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**Taking History Seriously: Reflections on a Critique of Amar's Treatment of the Ninth Amendment in His Work on the Bill of Rights**

**Thomas B. McAfee\***

**Introduction**

The contemporary debate over modern textualism<sup>1</sup> has prompted some to question whether a “close reading” of constitutional text – of the sort engaged in by textualism’s proponents – can be an adequate guide to original meaning.<sup>2</sup> Advocates of textualism, in an effort to obtain the original public meaning, or understanding, of constitutional text, “closely parse the Constitution’s words and grammar and the placement of clauses in the document,”

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<sup>1</sup>See, e.g., William N. Eskridge, Jr., *The New Textualism*, 37 U.C.L.A. L. Rev. 621 (1990) (coining the phrase and reviewing the theory both critically and historically); Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 Cardozo L. Rev. 1597, 1599 (1991) (describing textualism as “a reaction against the legal process theory set forth by Henry Hart and Albert Sacks”). An important scholarly proponent of textualism as a method of constitutional interpretation is Yale Law School’s Akhil Amar, a fact that prompted the publication of a legal symposium dedicated to exploring the implications of his book on the Bill of Rights to the project of interpreting the Constitution. See Symposium: Textualism and the Constitution, 66 Geo. Wash. L. Rev. 1061-1373 (1998).

Dean Treanor observes that both Justices Scalia and Thomas “champion this interpretive approach,” along with “a cadre of influential academics, Akhil Amar most prominently among them.” William Michael Treanor, *Taking Text too Seriously: Modern Textualism, Original Meaning, and the Case of Amar's Bill of Rights*, 106 Mich. L. Rev. 487, 487 (2007) [hereinafter cited as *Taking Text too Seriously*].

<sup>2</sup>Treanor, *Taking Text too Seriously*, *supra* note 1. Textualism refers to “the school of thought that seeks to construe the Constitution in accordance with the original meaning of the text.” *Id.* at 496. It requires “a search for the public meaning of the text at the time that text was written and ratified,” as contrasted with originalism’s “search for the subjective intent of particular sets of historical actors.” *Id.*

assuming “that this close parsing recaptures original meaning.”<sup>3</sup> In a recent article, Dean Treanor suggests that “perhaps because it seems obviously correct, that assumption has neither been defended nor challenged.”<sup>4</sup> The alternative view, and the one offered by Dean Treanor, is that a careful review of the history leading to the adoption of the language at issue, and even of the “drafting history,” often is essential to the discovery of the original understanding of the text.<sup>5</sup> Textualism is not invariably the best way to find the original meaning.

Perhaps Dean Treanor’s most important, and seemingly compelling, illustration of this fundamental critique of textualism relates directly to Professor Amar’s interpretation of the Ninth and Tenth Amendments in his well-known book, *The Bill of Rights: Creation and Reconstruction*.<sup>6</sup> Treanor offers a number of reasons to think that Amar placed undue weight on the placement of the Ninth and Tenth Amendments together, at the end of the Bill of Rights, while neglecting the evidence revealing that referring to the rights of “the people” was often a way to speak of purely *individual* (as contrasted with collective) rights.<sup>7</sup> The purpose of this article is to embrace the basic critique of textualism presented by Dean Treanor, agreeing that sometimes text can accurately be understood only in the context of the history that produced that

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<sup>3</sup>*Id.* at 487.

<sup>4</sup>*Id.*

<sup>5</sup>*Id.*

<sup>6</sup>Professor Amar’s treatment of the Ninth and Tenth Amendments as the “Popular Sovereignty Amendments” is found at pp. 119-133 of his 1998 book. Dean Treanor focused attention on Professor Amar because “[a]s the preeminent textualist scholar, Amar is an appropriate representative of the methodology.” Treanor, *Taking Text too Seriously*, *supra* note 1, at 492.

<sup>7</sup>Treanor, *Taking Text too Seriously*, *supra* note 1, at 508-519.

text; at the same time, this article will defend the view that Akhil Amar properly read that history as revealing the Ninth Amendment as designed to secure the other rights retained by virtue of the enumerated and limited powers scheme we call our federal system.

In Part I that follows, I sketch out Dean Treanor’s criticism of Amar’s treatment of the Ninth and Tenth Amendments, and the grounds on which he concludes that it illustrates the pitfalls of constitutional textualism. Parts II through VI reviews: (1) the history leading to the adoption of the Ninth Amendment (Part II); (2) the conventional objection to reading the Ninth Amendment as being, like the Tenth, a federalism-rooted provision (Part III); (3) the relation of natural rights and constitutional positivism to the Ninth Amendment (Part IV); (4) the Ninth Amendment and post-adoption evidence; (5) the relation between the Ninth Amendment and modern positivism (Part V). The materials reviewed demonstrate that a close reading of the constitutional text must be aided by a reading of that text in historical context. But when read in historical context, it becomes quite clear that the framers did not intend to impose unenumerated fundamental rights, even on the national government.

## **I. Summarizing the Critique of Amar on the Ninth Amendment**

By contrast to Treanor’s preferred approach, although Amar manages to not completely ignore the “drafting history and textual usages outside the constitutional document,” he “relegates these evidentiary sources to secondary importance.”<sup>8</sup> Instead, Amar’s “central focus is on the text, and it is assumed that close reading yields original meaning.”<sup>9</sup> Moreover, “the

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<sup>8</sup>*Id.* at 491.

<sup>9</sup>*Id.*

Ninth Amendment is primarily concerned,” says Amar, “not with the protection of individual rights, but rather with the people’s right to alter or abolish government.”<sup>10</sup> Hence the amendment’s language referring to “the people’ ha[s] a conspicuously collective meaning.”<sup>11</sup>

In Dean Treanor’s mind, Amar begins to go astray when “he stresses location” in analyzing the meaning of particular texts – “and in particular the fact that the Ninth and Tenth Amendments are next to each other and should thus be read together.”<sup>12</sup> Indeed, Amar refers to the Ninth and Tenth Amendments – even in the title of a chapter in his book – as “The Popular Sovereignty Amendments,” concluding that the Ninth “was ‘a federalism clause intertwined with the Tenth Amendment,’ and it ‘began as republican affirmation of collective rights of the people.’”<sup>13</sup> The problem is that this “assumes that location is a powerful guide to determining meaning and that meaning can be deduced from looking at the finished document rather than from probing drafting history.”<sup>14</sup> But the location of the Ninth and Tenth Amendments, as right “next to each other” in the federal Bill of Rights, “was a coincidence,” considering that Madison proposed amendments to be “inserted into the constitutional document, not added to the end.”<sup>15</sup>

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<sup>10</sup>*Id.* at 493.

<sup>11</sup>*Id.*

<sup>12</sup>*Id.*

<sup>13</sup>*Id.* at 508 (*citing* AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 119, 280 (1998) [hereinafter cited as *CREATION AND RECONSTRUCTION*].)

<sup>14</sup>*Id.* at 508-09.

<sup>15</sup>*Id.* at 509. Moreover, he reminds us, “the predecessors of the Ninth and Tenth Amendment were at very different places on [Madison’s] list of amendments.” *Id.*

Treanor concludes: “They eventually wound up together because of a series of legislative decisions having nothing to do with a sense they were linked.”<sup>16</sup>

Madison’s proposed Ninth and Tenth Amendments would have been placed “at almost opposite ends of the document.”<sup>17</sup> His Tenth Amendment “would have been combined with a separation-of-powers provision to form the penultimate article of the Constitution,” while his Ninth Amendment would have been “the final provision in a series of ten provisions that he sought to insert in Article I, Section 9 between Clause 3 and Clause 4.”<sup>18</sup> These protected rights “followed the two clauses of the unamended Constitution that protect rights against congressional infringement—the suspension of Habeas Corpus Clause and the Bill of Attainder-Ex Post Facto Clause.”<sup>19</sup> Treanor thus contends that when the Ninth Amendment is “viewed in relation to the amendments that preceded them in Madison’s proposal, Madison’s Ninth Amendment clearly protected individual as well as group rights.”<sup>20</sup> Treanor concludes that the

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<sup>16</sup>*Id.*

<sup>17</sup>*Id.* at 514.

<sup>18</sup>*Id.* at 514.

<sup>19</sup>*Id.*

<sup>20</sup>*Id.* The question, of course, does not really concern whether the Ninth Amendment was intended to protect “individual rights,” but precisely how the protection was to occur. Article II of the Articles of Confederation retained for each state “every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States.” 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 86 (Merrill Jensen ed., 1976) [hereinafter RATIFICATION OF THE CONSTITUTION]. But that provision protected individual rights only indirectly by securing state control of those rights unless national jurisdiction had been expressly granted. *See infra* notes 36-40 and accompanying text.

“history of their evolution indicates that the Ninth and Tenth Amendments were not understood as a unit and that no one conceived of them as belonging together.”<sup>21</sup>

Dean Treanor acknowledges that “collective rights were part of the Ninth Amendment’s ‘rights . . . retained by the people,’” but is emphatic that Amar’s claim that the amendment “began as a republican affirmation of collective rights of the people” is wrong “because it denies that the amendment was fundamentally concerned with the protection of individual rights.”<sup>22</sup>

Accordingly, Amar “ignores evidence of the demand for protection of individual rights, a demand that was at least as strongly pressed.”<sup>23</sup>

Thus, says Treanor, Amar fails even to discuss “the opening lines of” the Virginia Ratifying Convention’s resolution proposing amendments:

That there be a Declaration or Bill of Rights asserting and securing from encroachment the essential and unalienable Rights of the People in some such manner as the following:

FIRST, That there are certain natural rights of which men, when they form a social compact cannot deprive or divest their posterity, among which are the enjoyment of life and liberty, with the means of acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.<sup>24</sup>

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<sup>21</sup>*Id.* at 518.

<sup>22</sup>*Id.* at 508.

<sup>23</sup>*Id.* at 509.

<sup>24</sup>*Id.* at 511-12 (quoting Amendments Proposed by the Virginia Convention (June 27, 1788), *in* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST CONGRESS 17 (Helen E. Veit et al. eds., 1991) [hereinafter cited as DOCUMENTARY RECORD]. *Cf.* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 657-661 (J. ELLIOT 2d ed. 1866) [hereinafter cited as ELLIOT’S DEBATES].



Virginia “thus opens with a request for an amendment recognizing ‘natural rights,’” which “are principally, if not wholly, rights of the individuals, not the group.”<sup>25</sup> The same document “put these individual rights on a list of ‘the essential and unalienable Rights of the People.’”<sup>26</sup>

Treanor also reminds us that New York – “the other state whose ratification history Amar invokes – also proposed a series of constitutional amendments sounding in natural rights, although it is omitted from Amar’s account.”<sup>27</sup> As with Virginia, in New York we gather, says Treanor, that “the state ratifying convention was seeking protection of individual rights.”<sup>28</sup>

What all this ultimately means, Treanor tells us, is that Amar never acknowledges that the amendments proposed by the state ratifying conventions “reflected the usage under which individual rights were rights of the people.”<sup>29</sup> So he emphasizes the right to alter and abolish government even as he completely ignores the “proposed amendments regarding the natural right to pursue life, liberty, and happiness.”<sup>30</sup> “The evidence indicates,” moreover, “that individual

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<sup>25</sup> Treanor, *Taking Text too Seriously*, *supra* note 1, at 512.

<sup>26</sup> *Id.* (quoting Amendments Proposed by the Virginia Convention, *in* DOCUMENTARY RECORD, *supra* note 24, at 17.).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 513. Treanor notes that “New York also requested an amendment in which the individual right to conscience was formulated as a ‘right’ of the ‘People.’” *Id.* (quoting Amendments Proposed by the New York Convention (July 26, 1788), *in* DOCUMENTARY RECORD, *supra* note 19, at 21.) He concludes: “As in Virginia, the New York Ratifying convention considered an individual right to be a ‘right’ of the ‘People.’” *Id.* For the view that the proposed New York amendment most closely related to the Ninth Amendment was combined with the proposed amendment that eventually became the Tenth Amendment, see *infra* note 51 and accompanying text.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

rights were at least as much the subject of the Ninth Amendment as the collective rights that are the sole focus of Amar's analysis."<sup>31</sup> Amar thus "ignores evidence of the demand for the protection of individual rights, a demand that was at least as strongly pressed" as "the demand for protection of the popular right to change governments."<sup>32</sup>

Treanor tracks with Professor Barnett in attributing the Ninth Amendment to a draft by a member of the House Select Committee, Roger Sherman, and in particular his proposed Second Amendment that sought to secure "certain natural rights."<sup>33</sup> Yet he acknowledges that Madison's original proposal referred both to *not* construing "exceptions" in favor of rights to diminish "the just importance of other rights retained by the people," but also to not construing those exceptions to "enlarge the powers delegated by the Constitution;" instead, the exceptions should be construed as "either actual limitations on such powers, or as inserted merely for greater

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<sup>31</sup>*Id.*

<sup>32</sup>*Id.* at 509. It is at this point that Treanor cites the article by Professor Barnett that reads the Ninth Amendment both as providing for the protection of "individual rights as well as a narrow construction of the powers of the national government." *Id.*, citing, Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 *Tex. L. Rev.* 1 (2006) [hereinafter cited as *The Ninth Amendment*]. Interestingly, however, Professor Barnett is an advocate of textualism and is far more interested in the "public meaning" of the founders' language than in their "intended" meaning. See, e.g., Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 *LOY. L. REV.* 611, 623 (1999) (clarifying that he does not advocate "original intentions" originalism, but only "original meaning" originalism that looks for how language would likely have been understood). His interpretation of the Ninth Amendment, moreover, is clearly not based on the legislative history that produced the amendment.

<sup>33</sup>Roger Sherman, Proposed Committee Report (July 21-28, 1789), in *Documentary Record*, *supra* note 24 at 266, 268. Treanor's agreement that the Ninth Amendment was derived from a proposal of Roger Sherman is found at Treanor, *Taking Text too Seriously*, *supra* note 2, at 516. *But see* Thomas B. McAfee, *Restoring the Lost World of Classical Legal Thought: The Presumption of Liberty Over Law and the Court Over the Constitution*, 75 *U. CINC. L. REV.* 1499, 1557-1559 (2007) [hereinafter *The Court Over the Constitution*]. See *infra* note 109 and accompanying text

caution.”<sup>34</sup> Treanor observes, but does not explain either the reasons for the changes or its implications, that “[t]he [House Select] Committee edited the proposal down to the first clause and tightened the text,” meaning that its rights language “was modified to become the entire proposal.”<sup>35</sup> As one who has studied and written about the Ninth Amendment for over twenty years, I can say with some confidence that Amar’s treatment of the Ninth Amendment relates more directly to the ratification-era debate that produced the amendment than the account supplied by Dean Treanor.

## II. The Debate Over the Omission of a Bill of Rights

It is quite clear that the Ninth Amendment came to us because of the ratification-era debate over the omission of a bill of rights.<sup>36</sup> The Federalists defended that decision by invoking the precedent of the Articles of Confederation and its omission of any bill or declaration of rights.<sup>37</sup> While the state constitutions “started with a presumption in favor of

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<sup>34</sup>Treanor, *Taking Text too Seriously*, *supra* note 1, at 514-515.

<sup>35</sup>*Id.* at 516.

<sup>36</sup>*E.g.*, Barnett, *The Ninth Amendment*, *supra* note 32, at 7 (“During the ratification debates over the Constitution, the principal objection made by its opponents that resonated with the public was the absence of a bill of rights.”).

<sup>37</sup>*See, e.g.*, Thomas B. McAfee, *Inalienable Rights, Legal Enforceability, and American Constitutions: The Fourteenth Amendment and the Concept of Unenumerated Rights*, 36 WAKE FOREST L. REV. 747, 751 (2001) [hereinafter cited as *Inalienable Rights*] (noting that Madison in *The Federalist* No. 38 posed the question whether a Bill of Rights is “essential to liberty,” and answered the inquiry by referring to the lack of a Bill of Rights in the Articles of Confederation). THOMAS B. MCAFEE, JAY S. BYBEE, & A. CHRISTOPHER BRYANT, POWERS RESERVED FOR THE PEOPLE AND THE STATES: A HISTORY OF THE NINTH AND TENTH AMENDMENTS 29 (2006) [hereinafter cited as POWERS RESERVED] (noting that defenders of the proposed Constitution “relied on the example of the Articles of Confederation—a document with limited and enumerated powers that generated no opposition from those interested in securing basic rights”).

government power,”<sup>38</sup> the framers of the federal Constitution began with the opposite assumption: while in the states “everything which is not reserved is given,” under the proposed Constitution “everything which is not given, is reserved.”<sup>39</sup> The debate over the omission of a bill of rights, then, for the Federalist proponents of the Constitution, turned on the distinction between a government of “general” legislative powers, as held in the states, and a government of “enumerated” legislative powers, as would be held by Congress.<sup>40</sup>

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<sup>38</sup>McAfee, *Inalienable Rights*, *supra* note 37, at 751.

<sup>39</sup>James Wilson’s Speech in the State House Yard (Oct. 6, 1787), in 2 RATIFICATION OF THE CONSTITUTION, *supra* note 20, at 388. The elaborate argument included this:

When the people established the powers of legislation under their separate governments, they invested their representatives with every right and authority which they did not in explicit terms reserve; and therefore upon every question, respecting the jurisdiction of the house of assembly, if the frame of government is silent, the jurisdiction is efficient and complete. But in delegating federal powers, another criterion was necessarily introduced, and the congressional authority is to be collected, not from tacit implication, but from the positive grant expressed in the instrument of union. Hence it evident, that in the former case [of the states] every thing which is not reserved is given, but in the latter [case of the federal Constitution] the reverse of the proposition prevails, and everything which is not given, is reserved.

*Id.* Where “every thing which is not reserved is given,” *id.*, a bill of rights is needed so that essential rights are retained. *See infra* note 200 and accompanying text (James Iredell recognizing necessity of a bill of rights as to a government of general legislative powers).

