s rights. The result, they argued, would be that in exchange for inserting specific limitations to secure a small number of rights that the people had never granted away, they would obtain a government of general powers with authority to invade all the interests previously protected that would not be included in such an enumeration of the people’s fundamental rights.<sup>69</sup>

If the participants in the Philadelphia Convention underestimated the depth of public reaction that rejection of a bill of rights would engender, Federalist supporters of the Constitution equally misperceived both the cogency with which their defense of the omission of a bill of rights would be met and the public response to the debate.<sup>70</sup> In addition to reiterating their initial arguments about the breadth of power granted to the federal government and the need to reserve rights explicitly, the Antifederalists offered a devastating table-turning argument that raised serious problems for those defending both the Federalist “necessity” and “danger” arguments. The Antifederalist response rested on the proposed Constitution’s actual inclusion of specific limitations on certain powers granted to the national government, a fact that called into question the commitment of the Federalists to their own position.

The Antifederalists responded that, if it was indeed completely unnecessary to include specific rights, why had the Convention nevertheless made provision for a few basic rights, such as habeas corpus and the proscription of *ex post facto* laws and bills of attainder?<sup>71</sup> By extension, if the inclusion of these few rights implied acceptance of their ne-

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69. The problem of imperfect enumeration has been read by modern commentators to support the idea that the Federalists feared simply that enumerating some affirmative limitations on governmental power would be read as precluding the existence of additional, unwritten limitations of power that might be enforced in court. A full critique of this interpretation is provided in Part IV, *infra*.

70. For an excellent overall summary of the evolution of the ratification debates leading to the adoption of a bill of rights, see L. Levy, *supra* note 12, at 137–73.

71. As Levy says, “[t]he protection of trial by jury in criminal cases, the bans on religious tests, *ex post facto* laws, and bills of attainder, the narrow definition of treason, and the provision for the writ of habeas corpus, by the Federalists’ reasoning was turned against them.” *Id.* at 160.

In fact, although the Antifederalists used the partial enumeration of rights in the Constitution to counter the Federalist “danger” argument, some Antifederalists had already focused on the partial enumeration of rights as evidence of the need for a bill of rights. See, e.g., 2 *The Complete Antifederalist*, *supra* note 51, at 245, 248–49 (Letters from a Federal Farmer, Oct. 12, 1787) (if the Constitution protected some “sacred” rights, “it must take notice of one as well as another,” and “if unnecessary to recognize or establish one by the federal constitution, it would be unnecessary to establish another by it”).

cessity, the Federalist position was turned on its head. Extending the logic of the Federalists' own "danger" argument, the Antifederalists asked whether the Constitution's enumeration of a few rights raised the inference, "agreeably to the maxim of [the Federalists], that every other right is abandoned."<sup>72</sup> As Leonard Levy observed, "[t]he argument that to include some rights would exclude all others boomeranged."<sup>73</sup>

The Federalists faced their first determined battle over the demand for a bill of rights in the Pennsylvania ratifying convention. Though on December 12, 1787, Pennsylvania became the second state to ratify the Constitution, a minority at the state's ratifying convention fought to attach proposed amendments to the ratification transmitted to Congress. When their efforts to do so failed, the minority filed a report demanding that a bill of rights be added to the Constitution.<sup>74</sup> The Pennsylvania experience was repeated in Massachusetts two months later. But this time, when Federalist leaders confronted a serious risk of rejection of the Constitution for want of a bill of rights, they compromised with those who demanded the rights provisions by offering proposed amendments to be submitted with the ratification.<sup>75</sup> The Massachusetts compromise became a model, and the debate over a bill of rights thereafter increasingly concerned the issue of whether merely proposing amendments to be subsequently enacted would be sufficient to satisfy those whose reservations centered on the lack of a bill of rights.<sup>76</sup>

By the time of the Virginia and New York conventions in the summer of 1788, Federalist leaders in both states had been persuaded of the need to accept recommended amendments to mollify those who demanded that amendments be made before they would vote for ratification.<sup>77</sup> Once the Virginia convention had resolved to recommend

72. 2 Ratification of the Constitution, *supra* note 46, at 425, 427 (Robert Whitehill, Pennsylvania Ratifying Convention, Nov. 30, 1787).

73. L. Levy, *supra* note 12, at 160. The Federalists attempted to respond by arguing that the specific rights enumerated in the body of the Constitution functioned as exceptions to particular national powers of some potential breadth, see D. Farber & S. Sherry, *A History of the American Constitution* 25 (1990), but none sufficiently explained why other powers would not similarly include the power to invade basic rights or why (given the practice already embodied in the Constitution) a system of limited powers and reserved rights could not be combined with specific (and perhaps even cautionary) affirmative limitations.

74. See L. Levy, *supra* note 12, at 162; 2 B. Schwartz, *supra* note 52, at 627-28.

75. See D. Farber & S. Sherry, *supra* note 73, at 177; 2 B. Schwartz, *supra* note 52, at 674-75.

76. Four of the five states that ratified the Constitution after Massachusetts and prior to the creation of the new government made recommendations for amendments as part of their ratification. See D. Farber & S. Sherry, *supra* note 73, at 177.

77. See *id.* at 762, 852. One key to the Federalist victory in Virginia was the defection to their side of former governor Edmund Randolph, an important Virginia delegate to the federal Convention who had refused to sign the document that emerged from Philadelphia. See *id.* at 89; 2 B. Schwartz, *supra* note 52, at 763. Randolph would also later figure in an important debate in the Virginia assembly over the language proposed

amendments with its ratification, a committee was appointed to draft them. The Virginia committee included such important Federalists as John Marshall, George Wythe and Madison as well as leading Antifederalists Patrick Henry and George Mason.<sup>78</sup>

On June 27, 1788, the committee recommended, and the Virginia convention adopted, both a proposed bill of rights and a separate set of proposed amendments to the Constitution.<sup>79</sup> The seventeenth amendment proposed by the Committee responded directly to the Federalist "danger" argument. Three other states—New York, North Carolina and Rhode Island—followed Virginia's lead by proposing language that would prohibit an inference of enlarged or constructive power from the specific limitations on power contemplated in the proposed bill of rights.<sup>80</sup>

With the pressure generated by recommended amendments proposed by several state ratifying conventions, as well as the continuing call for a second convention to consider amendments to the Constitution, Madison moved from reluctantly agreeing to compromise by proposing a bill of rights at the Virginia convention to zealously promoting a bill of rights in the first Congress.<sup>81</sup> On June 8, 1789, a year after the Virginia ratifying convention, Madison presented Congress with proposed amendments in the form of resolutions containing various specific provisions, drafted largely from Virginia's proposals.<sup>82</sup> In addition, Madison offered both a compelling defense of the need for a bill of rights and a summary of the justifications for the amendments he was proposing.<sup>83</sup>

While Madison based his proposed ninth amendment on the state proposals,<sup>84</sup> his draft included additional language that specifically pro-

by Congress for what became the ninth amendment. See *infra* notes 272–284 and accompanying text.

78. See B. Schwartz, *supra* note 52, at 764–65.

79. See *id.* at 840–45.

80. See 2 B. Schwartz, *supra* note 52, at 911–12 (New York); *id.* at 970 (North Carolina); 1 Elliot's Debates, *supra* note 25, at 334 (Rhode Island). The New York proposal is set forth in the text accompanying note 240, *infra*. While the North Carolina and Rhode Island proposals were submitted after Congress had proposed the Bill of Rights for ratification by the States, Sager, *supra* note 12, at 246 n.14, they reflect the concern of the later state conventions with confronting the potential implications of the addition of a bill of rights to the Constitution.

81. See L. Levy, *supra* note 12, at 163–65; D. Farber & S. Sherry, *supra* note 73, at 226.

82. See L. Levy, *supra* note 12, at 166.

83. 1 Annals of Cong., *supra* note 21, at cols. 431–42. Madison's proposal for the text of the ninth amendment is found at 1 Annals of Cong., *supra* note 21, at col. 435.

84. See, e.g., M. Goodman, *The Ninth Amendment 4–6* (1981); B. Schwartz, *supra* note 41, at 142; Caplan, *supra* note 14, at 250–52, 254; Dunbar, *James Madison and the Ninth Amendment*, 42 Va. L. Rev. 627, 631–32, 634 (1956); Massey, *supra* note 12, at 310 n.26 (1987); Van Loan, *Natural Rights and the Ninth Amendment*, 48 B.U.L. Rev. 1, 12 n.68 (1968); Comment, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. Chi. L. Rev. 814, 820 n.25 (1966). For a comparison of Madison's draft and the state

hibited an inference diminishing "the just importance of other rights retained by the people."<sup>85</sup> This additional language raises the issue of whether Madison intended to prohibit an inference against additional limitations on granted powers or sought to refer only to the rights retained residually by virtue of the Constitution's limited grants of power to the federal government. Moreover, Madison's explanation of the proposed amendment in a speech he gave before Congress has proven equally enigmatic and has created controversy concerning the support it lends to affirmative rights or residual rights readings of the ninth amendment.<sup>86</sup>

Unfortunately, the legislative history of Congress's adoption of the ninth amendment is extremely sparse. A House select committee consisting of one representative of each state then in the Union, with Madison representing Virginia, reviewed, revised and approved Madison's proposed amendments.<sup>87</sup> This committee put the ninth amendment essentially in its present form, altering Madison's proposal mainly by eliminating the explicit focus on preventing an inference of enlarged powers.<sup>88</sup> But the debates in committee or the houses of Congress add nothing to an understanding of the proposed amendment or any of the changes made in its language, inasmuch as the Senate conducted its sessions in secret and the House deliberations include nothing of substance about the amendment.<sup>89</sup> Moreover, with the exception of some fascinating correspondence concerning a debate within the Virginia assembly over the merits of altering the language of the original Virginia state proposal,<sup>90</sup> the history of the amendment's ratification also offers no assistance in considering it. The key to discovering the original meaning of the ninth amendment, then, appears to lie in a fuller understanding of the debate over the demand for a bill of rights during the struggle over ratification of the Constitution.

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proposals, a contrast that supports the view that Madison drafted from the proposals, see *infra* notes 245–246 and accompanying text.

85. 1 *Annals of Cong.*, *supra* note 21, at col. 435. Part V *infra* addresses the questions raised by Madison's proposal and the changes made during its consideration by Congress.

86. For Madison's explanation, see 1 *Annals of Cong.*, *supra* note 21, at col. 439. For an analysis of Madison's explanation of the ninth amendment, see *infra* notes 261–269 and accompanying text.

87. See Caplan, *supra* note 14, at 257–58.

88. The committee's proposal reads: "The enumeration in this Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." See Dunbar, *supra* note 84, at 632. Prior to its passage by the entire House, "the Constitution" was substituted for "this Constitution," and a comma was added. Caplan, *supra* note 14, at 258.

89. See Caplan, *supra* note 14, at 258 & n.150.

90. See *infra* notes 271–297 and accompanying text (discussing letters from Hardin Burnley to James Madison and from Madison to President Washington).



### III. THE TEXTUAL POSSIBILITIES: THE NINTH AMENDMENT IN ITS HISTORICAL SETTING

[T]he very ease with which we can bridge the gap between our thought and that of the founders makes it too easy to assume that there is no gap, that the historical distance between 1987 and 1787 or 1868 is effectively zero. The unwary originalist may expect, as it were, that Madison, Wilson, Hamilton, and the rest can participate in our contemporary constitutional conversation without the aid of a translator.<sup>91</sup>

A pervasive theme of modern constitutional thought has been that the modern mind confronts difficulties in approaching historical materials bearing on the Constitution's meaning.<sup>92</sup> Among other problems, there exists the constant danger of falling into anachronistic readings, of succumbing to the fallacy of seeing the past as a mirror of our concerns in the present. Present-day interpreters are at even greater risk of committing the "past as mirror" fallacy when they conclude that the constitutional text addresses modern issues before fully understanding the historical context that produced the text upon which they rely.

The constitutional historian may be able to move beyond her anachronistic reading by immersing herself more deeply in the historical materials. But if the "plain meaning" of the constitutional text is used as an excuse to forego careful contextual research, the possibility of correcting an anachronistic reading is foreclosed. Moreover, the danger of missing a text's intended meaning through insufficient attention to context goes beyond the problem of entering distant worlds. The predominant modern view in both statutory construction and the law of contracts confirms the theoretical insight that the ambiguity of a text is often revealed only by reading it in a context that includes extrinsic evidence of intended meaning.<sup>93</sup> When the text is derived from a setting which is in many ways unfamiliar, whether it be the custom and practice within an industry or the world of the framers, special caution is appropriate lest it be determined that the meaning of the text is plain without closely examining its context.

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91. Powell, *supra* note 35, at 673.

92. See, e.g., Brest, *The Misconceived Quest for the Original Understanding*, 60 *B.U.L. Rev.* 204, 219-21 (1980); Kelly, *supra* note 33.

93. In the field of contract interpretation, for example, most courts and commentators now recognize that the two-step process for applying the parol evidence rule, in which interpreters first determine that a provision is ambiguous before they consider the usefulness of proffered extrinsic evidence, in practice collapses into a single step; the required "ambiguity" is potentially present in nearly all texts and is frequently brought to light by the extrinsic evidence. See, e.g., Farnsworth, "Meaning" in the Law of Contracts, 76 *Yale L.J.* 939, 957-65 (1967); Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 *Cornell L.Q.* 161, 164, 188-90 (1965). Similarly, "plain meaning" analysis in the field of statutory interpretation, when used to imply that extrinsic evidence bearing on meaning may be excluded from consideration, has been soundly criticized and widely rejected. See, e.g., R. Dickerson, *The Interpretation and Application of Statutes* 229-33 (1975).

Despite the modern consensus about the risks of unaided textualism, the temptation to pronounce the meaning of legal language to be plain sometimes proves irresistible. In an era dominated by debate over the legitimate sources of constitutional rights, the ninth amendment has provided just such a text. According to those who see the amendment as a source of affirmative limitations on government, its text "by force of its terms protects unenumerated rights of the people."<sup>94</sup> And at least one commentator, Douglas Laycock, has thus contended that "[i]t would take extraordinarily clear evidence of a different intent to overcome constitutional language that so clearly proclaims the existence of unenumerated rights."<sup>95</sup>

Indeed, some modern commentators go so far as to contend that the ninth amendment text precludes the traditional residual rights reading. Laycock claims, for example, that no amount of extrinsic evidence can "turn a clause about 'rights retained by the people' into one allocating powers between the state and federal governments."<sup>96</sup> Others argue that if the ninth amendment were designed to limit the powers of the national government, the text would have focused on "powers" instead of "rights."<sup>97</sup> Furthermore, it is argued, the amendment's "rights" focus is properly contrasted with the tenth amendment's explicit focus on reserving powers not granted to the national government.<sup>98</sup> After concluding that the tenth amendment appears to do everything that the traditional reading asserts that the ninth amend-

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94. L. Levy, *supra* note 12, at 269; see also Macedo, *Reasons, Rhetoric, and the Ninth Amendment: A Comment on Sanford Levinson*, 64 *Chi.-Kent L. Rev.* 163, 168 (1988) (ninth amendment is "an elastic clause for individual rights that is at least as explicit as the article I elastic clause for Congress' powers"); Moore, *The Ninth Amendment—Its Origins and Meaning*, 7 *New Eng. L. Rev.* 215, 217 (1972) ("The meaning of the language contained in this Amendment appears quite simple and obvious."); Paust, *Human Rights and the Ninth Amendment: A New Form of Guarantee*, 60 *Cornell L. Rev.* 231, 237 (1975) ("It seems clear from the language of the ninth amendment that certain rights exist even though they are not enumerated in the Constitution.").

Levy later asserts that the ninth amendment text "does protect the unenumerated rights of the people, and no reason exists to believe that it does not mean what it says." L. Levy, *supra* note 12, at 275. A major problem with both of Levy's assertions is that they are ambiguous enough so that an advocate of the residual rights interpretation, which defines retained rights by reference to the scope of enumerated powers, could agree with them, but mean something quite different from Levy's view. It is clear that Levy is referring to "rights" as affirmative limitations on governmental power. Interestingly, the same problem is a feature of virtually all of the statements about the ninth amendment text made by the modern commentators cited in the text above.

95. Laycock, *supra* note 17, at 351–52. For the consequences for interpreting the ninth amendment of raising this sort of presumption based on a reading of language out of context, see *infra* notes 265–269 and accompanying text.

96. *Id.* at 352.

97. See, e.g., Dunbar, *supra* note 84, at 633; Massey, *supra* note 12, at 310; Mitchell, *supra* note 12, at 1728; Levinson, *supra* note 5, at 142; Paust, *supra* note 94, at 238–39; Sager, *supra* note 12 at 246.

98. See sources cited *supra* note 97.

ment was intended to accomplish,<sup>99</sup> a growing number of scholars embrace John Hart Ely's claim that "the conclusion that the Ninth Amendment was intended to signal the existence of federal constitutional rights beyond those specifically enumerated in the Constitution is the only conclusion its language seems comfortably able to support."<sup>100</sup>

For a text as to which so much has been claimed, however, there has been little real analysis of the language of the ninth amendment. Moreover, almost none of the analysis that has been done has addressed the historical context of the ratification period that produced the ninth amendment. Clearly, the provision's central term is its reference to "rights," with the apparent aim being to preserve and protect rights of the people that are not specifically set forth in the Constitution. Proponents of the "residual rights" reading of the amendment dispute neither of these points. But the question is whether the textual reference to "rights," or to "rights retained by the people," tells us the nature of these interests or the mechanism by which those interests are to be protected.

The ninth amendment's prohibition of an inference against additional rights uses the term "others" to refer back to the rights enumerated in the Constitution, whether in the bill of rights or the body of the Constitution—provisions that recognize independently definable legal limitations on governmental power on behalf of individual rights.<sup>101</sup> To the modern reader, the language and structure may suggest that the unenumerated rights referred to are a string of additional individual rights protections of the same type as the enumerated rights. When the amendment's language is placed in even a general historical context, however, it becomes clear that the text does not unequivocally suggest that its purpose is to ensure the judicial enforceability of unenumerated affirmative limitations on government.

While the founding generation was certainly familiar with legally enforceable individual rights, their concern with protecting the rights

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99. Indeed, a common argument is that the traditional reading of the ninth amendment is implausible because it merely repeats the tenth amendment. See, e.g., J. Ely, *supra* note 3, at 34–35; Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 *Ind. L.J.* 309, 310 (1936); Laycock, *supra* note 17, at 349; Sager, *supra* note 12, at 246. While the redundancy argument will be more fully addressed as part of the consideration of the total context of the ninth amendment, the textual emphasis on "rights" and "powers" will be treated here. As to the "redundancy" argument, see *infra* notes 335–340 and accompanying text.

100. J. Ely, *supra* note 3, at 38; accord D. Farber & S. Sherry, *supra* note 73, at 381.

101. While the Constitution as originally drafted lacked a "bill" of rights, it did include some specific limitations on behalf of particular rights. Madison's initial proposal for the ninth amendment made reference to "exceptions here or elsewhere in the Constitution, made in favor of particular rights." 1 *Annals of Cong.*, *supra* note 21, at col. 435. While these legal limitations appear to us as "individual" rights, we shall see that it is not clear that all of the limitations contemplated were originally conceived of as ensuring purely individual rights.

of the people extended to the protection of interests that modern constitutional scholars might not think of as individual rights and to mechanisms for securing those interests other than the legal enforcement of specific limitations on the exercise of governmental power. To them, the people's rights included communal interests in self-government and related values, and both individual and communal rights were seen as being legally ensured by the structural provisions of their constitutions as well as by specific provisions in bills of rights.<sup>102</sup>

As Robert Palmer has observed, provisions found within the state constitutions of the founding era "are very diverse and do not conform to an individual rights model."<sup>103</sup> A typical state constitution's bill of rights included a mixture of individual liberties and communal rights—for example, the right or freedom to reform government, to hold government officials accountable and to control the "internal police" of the state.<sup>104</sup> While under one view such constitutions "thus favored individual liberties less than [they] favored a freedom-enhancing majoritarian government,"<sup>105</sup> an underlying assumption was that meaningful individual freedom is best safeguarded through the assurance of continued republican government.

Similarly, while article 1, section 9 of the federal Constitution contains similar individual rights provisions, it mainly contains limitations on the federal government "necessary to retain the vitality of states as independent governmental units."<sup>106</sup> Even so, Federalist defenders of the Constitution likened its provisions to the protections that might be included in a bill of rights, in part because the safeguards provided by the federal system were viewed as just as important to protecting the rights of the people as legal limitations originating in specific liberties.<sup>107</sup>

Many of the proposals for amendments generated at the state ratifying conventions sought to establish not specific and legally enforceable individual rights but rather structurally-oriented protections

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102. See generally Palmer, *Liberties as Constitutional Provisions: 1776-1791*, in *Liberty and Community: Constitution and Rights in the Early American Republic* 55, 61-86 (W. Nelson & R. Palmer eds. 1987) (documenting state constitutions' emphasis on communal rights to preserve republican government as the central liberty).

103. *Id.* at 62.

104. *Id.* at 63-64 (Pennsylvania), 68 (Virginia), 68-69 (Maryland), 70-75 (Massachusetts).

105. *Id.* at 68.

106. *Id.* at 95; see generally *id.* at 87-96 (documenting claim that constitutional limitations on federal power were intended to preserve the role of the states).

107. As Robert Palmer observes, "[f]or many people republican state governments still represented the basic liberty—they were liberty-enabling and liberty-enhancing structures—and the opposition to federal power went well with preservation of rights." Palmer, *supra* note 102, at 107. Thus one opponent of the Constitution complained that "the liberties of the states and of the people are not secured by a bill or DECLARATION of RIGHTS." 2 Ratification of the Constitution, *supra* note 46, at 210, 211 (An Officer of the Late Continental Army, Nov. 6, 1787).

designed to preserve state power to the end of avoiding perceived threats to the people's rights.<sup>108</sup> They reflected the Antifederalist contention that the Constitution was "inconsistent with the liberty and happiness of the people, as its establishment will annihilate the state governments, and produce one consolidated government that will eventually and speedily issue in the supremacy of despotism."<sup>109</sup> These proposals included various restrictions on federal legislative power, limits on the jurisdiction of federal courts and guarantees of the retention of specific state powers.<sup>110</sup> Because many would have seen the right to be governed by a republican government at the state level as the most basic liberty, and because the greatest threat which many saw the Constitution posing was the undermining of state governments, it is not surprising that a provision like the tenth amendment is the only one that appears in the proposals of every ratifying convention that offered any.<sup>111</sup>

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108. See generally Palmer, *supra* note 102, at 108–15.

109. The Dissent of the Minority of the Convention (Pennsylvania) (Dec. 18, 1787), 2 Ratification of the Constitution, *supra* note 46, at 639, cited in Palmer, *supra* note 102, at 109. An important New York Antifederalist, John Lansing, argued: "The states, having no constitutional control, would soon be found unnecessary and useless, and would be gradually extinguished. When this took place, the people would lose their liberties, and be reduced from the condition of citizens to that of subjects." 2 Elliot's Debates, *supra* note 25, at 307, 308 (June 24, 1788).

110. See *supra* note 108 (documenting state proposals).

111. See B. Schwartz, *supra* note 41, at 157–58. Another important Antifederalist theme that linked the guarantee of personal liberty to the preservation of state authority was the claim that the supremacy clause (and the Constitution generally) empowered Congress to enact laws that would override all state law, including the basic rights of the people as embodied in the state constitutions' declarations of rights. See, e.g., 2 The Complete Anti-Federalist, *supra* note 51, at 245, 246 (Letters From the Federal Farmer, Oct. 1787); 2 Ratification of the Constitution, *supra* note 46, at 309, 310 (Cumberland County Petition to the Pennsylvania Convention, Dec. 5, 1787); 2 *id.* at 386, 386 (John Smilie, Pennsylvania Ratifying Convention, Nov. 28, 1787). While many preferred simply to reject the Constitution, others proposed the adoption of specific rights guarantees (to limit federal power) and a general reservation of sovereign power that would at least ensure that state law was displaced only pursuant to authority clearly and specifically granted by the Constitution. At least one advocate of a residual rights reading has thus linked the ninth amendment to this goal of preserving state law rights, with the implication that the reservation of state power generally is provided by the tenth amendment while the reservation of rights is dealt with by the ninth. See Caplan, *supra* note 14, at 259–64.

But the fear of displacement of state law was really a variation on the general Antifederalist themes of unlimited powers and consolidated government. Maryland's Antifederalist minority, for example, proposed that "Congress shall exercise no power but what is expressly delegated by this Constitution." Address of a Minority of the Maryland Ratifying Convention (May 6, 1788), in 5 The Complete Anti-Federalist, *supra* note 51, at 92, 94. Its proponents claimed that, pursuant to this provision, the "general powers given to Congress" by the necessary and proper clause and the supremacy clause would be restrained, constructive powers prevented, and "those dangerous expressions by which the bills of rights and constitutions of the several states may be repealed . . . in some degree moderated." *Id.* at 94–95. These arguments lead directly to the tenth

There is, however, an even more central reason why proposals anticipating the tenth amendment were proposed by each ratifying convention that proposed amendments. It is because the fears that gave rise to the tenth amendment stood near the center of the debate over the omission from the Constitution of a bill of rights, that it was viewed by its proponents as crucial to ensure the rights of the people. Modern legal scholars largely perceive the tenth amendment as nothing more than a federalism provision, not as a provision to protect individual rights.<sup>112</sup> But the Antifederalists who insisted upon the provision that became the tenth amendment saw it as a means for reserving rights to the people; the Federalists who opposed them agreed, but felt that the provision was repetitive since article I of the Constitution already reserved rights to the people by enumerating the powers of the federal government.

The theory of the proposed Constitution rested on the model of the Articles of Confederation: in creating a national government of limited and defined powers that related to specific objects of national concern, with a general reservation of all other rights and powers, the Constitution preserved the rights and interests of the states and the people. However, the Antifederalists distinguished the Constitution from the Articles of Confederation in two ways. First, various constitutional provisions, including the wording of the particular grants of power, effectively conferred general powers upon the national government that might allow it to threaten the people's rights.<sup>113</sup> Even if the

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amendment as drafted by Madison, even while they further underscore that inferences against rights to be reserved structurally were feared as much as deficiencies in the elaboration of specific limitations on governmental power. The ninth amendment preserves residual rights against the more particular dangers posed by the enumeration of other rights.

112. This tendency in modern thought is reflected in the fact that law school courses on the bill of rights or those dealing with incorporation of the bill of rights through the fourteenth amendment generally ignore the tenth amendment. On the other hand, courses on governmental powers, dealing with the issues of federalism and separation of powers, treat the long-debated implications of the tenth amendment as important components of the course. There are good reasons for this division of the curriculum, but the division has nonetheless weighed too heavily on modern thinkers approaching the materials related to the ninth and tenth amendments and their relationship to each other.

Indeed, many students wonder about the place of the tenth amendment in the bill of rights, and it is not uncommon for people incorrectly to refer to the bill of rights as the first eight amendments to the Constitution. Earl Maltz has observed, for example, that both Representative John Bingham and Senator Jacob Howard referred to the first eight amendments as the bill of rights to be incorporated by the fourteenth amendment. See Maltz, *supra* note 6, at 982.

113. Antifederalists consistently pointed to the broad wording of the commerce clause, the supremacy clause and the necessary and proper clause as provisions that belied any intention to create a government of limited powers. See, e.g., 2 *The Complete Anti-Federalist*, *supra* note 51, at 245, 246-47 (Letters from the Federal Farmer, Oct. 12, 1787).

Constitution provided in theory for a reservation of rights, Antifederalists feared that as a practical matter there would be none remaining after the national powers were defined.

Second, because the Constitution omitted the provision in the Articles of Confederation that had expressly stipulated that each State "retains every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States,"<sup>114</sup> the Antifederalists contended that it would be construed as a surrender of all rights and as confirming an intent to create a government of unlimited powers.<sup>115</sup> It is thus no coincidence that the ratification-period writings and speeches objecting to the omission of a bill of rights almost uniformly refer to the omission of an express general reservation of rights and powers,<sup>116</sup> and that a remedy for the omission was universally demanded as part of a bill of rights.

Addressing the Massachusetts ratifying convention, Samuel Adams referred to a proposal for a general reservation of powers and asserted: "This appears, to my mind, to be a summary of a bill of rights, which gentlemen are anxious to obtain."<sup>117</sup> In Virginia, Patrick Henry summed up his argument that a bill of rights was "indispensably necessary" by insisting "that a general positive provision should be inserted in the new system, securing to the states and the people every right which was not conceded to the general government."<sup>118</sup> Also in Virginia, George Mason insisted that without such a general reservation "many valuable and important rights would be concluded to be given

114. 1 Ratification of the Constitution, *supra* note 46, at 86.

115. The centrality of the omission from the Constitution of article II of the Articles of Confederation to the Antifederalist argument for a bill of rights was first clarified for this author by the work of Russell Caplan. See Caplan, *supra* note 14, at 235-36, 246-47; see also 3 Elliot's Debates, *supra* note 25, at 445, 445-46 (Patrick Henry, Virginia Ratifying Convention, June 14, 1788); 4 *id.* at 152, 152 (Samuel Spencer, North Carolina Ratifying Convention, July 29, 1788); Thomas Jefferson to James Madison, *in* 4 Ratification of the Constitution, *supra* note 46, at 482-83 (Dec. 20, 1787).