<sup>40</sup>By contrast, Professor Barnett insists that the legislative power even of the states was limited by the rights “retained” as individuals left the state of nature and joined the social contract—though apparently not initially as a matter of federal constitutional law. *See* Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 433 (2004) (concluding that “the unlimited or plenary power construction of the police power is inconsistent with both the text and original meaning of the Ninth and Fourteenth Amendments”). Considering that Barnett acknowledges that neither the federal Bill of Rights, nor the Ninth Amendment, acted in any way to limit the states’ police powers, one can only imagine that Barnett simply assumes that the natural liberty rights he takes as “retained” by the Ninth Amendment would equally serve to limit state legislative police powers—at least as a matter of

A significant problem was that the Antifederalist opponents of the Constitution did not accept the idea that the Constitution created a government of limited, defined powers, rather than one of “general” powers. Thus Thomas Jefferson, who supported adding a Bill of Rights, responded to Wilson’s argument from enumerated powers by noting that the proposed Constitution omitted Article II of the Articles of Confederation, or an equivalent provision.<sup>41</sup> Article II had provided that each State “retains every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States.”<sup>42</sup> It was the importance of Article II in the minds of Antifederalist opponents of the Constitution that explains why the provision that eventually became the Tenth Amendment was proposed by every state ratifying convention that proposed an amendment.<sup>43</sup>

The reason that Madison’s reliance on the precedent of the Articles, as well as the Antifederalist insistence that the equivalent of Article II be placed in the Constitution, is so understandable, is precisely because Article II’s requirement that all not “expressly delegated”

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state constitutional law—even if there is no text saying so. That conclusion, of course, directly contradicts the views of state legislative power expressed by both sides of the ratification-era debate over the omission of a bill of rights. *See, e.g., supra* note 34 and accompanying text.

<sup>41</sup>Thomas Jefferson to James Madison, *in* 8 RATIFICATION OF THE CONSTITUTION, *supra* note 20, at 249-53 (Dec. 20, 1787). To Jefferson it was apparent that all is *not* reserved “in the case of the general government which is not given,” as demonstrated “by strong inferences from the body of the instrument, as well as from the omission of the clause of our present confederation which had declared that in express terms.” *Id.* at 250.

<sup>42</sup>1 RATIFICATION OF THE CONSTITUTION, *supra* note 20, at 86.

<sup>43</sup>Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1242 (1990) [hereinafter cited as *Original Meaning*]; AMAR, CREATION AND RECONSTRUCTION, *supra* note 13, at 123.

would be “retained” by each State appeared as a perfectly plausible way to ensure the protection of rights.<sup>44</sup> What is important to grasp, however, is that Article II secured rights not by setting forth affirmative limits on delegated powers – what the Federalists referred to as “exceptions” to granted powers and modern thinkers call “trumps” – but by making clear that the powers held by the Articles’ continental Congress were to be construed as strictly limited to those that had been explicitly delegated.<sup>45</sup>

What is often missed in understanding the ratification-era debate over the omission of a Bill of Rights is that the Federalist contention that a Bill of Rights was not only not necessary under an enumerated powers scheme, but would be “absurd and dangerous,”<sup>46</sup> was based on the

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<sup>44</sup>Even some Antifederalist opponents of ratification of the proposed Constitution freely acknowledged that if the Constitution contained a provision that guaranteed 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. Samuel Spencer, North Carolina Ratifying Convention (July 29, 1788), *in* 4 ELLIOT’S DEBATES, *supra* note 24, at 163, 163. *Accord*, A Review of the Constitution Proposed by the Late Convention Held at Philadelphia 1787, by A Federal Republican, *in* 2 RATIFICATION OF THE CONSTITUTION, *supra* note 20, at 303, 304-06 (stating that Constitution needed either a bill of rights or a declaration that all not “decreed to Congress” is reserved to states).

<sup>45</sup>*See, e.g.*, Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 Tex. L. Rev. 331, 356 (2004) [hereinafter cited as *Lost Original Meaning*] (describing Article II as having “distinguished the limited enumerated powers of the federal government from the unenumerated police powers of the states. Thus, all powers and rights not delegated to Congress were reserved to the people of the several states. The people of the states, in turn, may delegate those retained powers and rights to their own state government.”).

<sup>46</sup>James Iredell, North Carolina Ratifying Convention, *in* 4 ELLIOT’S DEBATES, *supra* note 24, at 149. Edmund Randolph argued in Virginia that as to an “ordinary legislature” with “no limitation to their powers,” a bill of rights might be necessary; but the “best security” in a compact “is the express enumeration of powers.” 3 ELLIOT’S DEBATES, *supra* note 24, at 467 (Virginia Ratifying Convention, June 15, 1788). In his most recent major defense of his reading of the Ninth Amendment, Barnett simply skips any thought that Federalists feared undermining the structural protection of rights, claiming that the feared danger was simply that “all [the rights] that were not listed were surrendered,” and that the rights to be protected are “impossible to

risk that the setting forth of rights could be understood to reverse the decision that the national legislature was to be one of enumerated and limited powers<sup>47</sup>—a rights-protective structural scheme.<sup>48</sup> Even an advocate of unenumerated fundamental rights has acknowledged that the Federalists “feared a Bill of Rights would imply that the federal government was a government of general powers rather than of limited, enumerated powers.”<sup>49</sup>

This is the reason that the Federalist argument was limited to stating the dangers of a bill

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enumerate.” Barnett, *The Ninth Amendment*, *supra* note 32, at 8.

<sup>47</sup>James Wilson 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 to the people would have been spurned at, in that house, with the greatest indignation.” 2 RATIFICATION OF THE CONSTITUTION, *supra* note 20, at 387-88 (James Wilson, Pennsylvania Ratifying Convention, Nov. 28, 1787). “The idea that an enumeration of rights was superfluous in a constitution of merely delegated powers was precisely the idea that Madison intended to express in the Ninth Amendment.” Edward J. Erler, *The Ninth Amendment and Contemporary Jurisprudence*, in *The Bill of Rights: Original Meaning and Current Understandings* 432, 436 (Eugene W. Hickok, Jr., ed. 1990).

<sup>48</sup>Madison linked the argument that a Bill of Rights was not necessary to the argument that it could prove dangerous when he summarized the Federalist defense in presenting his proposed Bill of Rights to Congress:

It has been said, that in the Federal Government [declarations of rights] are unnecessary, because the powers are enumerated, and it follows, that all that are not granted by the Constitution are retained; that the constitution is a bill of powers, the great residuum being the rights of the people; and, therefore, a bill of rights cannot be so necessary as if the residuum was thrown into hands of the Government.

James Madison, *Speech to the House Explaining His Proposed Amendments and His Notes for the Amendment Speech*, in 1 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 51, 59 (Randy E. Barnett ed. 1989) [hereinafter RIGHTS RETAINED].

<sup>49</sup>John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 Emory L.J. 967, 995 (1993).

of rights being added to “a government possessed of enumerated powers.”<sup>50</sup> Thus when state ratifying conventions proposed amendments against interpreting rights (referred to as “clauses which declare that Congress shall not exercise certain powers”) to “extend the powers of Congress,” their purpose was to ensure the protection of rights by avoiding an inference of general legislative powers.<sup>51</sup>

Treanor is certainly right that it was almost a coincidence that the Ninth and Tenth Amendments wound up “next to each other” in the Bill of Rights.<sup>52</sup> At the same time, when he

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<sup>50</sup>2 Ratification of the Constitution, *supra* note 20, at 388 (James Wilson, Pennsylvania Ratifying Convention, Nov. 28, 1787). 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). It was the existence of a federal government of enumerated powers that explains Madison’s fear that “enumerating particular exceptions to the grant of power” would “disparage those which were not placed in the enumeration,” and “those rights which were not singled out, were intended to be assigned *into the hands of the general government.*” James Madison, *Speech to the House Explaining His Proposed Amendments and His Notes for the Amendment Speech*, in RIGHTS RETAINED. *supra* note 48, at 51, 60 (emphasis added). Though acknowledging that Madison’s analysis was that this “is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights *into this system,*” Professor Barnett treats Madison’s statement as though it were an argument against bills of rights in any constitution. *See* Barnett, *Ninth Amendment*, *supra* note 27, at 9 (emphasis added).

<sup>51</sup>*See* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 840-45 (1971). Virginia’s seventeenth proposed amendment read:

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.

DOCUMENTARY RECORD, *supra* note 24, at 21.

<sup>52</sup>Treanor, *Taking Text too Seriously*, *supra* note 1, at 509. The House Select Committee that decided to place the proposed amendments in a separate document, and not to insert them



asserts that “the Ninth and Tenth Amendments were not understood as a unit and that no one conceived of them as belonging together,”<sup>53</sup> it appears that he is simply wrong.<sup>54</sup> As Professor

Lash found:

In the end, the Select Committee’s decision to place the Ninth and Tenth Amendments side by side was prescient. From the moment they were enacted (indeed, before), the two provisions were cited as expressing twin principles of federalism: limited and enumerated federal power. Madison linked the two in his speech as dual guardians of state autonomy, and numerous treatise writers of the Founding generation did the same.<sup>55</sup>

And when Edmund Randolph objected to the “eleventh proposed amendment” (our Ninth) before the Virginia Assembly, he contended that the amendment should have been worded more like the “the 1<sup>st</sup> and 17<sup>th</sup> amendments proposed by Virginia.”<sup>56</sup> Notice that even

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into the Constitution itself as Madison had proposed, also determined to place what became the Ninth and Tenth Amendments next to each other.

<sup>53</sup>*Id.* at 518.

<sup>54</sup>*See, e.g.,* Kurt T. Lash, *The Inescapable Federalism of the Ninth Amendment*, 93 IOWA L. REV 801, 844 (2008) [hereinafter cited as *Inescapable Federalism*] (observing that “Madison used the Ninth Amendment in defense of state rights and did so in a manner that recapitulates the entire history of the Amendment, from its roots in the state conventions to its final placement alongside, and in tandem with, the Tenth Amendment”); *id.* at 54 (noting that “[t]here are literally hundreds of cases and commentaries linking the Ninth and Tenth Amendments as twin guardians of federalism”).

<sup>55</sup>Lash, *Lost Original Meaning*, *supra* note 45, at 396. In perhaps the earliest commentary on the Constitution, Professor Tucker treats the Ninth and Tenth Amendments together, after quoting each verbatim, and concludes that each calls for “every power” to be “construed strictly” for the benefit of the people and the states. ST. GEORGE TUCKER, *View of the Constitution of the United States, in VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS* 245-46 (Clyde N. Wilson ed., 1999) (1803) [hereinafter cited as *VIEW OF THE CONSTITUTION*].

<sup>56</sup>2 SCHWARTZ, *supra* note 51, at 1188. Randolph’s argument is excerpted and then carefully analyzed at McAfee, *Original Meaning*, *supra* note 43, at 1287-1293. The Virginia

these amendments were widely separated, as were Madison's proposed Ninth and Tenth Amendments before Congress, but Randolph's argument makes clear that they were closely related in the minds of the framers.<sup>57</sup> The closeness of that relationship is confirmed as well, quite strongly, by the amendment proposed by the New York Ratifying Convention, on July 26, 1788.

That the Powers of Government may be reassumed by the People, whensoever it shall become necessary to their Happiness; that every Power, Jurisdiction and right, which is not by the said Constitution clearly delegated to the Congress of the United States, or the departments of the Government thereof, remains to the People of the several States, or to their respective State Governments to whom they may have granted the same; and that those Clauses in the said Constitution, which declare, that Congress shall not have or exercise certain Powers, do not imply that Congress is entitled to any Powers not given by the said Constitution; but such Clauses are to be construed either as exceptions to certain specified Powers, or as inserted merely for the greater caution.<sup>58</sup>

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proposed amendments present the functional equivalents of the Ninth and Tenth Amendments. Treanor would be wise to consider why Barnett interprets the Ninth Amendment both to secure individual rights and to justify “a narrow construction of the powers of the national government.” Treanor, *Taking Text too Seriously*, *supra* note 1, at 509. Barnett's advocacy of “narrow construction” of federal powers, to the end of protecting retained rights, implicitly admits that “rights” and “powers” are closely related and that a “federalism” reading of the Ninth Amendment has much to offer. *Cf.* Barnett, *Ninth Amendment*, *supra* note 32, at 17-21 (endorsing a “federalism model,” not as a matter of “original meaning,” but as a valid “constitutional construction” that creates a presumption in favor of retained rights). *But cf. infra* note 68 and accompanying text (Barnett separating Ninth and Tenth Amendments as about “rights” and “powers”).

<sup>57</sup>In a thorough analysis of the Virginia debate, including Madison's correspondence with Hardin Burnley and George Washington, I observed that both Burnley, a member of the Virginia assembly who described the assembly debate to Madison, and James Madison, agreed with Randolph that the Virginia proposed amendment that became the Ninth Amendment was drafted as a “reservation against constructive power.” McAfee, *Original Meaning*, *supra* note 43, at 1287-1293, 1288. A useful treatment of the Virginia debate is found in Lash, *Lost Original Meaning*, *supra* note 45, at 371-78.

<sup>58</sup>DOCUMENTARY RECORD, *supra* note 24, at 21-22. Amar clearly grasped the relevance of this connection. AMAR, CREATION AND RECONSTRUCTION, *supra* note 13, at 122. *See also*

The relatedness of the First and Seventeenth proposed amendments of the Virginia ratifying convention coincides as well with 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.”<sup>59</sup> It is also shown by their placement in the Virginia ratifying convention’s proposed amendments. Both of these amendments were *not* part of the Virginia convention’s proposed bill of rights. One set of amendments, the convention stated, was to “be a declaration or bill of rights asserting, and securing from encroachment, the essential and unalienable rights of the people.”<sup>60</sup> The First and Seventeenth proposed amendments were part of a separate section of Virginia’s proposed amendments, denominated AMENDMENTS TO THE BODY OF THE CONSTITUTION.<sup>61</sup> Virginia’s First proposed amendment was worded very similarly to Article II

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MCAFFEE, BYBEE, & BRYANT, POWERS RESERVED, *supra* note 37, at 36 n. 64 (New York proposal “confirms that the purpose of the Ninth Amendment . . . was to protect the enumerated powers scheme and to lend support to what became the Tenth Amendment”); Lash, *Lost Original Meaning*, *supra* note 45, at 355-56. Unsurprisingly, James Wilson had actually labeled a bill of rights as “an enumeration of the powers reserved.” James Wilson, 2 RATIFICATION OF THE CONSTITUTION, *supra* note 20, at 387, 388 (Pennsylvania Ratifying Convention, Nov. 28, 1787). A suggested dichotomy between “rights” and “powers” provisions – as assertedly embodied in the Ninth and Tenth Amendments – seems repudiated by Wilson’s formulation. For additional strong evidence that the proposed amendment’s reference to avoiding enlarged powers related directly to the debate over the dangers of adding a bill of rights, see Lash, *Inescapable Federalism*, *supra* note 54, at 817-23.

<sup>59</sup>James Madison to Thomas Jefferson, in 1 SCHWARTZ, *supra* note 51, at 614, 615 (Oct. 17, 1788).

<sup>60</sup>DOCUMENTARY RECORD, *supra* note 24, at 17.

<sup>61</sup>*Id.* at 19-21. In another source these amendments are described as AMENDMENTS TO THE CONSTITUTION. 3 ELLIOT’S DEBATES, *supra* note 24, at 659. *Cf.* Jon Kukla, “Yes! No! And If . . . Federalists, Antifederalists, and Virginia’s “Federalists Who are for Amendments,” in ANTIFEDERALISM: THE LEGACY OF GEORGE MASON 43, 59 (Josephine F. Pacheco ed., 1992)

of the Articles of Confederation, retaining “every power, jurisdiction, and right,” not “delegated to the Congress;” it eventually became the Tenth Amendment.<sup>62</sup> Virginia’s Seventeenth proposed amendment forbade construing limits on powers as extending the powers of Congress, holding that they should be construed as “making exceptions for the specified powers” or as “inserted merely for the greater caution.”<sup>63</sup>

When Madison offered proposed amendments to the Constitution in the House of Representatives, moreover, he included all three types of proposals – (1) one inspired by the Virginia Bill of Rights, sections 1 and 3, to be inserted in the preamble as a “prefix” to the Constitution<sup>64</sup>; (2) one seeking to prevent an inference of “enlarged” powers or diminished

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[hereinafter cited as ANTIFEDERALISM] (contrasting “a bill of rights and twenty structural changes”).

<sup>62</sup>DOCUMENTARY RECORD, *supra* note 24, at 19.

<sup>63</sup>DOCUMENTARY RECORD, *supra* note 24, at 21. It is also true, of course, that Virginia’s seventeenth proposed amendment was responsive to Federalist arguments about the “danger,” or “absurdity,” of including a bill of rights in the Constitution; so it is unsurprising that Madison included this proposed amendment – described as a “reservation against constructive power,” *see* text accompanying note 104 *infra* – in Article I, section 9. Virginia’s proposed amendment grew out of Hamilton’s objection, based on perceived dangers, to including a bill of rights. *See* ALEXANDER HAMILTON, THE FEDERALIST No. 84, at 579 (JACOB COOKE ED., 1961). The Ninth Amendment is widely traced both to Hamilton’s argument and to Virginia’s proposed amendment. McAfee, *The Court Over the Constitution*, *supra* note 33, at 1516-1519. Professor Barnett, however, would trace Hamilton’s argument exclusively to the Tenth Amendment. *Id.* at 1517-18.