116. See, e.g., A Democratic Federalist, *in* 2 Ratification of the Constitution, *supra* note 46, at 193, 194 (Oct. 17, 1787); A Federal Republican, *in id.* at 303, 304 (Nov. 28, 1787).

117. 2 Elliot's Debates, *supra* note 25, at 130, 131 (Samuel Adams, Massachusetts Ratifying Convention, Feb. 1, 1788). Indeed, one Federalist, Edmund Pendleton, contended that an express provision clarifying the idea of a general reservation of rights and powers would be a better means of protecting rights than an enumeration of specific rights. Edmund Pendleton to Richard Henry Lee (June 14, 1788), *in* 2 The Letters and Papers of Edmund Pendleton 1734-1803, at 532-33 (D. Mays ed. 1967).

118. 3 Elliot's Debates, *supra* note 25, at 445, 445 (Patrick Henry, Virginia Ratifying Convention, June 14, 1788). In North Carolina, Samuel Spencer contended that if there were in the Constitution a guarantee that "every power, jurisdiction, and right, which are not given up by it, remain in the states," there would be no need for a bill of rights. 4 Elliot's Debates, *supra* note 25, at 163, 163 (Samuel Spencer, North Carolina Ratifying Convention, July 29, 1788); see A Federal Republican, *in* 2 Ratification of the Constitution, *supra* note 46, at 303, 304, 306 (Nov. 28, 1787) (need for a bill of rights or declaration that all "not decreed to Congress" is reserved to the States).

up by implication.”<sup>119</sup>

These Antifederalist demands for a general reservation of rights and powers illustrate both points made above. First, the proposals were referred to as “rights” provisions, though by their terms they purported to reserve sovereign power rather than recognizing any particular individual right in the modern sense. Second, the rights thus guaranteed were ensured merely by clarifying the general premise that the national government was one of specific and limited powers.<sup>120</sup> This reliance on residual rights by those who advocated a bill of rights casts doubt on the assumption that the “rights” referred to in the ninth amendment must be affirmatively-defined limitations on behalf of individual rights. The affirmative rights assumption also ignores the historical significance of the tenth amendment to the Antifederalists responsible for its inclusion, who saw it as the very summary of a bill of rights.<sup>121</sup>

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119. 3 Elliott’s Debates, *supra* note 25, at 444, 444 (George Mason, Virginia Ratifying Convention, June 14, 1788).

120. Significantly, Adams and Mason clearly saw the proposed reservation as protective of the people’s “retained” rights even though both referred specifically to “rights” and “powers” reserved by “the states” or “the several states.” 2 Elliott’s Debates, *supra* note 25, at 130, 131 (Samuel Adams, Massachusetts Ratifying Convention, Feb. 1, 1788); 3 *id.* at 444, 444 (George Mason, Virginia Ratifying Convention, June 14, 1788). This suggests that modern commentators’ dichotomy between power-allocative and rights-protective provisions is foreign to the thinking of the founders.

Similarly, while a number of Antifederalist spokespersons and state-proposed amendments drew from the language of the Articles of Confederation, reserving “every power, jurisdiction, and right,” see, e.g., 2 Ratification of the Constitution, *supra* note 46, at 424, 427 (Robert Whitehill, Pennsylvania Ratifying Convention, Nov. 30, 1787); Sager, *supra* note 12, at 246 n.14 (quoting the relevant proposals from Virginia and New York, as well as the floor proposal offered by Pennsylvanian Antifederalists), it was equally common for such state proposals (as well as speeches and writings) to refer only to reserved “powers,” see *id.* at 246 n.14 (quoting proposals from Massachusetts, South Carolina, and New Hampshire). In each case, it seems clear that the speakers are referring to the same idea of reserved sovereignty, whether advocated in terms of the states, as the Antifederalists tended to do, or in terms of “the people.” For example, when Patrick Henry referred to “rights” and Samuel Adams referred to retained “powers,” they made the same basic argument on behalf of the people’s rights. That Madison drafted the tenth amendment after the pattern of the less redundant state proposals thus does not appear to bear on the intended meaning of the tenth amendment as a general reservation of the people’s rights.

121. When the tenth amendment is thus recognized as a rights-protective provision, it supplies a quick response to the criticism of Justice Reed’s reference to the “rights” that were “reserved by the Ninth and Tenth Amendments.” *United Public Workers v. Mitchell*, 330 U.S. 75, 96 (1947).

Randy Barnett responds: “The Tenth Amendment does not speak of *rights*, of course, but of reserved ‘powers.’” Barnett, *supra* note 12, at 6. Interestingly, however, just two pages later Barnett relies on Jefferson’s response to the argument against the necessity for a bill of rights in which he justifies this need based on (among other things) the omission of an express declaration that “‘all is reserved in the case of the general government which is not given.’” *Id.* at 8 n.26 (quoting Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), reprinted in 1 B. Schwartz, *supra* note 52, at 606-07).



The Federalists went even further in asserting the efficacy of ensuring the rights of the people through a constitutional structure of delegated powers and reserved rights. They insisted that under the Constitution as proposed "the people evidently retained every thing which they did not in express terms give up."<sup>122</sup> Following this logic, it was commonplace during the ratification debates for Federalists to describe the system of enumerated powers, or the Constitution itself, as a "bill of rights."<sup>123</sup> But, like the Antifederalists, the "rights" to which they referred were not affirmative rights, for they were defined as the "residuum" of the "powers" granted the government by the Constitution; they referred instead to the relationship between individuals and the national government.<sup>124</sup> Under the Federalists' reasoning, many of these rights would be granted by the people to their respective state governments.<sup>125</sup>

The critical question, then, is not merely whether the ninth amendment contemplates that there are "rights" beyond those enumerated in the first eight amendments (or elsewhere); clearly, in some important sense, the ninth amendment does this. Rather, the question is what

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While Jefferson would not have been satisfied with such a provision as a substitute for specific guarantees, his argument confirms that the reservation of all powers not granted was viewed as an important rights-protective device.

122. Letter from Washington to Lafayette, 29 *The Writings of George Washington* 478 (J. Fitzpatrick ed. 1939), quoted in Berger, *supra* note 14, at 6. In a speech at the North Carolina convention referring to the security offered by enumerated powers, Archibald Maclaine used the terminology of the ninth amendment: "We retain all those rights which we have not given away to the general government." 4 *Elliot's Debates*, *supra* note 25, at 139, 141 (George Maclaine, North Carolina Ratifying Convention, July 28, 1788).

123. Before the Massachusetts ratifying convention, Dr. Jarvis put the argument this way:

When we talk of our wanting a bill of rights to the new Constitution, the first article proposed must remove every doubt on this head; as, by positively securing what is not expressly delegated, it leaves nothing to the uncertainty of conjecture, or to the refinements of implication, but is an explicit reservation of every right and privilege which is nearest and most agreeable to the people.

2 *Elliot's Debates*, *supra* note 25, at 151, 153 (Dr. Charles Jarvis, Massachusetts Ratifying Convention, Feb. 4, 1788). In Pennsylvania, Thomas McKean asserted that the limited delegation of powers "amounts in fact to a bill of rights." 2 *Ratification of the Constitution*, *supra* note 46, at 411, 412 (Thomas McKean, Pennsylvania Ratifying Convention, Nov. 28, 1787); accord, 3 *Ratification of the Constitution*, *supra* note 46, at 569, 569 (Letter from Samuel Holden Parsons to William Cushing, Jan. 11, 1788) ("[I]t is the ruler who must receive a bill of rights from the people and not they from him. Every power not granted rests where all power was before lodged . . .").

124. The concern for individual liberty in the ratification debates "was not concern for rights as such, not a concern for individuals and individualism, but for rights vis-à-vis the federal government." Palmer, *supra* note 102, at 115.

125. Thus one of New York's proposed amendments stated that rights and powers not "clearly delegated" are reserved to "the People of the several States, or to their respective State Governments to whom they may have granted the same." 2 *B. Schwartz*, *supra* note 52, at 911-12.

sort of protection the Constitution affords these rights. Federalists referred to the "rights of the people" as "powers reserved"<sup>126</sup> or as reserved rights and powers.<sup>127</sup> These statements call into question the argument that the ninth amendment's focus on "rights," as contrasted with the tenth amendment's emphasis on "powers," establishes the affirmative rights reading. And while Antifederalists contended that rights not expressly reserved were implicitly granted as government powers,<sup>128</sup> they agreed that many important rights might be secured by a general reservation of "rights" and "powers" not granted.<sup>129</sup> If the ninth amendment played a meaningful role in ensuring that the national government was limited to the originally granted powers, Federalists and Antifederalists together would have felt quite comfortable in asserting that it thereby protected retained rights.

John Hart Ely has suggested that constitutional interpretation should at least begin with the text.<sup>130</sup> Most ninth amendment commentators, however, have ended there as well, bringing their conclusions about the text to the contextual materials bearing on the amendment's meaning. While the materials reviewed here do not by themselves establish the correctness of any particular reading of the ninth amendment, they do establish that the text does not unequivocally point to additional affirmative rights.<sup>131</sup> Indeed, this brief review of the overall

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126. 2 Ratification of the Constitution, *supra* note 46, at 387, 388 (James Wilson, Pennsylvania Ratifying Convention, Nov. 28, 1787). Wilson also equated the terms in asserting that "the powers given and reserved form the whole rights of the people." *Id.* at 469, 470 (Dec. 4, 1787).

127. See, e.g., 3 The Records of the Federal Convention of 1787, at 255, 256 (M. Farrand ed. 1911) [hereinafter Farrand] (C.C. Pinckney) (delegation of powers reserves "every power and right not mentioned").

128. See, e.g., Essays by the Impartial Examiner, 5 The Complete Anti-Federalist, *supra* note 51, at 172, 175 (Feb. 20, 1788); Letters of Agrippa, 4 *id.* 68, 108 (Jan. 19, 1788); Letters from the Federal Farmer, 2 *id.* 214, 324 (Jan. 20, 1788).

129. See, e.g., Letters from the Federal Farmer, 2 The Complete Anti-Federalist, *supra* note 51, at 214, 324 (Jan. 20, 1788); sources cited *supra* notes 117-121.

130. J. Ely, *supra* note 3, at 16-17.

131. A final textual argument, not addressed at any length here, is the claim that it necessarily "disparages" unenumerated rights to give them a lesser status in our constitutional system than those found in the text. See, e.g., Massey, *supra* note 12, at 343; Tribe, *supra* note 12, at 105. But this argument depends on the assumption that the other rights retained by the people are affirmative rights rather than being defined residually and is therefore question-begging. Residual rights are not disparaged by having their true nature recognized. The argument also presumes that the affirmative limitations contained in the first eight amendments are the only plausible baseline for assessing whether unenumerated rights have been disparaged.

Given the role of the tenth amendment as a rights-protective provision, however, proponents of this argument must explain why the rights residually ensured there are not an equally appropriate baseline for such a comparison. This Article contends that historical evidence establishes that the ninth amendment's purpose was to prevent an inference adverse to the rights secured by the limited grants of power. If this historical argument is compelling, the noncontextual logic of the "disparagement" argument must yield to the framers' understanding. For cogent and powerful objections to the

context of the ratification period has confirmed the need to study more carefully the contextual materials to determine whether they shed additional light on what is at least an equivocal text.

#### IV. THE MISCHIEF GIVING RISE TO THE NINTH AMENDMENT

Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy . . . . That aim . . . is not drawn, like nitrogen, out of the air; it is evinced in the language of the statute, as read in the light of other external manifestations of purpose.<sup>132</sup>

We can understand the original meaning of the Constitution, in whole or in part, only by “plunging [ourselves] into the systems of communication in which [the Constitution] acquired meaning. . . .” The “law office history” of systematic anachronism and quotation out of context is unconvincing advocacy and unacceptable scholarship.<sup>133</sup>

The text of the ninth amendment can only be understood against the backdrop of the Federalist objection to a bill of rights that led to proposals for a provision clarifying the impact of an enumeration of specific rights on the rights retained by the people. The classic formulations of the mischief feared by inclusion of a bill of rights are found in the speech by James Wilson before the Pennsylvania ratifying convention<sup>134</sup> and the formulation of Alexander Hamilton in *The Federalist*.<sup>135</sup> These two statements also serve as compelling starting points for an analysis of the Federalist “danger” argument against a bill of rights: Wilson focuses the concern partly on the problem of an incomplete or imperfect enumeration of rights while Hamilton speaks of the risk of an inference of new or extended powers from the enumeration of “except-

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“disparagement” argument, even without engaging the issue as to whether the unenumerated rights are defined by reference to granted powers, see Rapaczynski, *supra* note 14, at 182–85.

132. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 *Colum. L. Rev.* 527, 538–39 (1947).

133. Powell, *supra* note 35, at 675.

134. The most quoted excerpt from Wilson’s speech and a treatment of it is found *infra* text accompanying notes 138–147. Wilson’s argument is especially important because Madison’s presentation of his proposed amendment to the first Congress largely parallels Wilson’s treatment, and Madison’s formulation has provided the starting and ending point for the historical analyses of a number of commentators. Even when additional formulations are also considered, commentators rarely concede that anything more than a plain meaning analysis of these two statements by leading figures in the debate or other statements by less well-known participants is required to see the connection between these formulations and an affirmative rights reading of the final text. See, e.g., L. Levy, *supra* note 12, at 270–72; Levinson, *supra* note 5, at 140–41. The few exceptions are examined in this Part of the Article.

135. For a discussion of Hamilton’s argument, see *infra* notes 171–180 and accompanying text.

tions” to power.<sup>136</sup> The issues of how these formulations relate to each other, and how (or whether) each relates to the drafting of the ninth amendment are central issues for ninth amendment analysis.

Affirmative rights advocates have focused on the Federalist concern that rights would be lost because the enumeration of rights in a bill of rights would inevitably be incomplete.<sup>137</sup> For them this concern translated into a fear that unwritten constitutional limitations, rooted in natural rights theory or the tradition of unwritten fundamental law (or both), would be lost by virtue of a positivist inference that the enumeration of rights implied that other rights are excluded. The purpose of this Part is to demonstrate that affirmative rights commentators have misperceived the role of the problem of imperfect enumeration in the Federalist “danger” argument and thus misunderstood the mischief that the ninth amendment was designed to address. Section A of this Part will analyze the Federalist formulations of the problem of imperfect enumeration of rights and their consequences and will show that the true Federalist concern was that the enumeration would undermine the system of reserved rights. Section B will show that the version of the “danger” argument that emphasized the risk of an inference of constructive power also focused on preserving the system of enumerated powers to secure the rights thereby thought to be retained. Finally, Section C will show that the discussion of natural and inalienable rights during the debate over a bill of rights confirms the enumerated powers and residual rights focus of the Federalist concerns about the bill of rights.

#### A. *The Federalist “Danger” Argument and the Problem of Imperfect Enumeration*

A brief portion of Wilson’s state convention speech referring to the problem of imperfect enumeration has become the centerpiece of the contextual argument for the affirmative rights reading of the ninth amendment. Wilson said:

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 ren-

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136. For a brief description of these formulations, with a summary of their relationship that anticipates this Part of the Article, see *supra* notes 64–69 and accompanying text.

137. See, e.g., J. Ely, *supra* note 3, at 35–36; Tribe, *supra* note 12, at 101; Redlich, *Are There “Certain Rights . . . Retained By the People”?*, 37 N.Y.U. L. Rev. 787, 805 (1962); Laycock, *supra* note 17, at 353.

dered incomplete.<sup>138</sup>

The “affirmative rights” reading of Wilson’s argument tends to draw upon what is perceived as the most straightforward reading of the text of the ninth amendment. Because affirmative rights commentators assume that the ninth amendment clearly refers to affirmative rights, they also assume that Wilson’s concern that “the rights of the people would be rendered incomplete” by an “imperfect enumeration” of rights alludes to a potential loss of unwritten limitations on granted powers.<sup>139</sup> But Wilson’s oft-quoted language has never been analyzed against the backdrop of the ratification-era debate over the omission of a bill of rights.

Most advocates of the affirmative rights reading of the Federalist argument have focused on Wilson’s concern that “the rights of the people would be rendered incomplete.” This ignores the context of the speech. The consequence of enumerated rights provisions, Wilson warned, was that “an imperfect enumeration would throw all implied power into the scale of the government.”<sup>140</sup> Indeed, Wilson’s fear of implied power belies the very dichotomy between “rights” and “powers” that affirmative rights proponents assume divides the ninth and tenth amendments.<sup>141</sup> A careful reading of Wilson’s entire argument confirms that Wilson feared the elimination of the rights secured by the system of enumerated powers.

Wilson’s argument can only be completely understood as part of the ratification debate over the nature of the proposed Constitution. In his speech, Wilson argued that inclusion of a bill of rights would amount to adoption of the Antifederalist view that the Constitution created a government of general powers from which the people must carve

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138. 2 Ratification of the Constitution, *supra* note 46, at 387, 388 (Pennsylvania Ratifying Convention, Nov. 28, 1787).

139. This inference flows from the tendency of leading commentators to emphasize the language of the ninth amendment’s final text while subjecting Wilson’s language to little or no analysis. See sources cited *supra* note 137. For Laurence Tribe, this modern tradition of assuming an affirmative rights understanding of Wilson’s argument is its own justification. See Tribe, *supra* note 12, at 101 (claiming that “[i]t is generally recognized that the ninth amendment was enacted in response to fears that specific enumeration of rights in the form of a Bill of Rights might someday be interpreted so as to defeat or belittle rights not included in the enumeration”). Given that Tribe clearly is referring to affirmative rights, his claim is literally untrue inasmuch as there is no such general recognition among students of the amendment. See sources cited *supra* note 14. In his published writings to date, Tribe is yet even to acknowledge that there is a competing interpretation of the language of the ninth amendment.

140. 2 Ratification of the Constitution, *supra* note 46, at 388 (Pennsylvania Ratifying Convention, Nov. 28, 1787).

141. Even so, few commentators have even acknowledged the “shuffling of the language of rights and the language of power” in the more important formulations of the Federalist position. Sager, *supra* note 12, at 249. For a treatment of Sager’s attempt to reconcile this “shuffling” of language with an affirmative rights understanding of the Federalist “danger” argument, see *infra* notes 155–165 and accompanying text.

specific exceptions. The consequence he foresaw was that the vast reservoir of rights and powers reserved to the people by the enumeration of powers would be forfeited.<sup>142</sup> In effect, Wilson contended that the people must choose between only two options: enumerated powers and reserved rights or enumerated rights and implied general powers.<sup>143</sup>

That Wilson's fear involved an inference against the Constitution's system of enumerated powers and reserved rights is reflected in the portion of the speech that immediately follows the language quoted above. Wilson continued:

On the other hand, an imperfect enumeration of the powers of government reserves all implied power to the people; and by that means the constitution becomes incomplete. But of the two, it is much safer to run the risk on the side of the constitution; for an omission in the enumeration of the powers of government is neither so dangerous, nor important, as an omission in the enumeration of the rights of the people.<sup>144</sup>

Wilson's argument is that enumerations (whether of rights or powers) are inevitably incomplete. What is important is whether government or the people will be advantaged by the inevitable omissions. In his view, a bill of rights that enumerated limitations on granted powers would shift the advantage to government and thereby undercut the "bill of rights" represented by the system of enumerated powers.<sup>145</sup> The re-

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142. Here it appears that one questionable argument begat another. The argument that the concept of rights reserved by the granting of limited powers *must be* made express, and cannot be gathered from the enumeration of powers and the necessary and proper clause read together, seems strained, though perhaps it is made more plausible by the argument that the omission of the even more explicit reservation of rights and powers contained in article II of the Articles of Confederation would be read as a deliberate change. Even so, this is clearly the weakest of the Antifederalist arguments concerning the absence of a bill of rights.

At the same time, Wilson preferred to make the most of this argument from general constitutional theory by insisting that the device of enumerating rights *necessarily* presumes a government of general powers, notwithstanding the express provision for reserved rights and powers advocated by his Antifederalist opponents.

143. Wilson's contention that the inevitably incomplete enumeration of rights "would throw all implied power into the scale of the government" must thus be read alongside the statement that a bill of rights enumerates the "powers reserved." 2 Ratification of the Constitution, *supra* note 46, at 387, 388 (Pennsylvania Ratifying Convention, Nov. 28, 1787). Because a bill of rights expressly enumerates reserved powers, Wilson argues that it will become the exclusive means of limiting power and that the Constitution's more general implication reserving a vast range of powers to the people (and states) would be reversed.

144. *Id.* at 388.

145. For the pervasive reference by Federalists to the system of enumerated powers as a "bill of rights," see *supra* note 123. Samuel Parsons makes the argument in so many words:

Every power not granted rests where all power was before lodged—and establishing any other bill of rights would be dangerous, as it would at least imply

sult would be a net loss in the effective protection of the rights of the people.

Wilson himself adopted this interpretation of his own argument, stating: "In short, sir, I have said that a bill of rights would have been improperly annexed to the federal plan, and for this plain reason, that it would imply that whatever is not expressed was given, which is not the principle of the proposed Constitution."<sup>146</sup> Notice that Wilson contends here only that a bill of rights is an improper addition *to the federal plan*; this argument does not require him to address the value of a bill of rights as to a government of general powers, but only as to one designed like the federal Constitution. The only "principle of the proposed Constitution" that Wilson defended was the concept of enumerated powers as a safeguard of the people's rights, and here he clearly articulated the view that the bill of rights posed a unique threat to "the federal plan."<sup>147</sup> By grafting their assumptions about the need to enumerate rights onto the original design, Wilson argued that Antifederalist advocates of a bill of rights would endanger the Constitution's structural protection of rights.

Other well-known formulations of the problem of imperfect enumeration support the view that it served as a minor premise in a broader argument that a bill of rights would undermine the scheme of enumerated powers and thereby decrease the effective protection of the people's rights. At the North Carolina convention, James Iredell argued that

[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>148</sup>

Iredell's argument follows Wilson's contention that the enumeration of rights already secured by the scheme of enumerated powers would imply that this was a government of general powers and that the enumerated rights constituted exclusive reservations on behalf of the

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that nothing more was left with the people than the rights defined and secured in such bill of rights.

Samuel Holden Parsons to William Cushing (Jan. 11, 1788), *supra* note 123, at 569.

146. 2 *id.* at 391 (Pennsylvania Ratifying Convention, Nov. 28, 1787).

147. Earlier, Wilson had been quite explicit that it was the enumerated powers concept that he referred to: "*In a government possessed of enumerated powers*, such a measure would be not only unnecessary, but preposterous and dangerous." *Id.* at 388 (emphasis added); see *id.* at 387-88 (proposal to adopt a measure "that would have supposed that we were throwing into the general government every power not expressly reserved by the people would have been spurned at, in that house, with the greatest indignation").

148. 4 Elliot's Debates, *supra* note 25, at 167 (July 28, 1788) (emphasis added).

people.<sup>149</sup> It also follows the Federalist pattern of formulating the feared “danger” as the reversal of the basic premise of the “necessity” argument. Madison, for example, first observed that the Constitution provides that “every thing not granted is reserved,” and then contended that “[i]f an enumeration be made of our rights” it will be “implied that every thing omitted is given to the general government.”<sup>150</sup>

Federalists acknowledged, moreover, that a bill of rights would be more appropriate to a government of general powers and they limited their statements of the danger to “a government possessed of enumerated powers.”<sup>151</sup> Some made explicit the implication that the argu-

149. That this was Iredell’s position is made even more apparent from a subsequent speech at the same convention. In that speech, Iredell expressed his fear that a later generation might deduce from a bill of rights that “the people did not think every power retained which was not given.” *Id.* at 149 (July 29, 1788).

150. 3 Elliot’s Debates, *supra* note 25, at 620 (June 24, 1788). Affirmative rights commentators read the Federalist statements without paying sufficiently close attention to all of their language. Sherry, for example, relies upon Iredell’s speech, quoted above, to support the conclusion that the Federalists opposed a bill of rights because a limited enumeration would inaccurately imply that the listed rights were the only affirmative limitations on governmental power. Sherry, *supra* note 12, at 1162–63. But Sherry assumes that the statement merely speaks for itself, and she thus fails to confront that it is the enumeration of “rights which are not intended to be given up”—i.e., those secured residually by enumerated powers—that undermines the system of limited powers and reserved rights so that government might invade any right not included “without usurpation.”

Similarly, Sherry quotes Madison as saying that a bill of rights would be dangerous “because an enumeration which is not complete is not safe.” *Id.* at 1163 (quoting 3 Elliot’s Debates, *supra* note 25, at 626 (Virginia Ratifying Convention, June 24, 1788)). This starkly worded statement is best understood if read along with Madison’s prior explanation (quoted *supra* text at note 150) that the crux of the danger is in the overturning of the enumerated powers scheme. Moreover, Madison clarified his point by asserting that “[s]uch an enumeration could not be made, within any compass of time, as would be equal to a general negation, such as his honorable friend (Mr. Wythe) had proposed.” *Id.* at 626–27. As the first recorded speaker of that day, George Wythe, a Federalist who acknowledged the need for amendments, advocated ratification along with a call for subsequent amendment and submitted a “resolution of ratification” for the consideration of the Convention. *Id.* at 587. Wythe’s resolution, later adopted by the Convention, made a point of stating the Convention’s understanding “that every power, not granted [by the Constitution], remains with [the people], and at their will; that, therefore, no right, of any denomination, can be cancelled, abridged, restrained, or modified, by the Congress . . . except in those instances in which power is given by the Constitution for those purposes.” *Id.* at 656. Madison linked the problem of an inevitably imperfect enumeration with the Federalist assumption that a vast range of rights, too numerous to list, are secured by the enumerated powers scheme and threatened by the insertion of a bill of rights.

151. 2 Ratification of the Constitution, *supra* note 46, at 388 (James Wilson, Pennsylvania Ratifying Convention, Nov. 28, 1787). As to necessity, Wilson argued: “[W]hen general legislative powers are given, then the people part with their authority, and, on the gentleman’s principle of government, retain nothing. But in a government like the proposed one, there can be no necessity for a bill of rights. For, on my principle, the people never part with their power.” *Id.* at 470 (Dec. 4, 1787).



ment did not apply to a government of general powers. In North Carolina, Iredell argued:

If we had formed a general legislature, with undefined powers, a bill of rights would not only have been proper, but necessary; and it would have then operated as an exception to the legislative authority in such particulars. It has this effect in respect to some of the American constitutions, where the powers of legislation are general. But where they are powers of a particular nature, and expressly defined, as in the case of the [federal] Constitution before us, I think, for the reasons I have given, a bill of rights is not only unnecessary, but would be absurd and dangerous.<sup>152</sup>

If the Federalists feared that the decision to enumerate rights would lead to the loss of unwritten affirmative limitations on governmental powers rather than the loss of the system of enumerated powers and reserved rights, the “danger” argument would have been cast as a general argument against all bills of rights and would have applied equally to state constitutions that granted legislatures general powers and the proposed federal Constitution with its carefully limited grants of power to Congress. The fear of an unintended positivist inference against implied rights logically would apply to the attempt to enumerate rights in any constitution. But Iredell’s statement is unequivocally to the contrary, stating that a bill of rights is both “necessary” and “proper” as to a government of general powers, but “unnecessary” and “dangerous” where government is granted “powers of a particular nature.” Iredell’s endorsement of the propriety of bills of rights in the states suggests that his fear is not for the loss of implied affirmative rights. Rather, if the danger is only present under the federal scheme, it can only be because Iredell fears the evisceration of the residual rights secured by the limited grants of power rather than the loss of implied affirmative limitations.

It is also significant that the Antifederalists interpreted the Federalists’ “danger” argument in the way that it has been outlined here. Indeed, as noted in the previous historical review, the “danger” argument basically confirmed the Antifederalist conviction that the proposed Constitution, with its lack of a general reservation of rights and its inclusion of a handful of basic rights, would create a government of unlimited powers.<sup>153</sup> According to the Antifederalists, the “danger” argument simply confirmed that if the Constitution were not amended,

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152. 4 Elliot’s Debates, *supra* note 25, at 149; accord 3 *id.* at 467 (Edmund Randolph, Virginia Ratifying Convention, June 15, 1788) (distinguishing a “compact” in which the legislature is granted “certain delineated powers” from an “ordinary legislature” with “no limitation to their powers;” acknowledging that a bill of rights might be necessary in the case of the ordinary legislature, but insisting that the “best security” in a compact “is the express enumeration of powers”).

153. See *supra* notes 71–73 and accompanying text.

the people would have parted with their rights.<sup>154</sup>

Modern commentators have for the most part ignored the language of Wilson and others that clarifies the Federalist view that the loss of all rights which were omitted from the bill of rights would flow from the destruction of the scheme of enumerated powers and reserved rights. Lawrence Sager is one of the few commentators to acknowledge that important formulations of the Federalist “danger” argument involve a “shuffling of the language of rights and the language of power”<sup>155</sup> that requires explanation. Even so, for Sager the enumerated powers/residual rights interpretation of Wilson’s concern that “an imperfect enumeration would throw all implied power into the scale of the government” reflects a “confusion” stemming from the way these words “appear to the modern reader.”<sup>156</sup> While Sager’s analysis supplies a conceivable explanation for the troublesome language in the formulations of Wilson and Madison, it does not place the Federalist argument in the setting of the competing positions discussed above about the nature of the proposed Constitution.<sup>157</sup>

Sager argues that, contrary to the modern mind’s tendency to refer to an act as being within the scope of a governmental power but nevertheless trumped or prohibited by an affirmative right, for Wilson and Madison “the power of a government was the net authority of that government to act.”<sup>158</sup> Under the Constitution, according to Sager, this meant that national power would be defined in terms both of “the withholding in favor of the states implicit in the enumerated powers struc-

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154. Thus, Patrick Henry virtually parodied the Federalist argument when he contended that the inclusion of rights such as the privilege of the writ of habeas corpus “reverses the position of the friends of this Constitution, that every thing is retained which is not given up; for, instead of this, every thing is given up which is not expressly reserved.” 3 Elliot’s Debates, *supra* note 25, at 461 (Virginia Ratifying Convention, June 15, 1788); see also 2 Ratification of the Constitution, *supra* note 46, at 427 (Robert Whitehill, Pennsylvania Ratifying Convention, Nov. 30, 1787) (suggesting that it would be “inferred, agreeably to the maxim of our opponents, that every other right is abandoned”).

155. Sager, *supra* note 12, at 249.

156. *Id.* at 248 (quoting Wilson), 247–50. Sager concludes that “[a] bill of rights was not resisted as a threat to the containment of federal power, but as a threat to the full realization of the very liberty it sought to protect.” *Id.* at 247. He fails to perceive, however, that the Federalists who advanced the “danger” argument viewed the system of enumerated powers as the best means of realizing “the very liberty [a bill of rights] sought to protect.” Paraphrasing Sager, then, a bill of rights was resisted as a threat to the containment of federal power *because* undermining of the limited power scheme would prevent the realization of the very liberty a bill of rights sought to protect.

157. Sager’s analysis is used to explain not only Wilson’s reference to implied power, but also Madison’s statement, made while recounting the Federalist “danger” argument to Congress, that omitted rights would be “assigned into the hands of the General Government.” 1 Annals of Cong., *supra* note 21, at col. 439. Madison made his recapitulation when he presented a proposed draft of the ninth amendment. It is treated more fully *infra* notes 262–269 and accompanying text.

158. Sager, *supra* note 12, at 250.

ture of the Constitution (made explicit in the tenth amendment) and the withholding in favor of personal rights.”<sup>159</sup> Therefore, according to Sager, when Federalists expressed fear that rights would be assigned into the hands of the national government, so as to enlarge its powers, this would “mean simply that you fear for the loss of rights not specified.”<sup>160</sup> On the other hand, Sager contends that “things do not run in the opposite direction: that is, it does not follow from this linguistic scheme that Madison would be led to speak of ‘rights retained by the people’ as a means of referencing withholdings of federal power in favor of the states.”<sup>161</sup>

However, it is clear from the ratification debates that both the Federalists and their opponents constantly referred to “withholdings of federal power” as “rights retained by the people.”<sup>162</sup> Sager’s error is reflected in his claim that Wilson and Madison would have understood the “net authority” of the national government in terms of separate “withholdings” in favor of the states and in favor of personal rights. According to Sager, the residual authority withheld from the federal government by “the enumerated powers structure” and the tenth amendment were viewed as withholdings only “in favor of the states” and not in favor of personal rights. The withholdings in favor of personal rights, on the other hand, were seen as affirmative limitations on government power, rather than as indicating the residuum of the granted powers.

These assumptions, however, are untenable. The Federalists did not view the system of enumerated powers as withholding power only on behalf of the states; indeed, the heart of the Federalist defense of the Constitution was that its system of enumerated powers adequately protected the rights of the people. Sager’s description of the enumerated powers device thus falls into the modernist trap of perceiving it, and its articulation in the tenth amendment, solely as a means to protect states’ rights.<sup>163</sup> He also commits the correlative error of sug-

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159. *Id.*

160. *Id.*

161. *Id.*

162. See *supra* notes 122 (Federalist reference to system of enumerated powers and reserved rights in language of ninth amendment) and 118 (Antifederalist reference to need for constitutional guarantee that rights not conferred to federal government be retained by states).

163. For others who commit this same error in analysis by focusing on the language of “powers” rather than “rights,” see *supra* notes 96–100 and accompanying text. The fallacy of this assumption is developed in Part III, *supra*. There is no question that when Federalists claimed that the national government lacked the power to invade cherished rights, they were referring to the limited reach of enumerated powers. Even affirmative rights advocates frequently acknowledge this much. See, e.g., L. Levy, *supra* note 12, at 147, 153–54; Levinson, *supra* note 5, at 140; Sherry, *supra* note 12, at 1161. A few commentators have suggested, however, that the Federalist argument rested on the assumption that the enumerated powers would be construed against the background of implied affirmative limitations. See *infra* note 218.

gesting that "rights retained by the people" must refer to affirmative rights because that language would not have been a way "of referencing withholdings of federal power in favor of the states."<sup>164</sup> What this contention overlooks is that the enumerated powers and reserved rights understanding of Wilson's argument does not view "rights retained by the people" as protecting the states; on this understanding, Wilson is seeking to protect the withholding of federal power in favor of the peoples' rights (defined residually by the enumeration of governmental powers).<sup>165</sup>

An alternative explanation for Wilson's focus on both the inference of implied powers and the problem of an imperfect enumeration of rights views the two areas of focus as distinct and independent concerns. In analyzing specific "imperfect enumeration" statements of

164. Sager, *supra* note 12, at 250 (emphasis added).

165. "Rights retained by the people" would have been a perfectly natural way of referring to withholdings of federal power in favor of the people by the device of enumerated powers. Moreover, even withholdings of power in favor of the states were viewed as structural devices for protecting the rights of the people. See *supra* notes 107-109 and accompanying text.

Even following Sager's conceptual scheme and describing governmental power as the "net" authority that government holds after subtracting relevant withholdings, it still makes little sense to view the Federalist fear that enumerating rights would greatly enlarge power as referring simply to an inference that additional specific limitations on government might be lost. Sager must account for Wilson's strong claim "that an imperfect enumeration *would throw all implied power into the scale of government.*" 2 Ratification of the Constitution, *supra* note 46, at 388 (Pennsylvania Ratifying Convention, Nov. 28, 1787) (emphasis added). Wilson and other Federalists could not have made such a strong claim about the "net" authority of the national government, consistent with their own theory of the Constitution, if their concern were focused only on losing unenumerated limitations on granted powers on behalf of personal rights.

According to Federalist theory, the inference that an unenumerated limitation was lost would not lead to the conclusion that government would have the power to invade the interest which that limitation would have specifically guaranteed. The government would still have to warrant the exercise of power under the heading of an enumerated power. Even if some net power were added to the government because certain potential limitations would fall within the scope of enumerated powers, this would not explain the Federalist prediction that listing rights would give all implied power to the government. That claim is best explained as expressing the concern that the structural presumption of enumerated powers would be reversed; it was not a concern merely about providing less security for any particular number of rights, however large or indeterminate. In short, if the "net power" model is actually read into the Federalists' constitutional theory, then their scheme of protecting rights through enumerated powers would still hold true. It was precisely the threat of losing the whole scheme that was at stake rather than one particular sort of protection (express limitations in favor of particular rights) that might be lost.

Sager's analysis also fails to confront the relationship between Wilson's argument and Hamilton's formulation of the "danger" argument. See *infra* notes 176-186 and accompanying text. Their common denominator, of course, is a fear that the scheme of limited and enumerated powers will be undercut by inferences drawn from an attempt to enumerate specific rights. As we will see, however, Hamilton's argument does not lend itself even to a plausible textual argument that he was concerned that unenumerated affirmative limitations might be omitted and thereby lost.

Federalists during the ratification debates, for example, Suzanna Sherry contends that “[t]he fear that an enumeration of rights would be construed to limit unenumerated rights is not the same as the fear that it would be construed to grant unenumerated powers to the federal government.”<sup>166</sup> Sherry suggests that Wilson was referring to both fears in his formulation of the “danger” argument at the Pennsylvania convention.<sup>167</sup>

Construed as a claim on behalf of affirmative limitations on granted powers,<sup>168</sup> Sherry’s statement seems doubtful. While it is linguistically possible that Wilson was articulating fears of quite separate

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166. Sherry, *supra* note 12, at 1163 n.153 (citing Kelly, *supra* note 33, at 151–54).

167. See *id.*, at 1163 n.153. There is room for doubt on this point inasmuch as the argument receives little elaboration by Sherry and is subject to alternative interpretations. On the one hand, Wilson’s convention speech clearly refers both to an inference of implied power and to the loss of omitted rights. However, according to the argument advanced here, the speech does so in a way that makes clear that the two consequences of adding a bill of rights to the federal Constitution are interconnected rather than wholly independent. It seems reasonable that Sherry would be attempting to separate these strands of argument. Moreover, she criticizes Alfred Kelly for treating Wilson as concerned only with an inference of implied powers, and Kelly only analyzed Wilson’s convention speech. *Id.* (citing Kelly, *supra* note 33, at 151–54). Finally, she seems to be describing the “imperfect enumeration” formulations when she describes “some of the original opponents of a bill of rights” as basing their objections “partly” on the impossibility of enumerating all of the people’s rights. See *id.*, at 1163 n.153.

Elsewhere, on the other hand, Sherry describes Wilson’s earlier address in the state house yard in Philadelphia as expressing a concern about the potential inference of enlarged powers, Sherry, *supra* note 12, at 1161 n.146. In that speech, Wilson anticipated Hamilton’s argument in Federalist No. 84 that the expression of exceptions to powers raises an inference of an underlying constructive power that requires such an exception. See *Speech in the State House Yard, in 2 Ratification of the Constitution, supra* note 46, at 168 (Oct. 6, 1787). Sherry’s insistence that the inference against unenumerated rights is not the same as an inference in favor of unenumerated powers may be rooted in a view that Wilson argued about constructive power in Philadelphia and referred to the threat posed to rights by a partial enumeration at the state convention. This interpretation of Sherry’s argument perhaps better reconciles her insistence that there are two separate fears (enlarged powers and diminished rights) with her apparent characterization of Wilson’s convention speech as voicing, perhaps exclusively, the latter ground of objection. *Id.* at 1162. The view that there are two quite unrelated Federalist objections about dangers posed by a bill of rights is criticized *infra* Part IV.B.

168. There is a sense in which Sherry’s statement would be analytically true and not totally without significance, but in which it would not carry the weight she intends. Under the enlarged powers and residual rights reading of Wilson’s argument—to the extent that the device of enumerated powers is undercut by the enumeration of rights—there are two quite distinguishable consequences: first, power flows to the national government from the people and from the states (with implications for the nature and form of our government, as well as the rights of the people understood in the broadest sense); and second, particular rights of the people that had been ensured residually are completely undercut (including the sorts of fundamental rights presumably intended to be reserved that might have been, but were not, included in the enumeration of rights). But Sherry is asserting that Wilson’s argument on its face includes an independent concern that enumerating rights would create an inference that unwritten affirmative rights that would otherwise limit the scope of granted powers would be lost.

inferences in favor of constructive power and against affirmative rights, the enlarged powers and residual rights construction accounts for both the language and the thread of argument between the opposing parties on the nature of the Constitution. Wilson's convention argument is cast as a single objection formulated alternatively in terms of an inference of implied powers and lost rights resulting from the undermining of the Constitution's basic design. Sherry offers no reason to question the conclusion that the threat to rights was the reversal of the inference of limited government represented by the enumeration of powers, not the loss of implied limitations.<sup>169</sup> While Sherry's treatment at least attempts to deal with the language about power, her basic claim appears to be yet another manifestation of the modern tendency to assume that the Founders' commitment to rights necessarily referred to affirmative limitations on governmental power.

B. *Formulations of the "Danger" Argument That Focus on Constructive Powers*

As we have seen, some formulations of the "danger" argument started with the premise that the enumeration of specific rights in a Constitution served to create "exceptions" to powers granted.<sup>170</sup> Accordingly, the view of some Federalists was that insertion of unnecessary exceptions would imply that the government had been endowed with some power (or powers) from which these exceptions were carved. The best known formulation emphasizing the fear of constructive powers is Alexander Hamilton's treatment of the argument in *The Federalist*. After presenting the familiar Federalist "necessity" argument, Hamilton continued:

I go further, and affirm that bills of rights, in the sense and in the extent in which they are contended for, are not only unnecessary in the proposed Constitution but would even be dangerous. They would contain various exceptions to powers which are not granted; and on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why for instance, should it be said, that the liberty of press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it

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169. Indeed, in the sense that she intends her claim, *supra* note 168, Sherry's insistence that the two fears—of inferences in favor of implied powers and against unenumerated rights—are not the same seems incorrect. As shown above, according to the arguments advanced by Wilson, Madison and Iredell the inferences of constructive powers and against retained rights are essentially the same, inasmuch as governments of general powers are linked to enumerations of rights and thus the whole scheme of limited powers (and, of course, the general reservation of rights that results from limited powers) is threatened by the listing of rights.

170. See *supra* notes 65–66 and accompanying text.

would furnish, to men disposed to usurp, a plausible pretence for claiming that power.<sup>171</sup>

Hamilton's argument poses difficult problems for affirmative rights commentators. In focusing on the risk that a bill of rights would provide a basis "to claim more [powers] than were granted," Hamilton unequivocally refers to a threat to the integrity of the system of enumerated powers. His concerns about constructive power clearly do not refer simply to a "fear for the loss of rights not specified."<sup>172</sup> His argument, therefore, does not lend itself to an affirmative rights interpretation.<sup>173</sup> Because of this, some affirmative rights commentators have sought to separate Hamilton's argument from Federalist concerns about the threat that a bill of rights would pose to rights omitted from an enumeration of rights.

One approach is to split the "danger" argument into two unrelated arguments—the first, represented by Hamilton's Federalist argument, refers to an inference of extended powers, the second, captured in Wilson's convention speech, refers to an inference of the loss of unenumerated affirmative rights. In perhaps the clearest formulation of this dual-objection view, Randy Barnett argues:

Enumerating rights in the Constitution was seen as presenting two potential sources of danger. The first was that such an enumeration could be used to justify an unwarranted expansion of federal powers . . . . The second source of danger was that any right excluded from an enumeration would be jeopardized.<sup>174</sup>

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171. The Federalist No. 84, *supra* note 59, at 579 (A. Hamilton) (emphasis added).

172. Sager, *supra* note 12, at 250. Sager does not cite to, nor attempt to explain, Hamilton's contribution to the dialogue. Hamilton's formulation refutes Sager's claim that the Federalists did not oppose a bill of rights because of the threat it posed to the containment of federal power. *Id.* at 247.

173. Indeed, at least two affirmative rights advocates point to Hamilton as articulating an independent, and perhaps exclusive, concern with constructive powers. See Barnett, *supra* note 12, at 10; Sherry, *supra* note 12, at 1161 & n.146, 1163 n.153.

It is remarkable that some modern affirmative rights commentators reject the traditional residual rights reading of the amendment and insist on an affirmative rights reading, but nevertheless cite Hamilton's treatment as though it supports their view. See, e.g., B. Patterson, *supra* note 29, at 9–10; L. Tribe, *Constitutional Choices* 43 (1985); Massey, *supra* note 12, at 309 n.22; Moore, *supra* note 94, at 250. Norman Redlich even quotes James Madison's statement that he would favor a bill of rights "provided it be so framed as not to imply powers not meant to be included in the enumeration," as though it supported his affirmative rights reading of the ninth amendment. Redlich, *supra* note 137, at 808 n.98. These commentators do not confront these constructive powers texts or attempt any sort of reconciliation between them and the affirmative rights understanding of the Federalist argument.

174. Barnett, *supra* note 12, at 10 (citation omitted); accord, D. Farber & S. Sherry, *supra* note 73, at 224. Ely also adopts the view that the Federalists articulated both objections, but he traces both to Madison. See J. Ely, *supra* note 3, at 34–35. Likewise, Sherry suggests that there are two independent objections, but her treatment is less than clear about which formulations she views to be the sources of these objections. See *supra* note 167.

But the suggested division between an exclusive focus on feared expansion of federal powers and on the fear only of the loss of affirmative rights misinterprets both Hamilton and Wilson. Wilson's expression of concern about rights omitted from an enumeration was a part of a broader argument about the impact of a bill of rights on the system of enumerated powers and retained rights.<sup>175</sup> It did focus on the expansion of federal power. While Hamilton's argument also expresses that concern, it is equally concerned with securing rights. This can be seen from the fact that Hamilton ultimately proceeds from the same premise as Wilson's convention argument. Both felt that inserting a bill of rights into the Constitution would be to acknowledge implicitly the validity of the Antifederalist claims and to adopt their theory of the Constitution.

Hamilton's formulation is thus basically a variation of Wilson's convention argument rather than an unrelated argument; he focuses on potential implications of enumerating rights that are akin to those identified by Wilson. Hamilton contends that since rights enumerated in a bill of rights are necessarily "exceptions to powers," the very enumeration of rights might suggest "to men disposed to usurp" freedom<sup>176</sup> that there must have been "constructive powers"<sup>177</sup> that would, but for the specific rights provision, have permitted invasion of that interest, and which perhaps might also be read to permit "proper regulations concerning" the subject matter of the right.<sup>178</sup>

Hamilton's argument is in one sense more narrowly focused than Wilson's in that it draws the inference of a constructive power from particular enumerated rights. In another sense, however, it clarifies the extent of the Federalist concern: not only might the failure to enumerate freedom of the press in a bill of rights tacitly acknowledge implicit federal powers over that right, but even the enumeration of such a right might create an inference that some broader regulatory power exists out of which the right was carved. The risk is not only that some rights will be lost, but that undermining the system of enumerated powers will implicitly serve to acknowledge—indeed, might effectively create—powers not intended in the Constitution as drafted.<sup>179</sup> A reasonable inference from Hamilton's argument is that even if a given right were to be enumerated in the proposed bill of rights, the interests that it was designed to protect might be less secure than under the Constitution's structural scheme. This would be because the regulatory power which

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175. See *supra* text accompanying notes 138–169.

176. The Federalist No. 84, *supra* note 59, at 579 (A. Hamilton).

177. The phrase is Hamilton's. *Id.* at 580. That the ninth amendment has as its concern the prevention of this inference of constructive power, to the end of ensuring reserved rights, is confirmed by Edmund Randolph's description of its purpose in these very terms. See *infra* notes 274–276 and accompanying text.

178. The Federalist No. 84, *supra* note 59, at 579 (A. Hamilton).

179. *Id.*



the enumeration of rights could be read implicitly to concede might overcome the enumerated right in an uncertain case.<sup>180</sup>

Just as the Antifederalists understood the partial enumeration formulations as referring to a fear of undermining the enumerated powers scheme,<sup>181</sup> they also understood the arguments emphasizing the possibility of constructive powers as concerned with preserving rights. For example, a Pennsylvania critic of Wilson's State House Yard speech (the speech that Hamilton's Federalist argument echoes) construed it as claiming that the "insertion of a bill of rights would be an argument against the present liberty of the people."<sup>182</sup> This would be because, the summary continued, "[t]o have the rights of the people declared to them, would imply, that they had previously given them up, or were not in possession of them."<sup>183</sup>

It would be natural for Federalist defenders of the Constitution to emphasize, as Wilson and Hamilton did, that an enumeration of rights posed serious risks to important rights. But the real crux of the Federalist position was that the people's power over their lives generally would be better preserved by the structure of the Constitution than by any explicit listing of rights. The Federalists contended that an innumerable range of powers reserved to the people—in other words, rights—would be forfeited,<sup>184</sup> and not simply those that might logically have been included in a bill of rights, if there were an enumeration. This interpretation of the Federalist argument is reinforced by the acknowledgment in New York's proposed amendments that rights and powers not delegated are reserved to "the People of the several States,

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180. Hamilton's argument may thus explain the concern that rights might be "disparaged" (as well as "denied") inasmuch as a resulting implied regulatory power could lead to restrictive legislation which might limit the scope of an individual right without altogether eliminating it.

181. See *supra* notes 153–154 and accompanying text.

182. A Federal Republican, *A Review of the Constitution*, in 14 *Ratification of the Constitution*, *supra* note 46, at 255, 274 (Oct. 28, 1787). This summary of the Federalist position was written a full month before Wilson's speech at the Pennsylvania ratifying convention in which he emphasized the problem of an imperfect enumeration of rights.

183. *Id.* at 275. This Pennsylvania Antifederalist's two-fold response underscores his structural understanding of the Federalist "danger" argument: first, he asserts that it is rational to declare the right of the people to what they already possess; and, second, the Constitution lacks a provision similar to that found in the Articles of Confederation reserving what is not granted, so that there is the need at least to declare that what is "not decreed to Congress" is retained. *Id.*

184. Thus Wilson claimed that, with a bill of rights, "*everything* that is not enumerated is presumed to be given." 2 *Ratification of the Constitution*, *supra* note 46, at 387, 388 (James Wilson, *Pennsylvania Ratifying Convention*, Nov. 28, 1787) (emphasis added); see *id.* at 389 (people can respond to call for bill of rights: "We reserve the right to do what we please"); *id.* at 470 (no need for bill of rights under the Constitution because "the people never part with their power"); 2 *Ratification of the Constitution*, *supra* note 46, at 167, 167–68 (James Wilson, *Speech in the State House Yard*, Oct. 6, 1787) (Constitution reserves all power other than that delegated to national government).

or to their respective State Governments to whom they may have granted the same.”<sup>185</sup> Little wonder, then, that Federalist James Iredell spoke of the impossibility of enumerating all of the rights that they would reserve, offering to add twenty or thirty more to any proffered list.<sup>186</sup>

That the alternative formulations of the Federalist objection to a bill of rights converge around a concern with preserving the Constitution’s system for securing the rights-protective system of enumerated powers is confirmed by the relevant amendment proposed by the Virginia ratifying convention.<sup>187</sup> Virginia’s seventeenth proposed amendment begins with the declaration “[t]hat those clauses which declare that Congress shall not exercise certain powers, be not interpreted, in any manner whatsoever, to extend the powers of Congress.”<sup>188</sup> While it might be thought that the reference to prohibitions on the exercise of certain powers is an odd way to refer to individual rights provisions, it should be recalled that Wilson referred to individual rights provisions as the enumeration of “powers reserved” and Hamilton described them as “exceptions” to granted powers.<sup>189</sup>

Of equal importance in discerning the connection between the Federalist “danger” argument and Virginia’s proposed amendment is the proposal’s statement that these limiting clauses 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>190</sup> This language steers through the troubled waters of the bill of rights debate, leaving the necessity issue unresolved while offering reassurance to Federalists who feared that to acquiesce in the inclusion of a bill of rights would be to capitulate to the view that the Constitution had granted the new gov-

185. New York Proposed Amendments 1788, in 2 B. Schwartz, *supra* note 52, at 911, 912. In the Federalist lexicon, the people’s “rights” vis-à-vis the national government included literally every conceivable power or prerogative, as implied by their professed belief that the people are the fountain of power; but some of these “rights” would be, in turn, granted as powers to state governments.

186. See 4 Elliot’s Debates, *supra* note 25, at 164, 167 (James Iredell, North Carolina Ratifying Convention, July 28, 1788), quoted *supra* text accompanying note 148.

187. For a brief review of the context of this state proposal, see *supra* notes 77–96 and accompanying text.

188. 2 B. Schwartz, *supra* note 52, at 844 (Virginia Ratifying Convention, June 27, 1788). The equivalent language from the New York proposal states “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.” *Id.* at 912 (New York Ratifying Convention, July 26, 1788).

189. See *supra* note 162 and accompanying text; *supra* note 171. The second sentence of the Virginia proposal, moreover, refers to such clauses as “exceptions,” 2 B. Schwartz, *supra* note 52, at 844 (Virginia Ratifying Convention, June 27, 1788), and Madison’s first draft of the ninth amendment, as presented to Congress, links the concept of rights to prohibitions on the exercise of power by referring to “exceptions . . . made in favor of particular rights.” 1 Annals of Cong., *supra* note 21, at col. 435.

190. 2 B. Schwartz, *supra* note 52, at 844 (Virginia Ratifying Convention, June 27, 1788) (emphasis added).

ernment general legislative powers. To the extent that national powers are construed broadly enough to threaten basic rights, the enumeration of those rights would act as "exceptions" to the specified powers. To the extent that the powers are themselves construed so as to leave an area of liberty untouched, the Constitution's limiting provisions are there "for greater caution," to offer reassurance to concerned citizens. The language suggesting that some of the enumerated rights may play only this cautionary role additionally served to counter Hamilton's fear of an inference that the perceived need to list such rights implied that broad constructive powers were intended.

In combination, the two clauses of the Virginia proposal serve to prevent the evisceration of the enumerated powers scheme. This is itself powerful evidence that the feared mischief was an inference against enumerated powers and reserved rights rather than the loss of unwritten affirmative rights. The historical context of Virginia's proposal lends additional strength to this conclusion. At the Virginia state convention, Madison couched the Federalist concerns in terms of the danger of an imperfect enumeration of rights and Patrick Henry answered with the devastating Antifederalist exploitation of the Federalist admission that it was dangerous to include only a partial listing of rights.<sup>191</sup> Given the likelihood that their respective objections to partial enumerations would be confronted by the proposals made at the convention, it is reasonable to conclude that the committee believed that the adopted language, including its specific focus on preventing an inference of extended powers, was sufficient to prevent the realization of the feared mischief concerning the unintended evisceration of reserved rights and the implication of enlarged powers.<sup>192</sup>

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191. See *supra* notes 150, 176 and accompanying text. One affirmative rights scholar fails to perceive Virginia's proposal to deal with partial enumerations of rights as being distinguishable from tenth amendment proposals (even though Virginia included both). See Sager, *supra* note 12, at 246 & n.14. Sager claims that state concerns about constructive powers "were not excited by guarantees of personal rights in the Constitution, of course, since there were virtually no such guarantees in the Constitution submitted to the states." *Id.* at 246. Considering that Sager misconstrued Wilson's formulation of the "danger" argument, and apparently missed Hamilton's even more unequivocal focus on constructive power, see *supra* notes 155-165 and accompanying text, it should not come as a surprise that he would not see the relevance to the ninth amendment of the Antifederalist critique of the argument against a bill of rights. That both the Federalist and Antifederalist arguments about partial enumerations of rights are reflected in the ninth amendment is confirmed, however, by the wording of Madison's proposal to Congress referring to "exceptions *here or elsewhere in the Constitution.*" 1 *Annals of Cong.*, *supra* note 21, at col. 435 (emphasis added).

192. Considering that the prospect of the adoption of a bill of rights was becoming more certain with each state ratifying convention, it would seem reasonable that a drafting committee that included both Madison and Henry, not to mention other important figures on both sides of the debate, would attempt to address the problem of the implications feared from the attempt to list fundamental rights.

Madison's initial proposal to Congress, moreover, which was developed in light of the ratification debate's focus on securing rights, described the "exceptions" made in

None of the commentators who view the ninth amendment as aimed at both preserving the system of enumerated powers and securing affirmative rights have confronted the difficult questions that their position raises. First, they have not explained why both objections were not addressed by the Virginia proposal, which seems to have been cast in response to Hamilton's expressed concern with the inference of expanded powers, particularly given Madison's expression of the supposedly independent fear for the loss of affirmative rights at the Virginia convention. The dichotomy they suggest also presumes that Hamilton's eloquently stated concern about constructive power is unrelated to the problem of unenumerated rights, so that the ninth amendment that emerges from the drafting process was not tied to Hamilton's concern. Yet a tradition going back to nineteenth-century commentators Joseph Story<sup>193</sup> and Thomas Cooley,<sup>194</sup> traces the ninth amendment to Hamilton's *Federalist* argument. The dual-objection commentators have not offered a persuasive reason to reject that tradition.<sup>195</sup>

### C. *The Federalist "Danger" Argument and the Tradition of Inalienable and Natural Rights*

The affirmative rights reading of the *Federalist* objection to a bill of rights is coherent only if the participants in the ratification debate shared the view that, in the absence of a bill of rights, the constitutional scheme would recognize fundamental law and natural rights as limitations on the exercise of the enumerated powers. Otherwise, an incomplete enumeration of rights would protect the people better than no enumeration at all. If the notion of an enforceable unwritten fundamental law were indeed pervasive, the danger posed by the enumeration of rights could then be the inference that the listing of rights was intended as a complete summary of rights, rather than a suggestion that there existed limitations on behalf of the inalienable rights that govern-

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favor of rights in the same terms as Virginia's proposal, as either "actual limitations" or "as inserted merely for greater caution." 1 *Annals of Cong.*, supra note 21, at col. 435.

193. See 3 J. Story, *Commentaries on the Constitution of the United States* 752 (reprint ed. 1968) (1833).

194. See T. Cooley, *The General Principles of Constitutional Law* 35-36 (1st ed. 1880).

195. When it is recognized that Hamilton is expressing concern with securing rights, though he speaks only of powers, both the design of the ninth amendment and the historical recognition of Hamilton as its source become clearer. See, e.g., B. Patterson, supra note 29, at 9-10; supra note 173 (describing other modern affirmative rights commentators who have assumed a connection between Hamilton's argument and the ninth amendment). Beyond the questions raised here, the proponents of a dual-objection theory of the *Federalist* case against a bill of rights must explain the bill of rights' drafting history, and in particular, the amendment's apparent zig-zagging between two quite different sorts of concerns. For a treatment of the problems raised, see infra notes 320-333 and accompanying text.

ments are created to secure and preserve.<sup>196</sup>

The possibility of providing affirmative security for fundamental rights is not inherently implausible, inasmuch as the idea that constitutional rights need not be embodied in text was not foreign to the framers.<sup>197</sup> For a large number of modern commentators, moreover, the framers' recognition of affirmative limitations rooted in natural law is the key assumption that undergirds the "straightforward" reading of the text.<sup>198</sup>

Evidence from the ratification debate, however, undercuts the idea that enforceable natural rights constituted the background assumption illuminating the Federalist objection to the inclusion of a bill of rights in the Constitution. To be sure, the concept of the people's sovereignty was rooted in both contractarian and natural law thinking. In Pennsylvania, Wilson contrasted systems of government which required a bill of rights, either as a "grant" from the king or by virtue of a "compact" with a sovereign legislature, with the American system of popular sovereignty by which the people already possessed all of their natural rights.<sup>199</sup> And the debate over a bill of rights largely revolved around the question of how best to secure the people's natural, inalienable rights.