<sup>64</sup>James Madison, *Speech to the House Explaining His Proposed Amendments and His Notes for the Amendment Speech*, in 1 RIGHTS RETAINED, *supra* note 48, at 51, 54. For the prefix’s proposed content, *see infra* note 165 and accompanying text. *Cf.* Va. Const. Of 1776, Bill of Rights, §§ 1, 3, *reprinted in* 7 THE FEDERAL AND STATE CONSTITUTIONS: COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3812, 3813 (Francis Newton Thorpe ed., 1909) [hereinafter cited as STATE CONSTITUTIONS]. Amar links the emphasis on the people’s

rights, to be in article I, section 9<sup>65</sup>; and (3) one seeking the inclusion of the functional equivalent of the Tenth Amendment, to be inserted at Article VI of the Constitution.<sup>66</sup> The proximity of the language of Virginia's state proposals to the texts we know as the Ninth and Tenth Amendments is simply undeniable.<sup>67</sup>

#### IV. Rights and Powers

It is a common objection that if one construes the rights secured by the Ninth Amendment as referring to the rights defined by the enumerated powers scheme, such an interpretation “erroneously construes the Ninth Amendment to mean nothing more than what is stated in the Tenth.”<sup>68</sup> The Tenth Amendment states “that powers not delegated are reserved.”<sup>69</sup> If the “rights” are defined by reference to what’s left over after you explicate the “powers,” the Ninth Amendment adds nothing. Moreover, the “Tenth Amendment does not speak of *rights*, . .

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right to alter and abolish with analysis by Hamilton in The Federalist No. 78. See AMAR, CREATION AND RECONSTRUCTION, *supra* note 13, at 122.

<sup>65</sup>James Madison, *Speech to the House Explaining His Proposed Amendments and His Notes for the Amendment Speech*, in 1 RIGHTS RETAINED, *supra* note 48, at 51, 55.

<sup>66</sup>*Id.* at 56.

<sup>67</sup>For a close comparison, see Lash, *Inescapable Federalism*, *supra* note 54, at 822-23. Lash notes that some contend that the language referencing powers “was moved to the Tenth Amendment,” but correctly concludes that “this clearly is not the case.” *Id.* at 823. “The powers to which Madison refers in his initial draft of the Ninth involved only the implied enlargement of enumerated powers. This language was not moved to the Tenth; it simply disappeared.” *Id.*

<sup>68</sup>Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 6 (1988) [hereinafter cited as *Reconceiving*]. “By contrast,” Barnett observes, “the Ninth Amendment speaks only of rights, not of powers.” *Id.*

<sup>69</sup>*Id.*

. but of reserved ‘powers,’”<sup>70</sup> and such an interpretation of the Ninth therefore directly violates Justice Marshall’s famous dictum that “[i]t cannot be presumed that any clause in the constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it.”<sup>71</sup> The traditional reading of the Ninth Amendment, on this view, posits that the amendment was “confusingly written in terms of ‘rights’ that are ‘retained by the people,’ to express exactly the same idea”<sup>72</sup> stated in the Tenth Amendment. The result is that this conception “renders the Ninth Amendment effectively inapplicable to any conceivable case or controversy.”<sup>73</sup>

Prior to addressing the objection directly, it is at least relevant, and worthy of comment, that Professor Barnett, who makes much of this redundancy objection, has adopted an interpretation of the Necessary and Proper Clause that is at least as redundant of his own construction of the Ninth Amendment as the traditional interpretation of the Ninth Amendment is of the Tenth. At least since the early 1990's, Professor Barnett has embraced the view that it is “improper,” and therefore a violation of the power recognized in the Necessary and Proper Clause, for Congress to enact legislation that violated the “background rights” of the people.<sup>74</sup>

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<sup>70</sup>*Id.*

<sup>71</sup>*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803). Justice Marshall’s well-known dictum is used as a heading at the very beginning of Barnett’s first important treatment of the Ninth Amendment. Barnett, *Reconceiving*, *supra* note 68, at 1.

<sup>72</sup>Barnett, *Reconceiving*, *supra* note 68, at 6.

<sup>73</sup>*Id.*

<sup>74</sup>Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. Pa. J. Const. L. 183, 217 (2003) [hereinafter cited as *Necessary and Proper Clause*]. Barnett fully

More recently, Barnett has endorsed the idea that whatever rights are “retained” by the principle articulated in the Ninth Amendment, any law that “improperly” intruded on such a right would be a direct violation of the Necessary and Proper Clause.<sup>75</sup> If Barnett’s interpretation of the Necessary and Proper Clause is correct, it is not even clear why it was not prominently featured in the debate over the omission of a Bill of Rights; and, if it is correct, the Ninth Amendment clearly has no independent role to play in constitutional adjudication, since all the same rights are already secured by the Necessary and Proper Clause.

More generally, if the redundancy objection has any merit, it did not impact the committee that drafted the Virginia ratifying convention’s first and seventeenth proposed amendments, as both were rules of construction that referred to both rights and powers. Virginia’s first proposed amendment, tracking the Confederation’s Article II, stated that each state retained “every *power*, jurisdiction, and *right*,” not “delegated to the Congress.”<sup>76</sup> It’s seventeenth proposed amendment prohibited misconstruing rights limitations on federal powers

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accepted the relatively stringent – and “rights-protective” – construction of the Necessary and Proper Clause found in Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Reading of the Sweeping Clause*, 43 Duke L.J. 267 (1993) [hereinafter cited as *The Sweeping Clause*].

<sup>75</sup>Barnett, *Necessary and Proper Clause*, *supra* note 74, at 217-19. Barnett attempted for a period to reconcile his strict reading of the Necessary and Proper Clause with his stated view that the rights “retained” by the Ninth Amendment are the natural rights people bring with them from the state of nature when they join the social contract; but his sporadically stated view that the people also “retain” fundamental positive rights has managed to “win out,” though to date without anything offered by way of justification. See MCAFFEE, BYBEE, & BRYANT, POWERS RESERVED, *supra* note 37, at 62 n. 150

<sup>76</sup>DOCUMENTARY RECORD, *supra* note 24, at 19 (emphasis added).

as extending or enlarging the powers granted to Congress.<sup>77</sup> The reason thoughtful people could think them both essential is that both provisions are cautionary guarantees to assure that the limited powers design of the Constitution was understood and implemented.<sup>78</sup>

Professor Lash concluded that Madison based his draft of the Bill of Rights “on the concerns emanating from the state ratifying conventions,” and that the state proposed amendments show “how those who ratified the Constitutions understood and used terms like ‘powers’ and ‘rights.’”<sup>79</sup> As the various state proposals indicated, the Ninth and Tenth amendments have separate histories and serve complementary functions.<sup>80</sup> The Tenth Amendment grew out of expressed fears that the omission of such an explicit guarantee of

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<sup>77</sup>The full text of Virginia’s seventeenth proposed amendment is found at note 48 *supra*. It is clear that clauses “which declare that Congress shall not exercise certain powers” is a reference to “rights” provisions, and they work as “exceptions” to powers whenever they operate to trump the exercise of granted powers. When Professor Barnett contends that there is nothing in this proposal “about the rights *of the people*, collective or otherwise,” but instead relates exclusively to the “rights *of states*” – and is therefore unrelated to “the problem for which the Ninth Amendment was Madison’s solution” – it becomes clear that he simply does not understand how Virginia’s proposed amendments related to the debate over the omission of a bill of rights. Randy E. Barnett, *Lash’s Majoritarian Difficulty: A Response to A Textual-Historical Theory of the Ninth Amendment*, 60 *Stanf. L. Rev.* 937, 950 (2008).

<sup>78</sup>Amar is clearly right in asserting that the “obvious counterargument—chanted like a mantra by most mainstream scholars—is that this reading renders the Ninth Amendment wholly redundant of the Tenth. But this obvious counterargument is obviously wrong, and no amount of chanting can save it.” AMAR, CREATION AND RECONSTRUCTION, *supra* note 13, at 123.

<sup>79</sup>Lash, *Lost Original Meaning*, *supra* note 45, at 355.

<sup>80</sup>Their complementary functions explain why Professor Lash has observed that “every court and every scholar who addressed the Ninth Amendment in the first period of constitutional law read the Ninth in *pari materia* with the Tenth as one of the twin guardians of federalism.” Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 *Tex. L. Rev.* 597, 643 (2005) [hereinafter cited as *The Lost Jurisprudence*].



reserved powers, such as had been included in the Articles of Confederation, might raise the inference that general powers were intended.<sup>81</sup> The Ninth Amendment, on the other hand, addresses the altogether different threat posed by the enumeration of specific limitations on government powers designed to secure individual rights. The Tenth Amendment does not by its terms address any inferences which arguably flow from the enumeration of rights in the Constitution. Moreover, constitutional law scholars have in recent years underscored that the “anti-redundancy” presumption should be formulated as an “anti-nullity” presumption,<sup>82</sup> recognizing that “redundancy in legal documents is not particularly odd,” especially when “the drafting history of the Bill of Rights explains the presence of both provisions.”<sup>83</sup>

Nor is it correct that under its traditional interpretation the Ninth Amendment “is rendered irrelevant to any conceivable constitutional decision” and thus lacks “any potential application.”<sup>84</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. Indeed, the Federalist predictions in fact occurred, as there are examples early in the nation’s history of arguments for

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<sup>81</sup>McAfee, *Original Meaning*, *supra* note 43, at 1307.

<sup>82</sup>Akhil Reed , *Constitutional Redundancies and Clarifying Clauses*, 33 VAL. U. L. REV. 1, 3 (1998).

<sup>83</sup>Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 271 (1988).

<sup>84</sup>Barnett, *Reconceiving*, *supra* note 68, at 6.

enlarged federal powers being based on the explicit statements of limitations found in the federal Bill of Rights.<sup>85</sup>

It is significant, moreover, that one who opposes reading the Ninth Amendment as an attempt to secure the rights protected by the enumerated powers scheme, and who contends that the Tenth Amendment is about “powers” while the Ninth Amendment is about “rights,” nevertheless winds up employing a strict construction of federal powers as a central feature of efforts to implement that Ninth Amendment. During the debate over a bill of rights, one Federalist argued that the limited delegation of powers in article I “amounts in fact to a bill of rights.”<sup>86</sup> If the linchpin of this argument was the assumption that implied rights limitations would be read into the powers, this would be a peculiar argument, inasmuch as the limited delegation of powers as such would add nothing to the security given the rights. This would be even more puzzling when one considers how often the Federalists contended that their point was made by examining the text of the Constitution itself. Thus James Wilson asked: “[W]hat part of

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<sup>85</sup>See, e.g., MCAFFEE, BYBEE, & BRYANT, POWERS RESERVED, *supra* note 37, at 76-78 (reviewing reliance on First Amendment to justify criminalizing seditious libel in the Sedition Act); *id.* at 231 (concluding that “the concern that gave rise to the Ninth Amendment was not some kind of farfetched claim is illustrated by the actual historical inference of national power” based on “the adoption of a federal Bill of Rights”); AMAR, CREATION AND RECONSTRUCTION, *supra* note 13, at 124; Kurt T. Lash, “Tucker’s Rule”: *St. George Tucker and the Limited Construction of Federal Power*, 47 Wm. & Mary L. Rev. 1343, 1376 (2006) [hereinafter cited as *St. George Tucker*] (Marshall used Federalist argument based on rights limitations in justifying the national bank in *McCulloch*); Forrest McDonald, *The Bill of Rights: Unnecessary and Pernicious*, in THE BILL OF RIGHTS: GOVERNMENT PROSCRIBED 387, 398-400 (Ronald Hoffman & Peter J. Alberts eds., 1997) [hereinafter cited as GOVERNMENT PROSCRIBED].

<sup>86</sup>2 RATIFICATION OF THE CONSTITUTION, *supra* note 20, at 411, 412 (Thomas McKean, Pennsylvania Ratifying Convention, Nov. 28, 1787).

this system puts it in the power of Congress to attack [the rights of conscience]?”<sup>87</sup> Edmund Randolph inquired: “Where is the page where [freedom of the press] is restrained? . . . . I again ask for the particular clause which gives liberty to destroy the freedom of the press.”<sup>88</sup> The argument is that a simple examination of the text would convey what modern commentators insist is the consequence of an implied limitation based on inherent and natural rights.

On such a view, James Wilson could not logically have made the argument that if Congress had been granted the power “to regulate literary publications,” a liberty of the press provision would have been essential.<sup>89</sup> If implied limitations would be read in to the powers granted, a power “to regulate literary publications” would be interpreted as permitting only regulations that did not abridge the preexisting right to a free press. Wilson’s argument reflects that the parties to the debate over a bill of rights agreed that even inalienable natural rights (which freedom of the press was in most minds) were not automatically “retained” as to

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<sup>87</sup>2 ELLIOT’S DEBATES, *supra* note 24, at 455 (Pennsylvania Ratifying Convention, Dec. 4, 1787).

<sup>88</sup>3 *id.* at 469 (Gov. Edmund Randolph, Virginia Ratifying Convention, June 15, 1788).

<sup>89</sup>2 RATIFICATION OF THE CONSTITUTION, *supra* note 20, 168 (Oct. 6, 1787). 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 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 618 (MAX FARRAND ED., 1911) [hereinafter cited as FARRAND], 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 actual grants of power were 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 20 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”).

governments of general legislative powers—or, as Wilson’s specific argument suggests, if the powers granted are sufficiently broad as to fairly be read as enabling government to threaten such a natural right.<sup>90</sup> Wilson’s contention reflects that he took quite seriously the idea that the people’s authority was “absolute, supreme, and uncontrollable.”<sup>91</sup> Contrast Wilson’s reliance on the people’s authority in establishing the Constitution with Professor Barnett’s characterization of the idea that the Constitution is based on the “consent of the governed” as nothing more than an elaborate fiction.<sup>92</sup>

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<sup>90</sup>Wilson is a somewhat perplexing figure, in that he was, at the same time, an advocate of “a fairly expansive conception of the scope of liberty protected by natural law,” MARK DAVID HALL, *THE POLITICAL AND LEGAL PHILOSOPHY OF JAMES WILSON 1742-1798*, at 54 (1997), and yet displayed little “recognition of the problem of reconciling civil liberties with the principle of popular sovereignty.” JAMES H. READ, *POWER VERSUS LIBERTY: MADISON, HAMILTON, WILSON, AND JEFFERSON* 113 (2000). See McAfee, *The Court Over the Constitution*, *supra* note 33, at 1585-1587.

<sup>91</sup>James Wilson, in 2 RATIFICATION OF THE CONSTITUTION, *supra* note 20, at 348 (Pennsylvania Ratifying Convention, Nov. 24, 1787). To Wilson it was clear that popular sovereignty “is a power paramount to every constitution, inalienable in its nature, and indefinite in its extent.” *Id.* at 349. Accord, TUCKER, *Of the Several Forms of Government*, in VIEW OF THE CONSTITUTION, *supra* note 55, at 23 (people’s power is “unlimitable,” as well as “supreme, irresistible, absolute, uncontrollable,” and is “inherent” and “unalienable from them”). Indeed, Wilson would have agreed that “the signature right of the Founding era—the right of self-government—is best understood as a collective right rather than an individual right.” Richard Primus, *An Introduction to the Nature of American Rights*, in THE NATURE OF RIGHTS AT THE AMERICAN FOUNDING AND BEYOND (BARRY ALAN SHAIN ED. 2007) [hereinafter cited as THE NATURE OF RIGHTS].

<sup>92</sup>See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 11-32 (2004) [hereinafter cited as *RESTORING*] (chapter entitled “The Fiction of ‘We the People’: Is the Constitution Binding on Us?”). But see McAfee, *The Court Over the Constitution*, *supra* note 33, at 1565-1589; Lash, *Inescapable Federalism*, *supra* note 54, at 813; Stephen M. Griffin, *Barnett and the Constitution We Have Lost*, 42 SAN DIEGO L. REV. 283, 287-89 (2005). Given his arguments against popular sovereignty, it is difficult to determine why – or even how -- Barnett endorses the popular right to “alter or abolish” the form of government a people live under. See *infra* note 293 and accompanying text.

Contrast Wilson’s clear statement with Professor Barnett’s insistence that Madison held the view that “Congress would have no power to infringe upon the rights of freedom of the press or of conscience whether or not these rights had been enumerated.”<sup>93</sup> On this view, even a clear grant of power to regulate literary publications would not generate any need for a limiting provision inasmuch as the unstated right would already be “retained.”<sup>94</sup> Madison’s actual argument is as follows:

The defense against the charge founded on the want of a bill of rights pre-supposed, he said, that the powers not given were retained; and that those given were not to be extended by remote implications. On any other supposition, the power of Congress to abridge the freedom of the press, or the rights of conscience, &c., could not have been disproved.<sup>95</sup>

Notice that at the center of the argument is our long-encountered proposition that “the powers not given were retained.” Barnett, however, reads the injunction that the powers are “not to be

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<sup>93</sup>Randy E. Barnett, *Necessary and Proper*, 44 U.C.L.A. L. Rev. 745, 781 (1997). Cf. David N. Mayer, *The Natural Rights Basis of the Ninth Amendment: A Reply to Professor McAfee*, 16 S. Ill. U.L.J 313, 322-23 (1992) (acknowledging that Wilson and other federalists contended that in the states the people gave government every right and authority not explicitly reserved, and thus justified reliance on the enumerated powers scheme – but still doubting that they “meant to contradict natural rights theory”).

<sup>94</sup>Barnett’s view rests in part on the assumption that rights are “retained” whether they are positively “enumerated” or not. One does not even require a Ninth Amendment for such rights–enumerated or not–to be “retained.” Indeed, a “prior” source of constitutional protection, we learn, is that an act of legislation is “improper” under the Necessary and Proper Clause if it violates “the background rights retained by the people.” BARNETT, RESTORING, *supra* note 92, at 186, citing Lawson & Granger, *The Sweeping Clause*, *supra* note 74, at 297. Compare Lawson & Granger, *The Sweeping Clause*, *supra* note 74, at 318–19 (laws violating freedom of the press “improper” under the Necessary and Proper Clause) with Randy E. Barnett, *Necessary and Proper*, 44 U.C.L.A. L. Rev. 745, 781 (1997) (construing Madison’s assurances that a free press is not threatened by powers granted, based partly on idea that powers should not be “extended by remote implications,” as based on a theory of “unenumerated rights”).