As previously discussed, however, equally important to the debates

196. Even formulated in this way, however, the theory is somewhat strange. If the omission of a bill of rights was not thought to pose a threat to these rights because they are "inalienable" and therefore reserved because they "could not, in principle, be surrendered to the state," Hearings Before the Senate Comm. on the Judiciary, 100th Cong., 1st Sess. 3053 (1987) [hereinafter Bork Hearings] (testimony of David A.J. Richards), it is curious to think that these rights might nonetheless be endangered simply because they were omitted from an enumeration of rights. Enumerated powers aside, the inference from a written Constitution lacking a bill of rights that all such rights are granted away seems at least as plausible as the inference from an enumeration of rights that those not included are granted away. It is difficult to believe, moreover, that the Federalists were arguing otherwise.

197. Surely to ignore this possibility would be to fail to consider that some statements may reflect assumptions common to both spokespersons and audiences, but lost to a later generation. That is the implicit suggestion of the modern reading—that this common assumption was lost as our legal culture shifted to a more positivist view of the nature of the constitutional system. On the other hand, merely to assume that the ninth amendment involves affirmative rights protections stemming from our heritage of natural rights and unwritten norms, as constitutional scholars since Corwin have done, is as grievous an error as is ignoring a potential natural rights connection.

198. Commentators who have placed special weight on the natural rights views of the founding generation as a key to understanding the contemplated role of the ninth amendment include L. Levy, *supra* note 12, at 274–80; Grey, *supra* note 12, at 165; Massey, *supra* note 12, at 329–31; Moore, *supra* note 94, at 219–46; Paust, *supra* note 94, at 254–60; Sherry, *supra* note 12, at 1164–65; Van Loan, *supra* note 84, at 10–14. A large number of affirmative rights advocates, however, see in the ninth amendment an opposition to rigid positivism; but they would not necessarily embrace, or require that modern decision makers embrace, a natural rights theory.

199. See 2 *Ratification of the Constitution*, *supra* note 46, at 388–89, 391 (James Wilson, Pennsylvania Ratifying Convention, Nov. 28, 1787).

were the assumption that alternative legal systems might more or less adequately secure basic rights and the concern that some constitutional arrangements would have the effect of granting away those rights. When Patrick Henry objected that without a bill of rights the people would grant what they did not reserve, he offered this very appeal: "If you intend to reserve your unalienable rights, you must have the most express stipulation; for, if implication be allowed, you are ousted of those rights."<sup>200</sup> While Federalists rejected Henry's characterization of the Constitution, they did not disagree with his premise that even inalienable rights may be granted away. Wilson conceded that in a Constitution that granted to government a general legislative power, the people's most fundamental rights would be presumed to be granted unless specifically reserved.<sup>201</sup>

Modern thinkers, reading James Iredell's contention that an enumeration of "rights which are not intended to be given up" would imply that "every right not included in the exception might be impaired by the government without usurpation,"<sup>202</sup> believed him to be referring to implied limitations based on inalienable rights.<sup>203</sup> But Iredell's allusion to rights not "given up" instead refers to the reservation of rights by means of the enumerated powers. Iredell contended that the shift from this sort of implied reservation of rights to the device of enumerating specific rights would transform the conception of the Constitution to one of general powers subject to specific limitations, eliminating the idea of the people's reserved rights.

During the Bork hearings, one of Judge Bork's critics, David A. J. Richards, relied on the founders' theory of inalienable rights and sought to enlist Iredell to the affirmative rights cause. Richards quoted at length from one of Iredell's speeches to the North Carolina convention, in which Iredell predicted that a later generation would construe a

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200. 3 Elliot's Debates, *supra* note 25, at 445 (Virginia Ratifying Convention, June 14, 1788).

201. See 2 Ratification of the Constitution, *supra* note 46, at 470 (James Wilson, Pennsylvania Ratifying Convention, Dec. 4, 1787). In light of Wilson's position, it is misleading to use the ratification debate to assert that the Constitution reserved to the people "any powers not expressly granted . . . , including the wide range of inalienable human rights that could not in principle, be surrendered to the state." Bork Hearings, *supra* note 196, at 3053 (testimony of David A.J. Richards). Richards' summary of the Federalist "necessity" argument does not acknowledge that for the Federalists, rights were secured because the enumerated powers could not properly be construed to reach them, not because they existed as implied and inherent limitations on granted powers. Richards' statement misleadingly suggests that the unamended Constitution "reserved" affirmative limitations on governmental powers in favor of inalienable rights, but no one in the ratification debate suggested this reading of the constitutional scheme.

202. 4 Elliot's Debates, *supra* note 25, at 167 (North Carolina Ratifying Convention, July 29, 1788).

203. See Sherry, *supra* note 12, at 1164-66.

bill of rights as excluding unnamed rights.<sup>204</sup> According to Richards, Iredell prophetically anticipated the philosophy of Judge Bork "that would anachronistically limit the protection of rights to those enumerated rights protected in 1787 or 1791."<sup>205</sup>

Iredell's speech is highly relevant because it was delivered in the midst of the debate about how best to secure inalienable rights.<sup>206</sup> But Richards missed the thrust of Iredell's critique of a bill of rights. Within the very material Richards quoted, Iredell explains that his fear of a negative inference as to omitted rights rested on his prediction that a later generation would logically deduce from a bill of rights that "the people did not think every power retained which was not given,"<sup>207</sup> a clear allusion to enumerated powers and reserved rights. According to Iredell, natural rights are secured if there is "such a definition of authority as would leave no doubt"<sup>208</sup> so that "any person by inspecting [the Constitution] may see *if the power claimed be enumerated.*"<sup>209</sup> Iredell clearly feared the loss of the security provided by limited powers, not the loss of implied limitations on powers granted.<sup>210</sup>

204. See Bork Hearings, *supra* note 196, at 3047-48 (testimony of David A.J. Richards) (quoting Iredell, *in* 4 Elliot's Debates, *supra* note 25, at 149).

205. *Id.*, at 3047-48.

206. Iredell engaged Samuel Spencer in a dialogue over how best to secure the people's natural rights. Spencer objected that "[t]here is no declaration of rights, to secure to every member of the society those unalienable rights which ought not to be given up to any government." 4 Elliot's Debates, *supra* note 25, at 137 (North Carolina Ratifying Convention, July 28, 1788); see also *id.* at 138 (unalienable rights "are never to be given up"). The speech relied upon by Richards is Iredell's response to these statements, among others.

On the following day, Spencer contended that a general reservation of all rights not granted would have sufficed to provide the sought after security for inalienable rights, *id.* at 152, and he then argued for specific provisions to assure that there is a clear "fence" or "boundary" by which to measure when rights have been "trampled upon." *Id.* at 168.

207. *Id.* at 149. See *supra* notes 148-152 and accompanying text (treating other speeches by Iredell showing his understanding of the Federalist argument as referring to the limited powers scheme of the unamended constitution).

208. 4 Elliot's Debates, *supra* note 25, at 171 (North Carolina Ratifying Convention, July 29, 1788).

209. *Id.* at 172 (emphasis added). Iredell is here directly responding to Spencer's claim that inalienable rights require the protection of a "fence" to mark them off, which Iredell describes as the insistence that "there ought to be a fence provided against future encroachments of power." *Id.* at 171; see also *id.* at 137 (Spencer, North Carolina Ratifying Convention, July 28, 1788) ("[T]here ought to be something to confine the power of this government within its proper boundaries.").

210. While Richards reads Iredell's prophetic concern as reflecting a philosophy of natural and inalienable rights that provide inherent constitutional limits on governmental power, his lengthy quotation ends at the point where Iredell focused on the uniqueness of the federal constitution and acknowledged that a bill of rights would be both "necessary" and "proper" if "we had formed a general legislature." *Id.* at 149 (North Carolina Ratifying Convention, July 29, 1788); see note 152 and accompanying text. For Iredell, the key to securing rights is defined powers, and the danger of a bill of rights is that it might undercut that system; he would not describe his argument as one about

Eugene Van Loan has offered a unique variation on the inherent reserved rights theme that illustrates the analysis above.<sup>211</sup> Van Loan acknowledges that Wilson and Hamilton argued the danger of a bill of rights “in terms of implied power,” and he admits that a substantially equivalent argument was stated “in terms of reserved rights.”<sup>212</sup> According to Van Loan, however, although Madison recognized that certain “procedural” rights might be infringed by a broad construction of governmental powers through the necessary and proper clause, he believed that there could be no such “implication of power” with respect to “fundamental” rights because they were natural rights that were inalienable.<sup>213</sup>

In support of this unique theory, Van Loan claims that Madison argued on several occasions against “the implication of a power” in the area of fundamental rights.<sup>214</sup> But his only evidence from the ratification period is Madison’s statement to the Virginia ratifying convention that “[t]here is not a shadow of right in the general government to intermeddle with religion” and that the “least interference with it would be a most flagrant usurpation.”<sup>215</sup> In making this argument, Van Loan

affirmative limitations on behalf of inalienable rights as it has been reformulated by Richards and other modern commentators.

211. See Van Loan, *supra* note 84, at 10–16.

212. See *id.* at 7.

213. See *id.* at 10; see also *id.* at 10–16. Van Loan characterizes “trial by jury” and “the prohibition against general warrants” as “procedural limitations.” *Id.* at 10. According to Van Loan, the power to invade the interests that affirmative rights provisions like these would secure might be inferred from the Constitution because of the necessary and proper clause. See *id.* He claims that the distinction is buttressed by Madison’s reference to the right to trial by jury as a “positive right” that was necessary to protect the underlying natural right of liberty. See *id.* Considering, however, that the right to be free from general search warrants would have been thought of as a natural right, it is difficult to resist the conclusion that the main basis for Van Loan’s distinction among rights was simply Madison’s defense of the need for a bill of rights before Congress by pointing out that the power to collect revenues might be construed to include the power to use a general warrant. See *id.*

214. See *id.* at 10. In Madison’s Report on the Virginia Resolutions, one of the sources to which Van Loan cites, he presented a straightforward application of the enumerated powers doctrine as it was used during the ratification debates to respond to fears concerning the vulnerability of freedom of the press:

In reply to this objection, it was invariably urged to be a fundamental and characteristic principle of the Constitution, that all powers not given by it were reserved; that no powers were given beyond those enumerated in the Constitution, and such as were fairly incident to them; that the power over the rights in question, and particularly over the press, was neither among the enumerated powers, nor incident to any of them: and consequently that an exercise of any such power would be manifest usurpation.

Madison’s Report on the Virginia Resolutions, 4 Elliott’s Debates, *supra* note 25, at 546, 571–72 (1800).

215. See Van Loan, *supra* note 84, at 10 (quoting 3 Elliott’s Debates, *supra* note 25, at 330) (James Madison, Virginia Ratifying Convention, June 12, 1788). Van Loan also relies upon James Wilson and Edmund Randolph. See *id.* at 10 nn.56 & 57. Against the charge that the Constitution gave no security to the rights of conscience, Wilson re-



seems to take Madison's argument out of context. Madison was responding to Patrick Henry, who attacked the Federalist principle "that all powers not given are reserved" with the claim that the "sacred right" of religious freedom "ought not to depend on constructive, logical reasoning."<sup>216</sup> Madison answered with his own firm conviction that the Constitution could not properly be construed as having granted the

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sponded: "[W]hat part of this system puts it in the power of Congress to attack those rights? When there is no power to attack, it is idle to prepare the means of defence." 2 Elliot's Debates, *supra* note 25, at 455 (James Wilson, Pennsylvania Ratifying Convention, Dec. 4, 1787). Randolph asks of freedom of the press: "Where is the page where it is restrained? . . . I again ask for the particular clause which gives liberty to destroy the freedom of the press." 3 Elliot's Debates, *supra* note 25, at 469 (Gov. Edmund Randolph, Virginia Ratifying Convention, June 15, 1788). These are arguments from delegated powers and reserved rights, not implied limitations.

It is important to understand that these statements do not inquire after a provision that directly relinquishes the rights in question. Wilson and Randolph are simply asking to be shown a provision that could be fairly construed as empowering the national government to regulate these matters. See 2 Ratification of the Constitution, *supra* note 46, at 168 (James Wilson, Speech in the State House Yard, Oct. 6, 1787) (need to "stipulate" liberty of press would be present if power "to regulate literary publications" had been granted). That the Antifederalists obliged them by pointing to threatening provisions is one of the reasons why we have a bill of rights. See, e.g., *id.* Constitution, *supra* note 46, at 310 (Cumberland County Petition to the Pennsylvania Convention, Dec. 5, 1787); *id.* at 211 (An Officer of the Late Continental Army, Nov. 6, 1787); 13 *id.* at 460 (Centinal II, Philadelphia Freeman's Journal, Oct. 24, 1787); 2 *id.* at 194 (A Democratic Federalist, Oct. 17, 1787); 2 The Complete Anti-Federalist, *supra* note 51, at 245, 250 (Letters from the Federal Farmer, Oct. 12, 1787).

216. 3 Elliot's Debates, *supra* note 25, at 316, 317 (Patrick Henry, Virginia Ratifying Convention, June 12, 1788). Henry continues:

When our common citizens, who are not possessed with such extensive knowledge and abilities, are called upon to change their bill of rights . . . for construction and implication, will they implicitly acquiesce? Our declaration of rights tell us that "all men are by nature free and independent," &c. . . . Will they exchange these rights for logical reasons? If you had a thousand acres of land dependent on this, would you be satisfied with logical construction?

*Id.* at 318. Madison and others, of course, relied upon the very argument from grants and reservations being criticized by Henry. See 3 Elliot's Debates, *supra* note 25, at 620 (James Madison, Virginia Ratifying Convention, June 24, 1788); see also *supra* notes 60 & 150.

A variation on Van Loan's treatment is Thomas C. Grey's suggestion that the ninth amendment reflects Federalist arguments relying on implied limitations on grants of power to respond to the Antifederalist objection that the necessary and proper clause would yield a construction of federal powers that would permit violations of natural rights. Grey, *supra* note 12, at 163. Grey relies on the statement of Theophilus Parsons in his convention speech in Massachusetts, which was recorded in Elliot's Debates as follows:

Mr. Parsons demonstrated the impracticability of forming a bill, in a national constitution, for securing individual rights, and showed the inutility of the measure, from the ideas, that no power was given to Congress to infringe on any one of the natural rights of the people by this Constitution; and, should they attempt it without constitutional authority, the act would be a nullity, and could not be enforced.

power to meddle in religion;<sup>217</sup> he does not suggest that this is because the doctrine of implied powers does not apply when the exercise of governmental power might infringe on an inalienable right.<sup>218</sup>

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2 Elliot's Debates, *supra* note 25, at 161–62 (Theophilus Parsons, Massachusetts Ratifying Convention, Feb. 5, 1788).

Grey characterizes Parsons' contention "that no power was given to Congress to infringe on any one of the natural rights of the people" as a statement that such rights exist as implied affirmative limitations on the granted powers. Grey, *supra* note 12, at 163–64. But Parsons' argument cannot do this work. In the first place, Parsons' statement was not made in response to Antifederalist reliance on the necessary and proper clause. Moreover, the statement can more easily be read as yet another argument that such rights are protected by the Constitution's system of enumerated powers. See, e.g., Wilson and Randolph statements cited *supra* note 215. If Parsons were referring to implied limitations, rather than rights reserved by limited grants of power, his argument need not have been limited, as it was, to the prospect of including a bill of rights "in a national constitution." See also Parsons, *The Essex Result, in 1 American Political Writing During the Founding Era 1760–1805*, at 480, 507 (C. Hyneman & D. Lutz eds. 1983) (Parsons, as the principal author of a well-known revolutionary-era tract, opposed the proposed 1778 Massachusetts constitution in part because it omitted a bill of rights).

As we have seen, the Federalists generally defended the lack of a bill of rights with a straightforward argument about the limited nature of the granted powers and frequently acknowledged that a different question would be presented by a constitution that granted general legislative powers. See *supra* notes 58–59, 62–63, 122, 147–152, 207, 209 and accompanying text; *infra* note 218. For the only exception to this general rule along the lines of Grey's argument, written by a relatively obscure Federalist, see Essays by a Farmer, *in 5 The Complete Anti-Federalist*, *supra* note 51, at 69 n.3 (Maryland Gazette, Feb. 15, 1788) (quoting "Aristides," Maryland Journal and Baltimore Advertiser, Mar. 4, 1788) (arguing that, whatever the meaning of the Constitution's grants of power and the necessary and proper clause, "in exercising those powers, the Congress cannot legally violate the natural rights of an individual," and observing that "this again is all you could say, were there an express constitutional avowal of those rights"). But see Aristides, Remarks on the Proposed Plan of a Federal Government, *in 15 Ratification of the Constitution*, *supra* note 46, at 517, 537 (Jan. 31–Mar. 27, 1788) (if compact authorizes sovereign "to do all things it may think necessary and proper, then there is no limitation on its authority," and liberty rests on sound policy, good faith and the virtue of leaders; but when "compact ascertains and defines the power delegated," government cannot exert any power not conferred without "manifest usurpation").

Appearing as a change of position during a heated exchange, Aristides' argument attempted to answer powerful objections pointing up the weakness of the standard Federalist position. The argument was not, however, used in any formulation of the Federalist "danger" argument, and it contradicts the expressed views of the leading defenders of the Constitution, as well as the understanding of those views voiced by their articulate opponents. There is, therefore, no reason to think that this rather isolated argument had any influence on the course of debate that led to the ninth amendment.

217. See 3 Elliott's Debates, *supra* note 25, at 330 (Virginia Ratifying Convention, June 12, 1788).

218. Given the necessary and proper clause and the obvious potential for construing national powers broadly, it is frequently observed that the Federalist argument that the system of enumerated powers could substitute for an enumeration of rights had little to commend itself. See, e.g., L. Levy, *Original Intent and the Framers' Constitution* 270 (1988) (describing argument as "enormously unpopular and weak"); cf. Levinson, *supra* note 5, at 140 & n.43 (Hamilton's espousal of argument "does not fit altogether well with his defense of implied powers only four years later in relation to the chartering of the Bank of the United States"). Perhaps in part because of the weakness of the Federal-

Affirmative rights advocates also assume that the Antifederalists, as

ist argument, and in light of the tradition of inalienable rights that the people brought with them to the social contract, it has proven irresistible for some to construe the Federalist argument against the necessity of a bill of rights—that natural rights had not been given up in the Constitution—as a reference to the juridical status of natural rights as implied limitations on the granted powers.

The idea is that a bill of rights was unnecessary at least in part because the Federalists “expected these grants of power to be read against the background of accepted assumptions about natural rights” and hence conceived of as “subject to inherent limitations.” D. Farber & S. Sherry, *supra* note 73, at 380–81; see also Grey, *supra* note 12, at 163–64, discussed *supra* note 216. While the argument is only occasionally explicitly made, this assumption necessarily underlies the affirmative rights interpretation of the Federalist “danger” argument that a bill of rights would reverse the intended implication that all not granted was reserved. See, e.g., Sherry, *supra* note 12, at 1163 (quoting Iredell and describing reference to rights “not intended to be given up” as referring to natural rights of independent legal force rather than to residual protection offered by the constitutional structure).

Though this view can plausibly be applied to some formulations of the Federalist argument, a careful reading of the ratification debate demonstrates the dubiousness of this sort of interpretation of the Federalist ratification arguments about limited government. From Roger Sherman’s convention argument that a provision for freedom of the press was “unnecessary” because “[t]he power of Congress does not extend to the Press,” 2 Farrand, *supra* note 127, at 618, cited in L. Levy, *Original Intent and the Framers’ Constitution* 147 (1988), to Hamilton’s argument in *The Federalist* No. 84 that inclusion of a provision guaranteeing a free press would imply a power to regulate the press that was not given, the Federalist argument was that the nature and scope of the grants of power are the protections afforded the people’s rights by the proposed Constitution. See, e.g., *Plain Truth: Reply to an Officer of the Late Continental Army, in 2 Ratification of the Constitution, supra* note 46, at 219 (Nov. 10, 1787) (as Congress “can only have the defined powers given, it was needless to say anything about liberty of the press, liberty of conscience, or any other liberty that a freeman ought never to be deprived of”); *A Citizen of New Haven, in 3 id.* at 525 (Jan. 7, 1788) (attributed to Roger Sherman) (“The liberty of the press can be in no danger, because that is not put under the direction of the new government.”). The pains that the Federalists took to distinguish the proposed federal Constitution from the constitutions of the states and of England is evidence of the unique structural nature of their argument for reserved rights from specific and limited powers. See *supra* note 163.

Antifederalists, moreover, uniformly expressed this understanding of the Federalist defense in contending, as Madison did before the first Congress, that the enumerated powers could well be construed so as to invade valuable rights, and that the Constitution would indeed be construed so as to permit the abuse of fundamental rights. 1 *Annals of Cong.*, *supra* note 21, at col. 438 (June 8, 1789); *supra* notes 50–52, 111, 113 & 215 and accompanying text. Federalists never responded to these claims by accusing their opponents of misconceiving the original Federalist contention. Even affirmative rights commentators have acknowledged that the Federalist defense of the Constitution focused on the concept of limited powers rather than implicit affirmative rights, though they frequently miss the implication of this recognition for their position. See sources cited *supra* note 163. Other scholars have joined in this characterization of the Federalist position. See, e.g., Hamburger, *supra* note 14, at 315–16 (arguing that Federalists believed that the precise “enumeration of federal powers provided a clear boundary between federal power and the people’s rights”); Pole, *supra* note 45, at 18; Introduction to Chapter 3, *in 2 Ratification of the Constitution, supra* note 46, at 323 (Federalists contended that “a bill of rights was unnecessary because it was a federal government”); Editor’s Introduction, *in Letters from the Federal Farmer to the Republican* xxxiii (W.

proponents of inalienable rights, conceived of the bill of rights simply as supplying greater security to rights having an inherent constitutional status—rights that would have served as legal limitations on granted powers even in the absence of a bill of rights. David Richards, for example, quotes at length from the well-known *Letters from the Federal Farmer*, a powerful critique of the Constitution by a thoughtful exponent of natural rights.<sup>219</sup> Indeed, the *Federal Farmer* clarifies the idea that a bill of rights does not “change the nature of things, or create new truths,” but seeks rather to “establish in the minds of the people truths and principles which they might never otherwise have thought of, or soon forgot.”<sup>220</sup> For Richards, this amounts to saying that the bill of rights was merely a textual embodiment of the natural rights system, a set of provisions that memorialize “the principles of republican morality.”<sup>221</sup> As the ninth amendment reminds us, it is not a complete embodiment.

Antifederalists, while believing in natural rights, were also hard-headed realists when it came to the issue of securing inalienable rights in law,<sup>222</sup> as the *Federal Farmer* demonstrated. As the editor of a modern edition of this work has observed, the *Farmer* “makes clear that he considers many of man’s rights to be natural but insists that the existence of natural rights is in itself no guarantee of freedom.”<sup>223</sup> Like other

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Bennett ed. 1978) (summarizing Federalist position that government would have limited powers, making bill of rights unnecessary); R. Berger, *Congress v. The Supreme Court* 344 (1969) (same).

219. See Bork Hearings, *supra* note 196, at 3057. The Letters from the Federal Farmer were attributed during the founding period to Richard Henry Lee of Virginia, but there is now considerable dispute concerning their authorship. See Editor’s Introduction, *Letters from the Federal Farmer*, 2 *The Complete Anti-Federalist*, *supra* note 51, at 215–16. Whoever was the author of the *Letters*, he relied extensively on natural rights doctrine, and at one point carefully distinguished among “natural” rights, which men bring with them to civil society, “fundamental” rights, such as trial by jury, which are basic guarantees designed within society’s institutional framework to secure basic interests, and more ordinary rights that are granted and withdrawn by legislatures incidental to the promotion of the public good. *Id.* at 261 (Dec. 25, 1787).

220. Bork Hearings, *supra* note 196, at 3057 (quoting *The Anti-Federalist* 80–81 (H. Storing ed. 1985)).

221. *Id.* at 3058.

222. After summarizing the debate as to whether, under the Constitution, the people had reserved all powers not granted or would be understood to have granted all power not expressly reserved, the author concludes: “But the general presumption being, that men who govern, will, in doubtful cases, construe laws and constitutions most favorably for encreasing [sic] their own powers; all wise and prudent people, in forming constitutions, have drawn the line, and carefully described the powers parted with and the powers reserved.” *Letters from the Federal Farmer*, in 2 *The Complete Anti-Federalist*, *supra* note 51, at 248 (Oct. 12, 1787); see also *A Democratic Federalist*, in 2 *Ratification of the Constitution*, *supra* note 46, at 193, 194 (Oct. 17, 1787) (complaining that Constitution does not clearly state that all powers not given are reserved; comparing Constitution with Articles of Confederation, which did contain such a statement).

223. Editor’s Introduction, in *Letters from the Federal Farmer to the Republican*, *supra* note 218, at xxxiv.

Antifederalists, the *Farmer* rejected the Federalist argument that inalienable rights were ensured by the Constitution's structure partly because of the absence of an express reservation of rights to undergird the enumerated powers scheme, but more fundamentally because he did not think the national powers were adequately limited and defined.<sup>224</sup> Like Patrick Henry and others, the *Farmer* expressed concern that the scope of the powers granted by the Constitution was uncertain, and he acknowledged that, as to governments of general legislative powers, the people do indeed grant all powers that they do not reserve.<sup>225</sup> Whatever additional purposes it might serve, then, a bill of rights—at least for the *Farmer*—was not a mere reminder, but a strict necessity to prevent an inference that fundamental rights had been granted.

The *Federal Farmer*, however, lucidly developed the theme that there may be “different modes of proceeding” in the granting of needed powers and the reserving of essential rights according to the nature of the government involved.<sup>226</sup> He recognized, moreover, that the perceived need to secure basic rights through enumerated limitations on national powers was in conflict with the tradition that, as to a government established “to manage a few great national concerns,” it was “easier to enumerate particularly the powers to be delegated to the federal head, than to enumerate particularly the individual rights to be reserved.”<sup>227</sup> It is at this point that the *Federal Farmer* lends powerful support to the traditional view of the ninth amendment not only by acknowledging the theoretical soundness of securing natural rights by defining powers and the risks of partially enumerating rights, but even more fundamentally by offering a potential solution to the conflict along lines suggestive of the eventual design of the ninth and tenth amendments.

The *Farmer's* argument bears quoting at some length:

When we particularly enumerate the powers given, we ought either carefully to enumerate the rights reserved, or be totally silent about them; we must either particularly enumerate both, or else suppose the particular enumeration of the powers given adequately draws the line between them and the rights reserved, particularly to enumerate the former and not the latter, I think most advisable: however, as men appear generally

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224. Among other things, he contended that the supremacy clause effectively abolishes the authority of all “ancient customs, rights, the laws or the constitutions heretofore established”; that the supremacy of national treaties grants unlimited power inasmuch as it is not limited to those enacted pursuant to the Constitution; and that the necessary and proper clause ensures that the powers would not be limited to a few national objects. Letters from the Federal Farmer, in 2 *The Complete Anti-Federalist*, supra note 51, at 246–47 (Oct. 23, 1787).

225. See id. at 323–24 (Jan. 20, 1788).

226. Id. at 323.

227. Id. at 324.

to have their doubts about these silent reservations, we might advantageously enumerate the powers given, and then in general words, according to the mode adopted in the 2d art. of the confederation, declare all powers, rights and privileges, are reserved, which are not explicitly and expressly given up. . . . But admitting, on the general principle, that all rights are reserved of course, which are not expressly surrendered, the people could with sufficient certainty assert their rights on all occasions, and establish them with ease, still there are infinite advantages in particularly enumerating many of the most essential rights reserved in all cases; and as to the less important ones, we may declare in general terms, that all not expressly surrendered are reserved.<sup>228</sup>

Though steeped in the tradition of natural rights, the *Federal Farmer* engaged in a careful analysis of how best to secure those rights in a system of positive constitutional law. His answer was to enumerate "the most essential rights" and to express explicitly the general principle of reserved rights and powers to supplement the protection offered in the partial enumeration.<sup>229</sup> It is noteworthy that the *Farmer's* scheme contains no allusion to the independent legal and constitutional status of natural rights.

Indeed, in the midst of the ratification-era debate over the advantages and disadvantages of express and implied reservations and enumerated powers and enumerated rights, there was virtually no discussion of the force of natural rights standing alone. This is, no doubt, because the crux of the debate was how best to secure these rights in positive law.<sup>230</sup> While arguments from silence are always dangerous, it seems strange that the idea of implied affirmative rights was a

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228. *Id.* It is important to acknowledge, however, that the author is not anticipating the ninth amendment as such because he contemplates an explicit general reservation of rights in a provision similar to the tenth amendment. Nevertheless, this formulation powerfully anticipates the shape of the compromise that the contending parties eventually reached: a combination of specific limitations and a general reservation of rights as a comprehensive system for securing the rights of the people.