<sup>95</sup>2 Annals of the Congress of the United States 1901 (Feb. 2, 1791) (Joseph Gales ed., 1834).

extended by remote implications” as “a restrictive interpretation of necessity” that reflects that strict construction of federal powers in effect was the means for avoiding an inadequate protection of unenumerated fundamental rights.

Wilson’s argument that the power “to regulate literary publications” would necessitate a free press clause need not, however, be read as contradicting Madison’s claim that “the powers not given were retained.” Madison’s argument does not really appear to be one demanding strict construction; it simply urges against such liberal construction that granted powers are “extended by remote implications.” As a participant in the debate in which the Constitution’s defenders contended that Congress’s few and defined powers would function as a veritable bill of rights, Madison was urging a careful construction of granted powers, not one that invariably construed the Constitution—no matter what its words said—consistently with unenumerated “retained rights.”

And when James Iredell contended that an adequate “boundary” to prevent violation of rights has been provided and that “any person by inspecting [the Constitution] may see if the power claimed be enumerated,”<sup>96</sup> the argument becomes quixotic if it really amounts to saying that implied limitations, not really conveyed by the text itself, actually supply the only “boundaries” to government power. Thus Professor Hamburger could reasonably conclude that the Federalists believed that the precise “enumeration of federal powers provided a clear boundary between federal power and the people’s rights.”<sup>97</sup> Looking back in 1820 at the

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<sup>96</sup>4 ELLIOT’S DEBATES, *supra* note 24, at 171 (June 29, 1788).

<sup>97</sup>Philip A. Hamburger, *The Constitution’s Accommodation of Social Change*, 88 MICH. L. REV. 239, 315-16 (1989).

ratification-era debate over the omission of a bill of rights, and the subsequent adoption of the Ninth Amendment, John Taylor contended that the amendment enjoined “that the enumeration of certain rights shall not be construed to disparage those retained though not specified, by *not having been parted with*.”<sup>98</sup>

In presenting his draft of the Bill of Rights to Congress, Madison acknowledged that the granted powers included power “with respect to means, which may admit of abuse to a certain extent, in the same manner as the powers of the state governments under their constitutions may to an indefinite extent.”<sup>99</sup> Congress’s power to collect revenues would enable it to enact a law permitting the issuing of general search warrants as a means of enforcing its revenue laws.<sup>100</sup> Madison’s premise was that Congress’s powers should be understood by a natural construction of the language conveying power, together with the Necessary and Proper Clause – with no

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<sup>98</sup>JOHN TAYLOR, CONSTRUCTIONS CONSTRUED AND CONSTITUTIONS VINDICATED 49 (De Capo Press 1970) (1820) (emphasis added). *See id.* at 48. (suggesting that “different modes are pursued,” in that both “certain specified aggressions are forbidden,” and “all the rights and powers not delegated are reserved”); TUCKER, *View of the Constitution of the United States, in VIEW OF THE CONSTITUTION*, *supra* note 55, at 121 (asserting that under Constitution each state was “*retaining an entire liberty of exercising, as it thinks proper, all those parts of its sovereignty, which are not mentioned in the constitution, or act of union, as parts that ought to be exercised in common*”). *See* Lash, *Lost Original Meaning*, *supra* note 45, at 414. n. 409.

<sup>99</sup>DOCUMENTARY RECORD, *supra* note 24, at 82. Madison directly compared the discretion to Congress granted by the Necessary and Proper Clause, with the discretion of state legislatures to enact “improper laws” in “fulfilling the more extended objects of those governments.” *Id.*

<sup>100</sup>*Id.* at 82-83. Madison’s frank acknowledgment is quite consistent with the conclusion of a modern commentator that “[a]n examination of the arguments for and against the need for a bill of rights shows the Antifederalists to have the stronger argument.” Murray Dry, *The Antifederalists and the Constitution*, in ANTIFEDERALISM: THE LEGACY OF GEORGE MASON 25, 38 (Josephine F. Pacheco ed., 1992) [hereinafter cited as ANTIFEDERALISM]. But notice how contrary this conclusion is to the view that the nation could have proceeded based on natural rights that were nowhere enumerated. *See infra* note 139 and accompanying text.

presumption against government power imported in – and this necessitated the insertion of the Fourth Amendment.<sup>101</sup>

Despite his genuine concerns about the potential impact of the Necessary and Proper Clause, Madison continued to believe that the enumerated powers scheme would be a powerful means to secure important rights. This view was demonstrated reflected in his response to criticisms that emerged when Congress adopted the language of “retained” rights rather than adopting the language proposed by Virginia prohibiting an inference of enlarged powers from prohibitions on the exercise of powers in the Constitution.<sup>102</sup> Edmund Randolph had objected to the reference to “retained rights,” contending that it purported to protect rights, but the rights were “reducible [sic] to no definitive certainty.”<sup>103</sup> He thus advocated that this “reservation

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<sup>101</sup>At one time, Professor Barnett fully acknowledged that Madison’s argument reflected a recognition that the Necessary and Proper Clause showed the need for a bill of rights. Barnett, *Reconceiving*, *supra* note 68, at 14. Despite insisting that the Ninth Amendment secured natural liberty rights, and having freely acknowledged that the Fourth Amendment presented an example of a “positive right,” Barnett eventually changed his mind and concluded that both the Ninth Amendment and the Necessary and Proper Clause precluded the use of general search warrants. MCAFFEE, BYBEE, & BRYANT, POWERS RESERVED, *supra* note 37, at 62 n. 150; McAfee, *The Court Over the Constitution*, *supra* note 33, at 1549-50.

<sup>102</sup>The original Virginia Ratifying Convention proposed an amendment that forbade construing rights limitations “to extend the powers of Congress.” DOCUMENTARY RECORD, *supra* note 24, at 21. For the full text, see *supra* note 51. Madison’s proposal read 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 the greater caution.

1 Annals of Cong., *supra* note 21, at col. 452.

<sup>103</sup>Letter from Hardin Burnley to James Madison, in 1 SCHWARTZ, *supra* note 51, at 1188. Burnley was a member of the Virginia assembly. Professor Barnett takes Burnley and Madison as seeking a single end, of securing personal rights, and thus concludes that any concerns about



against constructive power” should conform to the pattern established by the first and seventeenth amendments proposed by Virginia.”<sup>104</sup> Madison, agreeing completely with Assemblyman Burnley, thought the distinction between not “extending” powers and retaining rights was “fanciful,” because if you can draw a line “between the powers granted and the rights retained,” it doesn’t matter whether you state the amendment in terms of rights or powers.<sup>105</sup>

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“power” were folded in to the Tenth Amendment. See Randy E. Barnett, *James Madison’s Ninth Amendment*, in 1 RIGHTS RETAINED, *supra* note 48, at 1, 13 (Randy E. Barnett ed. 1989) (“The danger of interpreting federal powers too expansively was handled by the Tenth Amendment, while the danger of jeopardizing unenumerated rights was addressed by the Ninth Amendment.”). If this were so, the question raised is how he manages to interpret the Ninth Amendment as both securing rights and as justifying “a narrow construction of the powers of the national government.” Treanor, *Taking Text too Seriously*, *supra* note 1, at 509.

<sup>104</sup>*Id.* In his letter to Madison, Burnley stated that he did not see “the force of the distinction, for by preventing an extension of power . . . safety will be insured if its [Congress’s] powers are not too extensive already.” *Id.* “Thus Burnley was confident that the people’s rights would be adequately protected by the proposed amendment, provided the Convention had adequately defined federal powers in the first place.” MCAFFEE, BYBEE, & BRYANT, POWERS RESERVED, *supra* note 37, at 37. For a review of this correspondence, concluding that it lends strong support to a “federalism” interpretation of the Ninth Amendment, see Lash, *Inescapable Federalism*, *supra* note 54, at 836-44; *id.* at 838 n. 130 (noting that Professor Barnett rejects Madison’s distinction “as out of sync with modern understanding of personal rights,” but concluding that Madison “had a different point of view”). But see Barnett, *The Ninth Amendment*, *supra* note 32, at 55 (contending that “Burnley himself clearly distinguishes between ‘the people’ and ‘the states’ and the actual words of the Ninth Amendment refer only to the former”). Barnett’s characterization of Burnley’s words confirms that he simply does not understand Burnley’s argument. For additional confirming evidence, see Barnett, *Reconceiving*, *supra* note 68, at 16.

<sup>105</sup>*Id.* at 1189, 1190 (letter from Madison to President Washington, Dec. 5, 1789). Notice that both defenses of the final wording required the use of a hypothetical assumption that federal powers had been adequately defined so that the rights were “adequately protected” and one could draw the line between granted powers and protected rights. For a more complete analysis of the correspondence regarding the debate in the Virginia assembly, see McAfee, *Original Meaning*, *supra* note 43, at 1287-1293. See also Lash, *Inescapable Federalism*, *supra* note 54, at 836-44; *id.* 839-40 (concluding that both Burnley and Madison “believed that Randolph had wrongly criticized the Ninth Amendment as inadequately ‘federalist,’ and that “the retained rights of the people would necessarily constrain federal power and adequately

Madison believed that, if the framers had drafted the grants of powers as carefully as they should have – and that he thought they had – drawing a distinction between the final version of the amendment and the one that Virginia had initially proposed, made no sense at all (or was “fanciful,” as he put it). Madison confirmed absolutely the views expressed by Hardin Burnley, who could not see “the force of the distinction,” for the same reason—namely, if its framers had succeeded in ensuring that Congress’s powers were “not too extensive already,” by the drafting of a set of meaningfully limited powers, prohibiting an inference of enlarged powers would mean exactly the same thing as preserving the people’s “retained” rights. Professor Lash observes that Madison was in effect confirming the close connection between the Ninth and Tenth Amendments:

Although the final version of the Ninth Amendment spoke only of the retained rights of the people, Madison insisted that preserving retained rights and constraining federal power amounted to the same thing and that the final version continued to express the same federalist principle demanded by the state conventions. This is how Madison described the Ninth Amendment in a major speech while the Amendment was under consideration, and this is how every scholar and court read the Ninth Amendment for the next one-hundred years.<sup>106</sup>

It has become common to assert that the fundamental, unenumerated rights construction of the Ninth Amendment receives strong support from the amendment’s reference to *rights*, not powers, that are “retained” by the people. For example, it has been contended that “under social

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protect the retained rights of the people and the states”). Even though it is true that neither of the state proposals, nor the final version of the Ninth Amendment, were designed to supply “an explicit protection of the rights *of states*,” Barnett *The Ninth Amendment, supra* note 27, at 54 (emphasis added), each was designed to protect what had been “retained” by the sovereign people – state by state -- when granting powers to the nation.

<sup>106</sup>Lash, *Inescapable Federalism, supra* note 54, at 808. Lash also observes that, although the other states were fully aware that Madison’s original proposal “expressly limited federal power,” no other state objected to the language change. *Id.* at 843.

contract theory,” this phrase refers to “natural rights ‘retained’ during the transition from the state of nature to civil society.”<sup>107</sup> The very fact that the amendment refers to *retained* rights is taken as referencing liberty rights that the people “retain” when they leave the state of nature and join the social contract.

Thus Professor Barnett emphasizes two considerations: first, Madison used the word “retain” in referring to natural rights the people keep “when particular powers are given up to be exercised by the Legislature.”<sup>108</sup> Secondly, Roger Sherman used the word “retained” when proposing a rough equivalent of Section 1 of the Virginia Bill of Rights to the committee charged with fashioning a completed version of the amendments proposed for the Constitution.<sup>109</sup> But the words “retained” and “reserved” were used pervasively in the ratification-era debate over the omission of a Bill of Rights, and generally referred to what the sovereign people – referring to either “the people” considered as a collective whole or to “the people” making the ratification

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<sup>107</sup> Jeff Rosen, Note, *Was the Flag Burning Amendment Unconstitutional?*, 100 YALE L.J. 1073, 1075 (1991) [hereinafter cited as *Flag Burning Amendment*].

<sup>108</sup>BARNETT, RESTORING, *supra* note 92, at 54, *citing*, 1 The Debates and Proceedings in the Congress of the United States 454 (Gales & Seaton eds., 1834). For a different analysis of the drafting process and its relationship to the Ninth Amendment, see McAfee, *Social Contract Theory*, *supra* note 74, at 296-305.

<sup>109</sup>BARNETT, RESTORING, *supra* note 92, at 238, 243. For a different perspective on Sherman’s role in bringing us the Bill of Rights, including treatment of Sherman’s proposed language anticipating both the Ninth and Tenth Amendments, see McAfee, *The Court Over the Constitution*, *supra* note 33, at 1556-1561. *Accord*, Lash, *Inescapable Federalism*, *supra* note 54, at 29 n. 102 (noting that although Barnett at one time “appeared to claim that Sherman’s Draft Bill of Rights” was linked to “retained individual natural rights,” it now appears that he has “backed away from that claim”); Lash, *Lost Original Meaning*, *supra* note 45, at 362-367. That Madison proposed similar language to be inserted in the Constitution’s preamble, see note 64 and accompanying text, simply confirms that Sherman’s proposed natural rights provision likely reflected that sections 1 and 3 of the Virginia bill of rights remained significant in the minds of the founders.

decision state by state – “kept” when they “granted” or “delegated” powers to the national government.<sup>110</sup> The pattern was reflected in the language of Article II of the Articles of Confederation, which stated that each State would “retain” “every power, jurisdiction, and right,” not “delegated to the Congress.”<sup>111</sup> It is thus unsurprising that James Wilson went so far as to assert that “the powers given and reserved form the whole rights of the people.”<sup>112</sup> And when Madison summarized the ratification debate when presenting his proposed amendments to Congress, he observed that the Federalists had viewed the Constitution as “a bill of powers, the great residuum being the rights of the people; and, therefore, a bill of rights cannot be so necessary as if the residuum was thrown into the hands of the Government.”<sup>113</sup>

The lack of significant weight legitimately given to the particular language chosen for the Ninth Amendment is illustrated by Patrick Henry’s use of the very phrase, “the rights retained by the people,” in describing the contents of the Virginia bill of rights in the Virginia Ratifying Convention.<sup>114</sup> It is absolutely clear that Henry did not perceive natural rights as automatically

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<sup>110</sup>The classic example of this usage is in Alexander Hamilton’s Federalist No. 84, where he contended that “[h]ere, in strictness, the people surrender nothing, and as they *retain* every thing, they have no need of particular reservations.” ALEXANDER HAMILTON, THE FEDERALIST NO. 84, *supra* note 63, at 578 (emphasis added). He goes on to favorably compare the preamble as a “recognition of popular rights” to the “aphorisms” that made up state Declarations of Rights. *Id.* at 578-79. *See infra* note 150.

<sup>111</sup>DOCUMENTARY RECORD, *supra* note 24, at 19.

<sup>112</sup>2 RATIFICATION OF THE CONSTITUTION, *supra* note 20, at 469, 470 (Dec. 4, 1787).

<sup>113</sup>James Madison, *Speech to the House Explaining His Proposed Amendments and His Notes for the Amendment Speech*, in 1 RIGHTS RETAINED, *supra* note 48, at 51, 59.

<sup>114</sup>3 ELLIOT’S DEBATES, *supra* note 24, at 448.

“retained” because they were natural rights or were “inalienable.”<sup>115</sup> That Henry was, instead, a constitutional positivist is reflected not only in his insistence on the absolute necessity of a bill of rights, but also in his role in opposing the inclusion of a Bill of Attainder Clause in the Virginia Bill of Rights and in his promotion, as governor, of the adoption of a bill of attainder during the American revolution.<sup>116</sup>

Though Justice Chase directly contradicts the substance and tenor of the ratification-era debate over the omission of a Bill of Rights, Professor Barnett takes his invocation of “unenumerated rights” in *Calder v. Bull*<sup>117</sup> as stating the precise “original public meaning” of the federal Ninth Amendment. He takes Justice Iredell as contending before the North Carolina Ratifying Convention not only that there *are* “unenumerated rights,” but that “*all rights* should remain unenumerated.”<sup>118</sup> After all, Barnett asserts, the Constitution’s framers “shared a common belief that although the people may delegate certain powers to their agents in government, they still retain their natural rights.”<sup>119</sup> Indeed, Professor Barnett assures us that

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<sup>115</sup>See *infra* notes 140-141 and accompanying texts.

<sup>116</sup>McAfee, *Social Contract Theory*, *supra* note 74, at 279-80, 294.

<sup>117</sup>3 U.S. (3 Dall.) 386 (1798).

<sup>118</sup>Randy E. Barnett, *Who’s Afraid of Unenumerated Rights*, 9 U. PA. J. CONST. L. 4, 4 (2006) [hereinafter cited as *Who’s Afraid*]. But it is quite clear that Iredell believed that the “unenumerated rights” consisted of the rights defined by what had not been “granted” to the federal government as powers. A close reading of Iredell’s speeches at the North Carolina Ratifying convention confirms that this is true. See *supra* note 96 and accompanying text; and *infra* notes 191-199 and accompanying texts.

<sup>119</sup>Randy E. Barnett, *A Ninth Amendment for Today’s Constitution*, 26 VALP. U. L. REV. 419, 422 (1991). By contrast, in the modern era, Professor Pound has contended that “[n]atural rights mean simply interests which we think ought to be secured . . . [and] it is fatal to all sound thinking to treat them as legal conceptions.” Roscoe Pound, *The Rights of Englishmen and Rights*

until the federal Bill of Rights was adopted “two years after the ratification of the Constitution,” with a handful of “exceptions,” it was clear that “all of the rights retained by the people were unenumerated.”<sup>120</sup> And yet, he offers reassuringly, “no one argued that the federal government had the power to abridge or deny . . . unenumerated liberties.”<sup>121</sup>

But we have seen that virtually no one engaged in the controversy over the omission of a bill of rights during the ratification-era debates thought the natural rights were simply “retained,” as a matter of law, under the state constitutions that existed prior to the ratification of the United States Constitution. Since the state constitutions conveyed “a general grant of legislative authority,” it followed that “no rights were immune from such broad state powers and some explicit reservation would be necessary.”<sup>122</sup> Even the rights sometimes referred to as “inherent” or “inalienable” – especially if not written down as specific limiting provisions – did not necessarily function as limits on the general powers of the states’ legislatures; this is why the state constitutions were universally regarded as requiring Declarations of Rights within their state constitutions if the powers of government were going to be limited in any fashion.<sup>123</sup>

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*of Man*, in *THE SPIRIT OF THE COMMON LAW*, at 85, 92 (1921).

<sup>120</sup>Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 435 (2004) [hereinafter cited as *The Police Power*]. See also BARNETT, RESTORING, *supra* note 92, at 235-36.

<sup>121</sup>*Id.* By contrast, Professor Barnett contends that the modern tendency to advocate more restrictive readings of the Ninth Amendment reflects a “modern philosophical skepticism about rights.” Barnett, *Reconceiving*, *supra* note 68, at 3.

<sup>122</sup>Richard S. Kay, *Book Review*, 44 AM. J. LEGAL HIST. 430, 431 (2000) (reviewing *INHERENT RIGHTS, THE WRITTEN CONSTITUTION, AND POPULAR SOVEREIGNTY: THE FOUNDERS’ UNDERSTANDING* (see *infra* note 124)).

<sup>123</sup>See *supra* notes 38-40 and accompanying texts. See *infra* notes 137-162; 171-184 and

### III. Natural Rights and Constitutional Positivism

It is common for advocates of the fundamental, unenumerated rights construction of the Ninth Amendment to write as if we are confronting a very strong dichotomy between “naturalists,” or advocates of natural rights jurisprudence, and “positivists,” those who advocate constitutional positivism.<sup>124</sup> Those who drafted and ratified the Constitution, and especially those who accepted and ratified the Bill of Rights, were naturalists.<sup>125</sup> By contrast, modern thinkers who contend for alternative interpretations of the Ninth Amendment, are often moral skeptics who are also positivists.<sup>126</sup> The prospect that there could be a “moral realist defense of constitutional democracy,”<sup>127</sup> that reads the Constitution itself as a basically positivist document,

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accompanying texts.

<sup>124</sup>THOMAS B. MCAFFEE, *INHERENT RIGHTS, THE WRITTEN CONSTITUTION, AND POPULAR SOVEREIGNTY: THE FOUNDERS’ UNDERSTANDING* 16 -17 (2000) [hereinafter cited as *INHERENT RIGHTS*] (concluding that this presumed dichotomy “obscures the reality that even a legal system purportedly grounded on natural law norms must confront challenging institutional questions about implementing those norms in political and legal practice”).

<sup>125</sup>For a citation to several sources attributing a natural law jurisprudence – and certainly not a positivist one – to the founding generation, see Thomas B. McAfee, *Prolegomena to a Meaningful Debate of the “Unwritten Constitution” Thesis*, 61 U. CINC. L. REV. 107, 133 n. 83 (1992) [hereinafter *Prolegomena*].

<sup>126</sup>BARNETT, *RESTORING*, *supra* note 92, at 242-252 (subsection entitled “The Views of Ninth Amendment Skeptics”); Randy E. Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 CONST. COMM. 93, 96 (1995) [hereinafter cited as *Getting Normative*] (contending that “skeptics” have provided “labored textual and historical arguments” against the unenumerated fundamental rights reading of Ninth Amendment); *id.* at 111 (if those who would comply with text are right that the text “does not provide any protection of unenumerated rights, they may have won the constitutional battle, yet lost the legitimacy war”).

<sup>127</sup>Michael W. McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 CHI.-KENT L. REV. 89 (1988).

is dismissed out of hand. The assumption is that the Constitution's framers were just enough naturalists that, even the text we call the Ninth Amendment, was in an important sense, superfluous, given that the Constitution's framers and ratifiers already believed that the people had "retained" the rights they held by nature at the time they joined the social contract we call the Constitution.

Those who begin with this sort of assumption find it difficult to believe that "the Framers in 1787 were committed to protecting fundamental freedoms, but did not believe enumeration was the best constitutional strategy for securing cherished individual rights."<sup>128</sup> As Professor Graber noted,

The persons responsible for the original Constitution thought they had secured fundamental rights by a combination of representation, the separation of powers, and the extended republic. The Bill of Rights, in their view, was a minor supplement to the strategies previously employed for preventing abusive government practices.<sup>129</sup>

Similarly, Richard S. Kay observed that the framers of the federal Constitution perceived "unwritten fundamental rights" as "profoundly important," but "they agreed that the critical issue on which their protection turned was the character of the new national government."<sup>130</sup> Professor

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<sup>128</sup>Mark A. Graber, *Enumeration and Other Constitutional Strategies for Protecting Rights: The View From 1787/1791*, 9 U. PA. J. CONST. L. 357, 362 (2007)

<sup>129</sup>*Id.* at 360. For general support for the view that the framers were initially relying on alternatives to the enumeration of rights, see MCAFFEE, *INHERENT RIGHTS*, *supra* note 124; McAfee, *The Court Over the Constitution*, *supra* note 33, at 1509-1511, 1565-1593; Thomas B. McAfee, *The Federal System as Bill of Rights: Original Understandings, Modern Misreadings*, 43 VILL. L. REV. 17, 98-104 (1998) [hereinafter cited as *Federal System*]; Thomas B McAfee, *Substance Above All: The Utopian Vision of Modern Natural Law Constitutionalists*, 4 S. CAL. INTERDISC. L.J. 501, 516-521 (1996) [hereinafter cited as *Utopian Vision*].

<sup>130</sup>Kay, *supra* note 122, at 432.



Kay concluded there would have been “little point” in the debate over inclusion of a bill of rights had unenumerated natural rights “been understood as directly enforceable by the courts.”<sup>131</sup>

It has thus become a standard objection to any restrained reading of the Ninth Amendment that it is part of “the historical tendency to misunderstand the meaning of the amendment” and reflects “the shift of our legal culture from a jurisprudence of natural law to one of legal positivism.”<sup>132</sup> But the alleged dichotomy between a constitutional jurisprudence based on natural law and rights, and one based on legal positivism, does not really address, let alone resolve, the fundamental questions presented about how to interpret the Ninth Amendment. Almost ten years ago, I wrote:

Three of the thinkers who most influenced the framers of the Constitution, John Locke, Edward Coke, and William Blackstone, do not supply us with definitive answers to the questions we would ask. Locke was committed to republican government and legislative supremacy that went hand in hand with his commitment to limited government and natural rights enforceable by the people’s inherent right of revolution. Coke described as void any Act of Parliament that is “against common right and reason, or repugnant, or impossible to be performed.” Yet Coke’s famous utterance “seems to have enjoyed only a brief usefulness in pre-Revolutionary polemics,” for citations to Coke ceased after Blackstone construed the statement as a mere rule of construction. Blackstone was committed to the common law and natural law, but he also believed in Parliamentary sovereignty (and the related idea of legislative supremacy).<sup>133</sup>

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<sup>131</sup>*Id.*

<sup>132</sup>McAfee, *Prolegomena*, *supra* note 112, at 113 n. 16 For a recent example of work that appears to embrace the notion of a presumed dichotomy between natural rights jurisprudence and constitutional positivism, see Barnett, *Who’s Afraid*, *supra* note 118, at 4.

<sup>133</sup>McAfee, *INHERENT RIGHTS*, *supra* note 124, at 3-4 (citing Dr. Bonham’s Case, 8 Coke Rep. 107, 118a (1610); JULIUS GOEBEL, JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, at 92-93 (1971); Thomas C. Grey, *The Original Understanding and the Unwritten Constitution*, in *SIX ESSAYS ON THE CONSTITUTION* 145, 152 (Neil L. York ed. 1988) [hereinafter cited as *The Original Understanding*].) Compare McAfee, *The Court Over the Constitution*, *supra* note 33, at 1509-11.

This pattern, reflected in these intellectual origins of American constitutional thought, is equally embodied in the works of the most significant founders – those who developed the thinking that produced the Ninth Amendment during the debate over the ratification of the Constitution. It was over thirty years ago that Robert Cover observed that “[t]he most telling aspect of the American variant of constitutional positivism was the enthusiasm for written constitutions—the almost compulsive mania for rendering the allocation of power explicit.”<sup>134</sup> Years before Cover wrote, Professor Corwin stated the view that “legislative sovereignty” lost out in America because “in the American written constitution, higher law at last attained a form which made possible the attribution to it of an entirely new sort of validity, the validity of a statute emanating from the sovereign people.”<sup>135</sup> As Gerald Stourzh has contended, in America the functioning eighteenth-century British constitution came to recognize “certain imperatives or prohibitions as fundamental elements of the laws of the land *without* thereby creating a special category of legal norms.”<sup>136</sup>

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<sup>134</sup>ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 27 (1975) [hereinafter cited as *JUSTICE ACCUSED*].

<sup>135</sup>EDWARD S. CORWIN, *The “Higher Law” Background of American Constitutional Law*, in *CORWIN ON THE CONSTITUTION* 138-39 (R. LOSS ED. 1981).

<sup>136</sup>Gerald Stourzh, *Fundamental Law and Individual Rights in the 18<sup>th</sup> Century Constitution*, in *THE AMERICAN FOUNDING—ESSAYS ON THE FORMATION OF THE CONSTITUTION* 336 (J. BARLOW, LEONARD LEVY, & K. MASUGI, EDS., 1988). *See generally* MCAFFEE, *INHERENT RIGHTS*, *supra* note 124, at 65-66 (subsection entitled “The Centrality of the Written Constitution”).

## A. The Antifederalists.

Those who opposed ratification of the Constitution in part because of the omission of a bill of rights – known in history as the Antifederalists – were adamant that a bill of rights was absolutely essential.<sup>137</sup> Their arguments insisting on “the necessity of an *express stipulation* for all such rights as are intended to be exempted from the civil authority”<sup>138</sup> demonstrate that they were simultaneously strong advocates of securing natural rights even as they were also strong constitutional positivists.<sup>139</sup> They repeatedly denied that a written Constitution includes even a presumption of any sort in favor of fundamental rights, insisting that it is “universally acknowledged” that the natural rights “can neither be retained to themselves, nor transmitted to their posterity, unless they are *expressly reserved*.”<sup>140</sup> Before the Virginia ratifying convention, Patrick Henry summed up his argument that a bill of rights was “indispensably necessary” by

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<sup>137</sup>Professor Rakove observed that “[t]he logic of the Antifederalist position was deeply positivist.” Jack N. Rakove, *The Dilemma of Declaring Rights*, in *THE NATURE OF RIGHTS*, *supra* note 91, at 181, 193. *See id.* at 193-94 (stating that the Antifederalist arguments “presupposed that the existence and security of rights depended on their explicit inclusion in the constitutional text”).

<sup>138</sup>Essays by the Impartial Examiner (Feb. 20, 1788), *reprinted in* 5 *THE COMPLETE ANTI-FEDERALIST* 177 (Herbert J. Storing ed., 1988) [hereinafter cited as *THE COMPLETE ANTI-FEDERALIST*].

<sup>139</sup>The Impartial Examiner contended that each community member must “be presumed to give up all those powers into the hands of the state by submitting his whole conduct to the direction thereof.” Michael Lienisch, *Reinterpreting Rights: Antifederalists and the Bill of Rights*, in *GOVERNMENT PROSCRIBED*, *supra* note 85, at 245, 266, *quoting*, 5 *THE COMPLETE ANTI-FEDERALIST*, *supra* note 138, at 177. *See supra* note 100.

<sup>140</sup>Essays by the Impartial Examiner (Feb. 20, 1788), *reprinted in* 5 *THE COMPLETE ANTI-FEDERALIST*, *supra* note 138, at 176. *Accord*, Patrick Henry, 3 *ELLIOT’S DEBATES*, *supra* note 24, at 445 (June 14, 1788) (“all nations” have adopted the construction that rights not expressly reserved are impliedly relinquished); Letters from Agrippa (Jan. 14, 1788), *reprinted in* 1 *SCHWARTZ*, *supra* note 51, at 515 (people “of course” delegated “all rights not expressly

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>141</sup> In the well-known *Letters of Agrippa*, the author concluded that “a constitution does not in itself imply any more than a declaration of the relation which the different parts of the government have to each other, but does not imply security to the rights of individuals.”<sup>142</sup> Perhaps the most thoughtful Antifederalist commentator, the author of *Letters from a Federal Farmer*, summed up social contract theory, including the assertion that the people cannot “deprive themselves” of inalienable natural rights, even as he claimed that they still might “resign” the rights “to those who govern.”<sup>143</sup>

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reserved”).

<sup>141</sup>3 ELLIOT’S DEBATES, *supra* note 24, at 445 (June 14, 1788). See McAfee, *Original Meaning*, *supra* note 43, at 1244. *Accord, id.* (quoting Henry asserting that “[i]f you intend to reserve your inalienable rights, you must have the most express stipulation; for, if implication be allowed, you are ousted of those rights”); Lash, *Inescapable Federalism*, *supra* note 54, at 828 (citing Henry’s speech insisting on the need for an “express stipulation”; also observing that Henry “merges the language of individual rights with that of state autonomy” ).

<sup>142</sup>4 THE COMPLETE ANTI-FEDERALIST, *supra* note 59, at 108 (Jan. 9, 1788). Following up on the logic of legislatures with general legislative powers, the same author argued that since “the whole power resides in the whole body of the nation,” the consequence is that “when a people appoint certain persons to govern them, they delegate their whole power” unless they reserve power in the Constitution. *Id.* at 109. He concluded “that a constitution is not itself a bill of rights.” *Id.* Similarly, the author of *Essays by a Farmer* posed the rhetorical question: “If a citizen of Maryland can have no benefit of his own bill of rights in the federal courts, and there is no bill of rights of the United States—how could he take advantage of a natural right founded in reason, could he plead it and produce Locke, Sydney, or Montesquieu as authority?” 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 138, at 13 (Feb. 15, 1788). The obvious assumption is that the great political philosophers who so influenced the revolutionary generation are not legal authorities; natural rights are not *ipso facto* constitutional rights, or rights within the civil law. They must be secured in positive law.

<sup>143</sup>Letters from a Federal Farmer, in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 138, at 231. See also The Impartial Examiner, in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 138, at

A powerful illustration of Antifederalist thought is presented by George Mason, who authored the Virginia bill of rights.<sup>144</sup> Mason was unquestionably one who was deeply committed to principles of natural law and natural rights.<sup>145</sup> Indeed, a number of modern commentators assert that Mason’s famous statement that there are “certain inherent rights” of which the people “cannot, by any compact, deprive or divest their posterity,”<sup>146</sup> was simply “declaratory of limitations which,

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175-179 (one who enters society gives up “to government his power to act freely unless he reserves particular powers,” meaning that it is essential to have “an express stipulation for all such rights as are intended to be exempted from the civil authority”); David Caldwell, in 4 ELLIOT’S DEBATES, *supra* note 24, at 9 (North Carolina Ratifying Convention, July 24, 1788) (arguing that Constitutions should embody “maxims” deemed fundamental to “every safe and free government,” and describing one such maxim as the statement that “[u]nalienable rights ought not to be given up, if not necessary”). For additional documentation that “inalienable” referred to a moral claim, not a legal one, see McAfee, *The Court Over the Constitution*, *supra* note 33, at 1533, 1556-1561.

<sup>144</sup>Va. Const., Bill of Rts (1776), *reprinted in* 7 STATE CONSTITUTIONS, *supra* note 64, at 3813. Kukla strenuously asserts that “Mason believed with all his heart in the urgency of a declaration of rights.” Jon Kukla, “Yes! No! And If . . . Federalists, Antifederalists, and Virginia’s “Federalists Who are for Amendments,” in ANTIFEDERALISM, *supra* note 100, at 43, 59.

<sup>145</sup>Indeed, Mason argued against a 1682 act of the Virginia assembly, which had purported to sell certain Indian women into slavery, that it was “void of itself, because contrary to natural right.” *Robin v. Hardaway*, Jeff. 109 (Va. 1772), *cited in* Corwin, *The “Higher Law” Background of American Constitutional Law*, in 1 Corwin on the Constitution 79, 199 (R. Loss ed., 1981).

<sup>146</sup>Va. Const., Bill of Rts § 1, in 7 STATE CONSTITUTIONS, *supra* note 64 at 3813. Section 1 reads:

That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity: namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

*Id.*

because they are inherent, exist as legal limitations whether declared in writing or not.”<sup>147</sup>

In fact, even though Section 1 of the Virginia Bill of Rights, the Inherent Rights Clause, is the provision from which Professor Barnett insists the Ninth Amendment was drafted,<sup>148</sup> its original author was a prominent Antifederalist who opposed ratification of the Constitution, in significant part because it omitted a bill of rights.<sup>149</sup> But if it was universally, or even widely, believed that natural rights supply legally enforceable limits on government because they’re inherent, it would have been clear that a bill of rights was simply unnecessary. So Mason’s objection to the omission of a bill of rights suggests that “inherent” did not mean “legally

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<sup>147</sup>Thomas B. McAfee, *The Bill of Rights, Social Contract Theory, and the Rights “Retained” by the People*, 16 S.I.U. L.J. 267, 281 (1992) [hereinafter *Social Contract Theory*]. It was Mason’s “Inherent Rights Clause” that accounts for the title of the book I published: MCAFFEE, *INHERENT RIGHTS*, *supra* note 124. For standard treatments making these claims, see Grey, *The Original Understanding*, *supra* note 133, at 156; Suzanna Sherry, *The Founders’ Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1132-33 (1987) [hereinafter cited as *Unwritten Constitution*]. Professor Barnett, in turn, concluded that the Ninth Amendment – drawn from Roger Sherman’s proposed amendment, which was based on Mason’s Inherent Rights Clause – was designed to secure each citizen his or her natural “liberty,” and indeed to create a “presumption of liberty.” BARNETT, *RESTORING*, *supra* note 92, at 235 (“[T]he phrase, ‘others retained by the people,’” was “a reference to the natural or liberty rights that are retained by the people when forming a government,” and it mandates that “they are not to be ‘denied or disparaged’”). For a different understanding of the relevance of the Inherent Rights Clause, see *infra* notes 148-158 and accompanying texts.