229. The *Federal Farmer* even appears to provide a critique of Wilson's insistence that the question is an either-or sort of issue: you must either enumerate powers and reserve rights, or enumerate rights and thereby imply general powers. Suggesting that the Federalist "danger" argument rests on "general indefinite propositions without much meaning," he goes on to assert that "the man who first advanced [the "danger" argument] . . . signed the federal constitution, which directly contradicts him." *Id.* at 323. If I understand the argument, it is that Wilson claimed that a bill of rights would be dangerous even though he embraced a Constitution that purports to limit government both by a system of enumerated powers *and* by a partial enumeration of rights.

230. Thus Antifederalists perceived the Federalist argument concerning enumerated powers and retained rights as "the only security that we are to have for our natural rights," A Democratic Federalist, in 2 Ratification of the Constitution, *supra* note 46, at 193 (Oct. 17, 1787), and the Federalists never disputed the claim. For the Constitution's opponents, the implication was clear: "There is no check but the people." 2 Ratification of the Constitution, *supra* note 46, at 386 (John Smilie, Pennsylvania Ratifying Convention, Nov. 28, 1787).

central underlying assumption common to those who participated in the process that led to the adoption of the ninth amendment, but was used only to articulate, quite ambiguously, the perceived risks created by including a bill of rights. If the constitutional and legal status of unenumerated rights were so firmly established, surely the protection offered these rights by the background assumption of implied rights would have been a natural and straightforward response to the argument that a bill of rights was an absolute necessity.<sup>231</sup>

More fundamentally, Wilson and others relied on the concept of rights reserved by the device of enumeration and clearly referred to the risk that enlarged powers that effectively undercut reserved rights would be implied from the enumeration of rights. What they never provided was an unequivocal argument that some background principle of enforceable, unwritten rights would be undercut by an enumeration of rights. The affirmative rights reading thus asks us to prefer an incomplete argument to one that was fully advanced.<sup>232</sup>

By contrast, it is possible to find statements, similar to Hamilton's, objecting to a bill of rights because it might provide an inference of enlarged powers where there is no explicit reference to rights at all. Indeed, when Madison wrote to Jefferson in October of 1788 expres-

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231. The view that there was a nearly universal tacit assumption of enforceable implied limitations on government also runs against the grain of the secondary argument employed by many Federalists—the argument that bills of rights are basically “parchment barriers” that offer little security to rights and that the ultimate security of rights must be an aroused public. See, e.g., *The Federalist* No. 84, *supra* note 59, at 580 (security of “liberty of the press” must depend on public opinion and spirit of people and government “whatever fine declarations may be inserted in any constitution”); 3 *Elliot's Debates*, *supra* note 25, at 190–91 (Edmund Randolph, Virginia Ratifying Convention, June 9, 1788) (“maxims” contained in a bill of rights “cannot secure the liberties of this country”); Madison to Jefferson, in 1 B. Schwartz, *supra* note 52, at 614, 616 (Oct. 17, 1788) (“experience proves the inefficacy” of “parchment barriers” in a bill of rights).

232. When Federalist statements that seem to lend the greatest force to the “diminished rights” position are read in context, in each case they seem focused on preserving the structural protection of rights offered by the Constitution. An example is Edmund Pendleton's query: “Again is there not danger in the Enumeration of Rights? May we not in the progress of things, discover some great and important [right], which we don't now think of?” Letter of Edmund Pendleton to Richard Henry Lee, in 2 *The Letters and Papers of Edmund Pendleton* 532–33 (D. Mays ed. 1967) (June 14, 1788). This statement appears to support the affirmative rights position, but only if it is taken out of the context of the author's entire course of argument. Pendleton first asserts that the people's rights are best protected on “the Broad and sure ground of this Principle—that the people being Established in the Grant itself as the Fountain of Power, retain every thing which is not granted.” *Id.* at 532. Then, after raising the concern that important rights might not be included, he observes that “[t]here the principle may be turned upon Us, and what is not reserved, said to be granted: If therefore Gentlemen think something should be done, it would seem to me more proper to do as Massachusetts proposes—Declare the Principle—as more safe than the Enumeration.” *Id.* at 533. The point, once again, is that the express reservation of rights jeopardizes the basic theory of the federal Constitution, and not that a listing of rights might generate rigid positivism in construing the Constitution.

sing support for a bill of rights, he qualified his support, noting that he favored such a bill, "provided it be so framed as not to imply powers not meant to be included in the enumeration."<sup>233</sup> One could read Madison's comment as an expression of concern that the government's net power might be enlarged because affirmative rights were lost, but the statement seems more consistent with the Federalists' concern about inferences of enlarged powers and against rights reserved by the limited grants of power. Along with the state convention proposals offered to confront the problem of enumerating specific limitations, Madison's statement provides compelling support for the residual rights understanding of the mischief feared by the opponents of a bill of rights.

#### V. THE DRAFTING AND RATIFICATION PROCESS: FULFILLMENT OR REVISION?

If the originalist does not justify historically his choice among the historical options, his arguments will be completely unconvincing because they are logically defective: without historical justification for his choice, his "use" of history is nothing but a normative conclusion decorated with quotations from the founders. If he denies or ignores the existence of other plausible historical viewpoints, he adds deception to fallacy.<sup>234</sup>

The amendments to the Constitution proposed by the several state conventions forbade an inference of extended powers from specific limitations on powers. These proposals powerfully reinforce the conclusion that the mischief that Federalists feared was the subversion of the scheme of enumerated powers and residual rights.<sup>235</sup> Residual rights commentators thus see continuity in the progression from the state proposals' prohibition of an inference of extended powers, through Madison's addition of language prohibiting an inference against the "just importance" of other retained rights, to the eventual elimination by the House Select Committee of the "powers" language in favor of securing "rights" against denial or disparagement.<sup>236</sup>

On the other hand, since the state proposals prohibit the inference that Congress's powers had been extended, they offer no security to any affirmative limitations on granted powers. Affirmative rights proponents are thus left with only two alternatives in defending their account: they must either show grounds for concluding that there is no connection between the state convention proposals and the ratification debates or Madison's drafting of the ninth amendment, or that at some

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233. James Madison to Thomas Jefferson, in 1 B. Schwartz, *supra* note 52, at 614, 615 (Oct. 17, 1788).

234. Powell, *supra* note 35, at 689.

235. See *supra* notes 77-80, 187-192 and accompanying text.

236. For a summary of the drafting history, including a brief account of the evolution of the ninth amendment's text, see *supra* notes 81-90 and accompanying text.



point during the process of drafting (and revising) the amendment, Madison or other members of Congress altered their visions of what the amendment would do.

Section A confirms the conclusion that Madison drafted the ninth amendment from the Virginia and New York proposals and refutes recent claims that these state proposals are unrelated to the ninth amendment. Section B suggests that the transition from a textual focus on powers to a focus on rights did not reflect a substantive departure from the state proposals' purpose of shielding the system of limited powers against any adverse inference from the listing of rights. Section C, in turn, discusses the materials that commentators have relied upon to support their conclusion that, in drafting the ninth amendment, Madison sought to protect affirmative rights. Section D criticizes the theories that attempt to explain the evolution of the ninth amendment as consistent with an affirmative rights reading. Finally, Section E summarizes the conclusions developed in this part of the Article and relates them to the analysis in Parts II and IV.

*A. The Virginia and New York Proposals and Madison's Initial Draft of the Ninth Amendment*

As discussed above, the changes to the Constitution proposed by the Virginia ratifying convention included both a proposed bill of rights and additional proposed amendments.<sup>237</sup> Within the latter group, both the first and seventeenth proposed amendments related to the concern that the national government be constrained within the powers granted by the Constitution. The first proposal reflected the Antifederalist demand for an express reservation of rights and powers and resembled the second Article of Confederation. It provided: "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."<sup>238</sup>

Virginia's seventeenth proposal, on the other hand, spoke more directly to the Federalist argument that enumerating rights would threaten the principle of limited powers. It provided:

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.<sup>239</sup>

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237. See *supra* notes 79–93, 188–192; see also 2 B. Schwartz, *supra* note 52, at 840–45.

238. 2 B. Schwartz, *supra* note 52, at 842.

239. *Id.* at 844. Russell Caplan contends that the ninth amendment has its origins in both the first and seventeenth Virginia proposals. Caplan, *supra* note 14, at 254 & n.132. Inasmuch as the first proposal focused textually on "rights," as did the second

Among the changes to the Constitution proposed by New York was a single amendment that addressed both the general concern with keeping the national government restricted to delegated powers and the need to prevent the feared inference of enlarged powers from power-limiting provisions within the Constitution. The New York proposal declared:

[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>240</sup>

Until recently, those who have considered the origin of Madison's draft of what became the ninth amendment have concluded not only that Madison drafted his proposal using the state-convention proposals as his basis, but also that the state proposals were responsive to at least some of the concerns about the risks presented by enumerating rights articulated by Wilson and other Federalists during the ratification debates.<sup>241</sup> In fact, the state proposals confirm the nature of the mischief feared by the Federalists.<sup>242</sup>

There is strong circumstantial evidence that links the state proposals—especially the Virginia proposal—and the ninth amendment. Most

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Article of Confederation, its allusion to "retained" rights certainly reflects the concern during the ratification period with explicitly securing reserved rights that the ninth amendment furthers. It is the seventeenth proposed amendment, however, that focuses on the unique danger that Federalists saw the Bill of Rights as posing.

Caplan suggests that the ninth amendment became the sole textual repository of the people's retained rights since Madison omitted the word "rights" from the tenth amendment. The implication would be that the ninth and tenth amendments are viewed as dealing with completely different sets of interests. I disagree. The tenth amendment makes the limiting premise of enumerated powers explicit, and the ninth ensures the same scheme against an adverse inference that might be raised by a partial enumeration of rights. See *supra* note 120 (suggesting that proposals for substantively identical provisions stating the principle of general reservation of rights and powers varied in their use of the precise terminology).

240. 2 B. Schwartz, *supra* note 52, at 911–12. As earlier noted, North Carolina and Rhode Island also offered proposed amendments to secure the scheme of limited powers from an adverse inference based on the enumeration of "exceptions" to power in the Constitution. See *supra* note 80.

241. For the historical setting of Madison's bill of rights proposals, including his initial draft of the ninth amendment, see *supra* notes 82–86 and accompanying text. As to the responsiveness of the Virginia and New York proposals to the concerns expressed during the ratification debates, see, e.g., Caplan, *supra* note 14, at 251–52; Dunbar, *supra* note 84, at 631–32; Massey, *supra* note 12, at 309–10.

242. See *supra* notes 187–192 and accompanying text.

obviously, James Madison served on the committee that drafted the Virginia proposal, which responded to concerns that he expressed on several occasions about the risks of inserting a bill of rights into the Constitution.<sup>243</sup> It seems reasonable to suspect that Madison would have drafted the ninth amendment by working from the proposal of his own state's convention. Madison confirmed the role that the Virginia state proposals played in shaping his draft bill of rights in a letter to President Washington.<sup>244</sup>

Turning to the texts, a comparison of the language of the state proposals and Madison's draft supports the view that the state proposals provided the source for the amendment that Madison proposed.<sup>245</sup> Both Madison's draft and the New York and Virginia proposals refer to limitations on powers as "exceptions" and are framed as rules of construction to prevent an inference of enlarged or extended powers. Furthermore, Madison's draft and the New York and Virginia proposals use virtually identical language to express the permissible inferences that may be drawn from the inclusion of the Bill of Rights. Considering in particular that both the last sentence of Madison's draft and the state proposals provide a concise rebuttal to the Federalist suggestion that including rights implies the necessity of their inclusion, it seems irrefutable that this language is tied to the ratification-period debate over inclusion of a bill of rights.<sup>246</sup>

Quite recently, however, Lawrence Sager has questioned the tradi-

243. The most pointed example is Madison's statement that he could support a bill of rights "provided it be so framed as not to imply powers not meant to be included in the enumeration." Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 1 B. Schwartz, *supra* note 52, at 614, 615.

244. Madison confirmed to President Washington that the proposed amendments "correspond as far as they go with the propositions of the State Convention." Letter from Madison to Washington (Nov. 20, 1789), in 2 B. Schwartz, *supra* note 52, at 1185, 1185. Bernard Schwartz observes that Madison in fact drew upon the text of proposed amendments from several states. B. Schwartz, *supra* note 41, at 165, and there is no question that he supplemented and carefully chose from among the Virginia proposals. Even so, the Virginia amendments were his starting point. As we have noted, moreover, Madison's proposed ninth amendment was the only proposed amendment that lacked a textual antecedent, as most of the other amendments were derived from the extant state constitutions or had roots in the English Bill of Rights. See *id.* at 198-99.

245. Madison's initial draft reads as follows, with language identical or similar to the state proposals italicized:

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 the greater caution.

1 Annals of Cong., *supra* note 21, at col. 452 (emphasis added).

246. The language of the provision concerning permissible inferences arising from the enumeration of rights is analyzed more completely in examining its relevance to understanding the mischief that the Federalists feared. See *supra* notes 190-191 and accompanying text.

tional assumption that Madison initially drafted the ninth amendment from the Virginia and New York proposals.<sup>247</sup> Sager groups the Virginia and New York proposals with a host of other state proposals "that made explicit the enumerated powers rule of construction."<sup>248</sup> He contends that any concern by the states that the Constitution might be construed to confer enlarged powers on the national government was "not excited by guarantees of personal rights in the Constitution, of course, since there were virtually no such guarantees in the Constitution submitted to the states."<sup>249</sup> According to Sager, all the cited state proposals "predated the Bill of Rights and were responsive to the draft Constitution itself; they did not depend upon the prospect of such a listing-out of rights."<sup>250</sup>

Sager's analysis shows that he has not given sufficient attention to the Virginia and New York proposals. In the first place, the texts of these two proposals cannot be grouped with other state proposals that focused on ensuring a government of limited powers. Unlike the other proposals, which simply made explicit the idea of reserved rights and powers, these two were directed against the very mischief that the Federalists feared.<sup>251</sup> Moreover, the claim that the states' concerns with preventing implied powers were not prompted by guarantees of personal rights is difficult to support. Not only is it belied by the text of the Virginia and New York proposals, but Sager bases his claim on the questionable premise that these proposals "predated" the Bill of Rights

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247. Another commentator who could be read to question the traditional view is Leonard Levy. See L. Levy, *supra* note 12, at 280; Sager, *supra* note 12, at 246-47. Levy, however, does not directly state that the Virginia proposal was entirely unrelated to Madison's drafting. Although he asserts that the connection between the ninth amendment and the Virginia proposal rests on confusion, he could conceivably be claiming only that the state proposals should not be confused with the final text of the ninth amendment—a statement in which other commentators might concur. Levy, however, never acknowledges any historical connection between the amendment and the Virginia proposal, and the thrust of his argument seems to be that they are unrelated. See *infra* note 283.

248. Sager, *supra* note 12, at 246 & n.14.

249. *Id.* at 246.

250. *Id.* at 247. Consequently, the proposals "speak, as we would expect, in the language of federal and state power, not of personal rights." *Id.* For Sager, the content of these state proposals are thus to be contrasted with ratification-period objections that centered on the impact that a specification of rights would have had on rights not specified. *Id.*

251. The other state proposals relied on by Sager are precursors of the tenth amendment that, as he put it, "made explicit the enumerated powers rule of construction." *Id.* at 246. Virginia's seventeenth proposal directly responds to the arguments about the danger of listing rights. See *supra* note 149 and accompanying text. The implication of Sager's reading is that Virginia offered two separate provisions that were supposed to say the same thing. In fact, they anticipate the ninth and tenth amendments. Ironically, Sager implicitly suggests that a committee that included Madison, Mason and Henry produced redundant proposals, in the same discussion in which he argues that the "residual rights" reading of the ninth amendment must be rejected because it would make the ninth and tenth amendments redundant. *Id.* at 246.

and on the incorrect conclusion that they were thus responsive to the original Constitution itself. As we have seen, there is every reason to believe that the drafters of the state proposals anticipated a bill of rights,<sup>252</sup> and contrary to Sager's assumption, even the Antifederalists expressed concerns about the risks posed by the partial enumeration of rights contained in the unamended Constitution.<sup>253</sup>

### B. *The Fulfillment of the Purposes of the State Proposals*

Though Madison drafted the initial version of the ninth amendment from the Virginia and New York proposals, he varied the language of the proposed amendment in ways that are not trivial. The

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252. By the time of the Virginia convention, it was reasonably apparent that there would be amendments to the Constitution; even if there had not been, prudent drafters would have cautiously considered the potential implications of the enactment of further limitations on government. The Federalist fears about the inclusion of an enumeration of rights predated the drafting of these proposed amendments, and Madison was both an articulate spokesman for these concerns and a member of the Virginia drafting committee.

253. Sager incorrectly assumes that the fear of an inference of constructive power would not have extended to the few power-limiting provisions found in the body of the Constitution. However, as we have seen, the rights found in the main body of the Constitution were a source of controversy with regard to the question of the danger of an inference of enlarged powers. Antifederalists initially used the partial enumeration of rights as evidence that the Constitution granted broad implied powers, see, e.g., Letters of Agrippa (Jan. 29, 1788), 4 *The Complete Anti-Federalist*, supra note 51, at 106; and later subjected the Federalists to a table-turning argument to disparage the danger a bill of rights allegedly would create. See supra notes 71-73. While the objection to enumerating limitations on government had been advanced most forcefully by the Federalists, the Antifederalist counter-offensive on the issue makes it all the more likely that concerned parties would have wanted to put the issue to rest by including a protective provision. The state proposals under discussion seem admirably suited to accomplish that end. That both the Federalist and Antifederalist arguments about partial enumerations of rights are reflected in the ninth amendment is shown by Madison's original wording, which refers to "exceptions here or elsewhere in the Constitution." 1 *Annals of Cong.*, supra note 21, at col. 452.

Leonard Levy, who also seems to question the received view that Madison's proposal relied on the state proposals, suggests a different explanation for the Virginia draft. He claims that Virginia's seventeenth proposal "concerned clauses in the Constitution declaring that Congress shall not exercise certain powers (e.g., no bills of attainder)." L. Levy, supra note 12, at 280. And he assures us that "[n]either [of Virginia's] proposal[s] addressed the issue of reserving to the people unenumerated rights." *Id.*; see also *id.* at 272 (suggesting that there was "[n]o precedent" for Madison's ninth amendment, but that it "stamped the Bill of Rights with his creativity"). Levy hints that the Virginia proposal focuses on prohibitions on the exercise of congressional power (such as the bill of attainder clause) that can, he implies, be distinguished from the rights provisions proposed for a bill of rights during the ratification-period debates. But Levy's suggestion does not hold up under close scrutiny because the bill of attainder clause is at least as quintessential an individual rights provision as any contained in the bill of rights amendments or the amendments proposed by the states. Levy offers no reason to believe that the language of the ninth amendment's textual precursors was not employed to describe the very sort of enumerated rights provisions that prompted Federalist concerns about listing rights.

proposal Madison presented to the first Congress, with relevant changes from the state proposals in italics, reads as follows:

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>254</sup>

The question is whether in making these changes Madison sought merely to clarify the state proposals or to change or supplement them. On the first view, the other rights retained are the residual rights ensured by the constitutional scheme; the inserted language clarifies that a purpose of the provision is to prohibit the inference that the listing of rights exhausted the rights held by the people.<sup>255</sup> The addition did not alter the essential meaning of the provision. Alternatively, Madison could have been attending to a concern left unaddressed by the state proposals; the reference to retained rights might be read to ensure that important affirmative limitations omitted from the Bill of Rights would retain their constitutional status.<sup>256</sup>

Looking at Madison's proposed ninth amendment against the backdrop of the ratification debate, there is a basis for at least a presumption of continuity between his draft and the Virginia and New York proposals upon which he based his draft. The state proposals were an attempt to confront the objection of Madison and other proponents of the Constitution concerning the threat posed by a bill of rights to the protection of rights offered by the enumerated powers scheme; it should not be lightly inferred that Madison later sought to change the substance of these proposals. This point is reinforced by the language Madison added, which coincides with the purpose of the state proposals to ensure the reserved rights of the people against an inference to be drawn from "exceptions . . . made in favor of particular rights."<sup>257</sup>

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254. 1 Annals of Cong., supra note 21, at col. 435 (emphasis added).

255. Under this reading, the operational effect of the respective "rights" and "powers" clauses would be identical, inasmuch as the inferences of diminished rights and enlarged powers would be two sides of the same coin. If there is any justification for thus describing two different inferences, even though they are operationally connected, it could only be that their ultimate implications were thought to merit independent attention. The undercutting of the enumerated powers design for protecting rights would also work a radical transformation in the nature and division of power within the governmental system—a fact with implications beyond the impact on rights protected residually.

256. The possibilities are either that Madison sought to conform the amendment to his understanding of the actual range of Federalist concerns during the ratification debates, see supra Section IV.B. (criticizing such a reading of Federalist objections), or, in my judgment more plausibly, that he attempted to fashion a two-pronged approach as he reconsidered the whole course of debate over the constitutional scheme for ensuring the rights and interests of the people.

257. 1 Annals of Cong., supra note 21, at col. 435.

At the very least, Madison's draft proposal provides strong additional confirmation that the Federalists were concerned that a bill of rights would undercut the scheme of limited powers and be read to imply constructive powers not intended by the constitutional design.<sup>258</sup> Because the Federalists discussed enlarged powers and lost rights as part of a single objection to the Bill of Rights, and not as independent reasons for viewing the Bill of Rights as dangerous, it seems at least plausible to believe that Madison chose to focus his draft on both aspects of that particular objection.

The alternative view that Madison sought to change the thrust of the proposals draws on the maxim that legal language always has a function; arguably, the inserted language lacks a substantial purpose under the first reading. The inserted language at least raises the question of whether Madison sought to be responsive to *all* of the lessons taught by the rejection of the Federalist argument that the enumerated powers scheme sufficiently protected the people's rights.

Madison had, by this time, adopted the premise of the argument for a bill of rights that the enumerated powers scheme was insufficient to guard completely against the invasion of basic rights. Since Federalists had contended that even basic rights might be omitted from an enumeration, it is conceivable that Madison inserted the additional language in order to incorporate affirmative limitations by reference, thereby creating a complete system of protecting rights.<sup>259</sup> While such a provision would go beyond providing an efficient remedy to the feared mischief described by the Federalists during the debate over ratification, it would be premature to rule it out without first considering extrinsic evidence, particularly in light of the tendency during that era for "rights talk" to shift between different sorts of rights and different mechanisms for protecting those rights.

1. *Madison's Presentation of His Initial Draft.* — In presenting his draft proposal for a bill of rights to Congress, Madison defended the need for a bill of rights and described the proposals he was suggesting.<sup>260</sup>

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258. This itself undercuts Lawrence Sager's view that the Federalist objection to a bill of rights focused exclusively on the potential for losing rights. See *supra* note 155–161 and accompanying text.

259. While there still may be reason to look at the extrinsic evidence, it should be noted that the ratification-period debate suggests that Madison and others viewed the combination of a specific enumeration of rights and a general reservation of rights (defined residually from the powers granted) as a complete system for securing rights. See, e.g., *supra* note 228 and accompanying text (treating views expressed in Letters from a Federal Farmer).

260. See 1 *Annals of Cong.*, *supra* note 21, at cols. 424–42. In addition to Madison's explanation of the ninth amendment treated in text, some commentators have found support for the residual rights reading of the ninth amendment in Madison's statement in this speech that courts would "resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights." 1 *Annals of Cong.*, *supra* note 21, at col. 457 (cited in Justice Department Report, *supra* note 14, at 22). The argument can hardly be conclusive, inasmuch as Madison could have consid-

With respect to the ninth amendment, he explained the resolution in these terms:

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 admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution.<sup>261</sup>

Given the context, it is surprising that some commentators have read this statement as unambiguously referring to affirmative rights that might be lost.<sup>262</sup> Read in context, however, Madison's remarks lend support to the view that the inserted language simply reinforced the purpose of the amendment as first embodied in the state proposals.

Madison's concern that enumerating exceptions would "disparage" rights not in the enumeration is linked to the implication that such rights would be "assigned into the hands of the General Government."<sup>263</sup> In his analysis, John Hart Ely at least acknowledges that "the possibility that unenumerated rights will be disparaged is seemingly made to do service as an intermediate premise in an argument that unenumerated powers will be implied."<sup>264</sup> Ely nevertheless concludes that Madison's statement indicated a dual concern to preserve unenumerated rights and to avoid unexpressed powers. On the other hand, in an essay reviewing Ely's book, Douglas Laycock insists that Ely "concedes too much," inasmuch as "Madison's only reference to the risk of implying unenumerated powers is to the power of infringing unenumerated rights."<sup>265</sup>

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ered the rights secured by the ninth amendment as being thereby "expressly stipulated for." See Mitchell, *supra* note 12, at 1740. Even so, as a response to the Federalist argument that the provision for specific rights would be ineffectual in any event, Madison's statement at least underscores the positive-law nature of the debate over how best to secure the rights of the people—a fact which cuts against the thesis that a crucial premise underlying the ninth amendment was the general assumption that there existed unwritten judicially enforceable affirmative rights. It therefore lends support to the residual rights thesis.

261. 1 *Annals of Cong.*, *supra* note 21, at col. 439.

262. See, e.g., J. Ely, *supra* note 3, at 36; L. Tribe, *supra* note 27, at 774–75; Redlich, *supra* note 137, at 805.

263. 1 *Annals of Cong.*, *supra* note 21, at col. 439.

264. J. Ely, *supra* note 3, at 36. Ely's formulation seems correct, except to the extent that it can be read as suggesting that a concern about implied governmental power is to be understood independently of preserving reserved rights.

265. Laycock, *supra* note 17, at 353. Notice that Laycock's reliance on his presumption in favor of what he takes to be the plain meaning of the final text of the amendment, *supra* text accompanying note 95, overwhelms his interpretation of



An examination of the whole text clarifies whether Madison's reference to rights being "assigned into the hands of the General Government" refers to the power to invade affirmative rights or to the evisceration of residual rights by the implication of unenumerated powers. Madison begins by indicating that he is summarizing an objection already offered by opponents of a bill of rights—an obvious reference to the ratification-period debates. In fact, Madison's concern that rights not singled out would be "*assigned into the hands of the general government*" recalls Wilson's fear that "an imperfect enumeration would *throw all implied power into the scale of government.*"<sup>266</sup> Madison was familiar with the argument as he had earlier asked the Virginia Convention: "[i]f an enumeration be made of our rights, will it not be implied that every thing omitted is given to the general government?"<sup>267</sup> As the ratification-period debates and the state proposals suggest that the Federalists focused on the related concerns of ensuring residual rights and preventing enlarged powers, Madison's reference to these objections supports the view that he was responding to the Federalist concerns.

Other considerations lend further support to the residual rights reading of Madison's speech. Madison's proposed amendment clearly speaks to the feared enlargement of powers construction that underlay the ratification debates from which emerged the state proposals. Laycock's construction, on the other hand, implies that Madison defended his proposed amendment in his speech to Congress without any reference to a central concern embodied in its text—a concern that was shared by Madison, among many others.<sup>268</sup> And if Ely were correct that Madison is addressing independent concerns—protecting rights *and* cabining power—why would Madison have articulated both issues

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Madison's statement. He deems it sufficient that Madison's statement can be read consistently with the "clear meaning" of the constitutional text, without regard for extrinsic evidence.

266. 2 Elliot's Debates, *supra* note 25, at 436 (emphasis added).

267. 2 B. Schwartz, *supra* note 52, at 825. Madison's statement here is of special importance for two reasons. First, unlike his explanation before Congress of the proposed ninth amendment, Madison here directly asserts that it is not just particular omitted rights of some indefinite number that might be seen as "given" (i.e., assigned) to the national government, but "every thing omitted." Second, in the preceding sentences, Madison has associated this argument with the argument against the necessity for a bill of rights from the fact that "every thing not granted is reserved." *Id.* Madison unambiguously contends here that it is precisely the loss of the whole of what enumerated powers reserves that he fears by an enumeration of rights. See also *supra* notes 148–152 and accompanying text (showing that Federalist "danger" argument went to concern for the loss of all rights and powers reserved by Constitution's limited powers scheme).

268. Laycock does not confront the proposed text that Madison defends, the state proposals from which he drafted, or the ratification debate. Nor does Laycock explain why Madison would ignore an important clause within his own proposal. See Laycock, *supra* note 17, at 353. To his credit, Ely's interpretation of Madison's speech is at least consistent with the view that Madison is discussing both clauses of his draft proposal when he articulates the objection to a bill of rights that the proposal addresses.

as a single objection to a bill of rights and described it as the most plausible he had heard?<sup>269</sup>

2. *The Relevance of the Ratification Debate in Virginia.* — When, in November of 1789, the proposed bill of rights came up for ratification in Virginia, Madison had an opportunity to explain and defend the changes that Congress had made to the amendment proposed by the Virginia convention. By this time, of course, the textual reference to “powers” in Madison’s initial proposal had been eliminated in favor of exclusive reliance on the “rights” formulation.<sup>270</sup> Notwithstanding this, Madison asserted that the proposed amendments “correspond as far as they go with the propositions of the State Convention.”<sup>271</sup> The correspondence between Hardin Burnley and Madison, and between Madison and President Washington, concerning objections offered to the proposed ninth amendment by Edmund Randolph sheds additional light on the original understanding of the meaning of the amendment.