<sup>148</sup>See BARNETT, *RESTORING*, *supra* note 92, at 246-47 & n. 85 (contending that the language of Ninth Amendment has a “common ancestry” with natural rights proposals that had been offered by Virginia and North Carolina.).

<sup>149</sup>Indeed, Dean Reinstein observed, in honoring the bicentennial of the Bill of Rights, that it was George Mason who seconded a motion to add a bill of rights to the proposed federal Constitution. Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 TEMP. L. REV. 361, 364 (1993) [hereinafter cited as *Completing the Constitution*]. The motion was, of course, “rejected decisively.” *Id.*

enforceable” to Mason.<sup>150</sup> But his objections went further still. He objected to the omission of Article II of the Articles of Confederation, contending that without such a provision “many valuable and important rights” would be considered to be “given up.”<sup>151</sup> Mason also stated what became the standard Antifederalist argument that “the Laws of the general Government being paramount to the Laws and Constitutions of the several states, the Declarations of Rights in the separate states are no security.”<sup>152</sup>

Almost twenty years ago, I wrote:

If natural rights were viewed as creating inherent and enforceable legal limits on the scope of granted powers, Mason and others should logically have viewed the

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<sup>150</sup>It has been observed that

when the state constitutions made reference to “inherent” or “inalienable” natural rights, these statements of principle were taken to be just that. They were taken as widely accepted statements of political principle, but not as enforceable limits to government power. This is what enabled Alexander Hamilton to argue that expressly stating the doctrine of popular sovereignty, and thereby acknowledging the authority of the people to amend their constitutional system to better meet their needs and to secure their rights, “is a better recognition of popular rights than volumes of those aphorisms which make the principal figure in several of our state bills of rights, and which would sound much better in a treatise on ethics than in a constitution of government.”

McAfee, *The Court Over the Constitution*, *supra* note 33, at 1505 (quoting THE FEDERALIST No. 84, at 579 (Jacob Cooke ed., 1961).)

<sup>151</sup>George Mason, 3 ELLIOT’S DEBATES, *supra* note 24, at 444 (June 14, 1788).

<sup>152</sup>13 RATIFICATION OF THE CONSTITUTION, *supra* note 20, at 348 (Oct. 7, 1787). Indeed, “[a] typical argument was that the Supremacy Clause implied ‘that the constitutions and laws of every state are nullified and declared void, so far as they are or shall be inconsistent with this constitution.’” McAfee, *Prolegomena*, *supra* note 57, at 138 n. 99 (citing 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 138, at 362, 365 (Essays of Brutus Oct. 18, 1787).) Some went even further, arguing that the Supremacy Clause was added “to prevent the possibility of doubt that the consequence would be consolidated government that ruled by an “iron-handed despotism.” Letter of Centinel V (Nov. 30, 1787), *in* THE COMPLETE ANTI-FEDERALIST, *supra* note 138, at 168.

supremacy clause as subject to these implied limitations, particularly since the supremacy clause grants the status of supreme law only to laws enacted pursuant to the Constitution. Implicit in Mason's argument is the assumption that natural rights had become binding constitutional norms by virtue of their inclusion within the state constitutions; since those constitutions were inferior to the federal constitution, it followed that the natural rights would be forfeited to the extent that federal powers were construed broadly enough to reach them.<sup>153</sup>

Mason may well have learned a thing or two from the experience of presenting his draft of the inherent rights proposal to the convention that inserted it into the Virginia constitution.

Because the Inherent Rights Clause that became section one of the Virginia bill of rights initially embodied the "natural equality principle,"<sup>154</sup> it created a fear that the provision would make slavery unconstitutional. The result was that the provision was amended. "With the critical change italicized, the amended provision stated that all men are 'by nature free and independent, and have certain inherent rights, of which, *when they enter into society*, they cannot, by any compact, deprive or divest their posterity.'"<sup>155</sup> The amendment clarified "that the fundamental rights that people retain as they enter civil society did not apply to the Black race because the

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<sup>153</sup>McAfee, *Social Contract Theory*, *supra* note 147, at 281. Responsive Federalists took Mason's argument as a straightforward positivist argument about the constitutional text's meaning. *E.g.*, Letter from Roger Sherman to Unknown (Dec. 8, 1787), *in* 14 RATIFICATION OF THE CONSTITUTION, *supra* note 20, at 386-87 (contending that Supremacy Clause applied only to laws not exceeding powers granted by the Constitution and that the states would police system to ensure that federal government did not overstep its boundaries); *id.* at 389 (to have "a well regulated government, the legislature should be dependent on the people, and be vested with a plenitude of power . . . to be exercised only for the public good").

<sup>154</sup>The clause states "[t]hat all men are by nature equally free and independent . . ." Va. Const., Bill of Rts § 1 (1776), *reprinted in* 7 STATE CONSTITUTIONS, *supra* note 64, at 3813.

<sup>155</sup>MCAFFEE, INHERENT RIGHTS, *supra* note 124, at 18 (quoting *id.*).



slaves had never entered into a state of civil society in Virginia.”<sup>156</sup> There could hardly be a more starkly positivist move than this amendment; it seems quite clear that if all are “by nature” free and independent, those rights would remain valid moral claims quite apart from whether someone thought you had, or had not, left the state of nature and entered “into society.”<sup>157</sup>

In view of Mason’s experience with the Inherent Rights Clause, it is entirely unsurprising that when Mason drafted a proposed bill of rights in 1788 – for the Virginia Ratifying Convention – the two changes from the Virginia Bill of Rights were: (1) the omission of the Inherent Rights Clause, which included the “natural equality” principle; and (2) the conditioning of a number of specific enumerated rights to “freemen” only.<sup>158</sup> Professor Reinstein concluded:

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<sup>156</sup>*Id.* See also Reinstein, *Completing the Constitution*, *supra* note 149, at 370-72; Warren M. Billings, “*That All Men are Born Equally Free and Independent*”: Virginians and the Origins of the Bill of Rights, in *THE BILL OF RIGHTS AND THE STATES* 335, 339-40 (Patrick J. Conley & John P. Kaminski, eds. 1992).

<sup>157</sup>The language change, however, enabled Edmund Randolph to contend that “the slaves not being constituent members of our society could never pretend to any benefits from such a maxim.” Barry A. Shain, *Rights Natural and Civil in the Declaration of Independence*, in *THE NATURE OF RIGHTS*, *supra* note 91, at 116, 118. Virginia’s section 1 itself appears to have rested to a degree on a basic ambiguity, between “natural” rights and customary (or common law) rights, that was exploited by revolutionary Americans; thus many contended, “No man will deny that provincial Americans have an inherent, *unalienable Right* to all the Privileges of British subjects.” *Id.* at 129. *Accord, id.* at 136 (noting that James Duane preferred “grounding our Rights on the Laws and Constitution of the Country from when we sprung,” and contended that the “Privileges of Englishmen were inherent” and “an inheritance,” meaning that we could not be “deprived of them”); MCAFFEE, BYBEE, & BRYANT, POWERS RESERVED, *supra* note 37, at 62 n. 150 (noting that arguments against writs of assistance were based on view that “acts against the fundamental principles of the British constitution are void,” even while claiming that “[t]his doctrine is agreeable to the laws of nature”).

<sup>158</sup>For the specific content of Mason’s proposed bill of rights – substituting “freeman” for persons or people, etc. – presented at the Virginia Ratifying Convention, see Reinstein, *Completing the Constitution*, *supra* note 149, at app. B, arts. 9, 10, 12, 14, 15. Mason’s reference was not altogether unique. In his Inaugural Address, President Washington – likely with Madison’s help as

Mason’s revisions, taken together, would have done more than insure a bill of rights in the United States Constitution would not threaten slavery. By explicitly conditioning rights to “freemen” only, Mason’s revisions would have legitimated the institution of slavery. This proposal would have incorporated the Declaration’s inalienable rights, but for white people only.<sup>159</sup>

At an equally fundamental level, Virginia’s “inherent rights” provision itself has generally not been viewed, or treated by courts, as generating a legally enforceable limitation on government power.<sup>160</sup> Professor G. Alan Tarr observed that the inherent rights clause – like many provisions in the state declarations of rights – was “addressed not to the state judiciary primarily but to the people’s representatives, who were to be guided by them in legislating, and even more to the liberty-loving and vigilant citizenry that was to oversee the exercise of government power.”<sup>161</sup>

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a ghost writer – suggested that the parameters of the new bill of rights were “a reverence for the characteristic rights of freemen, and a regard for public harmony. . . .” 2 THE PAPERS OF GEORGE WASHINGTON 176 (W.W. Abbot ed., 1987), cited in Reinstein, *Completing the Constitution*, *supra* note 149, at 374.

<sup>159</sup>*Id.* at 372. Even when efforts to invoke the “natural equality” principle in courts failed, it remained clear that constitutional drafters continued to equate such declarations with freedom. Hence slave state constitutions either completely omitted the “free and equal clause” from their documents, or added a “peculiar transformation” of language in the attempt to “make it consistent with the peculiar institution of slavery.” *Id.* at 377-78.

<sup>160</sup>See Thomas B. McAfee, *The “Foundations” of Anti-Foundationalism – Or, Taking the Ninth Amendment Lightly: A Comment on Daniel A. Farber’s Book on the Ninth Amendment*, \_\_\_ NEV. L.J. [9-10] (2008) [hereinafter *Foundations*] (reviewing Farber’s *RETAINED BY THE PEOPLE: THE “SILENT” NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON’T KNOW THEY HAVE* (2007)).

<sup>161</sup>G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 78 (1998). *Accord*, Rakove, *The Dilemma of Declaring Rights*, in *THE NATURE OF RIGHTS*, *supra* note 91, at 181, 190 (bills of rights in early constitutions were “conceived as statements of principle meant to guide the behavior of officials and citizens alike,” not as “actual restraints”). See also MCAFFEE, BYBEE, & BRYANT, *POWERS RESERVED*, *supra* note 37, at 12-13; Nathan N. Frost, Rachel Beth Klein-Levine, & Thomas B. McAfee, *Courts Over Constitutions Revisited: Unwritten Constitutionalism in the States*, 2004 UTAH L. REV. 333, 360-69 [hereinafter *Courts Over Constitutions*].

Modern Americans often have no grasp of how founding-era Americans viewed the claims in their declarations of rights:

The declarations' individual rights provisions were framed in terms of 'ought' or 'ought not' rather than 'shall' or 'shall not,' or occasionally as statements of political ideals. These formulations were clearly not inadvertent. . . . This wording very probably reflects in part the idea of restating the fundamental principles, which inherently bind government, as opposed to promulgating new sovereign commands. In a sense, this language conveys their greater importance; but in another sense, it also reflects the recognition of the drafters that such principles are to be honored rather than enforced. The language of the declarations conveys the idea that the enumerated liberties were "serious principles by which government was to abide," but were nevertheless subject in general to qualification as essential for the public good.<sup>162</sup>

It is thus almost certainly no coincidence that the ratifying convention proposals to include "inherent rights clauses" in the proposed amendments to be added to the new Constitution prompted Madison to propose language, clearly based on Virginia's inherent rights provision, to be inserted in a proposed "prefix" to the Constitution.<sup>163</sup> A crucial aspect of the development was that Madison, apparently encouraged by a letter from Thomas Jefferson, "substituted words of

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<sup>162</sup>MCAFFEE, INHERENT RIGHTS, *supra* note 124, at 24 (quoting Robert C. Palmer, *Liberties as Constitutional Provisions, 1776-1791*, in CONSTITUTION AND RIGHTS IN THE EARLY AMERICAN REPUBLIC 65, 75 (1987).)

<sup>163</sup>This development is described at *supra* note 64 and accompanying text. Compare MCAFFEE, BYBEE, & BRYANT, POWERS RESERVED, *supra* note 37, at 16 (noting that drafters of state declarations of rights did not "regard rights as enforceable against the legislature or executive," frequently using "the term 'ought' instead of the mandatory 'shall in their declarations"); *id.* at 30-31 (linking state plenary power conception to debate over omission of a bill of rights).

Madison did not go to the extremes that Mason did; He used "person" or "people" instead of "freeman" in the enumeration of rights, and he also omitted the "free and equal clause," substituting words that did not refer to natural rights. Reinstein, *Completing the Constitution*, *supra* note 149, at 372.

command and prohibition for the hortatory language that had dominated the Declarations of Rights.”<sup>164</sup> His proposed amendment to be added to the preamble, as a prefix to the Constitution, read as follows:

That there be prefixed to the constitution a declaration, that all power is originally vested in, and consequently derived from the people.

That Government is instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety.

That the people have an indubitable, unalienable, and indefeasible right to reform or change their Government, whenever it be found adverse or inadequate to the purposes of its institution.<sup>165</sup>

Just as Madison had reworded the amendments proposed by the state ratifying conventions to try to ensure that they could be legally enforceable, it is noteworthy that he retained the language of principle, not command, in the proposed amendment to be included in the Constitution’s preamble. Madison summarized the inherent rights language without referring to

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<sup>164</sup>McAfee, *Foundations*, *supra* note 160, at 10. See McAfee, *Inalienable Rights*, *supra* note 37, at 769-71.

<sup>165</sup>James Madison, *Speech to the House Explaining His Proposed Amendments and His Notes for the Amendment Speech*, in 1 RIGHTS RETAINED, *supra* note 48, at 54.

*Cf.* Va. Const. Of 1776, Bill of Rights, §§ 1, 3, *reprinted in* 7 STATE CONSTITUTIONS, *supra* note 64, at 3812, 3813 (asserting that “all men are by nature equally free and independent, and have certain inherent rights of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety;” and that government is “instituted for the common benefit, protection, and security of the people . . . ; and that, when any government shall be found inadequate or contrary to these purposes, a majority of the community hath an . . . inalienable . . . right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal”).

the relevant interests with that term.<sup>166</sup> He also followed the lead of the New York state ratifying convention, which had proposed an amendment that referred to the same specified rights as “essential rights which every Government *ought to* respect and preserve.”<sup>167</sup> Madison’s steps may well have reflected an attempt to move “in the direction of supporting government,” as he begins with society as a starting point and refers to government being for the “benefit of the people,” rather than referring to “inherent rights of which man cannot be divested.”<sup>168</sup> A more sinister evaluation is that “[t]he Founders deliberately omitted the Declaration [of Independence’s]

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<sup>166</sup>Dean Reinstein observed that:

Even without the declaration that all people are by nature free and equal, a constitutional provision asserting the existence of ‘certain natural rights’ might be applied against slavery, because both English and American courts had held that this institution violates all natural rights. So Madison omitted the clause on natural rights as well. Instead, he borrowed language from the Declaration of Independence and the Virginia Declaration of Rights but used it in a way that deprived those declarations of any force.

Reinstein, *Completing the Constitution*, *supra* note 149, at 373.

<sup>167</sup>*See* Amendments Proposed by the New York Convention, July 26, 1788, in DOCUMENTARY RECORD, *supra* note 24, at 21 (“That the enjoyment of Life, Liberty, and the pursuit of Happiness are essential rights which every Government ought to respect”) (emphasis added in text).

<sup>168</sup>Herbert J. Storing, *The Constitution and the Bill of Rights*, in HOW DOES THE CONSTITUTION SECURE RIGHTS? 15, 53 n.50 (Robert A. Goldwin & William A. Schambra eds. 1985). In any event, it not only is now well established that preambles are not operative provisions that are legally enforceable, but Edmund Randolph, writing his opinion as Attorney General on the constitutionality of the national bank, suggested that the preamble is at most “declarative only of the views of the convention,” indicating what “they supposed to be best fulfilled by the powers delineated; and that such is the legitimate nature of preambles.” Walter Dellinger & H. Jefferson Powell, *The Constitutionality of the Bank Bill: The Attorney General’s First Constitutional Law Opinions*, 44 DUKE L.J. 110, 126 (1994)

doctrine of equal rights from the Bill of Rights, not because that doctrine was considered mere rhetoric, but because its inclusion in the Constitution would have been dangerous to the continuous existence of slavery.”<sup>169</sup> Whatever the explanation, it appears that Madison drafted the language “in the ‘softer’ format that had characterized state declarations, despite the marked trend in another direction” because “he was seeking to avoid legally undermining slavery even while paying appropriate lip service to basic principle.”<sup>170</sup>

## **B. The Federalists**

A thorough analysis of the ratification-era debates strongly confirms that its participants were in general agreement that the basic questions they needed to address related to how best to interpret the positive law of the Constitution.<sup>171</sup> Under the state constitutions that were the forerunners of the

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<sup>169</sup>Robert J. Reinstein, *Completing the Constitution*, *supra* note 149, at 362-63. Surely Madison would have been aware that many in the South opposed a bill of rights for the reason offered by Charles Cotesworth Pinckney as part of the South Carolina ratification debate. Pinckney argued that “[s]uch bills generally begin with declaring that all men are by nature born free,” an assertion that would be made “with a very bad grace, when a large part of our property consists of men who are actually born slaves.” Akhil Reed Amar, *The Creation, Reconstruction, and Interpretation of the Bill of Rights*, in *THE NATURE OF RIGHTS*, *supra* note 91, at 163, 171 (citing JONATHAN ELLIOT, *FOUR DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 316 (1836)).