On November 28, 1789, Hardin Burnley reported to Madison a debate within the Virginia assembly about the language of the proposed eleventh amendment, which corresponds to the ninth amendment.<sup>272</sup> Burnley’s summary of the debate, as excerpted by Madison in a letter to Washington a week later,<sup>273</sup> began by summarizing Randolph’s objection:

[Randolph’s] principal objection was pointed against the word retained in the eleventh proposed amendment, and his argument if I understood it was applied in this manner, that as the rights declared in the first ten of the proposed amendments were not all that a free people would require the exercise of; and that as there was no criterion by which it could be determined whither any other particular right was retained or not, it would be more safe, & more consistent with the spirit of the 1st. & 17th. amendments proposed by Virginia, that this reservation against constructive power, should operate rather as a provision against extending the powers of Congress by their own authority, than as a protection to rights reducable [sic] to no definitive certainty.<sup>274</sup>

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269. Madison’s statement that this is the most plausible objection which can be made against a bill of rights recalls his assurance to Jefferson that he could support a bill of rights so long as it could be drafted to avoid an inference of enlarged powers. See *supra* note 233 and accompanying text. Some have thought, however, that the treatment of Madison’s presentation of the ninth amendment outlined here is undercut by the content of notes that Madison prepared in connection with his speech before Congress. For a treatment of these notes, see *infra* notes 298–304.

270. See *supra* note 88 and accompanying text.

271. 2 B. Schwartz, *supra* note 52, at 1185 (letter from Madison to President Washington, Nov. 20, 1789).

272. See *id.* at 1188 (letter from Burnley to Madison, Nov. 28, 1789).

273. See *id.* at 1189, 1190 (letter from Madison to President Washington, Dec. 5, 1789).

274. *Id.* at 1188.

Randolph's argument, as summarized by Burnley and repeated by Madison, makes some key assumptions that go unchallenged by both Burnley and Madison. First, as a former proponent of the Federalist arguments against a bill of rights, Randolph linked together the concern that "the rights declared in the first ten of the proposed amendments were not all that a free people would require"—the notion of endangered unenumerated rights—with the idea that the purpose of the proposed amendment was to ensure these rights by a "reservation against constructive power."<sup>275</sup> This confirms that, at least in Randolph's view, the Federalist argument did indeed link together the concern that an inevitably incomplete enumeration would threaten rights with the resulting inference of "constructive power."<sup>276</sup>

A second and closely related assumption made by Randolph was that the debate in Virginia concerned whether it would be safer to state the reservation against constructive powers in terms of "a provision against extending the powers of Congress . . . than as a protection to rights reducible to no definitive certainty."<sup>277</sup> In other words, Randolph presumed that Madison had set out to prevent an inference of constructive powers, but contended that the proposed language did not express the idea as clearly as had the Virginia proposal from which Madison drafted the amendment.<sup>278</sup> Randolph seems to have been concerned that framing the provision in terms of retained rights would not identify with sufficient certainty the various interests to be assured protection and would thus fail to convey the essential idea of preserv-

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275. *Id.* It is clear that Randolph fully understood the Federalist argument against a bill of rights and the argument's roots in the crucial distinction between governments of general powers and those to which limited powers had been granted. See *supra* note 152 and accompanying text.

276. Leonard Levy underscores that Madison "did not challenge Randolph's assertion that the amendments preceding the Ninth and Tenth did not exhaust the rights of the people that needed protection against government," as though this fact lends support to the affirmative rights reading that he advocates. L. Levy, *supra* note 12, at 281. But if Wilson or others were equivocal at times, surely Randolph is transparently clear in his belief that these rights were residual in nature and adequately protected so long as the provision was properly drafted to avoid an inference of constructive power. Rather than seeing the significance of Randolph's criticism as a confirmation of the true nature of the Federalist concern about enumerating rights, Levy suggests that Randolph "concluded, illogically, that the course of safety lay not in retaining unenumerated rights but in providing against an extension of the powers of Congress." *Id.*

277. 2 B. Schwartz, *supra* note 52, at 1188.

278. The inference suggested in text seems to be supported by Burnley's summary of Randolph's argument. It receives additional confirmation in a letter from Randolph to President Washington, dated December 6, 1789, in which Randolph states that the proposed amendment "is exceptionable to me, in giving a handle to say, that congress have endeavoured to administer an opiate, by an alteration, which is merely plausible." *Id.* at 1190, 1191. Randolph here appears to confirm that his main concern lay with possible constructions of the language chosen, rather than with accusing Madison and others of seeking to change the nature of the amendment itself.

ing the scheme of enumerated powers.<sup>279</sup>

The responses that Burnley and Madison offered to rebut Randolph's argument shed valuable light on the significance, or lack thereof, of the changes made by Congress. Having summarized the distinction that Randolph made between the Virginia proposal and the draft amendment's protection of retained rights, Burnley responded as follows:

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>280</sup>

In this passage, Burnley appears to reject Randolph's notion that there was a meaningful distinction between the Virginia and congressional proposals. Instead, he describes the other rights "retained by the people" in terms of the grants of power: "if [Congress's] powers are not too extensive already," the "rights of the people & of the States" will be protected against the "improper extension of power" that Randolph feared and would thus be safe under the amendment proposed by Congress.<sup>281</sup> According to Burnley, Randolph correctly described the purpose of the amendment as preserving the people's rights by a reservation against constructive power. However, Congress's language ensuring retained rights accomplished this end just as fully as had the Virginia proposal.

In relaying Burnley's report of the debate to Washington, Madison even more directly rejected Randolph's purported distinction between the Virginia proposal and the amendment proposed by Congress:

The difficulty stated agst. the amendments is really unlucky, and the more to be regretted as it springs from [Randolph,] 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 ["be not be abridged violated" stricken out], or that the former shall be not be extended. If no line can be drawn, a declaration in either form would amount to nothing.<sup>282</sup>

Like Burnley, Madison recognizes that the purpose of the amendment is to preserve the residual rights of the people, but he insists that it does not matter whether these rights are ensured by a provision guar-

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279. For a similar analysis of Randolph's argument, see Hamburger, *supra* note 14, at 316 n.291.

280. 2 B. Schwartz, *supra* note 52, at 1188.

281. *Id.*

282. *Id.* at 1189, 1190 (letter from Madison to President Washington, Dec. 5, 1789).

anteeing them against abridgment or by declaring that national powers shall not be extended. When Madison observes that either form of the amendment would “amount to nothing” unless a line could be drawn between the powers granted and the rights retained, he echoes Burnley’s argument that the key, under either the Virginia or congressional drafts, is whether there really are meaningful limits to national power under the Constitution as drafted.<sup>283</sup> If there are such limits, either draft’s language will protect reserved rights; if there are not, then Randolph’s preference for language opposing the extension of power would be no more effectual than the language of retained rights.<sup>284</sup>

This correspondence, then, offers not only a strong confirmation of the enlarged powers and residual rights reading of the Federalist objection to a bill of rights and the ninth amendment, but also a reasonable explanation for the elimination of the enlarged powers language from the proposed amendment. Just as the “retained rights” language could have been added to focus on the goal of ensuring the people’s reserved rights, the “enlarged powers” language could have been dropped because it was decided that it was not essential for conveying the meaning of the amendment.

Affirmative rights advocates have yet to provide a satisfactory explanation of the Burnley-Madison-Washington correspondence. Indeed, while the letters have been treated in published works since the 1950s, most modern writers have ignored them completely. This omission is particularly surprising given the attention that some commenta-

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283. See L. Levy, *supra* note 12, at 281 (describing Madison’s argument as “[p]lagiarizing Burnley”). While Levy’s characterization is exaggerated, it points up the similarity of the arguments. Madison’s argument is best understood when read together with Burnley’s.

284. Madison’s argument here tracks the argument found in Letters from the Federal Farmer, even down to the line-drawing metaphor:

When we particularly enumerate the powers given, we ought either carefully to enumerate the rights reserved, or be totally silent about them; we must either particularly enumerate both, or else suppose the particular enumeration of the powers given adequately draws the line between them and the rights reserved, particularly to enumerate the former and not the latter . . . .

2 The Complete Anti-Federalist, *supra* note 51, at 324 (emphasis added). Obviously, the Antifederalist author was not satisfied that the enumerated powers sufficed to draw this line so as to obviate the need for a bill of rights. Madison’s response to Randolph, however, suggests that he was sufficiently satisfied with the enumerated powers scheme to see that device as enough of a safeguard to secure many rights not deemed sufficiently fundamental to be placed in the bill of rights.

The Federal Farmer, moreover, anticipated the scheme that finally emerged when he proposed that the enumeration include “many of the most essential rights reserved,” and, “as to the less important ones, we may declare in general terms, that all not expressly surrendered are reserved.” *Id.* Given this work’s prominence in the ratification debate, it seems probable that Madison was familiar with this very text and may even have drawn upon it in his letter to Washington. In any event, it clearly reinforces the residual rights reading of the ninth amendment.

tors have paid to contextual evidence concerning the meaning of the ninth amendment.<sup>285</sup> Moreover, some of those who do contend with the correspondence conclude that Madison was disingenuous or confused. Leslie Dunbar, for example, claims that Madison's proposal to Congress focused on rights rather than powers, and adds: "This might seem a meaningless distinction [presumably because limited powers and retained rights are, in the lexicon of the Federalist "danger" argument, flip sides of the same coin], and so Madison at one time permitted himself to rationalize."<sup>286</sup> After quoting Madison's letter to Washington, Dunbar continues: "Madison knew better, as his effort to recast the Virginia and New York proposals attests."<sup>287</sup> Rather than seeing Madison's fairly straightforward statement to President Washington as illuminating his proposal to Congress, Dunbar argues that Madison merely deceived himself by attempting to "rationalize" his change of focus from the original state proposal.<sup>288</sup>

Others have attempted to provide alternative readings of Madison's statement. Randy Barnett, for example, asserts that Madison's response to Randolph "was distinguishing two conceptual strategies for accomplishing a single objective" of securing retained rights, an enumerated powers and residual rights approach and an af-

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285. See, e.g., Sherry, *supra* note 12.

286. Dunbar, *supra* note 84, at 633.

287. *Id.* at 634. Ironically, Dunbar sees a perfect harmony between the Federalist objection to a bill of rights and the state proposals, but concludes that Madison came to accept the Federalist position only in part. *Id.* at 630-31. Dunbar appears to acknowledge that for Wilson, Hamilton, and the participants in the state conventions that offered the proposals which led to the ninth amendment, the "necessity" and "danger" arguments were conceived as interlocking. Though his argument is difficult to discern, he seems to suggest that the state conventions accepted this connection and focused on "powers" so as to ensure a limiting construction of congressional powers. See *id.* at 630, 633.

On the other hand, Dunbar appears to believe that as Madison came to repudiate the Federalist "necessity" argument altogether, he unhinged the concern for securing additional rights from the Federalist focus on securing them residually by reference to limited powers. See *infra* notes 306-307 and accompanying text. For a critique of this analysis focusing mainly on the overwhelming evidence that contemporary writers, including Madison, agreed on the continuing importance of enumerated powers as a device for securing rights, see *infra* notes 306-309 and accompanying text. Dunbar's analysis of Madison's statement to Washington appears to suggest that Madison had inadvertently reverted to the original Federalist argument for the purpose of answering Randolph's objection, although this "reversion" is refuted by his original draft, his presentation to Congress and his letter to President Washington.

288. Similarly, in an argument that tracks Dunbar's, Calvin Massey contends that Madison's comments to Washington "may have obscured" his desire both to retain power in the central government at the expense of the states and to ensure meaningful limitations on behalf of individual rights. Massey, *supra* note 12, at 311 n.29. For Massey, then, Madison is unclear about what he sought to accomplish. As to Massey's theory that Madison was seeking to retain power in the central government at the expense of the states, and that this concern was independent of his goal of securing unenumerated rights in the initial drafting of the ninth amendment, see *infra* note 329.

firmative limitations approach.<sup>289</sup> Barnett insists, however, that only an affirmative rights reading of the provision for unenumerated rights gives meaning to the provision of rights as a distinguishable strategy, and that Madison is here defending an affirmative rights approach.<sup>290</sup>

This interpretation does not adequately explain Madison's analysis in its context, namely as a response to Randolph. The point that Madison and Burnley made is that Randolph's suggestion that there is a meaningful distinction between the Virginia and the congressional proposals was "altogether fanciful."<sup>291</sup> If Madison was observing that there are two quite different ways to limit governmental power, as Barnett asserts, and was at least implicitly defending one over the other, then Madison would have been admitting that there was a significant difference between the two alternative proposals. This creates the impression that Madison offered only the reassurance that his amendment accomplished the same end, perhaps more effectively, by a different route without really addressing Randolph's objection that the congressional proposal was less definite.

If Barnett's construction were correct, one would expect Madison forcefully to have argued for the superiority of the "rights"-focused approach; yet he suggested that the two approaches amount to the same thing. Barnett's analysis, moreover, does not explain Madison's insistence that the central question under either formulation of the amendment is the ability to draw the line between rights and powers—an allusion to the question of whether the powers enumerated in article I defined the scope of governmental power sufficiently so as to secure unenumerated rights.<sup>292</sup> Finally, Barnett's interpretation does not explain why Madison argued that it did not matter which way rights were protected, while Barnett elsewhere claims that Madison had by this time rejected the Federalist residual conception of rights.<sup>293</sup>

Leonard Levy is one of the few commentators who has confronted the context of the discussion. Levy claims that when Madison wrote that it did not matter whether the amendment was cast in terms of retaining rights or not extending powers, he was saying that individual rights protections can be framed either as grants of rights ("The right of the people to be secure . . .") or as restrictions on power ("Congress shall make no law . . .").<sup>294</sup> Like Barnett, however, Levy does not con-

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289. Barnett, *supra* note 12, at 16. Barnett uses different terminology, but the substance of his characterization appears to track the distinction between "affirmative" and "residual" rights drawn throughout this article.

290. *Id.*

291. 2 B. Schwartz, *supra* note 52, at 1189, 1190 (letter from Madison to President Washington, Dec. 5, 1789). Madison here echoes Burnley's statement that Burnley did not see "the force of the distinction." *Id.* (letter from Burnley to Madison, Nov. 28, 1789).

292. See *supra* note 284 and accompanying text.

293. See *infra* notes 307, 310.

294. L. Levy, *supra* note 12, at 282.

nect this observation to the context of Madison's comments comparing the Virginia proposals that Randolph preferred to the amendment offered by Congress and his comments answering Randolph's arguments as to why the former would be more responsive to the goal of such an amendment. Furthermore, and again like Barnett, Levy's interpretation fails to address Madison's line-drawing analogy and its relationship to Madison's claim that the alternative formulations amounted to the same thing.

Unsurprisingly, Levy concludes that "Randolph had identified a problem that remains without a solution."<sup>295</sup> Levy interprets Randolph's unresolved problem as a concern that the ninth amendment's rights are "too indefinite" and the text of the amendment "too vague."<sup>296</sup> But the problem remaining without a solution is Randolph's fear that the rights formulation might leave obscure the connection between protecting rights and avoiding constructive power by preserving the scheme of enumerated powers.<sup>297</sup> Modern commentators have proved him prophetic in that regard.

### C. *The Evidence that Madison Sought to Protect Affirmative Rights—A Critique*

Perhaps especially because of the original flair that Madison brought to the proposal that became the ninth amendment, a number of scholars have emphasized evidence of Madison's intent. The discussion that follows confronts arguments for the affirmative rights reading that are derived from historical evidence concerning Madison's thoughts about the proposed amendment or about rights in general.

1. *The Notes to Madison's Speech.* — Commentators who have relied upon Madison's presentation of the proposed bill of rights to the first Congress have failed to rebut the strong support that Madison's speech lends to the view that his draft was intended to clarify rather than to alter the state proposals. It has been suggested, however, that the notes prepared by Madison in connection with his speech reinforce the affirmative rights reading.<sup>298</sup> The relevant section of his notes reads: "disparage other rights—or constructively enlarge—The first goes vs. St: Bills—both guarded vs. by amendts."<sup>299</sup> Madison's notes can be taken to suggest that the feared disparagement of rights and enlarge-

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295. *Id.*

296. *Id.* at 281.

297. In failing to comprehend Randolph's argument that the Virginia proposal adequately described the rights to be protected, see *supra* note 276, Levy sees Madison's response as inadequate on the ground that it did not "challenge the assertion that the Ninth was too vague." *Id.* But when Randolph's objection is properly understood, Madison's response that the idea of "retained" rights also refers to preserving the limited powers scheme appears to be a cogent challenge to the claim regarding the amendment's vagueness.

298. See Sager, *supra* note 12, at 250 n.20.

299. 2 B. Schwartz, *supra* note 52, at I043.



ment of national powers are distinguishable inferences with potentially different applications to state and federal constitutions. They also appear to suggest that the concern about disparagement of rights would also apply to state constitutions, leading to the inference that the rights protected by the amendment are affirmative in nature inasmuch as the states lacked a system of enumerated powers and residual rights. Thus, Lawrence Sager has concluded that Madison here "indicates, as he did not in the speech itself, that he saw state bills of rights as posing the same kind of risk to unenumerated rights that a federal bill of rights would pose."<sup>300</sup>

The implications of Madison's notes have never been confronted by a proponent of the traditional, residual rights reading of the ninth amendment. The suggested inferences, however, seem plausible and appear to cut against the view that Madison did not intend to vary from the state proposals. At the same time, the risks of construing enacted law by reference to informal expressions of intent are at their greatest when it comes to construing a constitutional amendment by reference to material as enigmatic as cryptic notes, in outline form, used to prepare a speech.<sup>301</sup>

There are, in any event, alternative explanations of Madison's notes that reconcile them with the residual rights understanding that pervaded the debates and proposals from which his draft amendment and speech emerged. First, it is not surprising that the inferences of enlarged powers and against residual rights, which, it was feared, together might undermine the enumerated powers scheme, would receive separate treatment despite their operational connection.<sup>302</sup>

As to the suggestion that the inference of a disparagement of rights

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300. Sager, *supra* note 12, at 250 n.20. For Sager, this clearly suggests that "it is unenumerated federal personal rights that Madison saw as in peril." *Id.* Interestingly, Sager recognizes that Madison's apparent application of the disparagement of rights concern to state constitutions raises questions for proponents of a residual rights reading, but he overlooks the questions that Madison's notes raise with respect to Sager's own analysis. Sager had suggested in text that the shuffling of the language of rights and powers reflected a usage by Madison that saw power defined in net terms after withholdings in favor of rights. See *supra* notes 155-165 and accompanying text. But Madison's notes appear to divide the two concepts more sharply, as they impliedly suggest that the threat of constructive powers would not apply to the states. Under Sager's analysis of Madison's usage, however, the implication of constructive power that flows from omitting rights and contributing to the net power of government would apply equally to state and federal governments. As to why, on a residual rights reading, Madison might have described the effects separately in this way, see *supra* note 255.

301. As to the risks of relying on informal expressions of intent, see R. Dickerson, *supra* note 93, at 154-62. Madison's notes reveal virtually nothing about his thought processes underlying these notes; thought processes which were, in turn, not reflected in his formal presentation. This suggests that we should hesitate before placing great weight on the notes in construing the ninth amendment.

302. The destruction of the limited powers scheme would have implications both for the division of governmental powers and the securing of residual rights. See *supra* note 255.

applies to state constitutions, Madison's allusion might simply refer to the Federalist claim that the federal scheme for securing the rights of the people was better than the devices included in the state constitutions. The federal scheme of limited powers ensured an expanse of rights, as contrasted with the state approach of reserving only a few rights in a bill of rights. That Madison noted this disadvantage of the state constitutions, however, does not imply that he saw the ninth amendment's language as equally applicable to state constitutions. As we have seen, Federalists saw the enumeration of rights as the best method of limiting a government of general legislative power, such as the state governments, and thus acknowledged that their own "danger" argument did not apply to the states.<sup>303</sup> The Federalist solution to the problem of securing a range of rights had been the federal scheme of enumerated powers and reserved rights, which Madison's proposal apparently was designed to preserve even in the face of an enumeration of rights. No one involved in the ratification process of the Constitution or the Bill of Rights seems to have intimated that a clause providing for a general reservation of rights would be coherent if applied to a government which had been granted general legislative powers.<sup>304</sup>

There is, in short, a good deal to be said for trusting Madison's knowing reference back to the ratification debates in the speech that he actually delivered to Congress, rather than giving great weight to enigmatic notes used in the preparation of that speech. There remain, however, other contextual arguments that attempt to show that Madison intended to ensure additional limitations on granted powers.

2. *Other Portions of Madison's Speech to Congress.* — Some commentators have claimed that the affirmative rights reading is supported by Madison's analysis of the concept of rights in his speech before Congress. Leslie Dunbar, for example, argues that Madison's description of the nature of the rights enumerated in the proposed bill of rights signified his rejection of the theory of rights underlying the Federalist

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303. See *supra* notes 147–152 and accompanying text.

304. Under this narrower construction of Madison's notes, the problem again arises of mixing references to rights as enumerated limitations with references to rights as residual guarantees, just as in the ratification-period debates. This shifting usage certainly had the potential to cause confusion, and undoubtedly has generated a great deal of confusion among modern commentators. But the continuity between the ratification debate and Madison's speech and notes clearly cuts in favor of the residual rights reading.

It is also possible, of course, that Madison had focused in a new way on the risk of omitting rights and that his notes reflect a new solution of incorporating potential affirmative rights that might have been omitted. But it seems more probable to think that Madison's perspective had not been transformed. Indeed, it may be that the very omission of this particular point from his delivered speech reflected his perception of the potential for confusion that could result from using the state constitutions to illustrate the problem that listing rights normally implies limited rights and general powers when the draft was an attempt to preclude that inference with respect to the federal system to preserve the federal Constitution's retained rights.

arguments against a bill of rights.<sup>305</sup> Dunbar contends that of the two Federalist claims (that the enumerated powers scheme would suffice in lieu of a formal bill of rights and that an enumeration of rights would be taken as exhaustive), Madison came to accept only the second.<sup>306</sup> According to Dunbar, Madison's speech demonstrates that he had abandoned Wilson's concept of rights as "powers reserved."<sup>307</sup>

But Madison's admission of the need for a bill of rights in no way qualified his commitment to the doctrine of limited powers as an important means of ensuring rights. As we have seen, Madison expressed his concern with preserving the system of enumerated powers against untoward inferences to be drawn from an enumeration of rights at least twice.<sup>308</sup> Dunbar's speculations point to no evidence that calls into doubt that concern.<sup>309</sup> Furthermore, his assumption that Madison laid

305. Dunbar, *supra* note 84, at 630–31, 633–38.

306. See *id.* at 630–31. Dunbar is half right: Madison came to agree that the enumerated powers were sufficiently subject to abuse to justify a bill of rights, and to that extent he rejected the Federalist position during the ratification debate. In his speech to Congress, though, Madison emphasized only that the Federalist arguments from retained rights "are not conclusive to the extent which has been supposed" inasmuch as some granted powers could conceivably be abused in the absence of a bill of rights. 1 *Annals of Cong.*, *supra* note 21, at col. 438.

307. Dunbar, *supra* note 84, at 638. Dunbar relies on Madison's statement that the defect of the proposed Constitution was that "it did not contain effectual provisions against the encroachments on particular rights." 1 *Annals of Cong.*, *supra* note 21, at col. 433, quoted in Dunbar, *supra* note 84, at 634, as well as Madison's definition of "rights" as stipulations of the "methods by which in particular cases the government shall exercise its powers" or as concepts defining areas "totally outside the province of government." Dunbar, *supra* note 84, at 635. According to Dunbar, Madison's formulations of the nature of rights suggests that his ninth amendment proposal "was a declaration of a dualism of powers and rights—not a limitation on powers, but an affirmation of the independent foundation of rights." *Id.* at 636–37.

Randy Barnett appears to adopt a similar position. He contends that the residual rights model is based on Federalist arguments against enumerating rights based on enumerated powers, but that the problem of unenumerated rights had not yet arisen, presumably because the bill of rights and ninth amendment had not yet been drafted. See Barnett, *supra* note 12, at 8. Barnett thus finds it odd that interpreters would look to a losing argument about how to ensure rights in construing the nature of the unenumerated rights guaranteed by the ninth amendment. *Id.*

What both Barnett and Dunbar overlook is that the preservation of a system of limited powers and reserved rights was the one thing that Federalists and Antifederalists agreed about and that the debate was over which institutional design threatened reserved rights. From this perspective, "the problem of unenumerated rights" had arisen, hypothetically, as participants debated the implications of the omission of an express general reservation provision from the proposed Constitution, as well as the impact of a bill of rights, on the Constitution's efficacy for securing the people's reserved rights.

308. See *supra* notes 150, 233 and accompanying text.

309. Madison nowhere intimates that he rethought his position and rejected his own prior analysis that the Constitution as originally drafted structurally protected important rights. Indeed, in his most pertinent remarks, Madison invoked the ratification period arguments about the dangers of enumeration; those concerns hinged on the argument about preserving rights structurally, and Madison did not suggest that his views represented a departure from the concerns running from Wilson through the state pro-

out a global theory of rights seems to ignore that the comments relied upon were meant to address the ratification-period controversy over the need and propriety of enumerating specific rights; Madison was not referring in these remarks to the limited powers scheme and residual rights.<sup>310</sup>

3. *The Ninth Amendment as a Remedy to Madison's Skepticism About Enumerating Individual Rights.* — Several scholars have linked the ninth amendment with Madison's skepticism about the drafting of a bill of rights<sup>311</sup> or with his more general skepticism about the ability to convey ideas clearly.<sup>312</sup> Dean Redlich contends that Madison's treatment in Federalist No. 37 of the debate over the division between state and federal power under the Constitution as reflecting the difficulty of conveying complex ideas through the medium of language expressed an idea "closely allied" to his explanation before Congress of his draft of the ninth amendment.<sup>313</sup> Redlich does not, however, explain the nature of

posals. That this form of protection was thankfully deemed insufficient does not imply that it was deemed unimportant or unworthy of safeguarding.

310. See *supra* note 307. These same points refute the somewhat similar argument advanced more recently by Randy Barnett. Barnett insists that the competing interpretations of the ninth amendment represent wholly exclusive models of individual rights; indeed, he claims that the residual rights approach of defining rights by reference to powers must apply even to the enumerated rights inasmuch as it is based on the premise that when the people delegated powers they necessarily ceded any rights that might conflict with any such power. See Barnett, *supra* note 12, at 7. Since Madison clearly intended the specific provisions to limit the exercise of power, it follows that he adopted a power-limiting (or affirmative rights) model instead of the Federalist "rights-powers" (or residual rights) model.

Barnett fails, however, to explain why the combination of the enumerated rights and the ninth amendment are not properly viewed as an attempt to have it *both* ways: "rights" as specific limitations on the scope of government powers and as the fruit of structural protection. The state proposals and Madison's initial draft, after all, describe the enumerated rights as "exceptions" to power *or* as inserted out of caution. The caution was undoubtedly as to the possibility that the limited powers design would turn out not to offer the requisite security; the implication, though, is that the security offered by enumerated powers is still being heavily relied upon.

Moreover, given the tenth amendment's existence as part of the Bill of Rights, and its functioning as a means of protecting the reserved rights of the people, as reflected in the rhetoric of even the Antifederalist proponents of a bill of rights, it seems clearly inaccurate, however we read the ninth amendment, to insist that we function today under a unitary theory of rights. As the *Federal Farmer* observed as to James Wilson, Barnett insists that we choose a single approach to defining and ensuring rights while explicating a constitution that clearly uses both approaches. See *supra* note 229. But the ninth amendment is a repudiation of Wilson's specific premise that we must choose between enumerating rights and powers, as Madison's response to Randolph in Virginia demonstrates.

311. See, e.g., J. Ely, *supra* note 3, at 35; Moore, *supra* note 94, at 256.

312. See Redlich, *supra* note 137, at 805 (citing The Federalist No. 37, at 236 (J. Madison) (J. Cooke ed. 1961)). Dean Redlich appears to have been the first to rely upon Madison's skepticism about language in defense of the affirmative rights construction of the ninth amendment.

313. *Id.*

the connection, and nothing in the historical materials suggests that Madison or others ever linked the problem of omitting rights with the difficulties that drafters face in conveying ideas clearly.

Other scholars have traced the language of the ninth amendment to Madison's explanation in a 1788 letter to Jefferson that he had not previously thought a bill of rights important because "there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude."<sup>314</sup> Since Madison in the same letter also referred to the need to avoid an implication of enlarged powers and to ensure rights "by the manner in which the federal powers are granted,"<sup>315</sup> John Hart Ely has suggested that Madison's presentation before the first Congress combined the two concerns in a confusing manner.<sup>316</sup>

As with the skepticism as to the clarity of language that Madison expressed in Federalist No. 37, however, there is no evidence suggesting a link between the ninth amendment and Madison's concern that important rights be expressed broadly. Indeed, the evidence points the other way.<sup>317</sup> To begin with, Madison does refer both to the "necessity" and "danger" arguments in the letter to Jefferson, but not in the language identified by those who espouse the view that Madison's concern about the drafting of rights led to the ninth amendment. After acknowledging that "there are many who think such addition unnecessary, and not a few who think it *misplaced in such a Constitution*," Madison affirmed that he preferred a bill of rights, "provided it be so framed as not to imply powers not meant to be included in the enumeration."<sup>318</sup> This is the concern that led to the ninth

314. Letter from James Madison to Thomas Jefferson, in 1 B. Schwartz, *supra* note 52, at 614, 615 (Oct. 17, 1788).

315. *Id.* at 615.