<sup>170</sup>Thomas B. McAfee, *Did the Federal Constitution “Incorporate” the Declaration of Independence?*, 1 NEV. L.J. 138, 153-155 (2001). Pauline Maier observed that Madison and others possibly perceived that the Declaration’s principles “might impede the foundation of a stable, effective national government.” PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* 195 (1998). But it may be that “Madison feared alienating the support of slaveholders,” and thus he acquiesced in the rejection of his “pared-down version of the Virginia Declaration of Rights.” *Id.* See also Pauline Maier, *The Strange History of “All Men Are Created Equal,”* 56 WASH. & LEE L. REV. 873, 881 (1999) (contending that “Madison’s ‘prefix’ was probably designed in part to calm antifederalists without provoking slave holders,” but observing that “Congress instead eliminated the ‘prefix’ altogether”).

<sup>171</sup>In an important book on the ratification-era debate on the proposed Constitution, the

Constitution being debated, it was rather clear that “the people” had not “retained” any constitutionally protected (and hence legally enforceable) rights automatically.<sup>172</sup> Indeed those who drafted the state constitutions, we learn from Professor Lutz, “assumed that government had all power except for specific prohibitions contained in a bill of rights.”<sup>173</sup> Theophilus Parsons, who

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editors summed up the Federalist position:

Federalists rejected the proposition that a bill of rights was needed. They made a clear distinction between the state constitutions and the U.S. Constitution. Using the language of social compact, Federalists asserted that when people formed their state constitutions, they delegated to the states all rights and power which were not explicitly reserved to the people. The state governments had authority to regulate even personal and private matters. But in the U.S. Constitution, the people or the states retained all rights and powers that were not positively granted to the federal government. In short, everything not given was reserved. The U.S. government had strictly delegated powers, limited to the general interests of the nation.

Therefore, Federalists argued, a bill of rights was not only unnecessary, but might even be dangerous. Unnecessary, because the new federal government could no way endanger freedom of the press or religion, for instance, since it was given no constitutional power to regulate either. Dangerous, because a listing of rights could be interpreted as inclusive. Rights omitted might be considered as not retained. And the listing of rights, such as freedom of the press, might imply that a power to regulate the press existed absent the provision.

THE FEDERALISTS AND ANTIFEDERALISTS—THE DEBATE OVER THE RATIFICATION OF THE CONSTITUTION 151-52 (JOHN P. KAMINSKI & RICHARD LEFFLER EDS., 1998).

<sup>172</sup>This bit of common ground is what explains the Federalist reliance on the enumerated powers scheme as an alternative to a bill of rights, rather than the general idea that there are natural or inherent rights; it is also the reason most thoughtful commentators have thought the Antifederalists had the better of the argument. *See supra* notes 100, 139.

<sup>173</sup>DONALD S. LUTZ, POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS 60 (1980). Lutz’s characterization of the intentions of those who drafted the state constitutions and declarations of rights is strongly confirmed by Wilson’s defense of the omission of a bill of rights based on the Constitution’s grant of limited and defined powers. *See supra* note 39. It is critical to distinguish, however, between the framers’ description of the legal effect of granting or retaining specific powers and the same framers’ conceptions of the

became a Federalist proponent of the Constitution contended, in opposition to a proposed Massachusetts constitution in 1778, that the people's rights "ought to be settled and established, previous to the ratification of any constitution for the State."<sup>174</sup>

Nathaniel Gorham explained that "a bill of rights in state governments was intended to retain certain power [in the people] as the legislatures had unlimited powers."<sup>175</sup> The Federalist proponents of the Constitution "referred to the 'rights of the people' as 'powers reserved,' or as reserved rights and powers."<sup>176</sup> Since a Bill of Rights was "an enumeration of the powers reserved,"

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natural rights to which they were entitled. On one hand, Edmund Randolph referred to "those paramount rights, which a free people cannot be supposed to confide even to their representatives," even though the legislature is "instituted" by a written constitution under which it is "presumed to be at large as to all authority which is communicable by the people." Dellinger & Powell, *supra* note 156, at 122-23 (editing and reprinting Randolph's opinion on the constitutionality of the proposed national bank). Despite this qualification even of "general" legislative powers, Randolph still suggests that "[e]ssentially otherwise is the condition of a legislature whose powers are described," because then "it claims no powers which are not delegated to it." *Id.* at 123. Randolph would not reject Lutz's conclusion that the framers of the state constitutions intended legally that state legislatures held all power "except for specific prohibitions contained in a bill of rights;" rights could be "inalienable" or "paramount," morally, but became legal limits on government power only by being placed in a bill of rights. This is the only reason that Randolph could argue that the "best security" of rights was "the express enumeration of powers," even as he acknowledged the need for a bill of rights in state constitutions. 3 ELLIOT'S DEBATES, *supra* note 24, at 467 (Virginia Ratifying Convention, June 15, 1788). See *supra* note 46 and accompanying text.

<sup>174</sup>Quoted in, CLINTON ROSSITER, SEEDTIME OF THE REPUBLIC: THE ORIGIN OF THE AMERICAN TRADITION OF POLITICAL LIBERTY 422 (1953). The Reverend Jonas Clark similarly contended that "it is of the highest importance . . . that said rights intended to be *retained*, at least those that are fundamental to the well-being of society and the liberty and safety of individuals, should be in the most explicit terms declared." *Id.* (emphasis added).

<sup>175</sup>1 RATIFICATION OF THE CONSTITUTION, *supra* note 20, at 335 (Sept. 27, 1787).

<sup>176</sup>See McAfee, *Original Meaning*, *supra* note 43, at 1247. James Wilson went so far as to assert that "the powers given and reserved form the whole rights of the people." 2 RATIFICATION OF THE CONSTITUTION, *supra* note 20, at 469, 470 (Dec. 4, 1787). Cf. 3 FARRAND *supra* note 81, at 255, 256 (C.C. Pinckney) (delegation of powers reserves "every power and right not mentioned").



it followed that “[i]f we attempt an enumeration, everything that is not enumerated is presumed to be given.”<sup>177</sup> The Federalists were thus concerned that a bill of rights “would *at least imply* that nothing more was left with the people than the rights defined and secured in such bill of rights.”<sup>178</sup> Despite the limitations found in article I, sections 9 and 10, it remained quite clear, even long after adoption of the federal Constitution, that states constitutionally could pass a bill of attainder or an ex post facto law if the text of the constitution of the State did not prohibit the state from so using its law-making power.<sup>179</sup> The “right” to be free of legislative trials and laws criminalizing an act retroactively were “retained,” under the state constitutions, only when such a right was “stated as a limitation to the plenary power held by state legislatures in the state’s Declaration of Rights.”<sup>180</sup>

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These figures believed that what was “reserved” when the federal government was granted limited powers would constitute an adequate group of rights. This is why Professor Bowling refers to the Ninth and Tenth Amendments as “the reservation amendments.” Kenneth B. Bowling, *Overshadowed by States’ Rights: Ratification of the Federal Bill of Rights*, in GOVERNMENT PROSCRIBED, *supra* note 85, at 95.

<sup>177</sup>James Wilson, 2 RATIFICATION OF THE CONSTITUTION, *supra* note 20, at 387, 388 (Pennsylvania Ratifying Convention, Nov. 28, 1787). The Federalists were anxious, then, that an “enumeration of rights must not suggest a government of unenumerated power.” Lash, *Lost Original Meaning*, *supra* note 45, at 358.

<sup>178</sup>Letter from Samuel Holden Parsons to William Cushing (Jan. 11, 1788), in 3 RATIFICATION OF THE CONSTITUTION, *supra* note 20, at 569 (emphasis added). Thus Wilson could contend that “a bill of rights would have been improperly *annexed to the federal plan*” inasmuch as “it would imply that whatever is not expressed was given, which is not the principle of the proposed Constitution.” James Wilson, Speech at the Pennsylvania Ratifying Convention (Nov. 28, 1787), in 2 RATIFICATION OF THE CONSTITUTION, *supra* note 20 at 391 (emphasis added).

<sup>179</sup>McAfee, *Liberty Over Law*, *supra* note 33, at 1546-47 (observing that Justice Joseph Story stated quite clearly that a “every state, unless prohibited by its own constitution, might pass a bill of attainder, or ex post facto law, as a general result of its sovereign legislative power”).

<sup>180</sup>*Id.* at 1547 n. 246.

Dean Reinstein underscored that the Constitution’s Federalist defenders contended that bills of rights had been “necessary to limit the powers of otherwise omnipotent monarchs.”<sup>181</sup> By contrast, since the proposed Constitution recognized the people’s sovereignty, and “the government had only those powers delegated to it,” the “people’s rights should be secured by the structure of the new government and not by an enumeration of rights.”<sup>182</sup> The Federalists were also intensely aware that the state declarations of rights were generally drafted in hortatory language, suggesting that those who drafted them were not contemplating legal enforcement, a phenomenon that led many of them to conclude that “[a] bill of rights was also useless because it would be unenforceable,” and government “would not be stopped by any ‘paper guarantee.’”<sup>183</sup>

Despite their strikingly different views about the nature of the proposed Constitution, both the Federalists and Antifederalists completely agreed that only laws that violated express prohibitions were unconstitutional under the state constitutions that preceded the federal Constitution. This is amply documented:

It was a standard view that the state governments, ‘unlike governments of delegated and enumerated powers, had (as representatives of the sovereign people) all powers not constitutionally forbidden them. The consistent understanding was that as a government of ‘plenary’ power, ‘a state constitution does not grant governmental power but merely structures and limits it.’ To its Framers, precisely because the proposed federal Constitution gave power to the national government only when it was explicitly conferred, it raised an inference in favor of liberty.<sup>184</sup>

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<sup>181</sup>Reinstein, *Completing the Constitution*, *supra* note 149, at 366.

<sup>182</sup>*Id.*

<sup>183</sup>*Id.* (quoting Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 THE PAPERS OF JAMES MADISON 295-300 (Robert A. Rutland et al. eds. 1977).)

<sup>184</sup>Frost, Klein-Levine, & McAfee, *Courts Over Constitutions*, *supra* note 161, at 339 (citing Forrest McDonald, *The Bill of Rights: Unnecessary and Pernicious*, in GOVERNMENT

It was precisely because the “rights” were understood by reference to the powers that had been delegated to the nation that both parties to the bill of rights dispute could refer interchangeably to rights “retained” by the people and rights “reserved” to the states. So Patrick Henry could insist that it “was expressly declared in our Confederation that every right was retained by the states, respectively, which was not given up to the government of the United States.”<sup>185</sup>

By contrast, several modern commentators, including in particular Professor Barnett, contend that the Ninth Amendment embodies the social contract moral and political theory of America’s Lockean founders, including a guarantee of natural liberty rights that were “retained” by the people. But even advocates of this reading of the Ninth Amendment often acknowledge that “early in our legal history judges made a decided turn away from natural rights as a basis of limiting legislative power and towards a positivist approach that enforced whatever laws did not violate express prohibitions.”<sup>186</sup> According to Professor Barnett, this “positivist” approach did not manifest itself

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PROSCRIBED, *supra* note 85, at 387, 388, and TARR, *supra* note 81, at 7; G. ALAN TARR & MARY CORNELIA PORTER, *STATE SUPREME COURTS IN STATE AND NATION* 50 (1988). *See also* McAfee, *Inalienable Rights*, *supra* note 37, at 749-51. Even Professor Massey, a longtime advocate of unenumerated rights under the Ninth Amendment, acknowledged that the state constitutions rested on a presumption that state governments possess “all powers except those explicitly denied” to them. CALVIN MASSEY, *SILENT RIGHTS: THE NINTH AMENDMENT AND THE CONSTITUTION’S UNENUMERATED RIGHTS* 87 (1995).

<sup>185</sup>Patrick Henry, *Debates in the Convention of the State of Virginia* (June 14, 1788), in 3 ELLIOT’S DEBATES, *supra* note 24, at 445-46.

<sup>186</sup>Randy E. Barnett, *Who’s Afraid*, *supra* note 118, at 5. In fact, as we have seen the project of the first Congress was to consolidate rights.

As nervous as all centrists about the instability of rights arguments, they pruned the open-ended, natural-rights abstractions out of the document with the rigor of men determined to lock up that line of argument against the future and the external

until the well-known Chase/Iredell debate in *Calder v. Bull*,<sup>187</sup> a decision that illustrated a developing reluctance of courts “to explicitly protect unenumerated rights.”<sup>188</sup> Justice Chase, of course, was emphatic that “the nature and terms of the social compact” are “the foundation of the legislative power,” and will invalidate laws even though “its authority should not be expressly restrained by the Constitution, or fundamental law, of the State.”<sup>189</sup> As Professor Grey observed, however, Justice Chase also acknowledged that the state legislatures “retain all the powers of legislation, delegated to them by the state constitutions; which are not expressly taken away by the constitution of the United States.”<sup>190</sup> Indeed, Professor Grey states that despite acknowledging conventional understandings, Justice Chase apparently concluded that “this plenary legislative power

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democratic clamor. Many of them hoped to make the language of rights routine and merely legalistic.

Daniel T. Rogers, *Rights Consciousness in American History*, in *THE NATURE OF RIGHTS*, *supra* note 91, at 258, 264.

<sup>187</sup>3 U.S. (3 Dall.) 386 (1798).

<sup>188</sup>Barnett, *supra* note 20, at 3. Barnett’s useful discussion of the Chase/Iredell debate is found at *id.* at 3-6. Similarly, Professor Grey asserts that “Iredell gave what seems to be the first explicit statement of full-fledged constitutional positivism; the doctrine of judicial review can enforce written but not unwritten constitutional principles.” Grey, *The Original Understanding*, *supra* note 133, at 145, 149. For a critical reaction, see MCAFFEE, BYBEE, & BRYANT, *POWERS RESERVED*, *supra* note 37, at 50 n. 12. James Wilson and Federalist defenders of the Constitution clearly interpreted the state constitutions as granting plenary powers to their legislatures, while enumerated powers almost reversed this presumption in favor of government power. *See supra* note 39 and accompanying text.

<sup>189</sup>*Calder v. Bull*, 3 U.S. (3 Dall.) 386, 387 (1798) (emphasis subtracted).

<sup>190</sup>*Id.* at 399. *See* Grey, *The Original Understanding supra* note 133, at 148.

was not so plenary after all.”<sup>191</sup>

In discussing Iredell’s contribution to the debate in *Calder*, Barnett concludes that what is “both interesting and disturbing is how it contrasts with his colorful affirmation of unenumerated rights before the North Carolina ratification convention ten years earlier.”<sup>192</sup> It is certainly true that Iredell had referred to unnamed rights when debating the ratification of the Constitution in North Carolina. Specifically he had said:

[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>193</sup>

Iredell had asserted in North Carolina, says Barnett, “that impairing such unenumerated rights would be a usurpation.”<sup>194</sup> Moreover, Barnett argues, “nowhere in this speech does he suggest

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<sup>191</sup>Grey, *The Original Understanding*, *supra* note 133, at 148. It is critical to realize that unwritten constitutionalism necessitates viewing legislatures as not holding “plenary” powers; but, as *Calder* illustrates, this is a view that contradicts the assumptions of both the Federalist and Antifederalist participants in the ratification-era debate over the omission of a bill of rights.

<sup>192</sup>Barnett, *The Ninth Amendment*, *supra* note 32, at 4 (citing 4 ELLIOT’S DEBATES, *supra* note 24, at 167).

<sup>193</sup>4 ELLIOT’S DEBATES, *supra* note 24, at 167 (July 28, 1788) (emphasis added). *See also id.* at 149 (arguing that a bill of rights “would not only be incongruous, but dangerous,” because it would be construed as showing “that the people did not think every power retained which was not given,” with the implication that a bill of rights “might operate as a snare rather than a protection”). Iredell was not so much articulating the need for an “unenumerated” rights clause as he was trying to indicate the advantages of the limited powers scheme as a device for securing valid moral claims (rights) as contrasted to a legislature of general powers being subjected only to the limits stated in a bill of rights. *See infra* note 200 and accompanying text.

<sup>194</sup>For analysis and interpretation of Iredell’s comments, see Barnett, *The Police Power*, *supra* note 120, at 445-46 (asserting that only Iredell’s assurance of the range and scope of

that only enumerated limitations on legislative power would be enforceable, as he later did in *Calder*.<sup>195</sup>

The evidence, however, reveals that Iredell held a consistent view over the entire ten year period. Iredell's presentation in North Carolina was delivered in the midst of a debate about how best to secure inalienable natural rights. The Antifederalist, Samuel Spencer, had 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."<sup>196</sup> In response, Iredell assured that the natural rights would be secure if there is "such a definition of authority as would leave no doubt<sup>197</sup>" so that "any person by inspecting the Constitution may see if the power claimed be enumerated."<sup>198</sup> It is in

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unenumerated rights can explain how he "eventually adopted so short a list as those contained in the Constitution and the Bill of Rights"). Barnett's interpretation tracks with Suzanna Sherry's, and both read Iredell's reference to "rights which are not intended to be given up" to be referring to inalienable natural rights. See Sherry, *Unwritten Constitution*, *supra* note 142, at 1164-66. But there are good reasons to think that Iredell was referring to rights not "given up" by virtue of the limited grant of federal power, especially given that he so clearly stated that the rights are presumptively "given up" to a legislature with general powers. Given Iredell's endorsement of the necessity of a Bill of Rights under the state constitutions (see *infra* note 200 and accompanying text), his concern appears to have been that shifting to a bill containing specific limitations might mean that the Constitution would establish a national legislature of general powers (like the states), thereby effectively eliminating the rights reserved by the limited powers scheme.

<sup>195</sup>*Id.* Though Iredell clearly perceived unenumerated natural rights, it is just as clear that he did not perceive them as legally binding as to a government with general legislative powers. See *infra* note 200 and accompanying text.