316. See J. Ely, *supra* note 3, at 35-36; cf. Sherry, *supra* note 12, at 1163 n.155 (suggesting that Madison's statement reflected "that he was at this time more worried about limited language of specific rights than the limiting effect of enumerating rights," but nevertheless concluding that Madison is here referring "obliquely" to the objection he described before Congress). But see Van Loan, *supra* note 84, at 17. For treatments that view this language as possibly relevant to Madison's drafting of the ninth amendment, but which also express some doubt, see Kelly, *supra* note 33, at 152-53; Comment, *supra* note 84, at 823-25.

317. See Van Loan, *supra* note 84, at 17 (observing that Virginia and New York proposals were prototypes for Madison's drafting and that "there is no evidence whatsoever that those conventions shared Madison's personal concern").

318. Letter from James Madison to Thomas Jefferson, in 1 B. Schwartz, *supra* note 52, at 614, 615 (Oct. 17, 1788) (emphasis added). Madison's emphasis that a bill of rights is misplaced "in such a Constitution" is one more allusion to the Federalist concern that the enumeration of rights would undermine the limited powers scheme and implicitly grant away the people's reserved rights.

Other portions of the letter, as well as Madison's congressional speech, also call the interpretation into question. Whereas Madison's letter stated that the structural protection of reserved rights and the possibility of not obtaining "requisite latitude" were grounds for not thinking it important to obtain a bill of rights, Madison's presentation to

amendment, and the text of the ninth amendment does not, thankfully, purport to supply a remedy to the problem of rights not drafted to someone's liking.

#### D. *Confronting the Evolution of the Text of the Ninth Amendment*

The progression from the Federalist arguments and the state proposals to Madison's draft supports the view that the animating concern shared by the participants was the need to avoid significant enhancements of national power. The evidence supporting this characterization of the historical materials reinforces the position that affirmative rights advocates have not dealt adequately with the connection between the ratification debates and the drafting history of the ninth amendment. The materials that follow confront the few affirmative rights proponent's treatments that have offered explanations for the link between the state proposals and Madison's draft and the evolution of the ninth amendment text.

Leslie Dunbar is one of the few commentators to confront Madison's draft and its apparent connection to the state proposals. Dunbar acknowledges that Madison drafted the ninth amendment by using the state proposals, but contends that "the reference in his version to the non-enlargement of the powers of Congress is contained within the single context of the people's rights."<sup>319</sup> By seeing the "powers" language as essentially superfluous, Dunbar is thus freed from the burden of explaining why the goal of preventing an inference of enlarged governmental power from a bill of rights was eliminated.<sup>320</sup>

Dunbar's view seems implausible. It runs counter to Federalist formulations voiced during the ratification debates, to Madison's insistence on drafting the bill of rights to avoid enlarged powers as a condition of his support for a bill of rights, and to the clear thrust of the state proposals upon which Madison's draft draws. Moreover, Dunbar

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Congress clearly refers back to the Federalist claim that a bill of rights would be "improper" or "even dangerous." 1 *Annals of Cong.*, supra note 21, at col. 436. Moreover, Madison's letter literally enumerated two separate grounds for not advocating a bill of rights, as compared to the clear implication before Congress that he is recapitulating a single objection with which he appears to presume his audience is already familiar. Finally, both of the reasons that Madison offers for not promoting adoption of a bill of rights are distinct from the more serious objection he summarizes before Congress, which had already been stated separately in the letter.

319. Dunbar, supra note 84, at 633. Dunbar's analysis of the text of Madison's proposal corresponds with other analyses of Madison's explanation of the proposal. See supra notes 261-265 and accompanying text.

320. Dunbar would thus agree that the eventual elimination of the enlarged powers language can be explained as the removal of surplusage—which is also the position taken here. But for Dunbar, the goal of removing the excess language was to state more succinctly that the provision supported an affirmative rights interpretation. Dunbar thus sees Madison's draft proposal for the ninth amendment as charting a wholly different course, rather than as merely supplementing the state proposals for confronting the mischief articulated by the Federalists.

offers no evidence to buttress his construction of Madison's text or his own willingness to embrace a view that depicts Madison as drawing from the language of the Virginia state proposal that he helped to draft while at the same time repudiating its basic thrust.

Dunbar's attempt to explain why Madison rejected the state proposals' focus on preventing a construction of enlarged powers is also open to question. He claims that the state proposals constituted "a strong declaration of a strict construction of congressional powers,"<sup>321</sup> and insists that Madison "was not sympathetic to further restrictions on congressional power."<sup>322</sup> Madison's goal was to enhance liberty, not to undo the work of the Convention in constituting a government of ample powers.<sup>323</sup>

These arguments are, however, inconsistent with what we know about Madison's role in the Bill of Rights debate. Before his proposal to Congress, Madison had twice expressed unequivocal concerns about the danger of enlarged powers flowing from an enumeration of rights.<sup>324</sup> Dunbar ignores that the language of Madison's proposal, like the state proposals, speaks only against an inference of *enlarged* powers by virtue of an enumeration of rights and that it does not convey the idea that congressional powers be construed strictly.<sup>325</sup> Furthermore, Madison's professed view was that the tenth amendment, with language of analogous import preserving reserved powers against an adverse inference, would not change the implications of the Constitution.<sup>326</sup>

Two additional commentators who do not deny the continuity between the state proposals and Madison's draft of the ninth amendment nevertheless find it useful to concur with Dunbar's additional suggestion that Madison came to oppose the "enlarged powers" language be-

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321. Dunbar, *supra* note 84, at 633.

322. *Id.* at 634.

323. See *id.*

324. See *supra* notes 150, 233 and accompanying text.

325. 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.

326. See 1 *Annals of Cong.*, *supra* note 21, at cols. 438-39. Madison consistently opposed Antifederalist attempts to include the word "expressly" within the proposed tenth amendment, which would be consistent with article II of the Articles of Confederation, because that language probably would have had the effect of precluding all implied powers. The Virginia state proposal that became the ninth amendment goes no further than the precursors to the tenth amendment in Madison's proposal for a bill of rights.

It should be added here that although one might be tempted to think that Madison's position in favor of implied powers is inconsistent with his view that enumerated powers would secure a great many rights, it must be remembered that opponents of broad national powers—like Jefferson and Madison, who favored relatively strict construction of the powers granted by the Constitution—did not reject the doctrine of implied powers but only interpreted its potential more narrowly than did nationalists like Hamilton and Marshall.

cause he feared an inference against a strong national government.<sup>327</sup> The scenario proposed is that Madison experienced some change of heart, as shown by the House Select Committee's elimination of the powers language from the proposed amendment.<sup>328</sup> Neither commentator explains why Madison would have drafted strict construction language in the first place, nor why his draft proposal should be read as calling for strict construction of national power. They apparently prefer to rely on Dunbar as authority for these propositions.<sup>329</sup>

In addition, these commentators broadly hint that the select committee simply shifted the concern about powers to the tenth amendment. Calvin Massey writes, "[T]his focus on powers [in Madison's resolution] is missing in the final version [of the ninth amendment] which deals only with the rights retained by the people. The tenth amendment provides the focus missing in the ninth on the limitation of powers of the federal government."<sup>330</sup> This is itself an interesting speculation, but it conflicts with the notion that the powers language was removed in favor of federal power. Madison's draft of the ninth amendment no more restricts federal power than does the tenth, and it is difficult to see how Madison averted a perceived threat to national power merely by moving the "powers" language to the tenth amendment. A more compelling problem, however, is that the tenth amendment does not adequately substitute for Madison's draft on enlarged

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327. See Massey, *supra* note 12, at 310 & n.27; Comment, *supra* note 84, at 821–22 & n.36.

328. See Massey, *supra* note 12, at 310 & n.27 (comparison of Madison resolution and predecessors to final draft "reveals a subtle shift of focus" that reflects "Madison's commitment, at the time, to a strong federal system"); Comment, *supra* note 84, at 821–22 & n.36 (changes made by Select Committee "reveal an important crystallization in Madison's attitude toward individual rights and governmental powers"; prior drafts would have made ninth amendment "a specific limitation on the necessary and proper clause"). Both authors cite Dunbar. See Massey, *supra* note 12, at 310 n.27; Comment, *supra* note 84, at 822 n.36.

329. Indeed, Massey describes the "original focus" as involving a "restriction of any implication of congressional power beyond the express grant of the Constitution." Massey, *supra* note 12, at 310 n.27. But Madison's original proposal cannot plausibly be read as precluding the exercise of power by use of the necessary and proper clause. To the extent that Massey refers only to avoiding implications of new or enlarged powers from the enumeration of rights, there is every reason to think that this was Madison's purpose in drafting the proposal and no reason to think that his purpose had changed.

Massey has more recently suggested that the ninth amendment reflects a secondary purpose of insulating individual rights protections of the state constitutions from the ordinary operation of the supremacy clause in a manner responsive to Antifederalist fears of federal limitations on individual rights under state law. Massey, *Antifederalism and the Ninth Amendment*, 64 *Chi.-Kent L. Rev.* 987, 994–98 (1988). Taking Massey's two arguments together, then, we are asked to think that the "powers" language was removed to avoid undercutting a strong federal system, but that the "rights" language was intended to supply the states with a way to evade the force of federal law.

330. Massey, *supra* note 12, at 310–11; see also Comment, *supra* note 84, at 822 ("[t]his separation of rights and powers into the first nine and the tenth amendments" created two separate spheres of rights and powers).



powers. Madison's draft addresses the specific problem of powers being inferred from the very existence of an inevitably incomplete enumeration of what the people reserve to themselves. As a general reserved powers provision, the tenth amendment does not address that problem at all, though it conceivably makes the feared inference more difficult to justify.<sup>331</sup>

Those claiming that the "enlarged powers" and "unenumerated rights" concerns are independent fears underlying the ninth amendment have seldom attempted to explain this view. Ely, for example, admits "that there was fear . . . that the addition of a bill of rights might be taken to imply the existence of congressional powers beyond those stated in the body of the Constitution," and that "the alleviation of this fear was one reason Madison gave for adding the Ninth Amendment to the Bill of Rights."<sup>332</sup>

Those who argue that Madison and his draft amendment clearly made both points have not answered the question of why the fear of constructive power was not addressed by the final text of the amendment. Since Ely rejects the alternative construction that sees the "enlarged powers" concern as a side effect of losing affirmative rights, and sees it instead as a quite independent concern, the implication is that the proposed function of preventing an inference of enlarged powers was simply dropped. This raises the question of whether or not it is plausible to think that the oft-stated concern with avoiding an inference undercutting the federal system was simply abandoned in favor of pursuing additional personal rights. Ely does not specifically address the question, nor does he address the evidence from the Randolph/Burnley/Madison dialogue, which shows that Madison saw the "powers" and "rights" formulations as alternative descriptions of a single approach to preventing the feared mischief.

Given his emphasis on the textual language of "rights" and "powers" in distinguishing the ninth and tenth amendments, it might be assumed that Ely supposes that the enlarged powers issue was left for the

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331. It is conceivable that Madison, or, perhaps more likely, the Select Committee, determined at some point that the tenth amendment was an adequate safeguard against any untoward implication of enlarged powers. Presumably they could have determined that it would be better not to muddy the waters with more than one affirmation of the doctrine of limited powers as they shifted to a vision of ensuring unenumerated rights. If so, however, they would have been rejecting the contrary conclusions of the Virginia and New York conventions, and it is probable that they would have mentioned this at some point had they done it. Madison had a chance to do so during the Virginia debates on ratification of the Bill of Rights, but he did not. See *supra* text accompanying note 282. For a more complete analysis of the relationship between the ninth and tenth amendments, see *infra* section VI.A.

332. J. Ely, *supra* note 3, at 34. Later, Ely claims that Madison "wished to forestall both the implication of unexpressed powers and the disparagement of unenumerated rights." *Id.* at 36. Compare the views of Sherry, *supra* note 12, at 1161-64. Sherry acknowledges that the Federalists feared enlarged powers, but omits any explanation of how or if this fear was met.

latter amendment. It is strange, however, that such a thoughtful commentator could in a single paragraph acknowledge that the ninth amendment was partly prompted by fears of implied powers from “the addition of a bill of rights” and then, two sentences later, assert that the tenth amendment, which makes no reference to inferences drawn from the enumeration of rights in a bill of rights, “completely fulfills the function that is here being proffered as all the Ninth Amendment was about.”<sup>333</sup> Ely seems to suggest that the distinguished group compris-

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333. J. Ely, *supra* note 3, at 35. Ely claims that the tenth amendment “says—in language as clearly to the point as the language of the Ninth Amendment is not—that the addition of the Bill of Rights is not to be taken to have changed the fact that powers not delegated are not delegated.” *Id.* Compare Barnett, *supra* note 12, at 10 (danger of increased powers from “various exceptions to powers” eventually “unpacked” from concern for rights and “handled by the Tenth Amendment”). Surely, however, the text of the tenth amendment does not by its terms purport to speak to the implications of the amendments that precede it. If its text were not enough, it might be sufficient contextual evidence that the tenth amendment has a separate history and was advocated and proposed without regard to the Federalist objection to a bill of rights. Given that every state’s proposed amendments included a tenth-amendment-like provision, this argument does not explain why New York and Virginia, as well as two additional states, were not satisfied with a tenth-amendment-like provision alone.

More recently, Randy Barnett has claimed that this proposed division of labor between the ninth and tenth amendments is confirmed by a recently discovered draft of proposed amendments written by Roger Sherman—a member of the House Select Committee who worked with Madison in preparing a final proposal for Congress. See Barnett, James Madison’s Ninth Amendment, *in* *The Rights Retained by the People* 1, 7 n.16 (R. Barnett ed. 1989). Barnett observes that Sherman’s draft includes a reserved powers provision that correlates with the tenth amendment, and then points to a “natural rights” provision that “reflects the sentiment that came to be expressed in the Ninth.” *Id.*

In fact, however, Sherman’s draft reinforces the residual rights understanding of the ninth amendment. Although Barnett describes it as “a working draft of the Bill of Rights,” *id.* at 351 (Appendix A), this is not a document that gives new insight into the work of the committee. Sherman’s draft largely follows Madison’s proposals to Congress, except that Sherman omits some of Madison’s draft provisions—including the due process clause, the right to bear arms, proposed limitations on the states and several guarantees related to receiving a fair trial. See *id.* at 351–52. Consistent with this pattern, the “natural rights” provision that Barnett links to the ninth amendment followed Madison’s proposals, which contained a provision, inspired by Virginia’s 1776 Declaration of Rights and the Declaration of Independence, asserting the principles that government exists to secure the people’s enjoyment of the fundamental rights to life, liberty, property and the pursuit of happiness and of government by consent. See 1 *Annals of Cong.*, *supra* note 21, at col. 452; see also 2 B. Schwartz, *supra* note 52, at 911 (similar provisions in New York’s proposed amendments); *id.* at 840 (proposals one through three of Virginia’s proposed bill of rights). Compare *id.* at 234 (Virginia Declaration of Rights sections 1–3); *id.* at 251, 252 (Declaration of Independence); Barnett, *supra*, at 351, Appendix A (Roger Sherman’s draft sections 1–2).

There is no evidence that members of the ratifying conventions that advocated such provisions, or Madison himself, perceived them as related to Federalist objections to adding a bill of rights. It is significant, moreover, that Virginia and New York not only proposed *both* the antecedent to the ninth amendment and the provisions declaring the first principles of the social contract, but also that Madison’s proposals retained both provisions despite the addition of language to clarify the rights focus of the ninth

ing the committee that drafted Virginia's proposed amendments foolishly thought that it was important to reaffirm generally the structure of the Constitution and to ensure it specifically against an adverse inference to be drawn from a bill of rights. We are supposed to believe, at a minimum, that Madison and the Select Committee so concluded, despite Madison's initial decision to draft proposals that included both provisions.

### E. Conclusions

The historical materials bearing on the drafting and ratification of the ninth amendment confirm the evidence from the ratification debates and the state proposals that emerged from these debates. The debate over the necessity and propriety of applying a bill of rights to a government of limited powers reflected the influence of a political tradition of natural rights, but the debate centered on the role of positive law, i.e., the written Constitution, in securing those, and other, rights. The Federalist insistence that natural rights had been reserved and not granted was *not* an argument propounding the inalienability of natural rights as a matter of constitutional theory, but rather was a claim about the nature and implication of the Constitution's system of delegated

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amendment. Additionally, as to the first principles, Madison proposed that they be added as a prefix to the Constitution, see 1 *Annals of Cong.*, supra note 21, at col. 452, and they were ultimately dropped by the Select Committee, see 2 B. Schwartz, supra note 52, at 1122-23 (amendments reported by committee). In short, the first principles provisions have their own unique history and fate in the process of adopting a federal bill of rights. For another scholar who attempts to link such natural rights provisions with the ninth amendment, see Kaminski, supra note 12, at 148.

Even more strikingly, Sherman's handwritten draft appears to include the essential elements of a ninth amendment provision in addition to the language of first principles. The amendment that Barnett links to the tenth amendment reads as follows:

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

Barnett, supra note 12, at 7 n.16. While a deleted word in Sherman's draft creates room for some uncertainty, it nonetheless appears that Sherman is tracking the Virginia and New York proposals in prohibiting a construction "contrary" to the "retained" powers idea from the inclusion of provisions "enumerated by way of caution." Sherman's draft thus follows the New York proposed amendments in combining what became the ninth and tenth amendments in a single provision, see supra text accompanying note 240, except that Sherman's draft appears to describe rights provisions as purely cautionary without even acknowledging that they might operate as exceptions to granted powers. A provision that assumed the validity of the Federalist arguments against the need for a bill of rights would fit well with Sherman's consistent opposition to a bill of rights, see 2 B. Schwartz, supra note 52, at 1121; supra note 218 (quoting Sherman's convention statement against the necessity for a bill of rights). Rather than pointing up the fundamentally different thrusts of the two amendments, Sherman's draft bill of rights underscores the intimate connection between the ninth and tenth amendments and confirms the understanding of the Federalist objection to a bill of rights presented in this Article.

powers and reserved sovereignty. The Antifederalist critique denied the sufficiency of the constitutional design to secure natural rights in law while affirming the importance of an express declaration reserving all rights and powers not granted. Their proposed reservation of rights as a supplement to a bill of rights, however, was not to be a reservation of various trumps to granted powers not expressly renounced by the people, but an affirmation of residual rights that the people could have granted—and indeed might have granted by a fair reading of the delegated powers.

Just as the Antifederalists were satisfied with the security offered to basic rights by the state constitutions, even when these documents offered no particular security to rights not listed, they were also willing to rely upon an express general reservation of rights as a sufficient supplement to a federal bill of rights. Similarly, having conceded the potential value of a bill of rights as an added security, Madison and other Federalists nevertheless sought to ensure that the original design for securing the rights of the people was not completely undermined. The ninth and tenth amendments provide this supplement to the bill of rights, and the ninth in particular supplies both the specific textual focus on the people's retained rights and an efficient remedy to the perceived threat of an adverse inference arising from the listing of specific limitations in a bill of rights.

## VI. BEYOND THE PRERATIFICATION HISTORY: THE NINTH AND TENTH AMENDMENTS AND THE POSTRATIFICATION UNDERSTANDING OF THE NINTH AMENDMENT

Several arguments about the original meaning of the ninth amendment do not proceed from preadoption history. For many commentators, the key to discerning the ninth amendment has been to compare and contrast the ninth and tenth amendments. That process requires an examination of their interlocking histories. An additional area that merits attention involves claims that various sorts of postratification materials confirm the affirmative rights reading of the ninth amendment.

### A. *The Relationship Between the Ninth and Tenth Amendments*

Affirmative rights advocates have relied on the tenth amendment to establish a number of their most important claims about the ninth. It has been asserted that the tenth amendment: (1) reveals the ninth amendment's obviously contrasting focus on "rights" rather than "powers"; (2) supplies the explanation for the omission from the final draft of the ninth amendment of the language prohibiting an inference of enlarged powers that was contained in the state proposals and Madison's initial draft; (3) establishes that the traditional reading of the ninth amendment is implausible because it would render the ninth amendment utterly redundant and rob it of any role in the constitu-

tional scheme; (4) confirms that there are indeed unenumerated affirmative rights by stating that there are powers held by neither the national nor state governments; and (5) supplies a pattern of structural argument supporting judicial intervention to preserve assumptions about a limited national, and after the fourteenth amendment, state, government. It might be noticed that these claims are not in every case consistent with each other.

The first two of these claims have been fully confronted in earlier sections of this article, which developed the historical meaning of the ninth amendment.<sup>334</sup> With that history in mind, the latter three claims will be addressed in turn.

1. *The Redundancy Argument.* — A long and growing list of commentators, going back at least to Knowlton Kelsey, have contended that the residual rights reading of the ninth amendment confuses it with the tenth amendment and renders the ninth superfluous.<sup>335</sup> These commentators frequently invoke the dictum that “[i]t cannot be presumed that any clause in the constitution is intended to be without effect.”<sup>336</sup> This is in one sense an unusual argument, considering that the ninth and tenth amendments are widely recognized as provisions that were both intended to play a largely redundant, clarifying role. Madison, for one, believed that the tenth amendment was intentionally redundant.<sup>337</sup> Admittedly, however, the multiplication of redundancies would raise questions.

Most advocates of the redundancy argument, however, have failed even to note the existence of the state proposals from which, as we have seen, Madison drafted the ninth amendment, let alone their relevance to an understanding of the ninth amendment.<sup>338</sup> At least four states proposed amendments reflecting their view that it was worth ensuring the system of limited powers against both the general threat posed by the lack of an express provision stating the limited powers principle and the risk posed by the specific limiting provisions found within the proposed Constitution and those to be contained in a bill of rights.<sup>339</sup> Their proposals give powerful support to the view that the two provisions were not redundant.

On the residual rights reading, the ninth amendment serves the

334. See *supra* notes 117–147 and accompanying text (as to the first claim); notes 330–331 and accompanying text (as to the second).

335. See, e.g., J. Ely, *supra* note 3, at 34–35; L. Levy, *supra* note 12, at 280; Kelsey, *supra* note 99, at 310–11; Levinson, *supra* note 5, at 142–43; Sager, *supra* note 12, at 246.

336. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803). See, e.g., Barnett, *supra* note 12, at 1; Paust, *supra* note 94, at 237.

337. See 1 *Annals of Cong.*, *supra* note 21, at cols. 458–59.

338. Of the sources cited *supra* note 335, only Leonard Levy and Lawrence Sager even refer to the State proposals. Each of them denies the proposals' relationship to the ninth amendment without really confronting the context in real depth.

339. See *supra* note 80.

unique function of safeguarding the system of enumerated powers against a particular threat arguably presented by the enumeration of limitations on national power. If one takes seriously the Federalist "danger" argument, it would seem to make sense for the framers of the Bill of Rights to state explicitly that the enumeration of rights they provided neither exhausted the rights held by the people nor undermined the system of enumerated powers. The tenth amendment, on the other hand, answered a separate Antifederalist concern: that the omission of an express provision reserving all not granted, as was included in the Articles of Confederation, would be read to imply a government of general powers. The ninth and tenth amendments each serve to secure the design of enumerated powers and reserved rights and powers against the distinctive threats perceived to flow from listing exceptions to powers not granted and relying on implication rather than on express reservation.

Nor is it correct that under the residual rights reading the ninth amendment "is rendered irrelevant to any conceivable constitutional decision" and thus lacks "any *potential* application."<sup>340</sup> 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. That such arguments have never been made is a testimony perhaps to the efficacy of the ninth amendment, or perhaps to the speciousness of the original concern. Plainly there are conceivable uses for the amendment.

2. *The Powers "Retained" by the People.* — By contrast to the redundancy argument, Dean Redlich has suggested that the key to understanding the symbiotic relationship between the ninth and tenth amendments is found in the last four words of the tenth amendment: "The powers not delegated . . . are reserved to the states respectively, or to the people."<sup>341</sup> According to Redlich, these words identify a sphere of powers "possessed by neither the federal government nor the states."<sup>342</sup> Redlich speculates that these words were added to conform the tenth amendment's meaning to that of the ninth and to carry out the intent of both: to recognize unenumerated rights against the federal government with the implication that because of these rights there were powers held by neither government.<sup>343</sup> Unlike other affirmative rights commentators, Redlich equates unenumerated rights and reserved powers.

Redlich manages to equate the people's unenumerated rights with their reserved powers without considering whether these rights might

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340. Barnett, *supra* note 12, at 6.

341. U.S. Const. amend. X (emphasis added).

342. Redlich, *supra* note 137, at 807.

343. See *id.*

instead be defined residually by reference to the federal powers. In assuming that both provisions refer to affirmative rights that diminish governmental power, he ignores the provision advocated by proponents of a bill of rights that would have clarified the reserved rights of the people, and the states, prior to the drafting of the state proposals that became the ninth amendment. He also ignores that the language added to the end of the tenth amendment confirms and clarifies its original purpose.<sup>344</sup> The last four words of the tenth amendment were almost certainly added to summarize the popular sovereignty doctrine, that the people retain what they have not delegated to their state governments, a concept that the original wording of the tenth amendment, with its roots in the notion of state sovereignty contained in the Articles of Confederation, left unclear.<sup>345</sup>

3. *Structural Arguments for an Expansive Ninth Amendment.* — Laurence Tribe's main contribution to ninth amendment constitutional theory has been a suggestive analogy between ninth amendment analysis and modern Supreme Court cases that read into the tenth amendment "tacit postulates of states' rights."<sup>346</sup> Notwithstanding that the formal words of the tenth amendment appear only to reserve powers not delegated, some Supreme Court justices have insisted "that the constitutional plan as a whole" contemplates that some exercises of delegated powers, as construed by the modern Court, "would so erode the meaningful existence of the states as separate polities that such exercises should be deemed unconstitutional."<sup>347</sup> Expressing his agreement with this view of the tenth amendment, Tribe appeals for "the same generous spirit of attention to text and structure" on behalf of the

344. This is Story's interpretation:

This amendment is a mere affirmation of what . . . is a necessary rule of interpreting the constitution. Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities, if invested by their constitutions of government respectively in them; and if not so invested, it is retained BY THE PEOPLE, as a part of their residuary sovereignty.

3 J. Story, *supra* note 193, at 752.

345. Oddly, Redlich also claims that his reading is strengthened by evidence indicating that the ninth and tenth amendments, like the bill of rights generally, were not intended to limit the power of state governments, see Redlich, *supra* note 137, at 806, apparently on the ground that the only other plausible construction is to view the language added to the tenth amendment as limiting state power. But the evidence against application of the ninth and tenth amendments to state government actually cuts against Redlich's analysis. If the people's reserved powers that correspond with unenumerated rights are additional "exceptions" to governmental powers that the people hold independently of the federal or state governments, then they *should* translate into affirmative rights against state government. It is thus the residual rights interpretation of the amendments that best explains both their congruity and their applicability to only the national government.

346. Tribe, *supra* note 12, at 99.

347. *Id.*

ninth amendment.<sup>348</sup>

The analogy, though largely undeveloped, is intriguing. The ninth amendment has become a symbol, whatever the intended meaning of its language, of a constitutional philosophy of inherent and inalienable rights. To the extent that the “unwritten” Constitution is the best interpretation of our “Constitutional plan as a whole,”<sup>349</sup> the ninth amendment’s reference to the people’s retained rights seems on its face like a reasonable textual home for this general view.<sup>350</sup> The response to this view is that the historical evidence shows that the text of the ninth amendment was inserted into the Constitution to accomplish a much more restricted purpose—to prevent the evisceration of the enumerated powers scheme. There is no reason to think that the amendment’s language, read in historical context, strengthens the argument for unwritten affirmative rights derived from constitutional structure.

The question raised applies to judicial and scholarly glosses on both amendments: why do those who advocate the philosophy of inalienable rights decline to argue directly from a structure and relationship analysis? Why do they insist on using a text that was not written to address their views?<sup>351</sup> Under either the text-and-structure or purely structural approaches, the real case for these modes of interpretation must be made apart from the text and history of the particular provisions. Arguably, the case for a postulate of state sovereignty is less problematic than the case for a consensus as to legally enforceable implied rights.<sup>352</sup> Be that as it may, the ninth amendment does not on

348. *Id.* at 100.

349. The classic treatment of this sort of thinking from the design of the Constitutional structure is provided by C. Black, *Structure and Relationship in Constitutional Law* (1969).

350. Indeed, the ideas of natural law and natural rights as affirmative limitations on the exercise of governmental power have sometimes entered the constitutional law arena in discussions about the structural design of the Constitution. Justice Chase, for example, claimed that “[t]he purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it.” *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (emphasis omitted). Some commentators have even sought to distinguish a structural approach that finds affirmative limitations by reference to the nature of “legislative power,” but supposedly without explicit reliance on “natural rights.” See, e.g., E. Corwin, *Liberty Against Government* 67–68 (1948) (describing the views of Thomas Cooley and criticizing them as ultimately resting on concepts of natural rights).

351. See C. Black, *supra* note 349, at 22–23 (contending generally for the superior focusing power of moving directly to structural analysis). The tendency to rely upon constitutional text when the argument can be advanced more directly from constitutional design provides an unwitting tribute to the power of constitutional textualism; even those who express great skepticism about the constraining power of text and history seem more comfortable thinking that they can point to a text that shelters their position.

352. The assumption that the states were to be sovereigns has deep roots and is reflected in the historical doctrine of intergovernmental immunities and the assumption



this theory prove the case for the unwritten constitution nor rebut the originalist position; it is instead a hostage in a broader debate about the relative strengths of various ways of reading the Constitution. In this setting, the ninth amendment does not remain a "central text"<sup>353</sup> any more than does the text of the tenth amendment in attempts to raise some state sovereignty barriers to national power.

To the extent that this sort of structural argument was based on the modern departure from the originally contemplated scope of national powers, additional questions arise.<sup>354</sup> In the current era of concern over the power of government-as-Leviathan, it might be thought legitimate, apart from contractarian theories, to raise affirmative limitations on the exercise of federal power on behalf of individual freedom even where state regulatory authority would not be similarly limited. One could argue that the failure of the federal structure to prevent encroachment on state regulatory authority need not be worrisome, but that the eularged construction of national power should be of concern when federal regulation impacts on individual liberty. Similar reasoning has certainly found its way to the Supreme Court.<sup>355</sup>

The reinterpretation of the ninth amendment along these lines, however, offers little in originalist terms to those who advocate protections for various fundamental rights. The right to grow and consume wheat on one's own farm without federal interference, which would likely have been anticipated to be residually secured, might very well

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of such nationalists as John Marshall that there clearly would be boundaries for the exercise of national power notwithstanding the breadth of the commerce and necessary and proper clauses. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819) (recognizing possibility of judicial finding that Congress had acted pretextually to accomplish objects not entrusted to the federal government); Gunther, Introduction, in *John Marshall's Defense of McCulloch v. Maryland* 1, 18-19 (G. Gunther ed. 1969) (Marshall's extra-judicial defense of implied powers doctrine clarified that, contrary to the claims of his political opponents, he believed in a central government of limited powers and that such limits were judicially enforceable). While there are clearly strands of thought supporting the constitutional status of unwritten norms of natural or fundamental rights, the ratification debate that we have reviewed itself raises serious doubt that this was an assumption that was built into the design of the Constitution. For some further discussion, see *infra* notes 383-388 and accompanying text.

353. See *supra* note 13 and accompanying text.

354. For emphasis on "the gradual but persistent erosion of both structural constraints and the paper barriers of delegated powers" as a justification for invocation of the ninth amendment, see Barnett, *supra* note 12, at 25-26. Barnett bases his affirmative rights reading of the ninth amendment on its text and history, but also sees the growth of national power as reinforcing the need for its invocation. *Id.* The erosion of the structural scheme can also be stated as an independent and sufficient reason for interpreting the ninth amendment to supply additional limitations.

355. For a treatment of cases in which the Supreme Court has adopted a surprisingly narrow application of the necessary and proper clause where individual liberty was concerned, see G. Gunther, *Cases and Materials on Constitutional Law* 118-26 (9th ed. 1975). Gunther is critical of this reliance on a narrow construction of federal power rather than direct reliance on relevant individual rights provisions. *Id.* at 126.

have meant more to many of the founders than would some of the fundamental rights sought to be protected by modern advocates. Moreover, if the goal is merely to rectify the impact on reserved rights of the growth of the modern state, the theory offers scant help in justifying fundamental rights, like the modern right to privacy, to the extent that the theory's aim is to require the application of strict judicial scrutiny to federal programs impinging on these rights. Even if the growth of national power adds a functional justification for an expansion of rights against the government, it neither explains nor justifies the modern double-standard of judicial review in individual rights cases, nor does it reveal any fatal inconsistency in the position of originalists who reject such arguments for a compensating, nonoriginalist use of the ninth amendment.

### B. *The Postratification Understanding*

Apart from the legislative debate in Virginia, as reflected in the correspondence of Burnley and Madison, almost nothing is learned about the meaning of the ninth amendment from the process of ratifying the Bill of Rights. The sort of consensus about meaning that is required of an originalist jurisprudence must stem from a presumption that the ninth amendment's purpose, as revealed by its preadoption history, was widely understood. One way of confirming this sort of general understanding is to examine the interpretations offered by those who subsequently confronted the text of the ninth amendment. If thoughtful nineteenth-century commentators had concurred as to the amendment's proper construction, this would strengthen the view that the lack of adjudication concerning the ninth amendment reflected a continuing consensus about its meaning rather than mere neglect by litigants and judges.<sup>356</sup>

Inasmuch as Joseph Story was the most authoritative of the nineteenth century commentators,<sup>357</sup> his treatment is worth examining. Affirmative rights advocates have claimed that Story sits in their camp.<sup>358</sup> However, in the section of his treatise on the constitution that covers

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356. At least one prominent critic of recent versions of originalism has suggested that a combination of text, original understanding, and long periods of practical and judicial construction might well suffice to yield binding interpretive understandings. D. Richards, *Toleratiou and the Constitution* 48 (1986) (applied as to war powers). The argument as to the ninth amendment is at least as powerful as the example upon which Richards draws.

357. See Sutherland, Introduction, in 1 J. Story, *supra* note 193, at viii-x.

358. See, e.g., Sager, *supra* note 12, at 241 & n.6. The most unfortunate reliance on Story is found in the 1988 edition of Laurence Trihe's justly famous treatise, *American Constitutional Law*, *supra* note 27. There the author combines an unfortunate (if innocent enough) misattribution with what appears to be a (perhaps less excusable) reliance on a secondary source for a proposition that is not supportable. Trihe attributes to Joseph Story the statement that the "Bill of Rights presumes the existence of a substantial body of rights not specifically enumerated but easily perceived in the broad concept of liberty

the ninth amendment, Story states that the amendment was introduced to prevent a perverse or ingenious misapplication of the maxim “that an affirmation in particular cases implies a negation in all others” or “that a negation in particular cases implies an affirmation in all others.”<sup>359</sup> In other words, the Bill of Rights neither negates additional rights nor affirms additional powers. While Story does not elaborate at any length on the nature of the additional rights, he asserts that the amendment “was undoubtedly suggested by the reasoning” of Hamilton’s *Federalist* No. 84 and refers the reader to six earlier sections of his treatise.<sup>360</sup> Story’s reliance on Hamilton’s argument as the source for the amendment suggests that Story, like Hamilton, linked the concern that a bill of rights might lead to constructive powers to the elimination of the system of residually retained rights.

An analysis of the sections of his own work that Story cites confirms this conclusion. These sections summarize the ratification-era debate over the necessity and propriety of a bill of rights. In section 1855, Story paraphrases Hamilton in summing up the view that a bill of rights might even be dangerous: “such a bill would contain various exceptions to powers not granted; and on this very account might afford a colorable pretext to claim more than was granted.”<sup>361</sup> He goes on to affirm, however, that enumerated rights “could not fairly be construed to imply a regulating power.”<sup>362</sup> Story’s analysis of the potential for a “perverse” inference against rights and in favor of power follows Hamilton’s fear of undercutting the constitutional scheme of enumerated powers and retained rights.<sup>363</sup> Story thus reads the final text of

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and so numerous and so obvious as to preclude listing them.’” *Id.* at 775 (citing 3 J. Story, *supra* note 193, at 715–16). But Story makes no such statement.

Computer-based research suggests that the true source of the quoted material is *Zeller v. Donegal School Dist.*, 517 F.2d 600, 614 (3d Cir. 1975) (Seitz, J., dissenting), in which a federal appellate judge makes this claim and cites to the relevant pages of Story, but without attributing the language to Story. It seems probable that Tribe (or a research assistant) relied upon the secondary source without carefully reading Story, and then mistranscribed the significance of the reference in his notes.

359. 3 J. Story, *supra* note 193, at 751–52.

360. *Id.* at 752 & n.2 (citing §§ 1852–1857). Story’s reliance on Hamilton is important because Hamilton’s statements concerning “enlarged powers” as the focus of the “danger” argument that led to the adoption of the ninth amendment are the most unequivocal of the Federalists’ arguments.

361. *Id.* at 715. Compare *The Federalist* No. 84, *supra* note 59. Story writes: [I]n a government like ours, founded by the people, and managed by the people, and especially in one of limited authority, there was no necessity of any bill of rights; for all powers not granted were reserved; and even those granted might at will be resumed, or altered by the people.

1 J. Story, *supra* note 193, at 277; accord, 3 *id.* at 715 (“as [the people] retain every thing, they have no need of particular reservations”).

362. 1 *id.* at 277. As did Hamilton, Story underscored that a bill of rights would supply only a “colorable pretext” for such an inference. *Id.*

363. 3 *id.* at 715. In a later section, Story again takes up the suggestion “that the affirmance of rights might disparage others, or might lead to argumentative implications

the ninth amendment as a structural provision that secures residual rights by preserving the system of limited powers. This treatment confirms the understanding embodied in the discussion between Randolph and Madison in Virginia of the continuity between the Federalist arguments and proposals and the ninth amendment text adopted by Congress and ratified in the states.<sup>364</sup>

Other nineteenth century commentators concurred in Story's views. Bayard observed that the ninth and tenth amendments reflected "the care with which [the people] guarded against any unauthorized extension of [the new government's] power."<sup>365</sup> Bayard's formulation recalls the Virginia and New York proposals' explicit prohibition of an inference of extended powers from the enumeration of rights—language that clearly does not serve to secure affirmative rights. Thomas M. Cooley, a textualist of note and no stranger to implied affirmative limitations on government,<sup>366</sup> also affirmed that the purpose of the ninth amendment was to confront Federalist No. 84's concern that stating exceptions to powers "would afford a tolerable pretext to claim more than were granted."<sup>367</sup> As with Story and Bayard, this reading of

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in favor of other powers." *Id.* at 720. Again, however, Story affirms that such reasoning "could never be sustained" and clearly treats it as a single objection that the language of the ninth amendment precludes. *Id.*

364. Story's repeated emphasis that the feared inference was not a valid one both refers back to Hamilton and cuts against an affirmative rights construction of his argument. Federalists and Antifederalists had basically agreed that an inference from a listing of rights that rights not enumerated were granted away was not a doubtful one with respect to a government of general legislative powers, see, e.g., *supra* notes 52 and 152 and accompanying text. It was the inference against the thrust of enumerated powers that Hamilton and Story thought was, at least, a dubious one. It is also noteworthy that the references in the index to Story's three volume work denominated, "POWERS, reserved to the States or People," and "RIGHTS RESERVED to the States and People," both refer the reader to sections that treat both the ninth and tenth amendments. 3 J. Story, *supra* note 193.

365. J. Bayard, *A Brief Exposition of the Constitution of the United States* 154 (2d ed. 1834), cited in Caplan, *supra* note 14, at 224 n.5.

366. As to Cooley's textualism and its influence on his reading of the fourteenth amendment, see 6 C. Fairman, *Reconstruction and Reunion 1864–88*, pt. 1, at 1369–70 (1971); McAfee, *Constitutional Interpretation: The Uses and Limitations of Original Intent*, 12 U. Dayton L. Rev. 275, 285–86 (1986). Cooley was also the author of *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* (5th ed. 1883), a work which reflected a commitment to implied limitations on governmental power.

367. T. Cooley, *The General Principles of Constitutional Law* 86 (3d ed. 1898). Cooley goes on to underscore the structural reading, emphasizing that the feared inference was "unfounded" even while suggesting that the amendment confirmed "that constitutions are not made to create rights in the people, but in recognition of, and in order to preserve them." *Id.* at 36–37. The residual rights understanding of the ninth amendment has roots in popular sovereignty in which the people initially hold their rights and then delegate powers to government and it is therefore reconcilable with Cooley's suggestion that the Constitution's purpose is to preserve rights that the people already held.

the ninth amendment underscores the author's perception of the amendment's continuity with the Federalist "danger" argument and reflects an understanding of the provision as being focused on preserving the enumerated powers scheme. Neither Bayard nor Cooley have any difficulty seeing the language preserving other rights retained by the people as relating to this original purpose for the amendment.

A final example of nineteenth century commentary is especially intriguing. In 1850, Gerrit Smith, a radical antislavery advocate, argued that the bill of rights applied against the states, except for the first, ninth and tenth amendments.<sup>368</sup> Sanford Levinson has accurately perceived that it is significant that the ninth amendment was not cited as a restriction on state power "by those with the greatest incentive to do so."<sup>369</sup> What is most compelling about Smith's statement, however, is that the same person who saw the arguments in favor of the view that the Bill of Rights generally applied to the states ignored what many modern scholars see as the most obvious interpretation of the ninth amendment. If the ninth amendment secures inalienable rights as affirmative limitations, it is difficult to see why it would not, together with the second through eighth amendments, be applicable to the states. The rationale behind Smith's position seems reasonably clear: the modern ninth amendment is the most potent weapon that an antislavery theorist could have had; nevertheless Smith lumps the ninth amendment together with the first and tenth amendments as inapplicable to the states because he viewed it merely as a structural provision, like the tenth amendment, with no significant implications for a jurisprudence of human rights.<sup>370</sup>

## VII. IMPLICATIONS FOR CONSTITUTIONAL THEORY

It has become popular to think that the ninth amendment might contribute to the resolution of fundamental issues concerning the nature of our constitutional order.<sup>371</sup> It is not clear, however, how it

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368. See W. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760-1848*, at 267 (1977).

369. Levinson, *supra* note 5, at 144-45.

370. There is some postratification evidence that appears to cut against the traditional residual rights reading of the ninth amendment. Early in the nineteenth century, state constitutions began adopting the essential language of the ninth amendment, even though, given the absence of the device of enumerated powers, the only purpose of such language in such a constitution would be to refer to additional limitations on the powers of the state. See J. Ely, *supra* note 3, at 203 n.87. There is, however, no evidence that the inclusion of the ninth amendment's language in these state constitutions reflected any careful consideration of the original context of the ninth amendment. Since the Federalists who, in effect, demanded a ninth amendment did not perceive a bill of rights as presenting the feared danger when included in a state constitutional framework, it is hard to believe that these state law adoptions reflect anything other than a misperception of the role of the ninth amendment in the federal scheme.

371. See Sager, *supra* note 12, at 254-61; Tribe, *supra* note 12, at 100-01; see also J. Ely, *supra* note 3, at 38-39; Laycock, *supra* note 17, at 344-56.

could, except as part of a debate conducted within an originalist framework as to the full implications of originalist methodology. Those who are skeptical as to the viability of originalism seem less than coherent when they argue that the text and history of the ninth amendment provide a meaningful table-turning argument against originalists like Bork and Meese.<sup>372</sup> But even nonskeptical-but-thoroughgoing nonoriginalists are limited to a negative thesis, namely asserting that originalists lack a consistent philosophy by showing that the founders intended by the ninth amendment to secure affirmative limitations that were part of an unwritten fundamental law.

Indeed, when scholars such as Laurence Tribe contend that originally intended meaning should not bind modern interpreters,<sup>373</sup> but nevertheless insist that text and history alone demonstrate the centrality of the ninth amendment, they involve themselves in an inconsistency at least as great as any that Meese or Bork could be charged with. As we have seen, the traditional reading of the ninth amendment has at least as compelling textual and doctrinal credentials as the doctrine of substantive due process, which Tribe has endorsed.<sup>374</sup> However, even

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372. The clearest examples of skeptics who abandon their skepticism to conclude self-assuredly that the ninth amendment disarms originalism as a constitutional theory include Levinson, *supra* note 5, at 134–43, and Mitchell, *supra* note 12, at 1719–20. Another example is Philip Kurland. Compare Kurland, *History and the Constitution: All or Nothing at All?*, 75 Ill. B.J. 262, 265–66 (1987) (expressing deep skepticism about the meaningfulness of inquiry into original intent as a method of constitutional decision making), with Levinson, *supra* note 5, at 138–39 (noting that Kurland’s testimony against Judge Bork was based in part on Kurland’s conversion to the modern reading of the ninth amendment based on work in compiling materials on the founders’ Constitution). Laurence Tribe presents a similar, but more complicated, picture. See *infra* note 373.

373. This conclusion depends, of course, on which Tribe is writing. Tribe has long since gone on record as being committed to a living Constitution, see, e.g., L. Tribe, *American Constitutional Law 2* (1st ed. 1979 Supp.), and his most recent works seem to confirm a general premise that extrinsic evidence cannot eliminate “the possibility of constructing out of the Constitution’s phrases an argument of sorts for nearly any desired conclusion.” See Tribe, *supra* note 10, at 759. At other times, however, Tribe writes as though there is a binding meaning to at least some portions of the Constitution as originally drafted—a view that seems consistent with originalist jurisprudence and at odds with a total embrace of the living constitution metaphor. See *id.* at 760–63; McAfee, *supra* note 366, at 288 n.79 (pointing to Tribe’s reliance on historical understanding to sustain his reading of the division of power with respect to war-making).

374. See Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 Yale L.J. 1063, 1066 n.9 (1980). As I have observed elsewhere, Tribe deems it sufficient that substantive due process can be reconciled with the text and related to constitutional theories of separation of powers and individual expectations at common law, without addressing whether it comports with the understanding of due process of law at the time of the founding. McAfee, *supra* note 366, at 291–92. But if a non-originalist approach to the due process clause can thus be justified by reference to plausible textual and doctrinal arguments, Tribe should explain why the ninth amendment’s text, read in light of the purpose he finds in the underlying history, can be central to understanding the Constitution when quite plausible textual and doctrinal arguments can be used to undergird the traditional reading.

if the affirmative rights reading were correct, one would be tempted to ask why nonoriginalists expect constitutional decision makers to feel constrained by any original understanding of the ninth amendment.

The contemporary world is a different place than the one that the founders inhabited, and it might be thought that the original intention that there be an open-ended model of individual rights, if such were embodied in the ninth amendment, should give way to the "mature skepticism" of modern relativistic thinking that values pluralism and democracy more than did the founders.<sup>375</sup> Nonoriginalism may weigh in on the side of restricting, as well as unleashing, the federal judiciary. Coming from commentators who display only occasional interest in the originally intended meanings of constitutional provisions, the insistence that the intentions behind the text of the ninth amendment must govern our interpretation of that text, and indeed our theory of the Constitution, necessarily has a hollow ring.

As a critique internal to originalism, however, establishment of the affirmative rights reading would undercut the claim of many that originalism can significantly constrain constitutional decision makers. If originalists are to take their own theory seriously, it is difficult to see how they could ignore a constitutional command prohibiting an inference against denying or disparaging unwritten affirmative limitations on governmental power.<sup>376</sup> Even those who acknowledge that the justification of their theory is ultimately rooted in its ability to contribute to the legitimacy and stability of our constitutional order rather than in the fact that its premises were those of the founders, should be troubled by the rejection of their own interpretive methodology when it comes to the ninth amendment.<sup>377</sup> To reject the open-ended ninth amendment intended by the founders would conflict too sharply with

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375. See A. Bickel, *The Morality of Consent* 4 (1975). Bickel was no originalist, but he was an advocate of judicial restraint.

376. But see Maltz, *supra* note 6, at 983. Maltz claims that judicial enforcement of textually recognized, yet unnamed, affirmative rights would be antithetical to the "positivistic view of law" that is at the core of originalist theory. However, Maltz fails to supply the basis for his implicit reliance on a supposed positivist meta-rule requiring that all legal norms be specified before provision for them in positive law amounts to a "legitimate constitution-making process." *Id.* at 984. It seems reasonably clear that ordinary positive law may properly incorporate vague, value-laden norms that require the exercise of wide discretion in explication and application, and it seems unlikely that Maltz would disagree with this. So it is difficult to see why a positivist Constitution may not authoritatively require decision makers, including courts, to use natural law methodology (or the conception of interpreting traditional, unwritten norms) to provide content to a completely general commitment to retained affirmative rights. The command not to deny or disparage unenumerated rights, if it reflected an intent to secure constitutional status for affirmative natural rights that might be omitted, should bind an originalist as much to the search for an appropriate theory of such rights as to enforcing the minimum age requirement for the Presidency.

377. For the argument of one such commentator, see Monaghan, *supra* note 6, at 772.

originalism's emphasis on rule of law values to warrant an expedient reading.<sup>378</sup>

Nevertheless, important distinctions within originalist methodology have often been bypassed in prior analyses. Under almost any originalist theory, there is room for a more creative role for decision makers—a role that may involve frankly nonoriginalist arguments—whenever the search for meaning does not provide a sufficiently clear answer.<sup>379</sup> If, for example, the evidence as to the original meaning of the ninth amendment is simply indeterminate, Bork and Meese would not contradict their professed commitment to originalism by deciding in favor of an interpretation that renders the Constitution the most meaningful in originalist terms. This possibility merely underscores that originalism ultimately must be grounded in a theory of constitutionalism rather than in the historical analysis of the ninth amendment or even the constitution as a whole. Given that it must stand or fall on these theoretical terms in any event,<sup>380</sup> this recognition would not cripple originalism. The only sacrifice would be the need to refrain from the standard charge that believers in unwritten fundamental law clearly depart from the constitutionalism conceived of by the founders—a charge that admittedly has been attractive to originalists.

This Article should at least demonstrate that the affirmative rights reading of the ninth amendment cannot be firmly established as its original meaning. The residual rights reading more than adequately accounts for the most clearly relevant textual and historical materials. Moreover, a number of the advocates of the affirmative rights reading have conceded that the originally intended meaning of the amendment is less than clear,<sup>381</sup> and others have approached the interpretive pro-

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378. A reading that ignored such a clear consensus as to the intended meaning of the amendment would run afoul of a straightforward application of the supremacy clause, as well as the ideal of the rule of law. Monaghan might see this sort of decision as being justified by the competing values of upholding prior restrictive readings under the doctrine of *stare decisis*. See *id.* at 739–67. Without analyzing the doctrine of precedent at any length, it seems clear that the considerations justifying the use of that doctrine do not warrant mere selective invocation of an originalist canon when it served to restrict the discretion of decision makers. There should be no double standard when it comes to the ninth amendment. If his textual and historical premises were sound, I would have to agree with the compelling analysis of Laurence Sager on these issues—a treatment that, in my judgment, necessarily rests on originalist interpretive premises. See Sager, *supra* note 12, at 254–64.

379. See, e.g., McAfee, *supra* note 366, at 290–91. This is not, however, to say that judges are free to import their personal predilections into law at every uncertain turn. The duty of judges in performing the creative function when it is required is itself an important issue of theory as to the role of courts in a constitutional democracy. For suggestive thoughts about that role, see *id.* at 293–95.

380. See Monaghan, *supra* note 6, at 772; Powell, *supra* note 35, at 662–66.

381. See, e.g., Barber, *supra* note 12, at 76 (language and history “admit, though they may not compel, the liberal interpretation”); Mitchell, *supra* note 12, at 1728 (there is no textual basis for linking ninth and tenth amendments “and the historical record on this point is inconclusive”); Comment, *Unenumerated Rights—Substantive Due Pro-*



cess from decidedly nonoriginalist premises.<sup>382</sup> Even if the ninth amendment enables advocates of open-ended judicial review to claim fidelity to a plausible reading of text and history, it certainly does not inflict the sort of massive blow to originalist theory that its most recent proponents have suggested.<sup>383</sup>

Some might think that the lesson here is that it is too messy and complicated to rely on originalist analysis for constitutional decision making. After all, the body of scholarship concerning the ninth amendment does not reach a consensus; arguably all it suggests is that lawyers do not make good historians. But the textual and historical materials reviewed here do illustrate the disadvantages both of overdrawn skepticism about language and history and of the pervasive teaching that there are never answers, but only arguments. Scholarship tinged by these doubts can slide into rhetoric that pretends to look for answers but instead justifies preordained conclusions. The ninth amendment, at least, provides an area in which originalist methodology can supply a reason to accept one answer as authoritative. The combination of text, context and historical consensus here establishes the meaning of the ninth amendment as conclusively as it can for any constitutional provision whose meaning is not self-evident on its face.

From an originalist perspective, the more interesting question is the bearing of these materials on larger issues concerning the status of natural rights and notions of unwritten fundamental law in our constitutional system. The history of the ninth amendment strongly suggests that this provision articulates no such theory. Indeed, the ratification materials seem to cut against the view that at the time of the founding

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cess, the Ninth Amendment, and John Stuart Mill, 1971 *Wis. L. Rev.* 922, 931 (“the history of the amendment does not demand one interpretation”).

382. See, e.g., C. Black, *supra* note 12 (using ninth amendment to argue for expansive judicial role, but without making any claims about its original meaning); McIntosh, *supra* note 12, at 938–41 (arguing that ninth amendment should be read in terms of the best theory of the concept of “rights”). Indeed, until quite recently even some of the leading studies that seemed to assert an historical meaning approached the materials in a way that strongly suggests that the goal was mainly to supply a textual and historical tether for a Supreme Court that seemed drawn to this sort of rhetoric, rather than reflecting any deep commitment to the idea that a knowable historical understanding is there to be discovered. This is my view, at least, of a work such as Redlich’s, *supra* note 137.

Even the recent table-turning arguments sometimes partake of this half-hearted flavor. See, e.g., Levinson, *supra* note 5, at 132, 139–41. The reliance upon quotations taken out of the context of the speeches, as in David Richards’s reliance on Iredell’s speech at the North Carolina convention, see *supra* note 210 and accompanying text, similarly suggests an obligatory stab at text and history to bolster a more deeply rooted philosophical viewpoint. The problem seems to be that some commentators begin to take their advocacy seriously, and thus come to believe that they and others have actually discovered the materials that deal a deathblow to originalism as a coherent approach to constitutional interpretation.

383. For a treatment suggesting the same conclusion on analytical grounds, rather than historical, see Rapaczynski, *supra* note 14, at 204–07.

there was a clear consensus in favor of the concept of enforceable unwritten limitations.

This view seems consistent with Gordon Wood's authoritative treatment of the tensions in confederation-era American thought concerning the nature of law.<sup>384</sup> Wood contends that the commitment to preserving rights and the suspicion of leaving indeterminate the restraints on government led, even before the Revolution, to the growing insistence on written law as the only effective check against abuse of power.<sup>385</sup> But the insistence on written law had roots in English positivist conceptions of law that conflicted with colonial ideas of natural rights that possessed legal status.<sup>386</sup> This ambiguity in legal thought between the commitment to natural rights and the recognition of the need for the security of positive law was combined in the 1780s with impulses toward seeing courts as the potential bulwark of fundamental rights, impulses that paradoxically were accompanied by extreme fear and suspicion of judicial discretion.<sup>387</sup> The evidence showing a clear consensus on how to integrate the written constitution, a theory of the judicial role, and the idea of natural law and unwritten norms remains elusive to this day.<sup>388</sup> Given this seemingly insoluble conflict, it seems

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384. See G. Wood, *The Creation of the American Republic 1776-1787*, at 291-305 (1969).

385. See *id.* at 292-94.

386. See *id.* Wood observes that thinkers in this era frequently affirmed that the written law was not the source of their rights, nor even the sole means of their implementation. *Id.* at 293-95. Yet he observes that "as often as such statements were made, their significance was not fully appreciated, and a pervasive confusion about law remained." *Id.* at 294. It appears that this confusion persisted, for the ratification debate reflects the positivist emphasis on the written constitution, and the corresponding implications of omission of meaningful checks on power, and yet it is followed by a period in which unwritten principles are occasionally invoked to support judicial rulings in favor of individual rights. See, e.g., E. Corwin, *supra* note 350, at 66. The tension is reflected as well in the famous Chase-Iredell debate over the role of natural rights thinking in constitutional adjudication. See *id.* at 59-65.

387. Similarly, at the end of his compelling treatment of the use of unwritten norms of fundamental law in revolutionary America, Thomas Grey acknowledges that "[t]he new practice of establishing a written constitution, drawn up by a special representative convention and ratified by the people influenced the place of unwritten law in constitutional theory," and that the impact of this practice on thinking about the constitutional status of judicially ascertainable fundamental law "remains to be carefully analyzed." Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 *Stan. L. Rev.* 843, 893 (1978).

Grey further acknowledges that at least one important strand of thought that emerged from the revolutionary period viewed natural rights "as purely ethical limitations on government" that were "accessible to all by direct intuition"—views that historically lent themselves to majoritarian democracy as much as to notions of a special role for the courts. *Id.* at 891. Grey found that, as of 1978, the place of these competing conceptions of higher law in the thinking of the founders had not been examined in detail, *id.* at 892, and it appears that the same statement can be made today.

388. Although Thomas Grey and Suzanna Sherry have shown that unwritten fundamental law continued to influence judicial decision making at the time of the founding,

reasonable to believe that this issue will more likely be resolved by resort to constitutional theory than to constitutional history.

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Grey, *supra* note 12, at 157-59; Sherry, *supra* note 12, at 1134-46, they are less persuasive in attempting to show that the framers perceived themselves as merely complementing the fundamental law tradition by writing a Constitution. Grey, *supra* note 12, at 159-67; Sherry, *supra* note 12, at 1157-67.

If there were an area in which traditional skepticism about inquiry into original intent appears to make some sense, then the status of unwritten norms in our constitutional order may be it. This Article has demonstrated that the state ratification debates, which would seem central to the discovery of a clear consensus about the tradition of judicially enforceable natural rights, actually lend support to the positivist conception of the Constitution and Bill of Rights. A central question, however, is whether the entire debate over the potential implications of the proposed Constitution prompted caution on both sides in advancing claims about the nature of the judicial role or the potential status of unwritten norms.