<sup>196</sup>4 ELLIOT'S DEBATES, *supra* note 24, at 137 (North Carolina Ratifying Convention, July 28, 1788). Notice that Spencer characterizes the claim that a right is "unalienable" as fundamentally a moral claim – that which "ought not be given up to any government."

<sup>197</sup>*Id.* at 171 (July 29, 1788).

<sup>198</sup>*Id.* at 172 (emphasis added). Iredell responds to the claim that the rights required the protection of a "fence" to mark them off, which Iredell describes as the insistence that "there ought

this context that Iredell explains that his fear of a negative inference as to omitted rights rested on a concern that a later generation might deduce from a bill of rights that “the people did not think every power retained which was not given.”<sup>199</sup>

At the same ratifying convention in 1788, Iredell was extremely clear that, as to a government with general legislative powers, a law conflicting with an unstated right would *not* be seen as “impairing” the unenumerated right, or as a usurpation, and that “only enumerated limitations on legislative power would be enforceable.”

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>200</sup>

Iredell’s argument follows the Federalist pattern of formulating the feared “danger” as a reversal of the assumptions that justified the argument against the necessity of a bill of rights. For example, at one point Madison observed that the Constitution provides that “every thing not granted is reserved,” but 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>201</sup> For example, at one point Madison

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to protection of a “fence provided against future encroachments of power.” *Id.* at 171.

<sup>199</sup>*Id.* at 149.

<sup>200</sup>4 ELLIOT’S DEBATES, *supra* note 24, at 149. Iredell clearly fully accepted the Federalist position that the distinction between governments of general versus enumerated legislative powers explained the need, or lack of need, for a bill of rights. This is a theme that has been carefully documented for almost twenty years. See McAfee, *Original Meaning*, *supra* note 43, at 1267-1268.

<sup>201</sup>3 ELLIOT’S DEBATES, *supra* note 24, at 620 (June 24, 1788). See *supra* note 50 and accompanying text.

observed that the Constitution provides that “every thing not granted is reserved,” but 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>202</sup> This is why it is misleading to rely starkly on Madison’s contention that a bill of rights would be dangerous “because an enumeration which is not complete is not safe.”<sup>203</sup> If one correctly gathers that Madison was confident, on the one hand, that in the Constitution as drafted “every thing not granted is reserved,” one quickly realizes that it is only adding a bill of rights to the enumerated powers scheme that could imply “that everything omitted is given to the general government.”<sup>204</sup>

Thus, Madison further 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.”<sup>205</sup> George Wythe, a Federalist proponent of the Constitution, had submitted to the Virginia Ratifying Convention a “resolution of ratification” that had stated “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

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<sup>202</sup>3 ELLIOT’S DEBATES, *supra* note 24, at 620 (June 24, 1788).

<sup>203</sup>Sherry, *Unwritten Constitution*, *supra* note 142, at 1163 (quoting Madison, 3 ELLIOT’S DEBATES, *supra* note 24, at 626 (Virginia Ratifying Convention, June 24, 1788)). Sherry takes Madison as referring to the potential loss of “unenumerated” rights—thinking of additional, but unmentioned limits, on granted powers in favor of rights.

<sup>204</sup>*See supra* note 50 and accompanying text.

<sup>205</sup> James Madison, Virginia Ratifying Convention, *in* 3 ELLIOT’S DEBATES, *supra* note 24, at 626-27.



purposes.”<sup>206</sup> In short, before the Virginia Ratifying Convention Madison linked the problem of an inevitably imperfect enumeration of rights 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.<sup>207</sup>

## V. The Ninth Amendment and Post-Adoption Evidence

One of the challenges facing those who seek the original meaning of the Ninth Amendment is precisely that the history of the amendment relates both to rights and powers and is easily tied to early disputes about national power under our federal system. While the early post-*Griswold* debate over the meaning of Ninth Amendment focused almost exclusively on the ratification-era dispute over the omission of a bill of rights that led to the proposed amendments of the state ratifying conventions, in recent years scholars have increasingly looked at evidence generated by subsequent efforts to explicate the scope of federal powers under the Constitution. The Federalists always contended that the limits on federal power implicit in our federal system, and most especially its system of limited and enumerated powers, would do a great deal to secure a number of the rights that might otherwise be included in a bill of rights.<sup>208</sup> Beyond the argument

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<sup>206</sup>George Wythe, Virginia Ratifying Convention, *in id.* at 656.

<sup>207</sup>The Federalists – neither James Madison, George Wythe nor the rest – were *not* “contending that these rights and all others were best protected by leaving them unenumerated,” Barnett, *The Ninth Amendment*, *supra* note 32, at 28, except to the degree that the enumerated powers scheme secured them.

<sup>208</sup>The Federalists never contended that the enumerated powers scheme would secure each and every right that might be included in a bill of rights. The notion that they contended against the necessity of a bill of rights based on a “rights-powers conception” of individual rights – where rights

that a bill was not really necessary, Federalists also feared that a bill of rights might be viewed as essential and even present the danger of reversing the presumption to one in favor of power, so that the *only* security provided for rights would be – as in the state constitutions – the specific limitations found in the bill of rights.

Specifically, the inclusion of rights in a bill of rights could be construed as in effect implying powers not intended to be given.<sup>209</sup> A separate concern – articulated most frequently by Antifederalist opponents of ratification – was that the omission of Article II of the Articles of Confederation, reserving unenumerated “rights, powers, and jurisdiction,” to the states, could be read to mean that the federal government would hold general legislative powers.<sup>210</sup> From this perspective, the Ninth and Tenth Amendments are “explanatory amendments,” both being intended to control “the expansion of federal power and reserving all nondelegated power and rights to the states.”<sup>211</sup> As Professor Lash has noted, “listing certain rights could imply that the only limits to the

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are defined invariably and entirely by reference to powers, thus never “trumping” powers – receives no support from the ratification-era debate over the omission of a bill of rights. *See* McAfee, *The Court Over the Constitution*, *supra* note 33, at 1532-1535 (critiquing Professor Barnett’s attempt to defend such a proposition). The Federalists merely believed that a number of the most fundamental rights, about which Antifederalists were concerned, were adequately secured by the grant of limited and defined powers – indeed, as “the residuum” of those powers.

<sup>209</sup>*See* ALEXANDER HAMILTON, THE FEDERALIST NO. 84, *supra* note 55, at 579.

<sup>210</sup>*See supra* notes 36-45 and accompanying texts.

<sup>211</sup>Lash, *Lost Original Meaning*, *supra* note 45, at 358. The term “explanatory amendment” is Madison’s. 2 ANNALS OF CONGRESS 1901 (JOSEPH GALES ED., 1834) (Feb. 2, 1791) (James Madison) (referring to the “explanatory declarations and amendments accompanying the ratifications of the several States”). *See also* Lash, *Lost Original Meaning*, *supra* note 45, at 358-59, 392. Lash correctly takes the Ninth Amendment as clarifying that “[t]he enumeration of rights must not suggest a government of unenumerated power.” *Id.* at 358.

interpreted scope of federal power were those particular limits listed in the Constitution.”<sup>212</sup>

But of course from the early days of the republic Americans have disagreed about the interpretation of federal powers, as well as the scope of the grant of power contained in the Necessary and Proper Clause. Now it is true that the “explanatory amendments” we call the Ninth and Tenth Amendments explicitly merely re-state the propositions that the government is one of delegated and reserved powers – propositions that were thought by many to secure and protect rights and interests of both states and individuals. They do not purport to tell us – at least not clearly and explicitly – how national powers are to be construed.<sup>213</sup> Even so, both amendments have come to figure in the debate over how to interpret the powers granted the national government, and the Necessary and Proper Clause, and each has been used at various times, by courts or commentators (and sometimes both) to warrant a restrained construction of either the powers themselves or the Necessary and Proper Clause.

When Madison presented his proposed amendments to Congress, he noted that many were anxious for a provision stating that “the powers not therein delegated should be reserved to the several States.”<sup>214</sup> Admitting that such a provision may be “deemed unnecessary,” he concluded

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<sup>212</sup>Lash, *Lost Original Meaning*, *supra* note 45, at 361.

<sup>213</sup>It is still true that the Virginia Ratifying Convention proposal, from which the Ninth Amendment was drafted, did specifically prohibit an inference of extended powers from the inclusion of limits on powers elsewhere in the Constitution (or Bill of Rights). Even so, it was Madison who was emphatic that “preserving retained rights and constraining federal power amounted to the same thing and that the final version [of the Ninth Amendment] continued to express the same federalist principle demanded by the state conventions.” Lash, *Inescapable Federalism*, *supra* note 54, at 808. *See supra* notes 103-106 and accompanying text.

<sup>214</sup>1 Annals of the Congress of the United States 441 (Joseph Gales ed., 1791) (1834).

that “there can be no harm in making such a declaration, if gentlemen will allow that the fact is as stated.”<sup>215</sup> So “Madison stated his belief that the proposed Tenth Amendment probably was not necessary, but that expressly declaring the principle was considered important to the state conventions.”<sup>216</sup> As we have noted, it is no coincidence that similar language generally reserving all not granted was proposed by every state ratifying convention that proposed amendments.<sup>217</sup>

#### **A. Madison’s Opposition to Hamilton’s National Bank**

Madison and other Federalists had argued against a bill of rights on grounds that a sufficient security for rights grew from the fact the “every thing not granted is reserved,” and, further, that the implication of general legislative powers might be drawn from a bill of rights.<sup>218</sup> This is precisely why Madison could contend, as he did, that there was no real distinction between Virginia’s Seventeenth proposed amendment and the Ninth Amendment’s final language that referred to

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<sup>215</sup>*Id.* The view Madison expressed in Congress is the view commonly accepted as the modern reading by which the Tenth Amendment is viewed as “[d]eclaratory of overall constitutional scheme” and “had no independent force as originally understood.” CHARLES LOFGREN, *The Origins of the Tenth Amendment: History, Sovereignty, and the Problem of Constitutional Intention, in GOVERNMENT FROM REFLECTION AND CHOICE: CONSTITUTIONAL ESSAYS ON WAR, FOREIGN RELATIONS, AND FEDERALISM* 113 (1986). See MCAFFEE, BYBEE, & BRYANT, POWERS RESERVED, *supra* note 37, at 40.

<sup>216</sup>Lash, *Lost Original Meaning*, *supra* note 45, at 360.

<sup>217</sup>See *supra* note 38 and accompanying text. In addition, Antifederalists would lobby hard “to change the wording of what would eventually become the Tenth Amendment—to restrict the powers of the new government to those *expressly* delegated by the Constitution.” SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788-1828*, at 244 (1999) (emphasis added) [hereinafter cited as *THE OTHER FOUNDERS*]; Dry, *The Antifederalists and the Constitution, in ANTI-FEDERALISM*, *supra* note 100, at 39 (listing five state conventions that proposed limiting Congress’s powers to those “expressly” or “clearly” delegated).

<sup>218</sup>See *supra* note 200 and accompanying text.

retained rights.<sup>219</sup> Federalists believed that the limited grant of federal power was adequate to secure freedom of the press and freedom of religion, but also perceived the danger that the specific provision for such freedoms could generate an inference of a power to regulate such topics. They were thus anxious to make clear “what the Federalists claimed were principles already implicit in the structure of the Constitution.”<sup>220</sup>

At the same time, the omission of a Bill of Rights could only be defended if Congress’s powers were not interpreted to “give an unlimited discretion to Congress.”<sup>221</sup> In opposing Hamilton’s bill that would create a national bank, Madison concluded that Hamilton had articulated the doctrine of implied powers so as to “reach every object of legislation, every object within the whole compass of political economy.”<sup>222</sup> According to Madison, “an implication of the critical premise that these are *limited* grants of power is that there is a barrier to the exercise of a ‘great and

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<sup>219</sup>See *supra* notes 105-106 and accompanying text.

<sup>220</sup>Lash, *Lost Original Meaning*, *supra* note 45, at 391-92. A related point is that “the Founders generally viewed rights and powers as two sides of the same coin.” *Id.* at 400. Hence “limiting powers and securing rights amount to the same thing: the extension of one results in the disparagement of the other.” *Id.* See also McAfee, *Original Meaning*, *supra* note 43, at 1226, 1291.

<sup>221</sup>James Madison, *Gazette of the United States (Philadelphia)*, Feb. 23, 1791, reprinted in 14 *Documentary History of the First Federal Congress, 1789-1791*, at 371 (William Charles DiGiacomantonio et al., eds, 1995) [hereinafter cited as *Documentary History*]. Madison’s speech opposing the bank bill is discussed in *id.* at 388-91. The solution to the problem was clear enough; it “simply required that the Constitution be interpreted as if the Antifederal amendments had been passed: strict construction.” Dry, *The Antifederalists and the Constitution*, in *ANTIFEDERALISTS*, *supra* note 100, at 41.

<sup>222</sup>Madison, 14 *Documentary History*, *supra* note 221, at 372.

important power, which is not evidently and necessarily involved in an express power.”<sup>223</sup> More than ten years ago, I summarized Madison’s analysis of this issue:

Madison relies on a number of critical factors, including the legislative nature of the proposed bank’s power to make by-laws, the power granted to purchase and hold real property, the support the bank would receive from penal regulations and, finally, the particular point that the bank was effectively granted a monopoly in derogation of the “equal rights of every citizen.” Madison’s net conclusion is that these factors, when taken together, show that “the power of incorporation exercised in the bill” may not “be deemed an accessory or subaltern power, to be deduced by implication, as a means of executing another power.”<sup>224</sup>

In the context of this argument for a somewhat restrained reading of enumerated powers, Madison relied upon both the Ninth and Tenth Amendments.<sup>225</sup> They were the “explanatory amendments,” both of which excluded from proper interpretation “the latitude now contended.”<sup>226</sup> The Ninth Amendment guarded against “a latitude of interpretation,” and the Tenth excluded “every source of power not within the constitution itself.”<sup>227</sup> Professor Lash sums up the conclusions

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<sup>223</sup>McAfee, *Federal System*, *supra* note 129, at 126, *quoting* James Madison, 2 ANNALS OF CONG. 1899 (1791).

<sup>224</sup>*Id.* at 127, *quoting* James Madison, 2 ANNALS OF CONG. 1900 (1791).

<sup>225</sup>Madison’s focus on the Ninth Amendment may have reflected in part that he had rather clearly suggested to Congress that the Tenth Amendment may well be redundant and unnecessary. *See supra* notes 207-09 and accompanying text. As we will see, however, in the battle over the Alien and Sedition Act Madison would rely on the Tenth Amendment as having “independent force” in justifying relatively strict construction of federal power. It should not be surprising, then, that the Ninth and Tenth Amendments came to be perceived to both embody and reflect governing assumptions about the nature of our federal system.

<sup>226</sup>James Madison, WRITINGS 489 (Jack N. Rakove ed., 1989) [hereinafter cited as WRITINGS].

<sup>227</sup>*Id.* Hamilton’s defense of the bank did not rely on the limiting provisions of the Bill of Rights to justify an expansive reading of the Necessary and Proper Clause, so it is quite unclear that either Virginia’s seventeenth proposed amendment or the final text of the Ninth Amendment can be

Madison reaches in his speech against the bank in this fashion:

The federal government is one of limited enumerated power. All nondelegated powers are reserved to the states. Unduly broad interpretations of these enumerated powers would destroy this principle by allowing the government to invade areas of law reserved to the states. Important powers like those exercised by the Bank Bill are not appropriately derived by implication but require enumeration.<sup>228</sup>

Some have contended that Madison's reliance on the Ninth Amendment reflected that he perceived the bank as invading an individual right "retained" by the people.<sup>229</sup> Specifically, it is argued that this is what Madison was referring to in describing the bank as a monopoly that "affects the equal rights of every citizen."<sup>230</sup> In truth, Madison never stated or implied that "the monopoly status of the bank would be a sufficient basis by itself to warrant constitutional objection."<sup>231</sup> It is,

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read as literally applying to the bank problem. Madison's analysis reflects, however, that the Federalists came to perceive themselves as seeking to prevent interpretation with the effect of "levelling all the barriers which limit the powers of the general government, and protect those of the state governments." Madison, 14 Documentary History, *supra* note 221, at 375.

<sup>228</sup>Lash, *Lost Original Meaning*, *supra* note 45, at 393. Professor Lash concluded: "In his Bank speech, Madison presented the Ninth Amendment as a rule of construction that preserves the principle enshrined in the Tenth." Lash, *St. George Tucker*, *supra* note 85, at 1360.

<sup>229</sup>Randy E. Barnett, *Necessary and Proper*, 44 U.C.L.A. L. Rev. 745, 784-85 (1997); David N. Mayer, *The Natural Rights Basis of the Ninth Amendment: A Reply to Professor McAfee*, 16 S. Ill. L.J. 313, 318-19 (1992).

<sup>230</sup>Randy E. Barnett, *Foreward: Unenumerated Rights and the Rule of Law*, 14 HARV. J. L. & PUB. POL'Y 615, 637 (1991).

<sup>231</sup>McAfee, *Federal System*, *supra* note 129, at 128. See Lance Banning, *Federalism, Constitutionalism, and Republican Liberty: The First Constructions of the Constitution*, in *Liberty and American Experience in the Eighteenth Century* 388, 404 (David Womersley ed. 2006) (summing up Madison's arguments against the bank bill with his statement that it would destroy "the essential characteristic of a government . . . composed of limited and enumerated powers"). Others who used the Ninth Amendment to oppose the bank, even when the debate concerned renewing its charter, were clear that their argument was based on federal power and states' rights, not personal claims. See Lash, *Inescapable Federalism*, *supra* note 54, at 863-65.

moreover, especially unlikely that Madison would have been relying on a fundamental right against economic monopolies, in view of his history of opposition to including an antimonopoly constitutional prohibition in the bill of rights.<sup>232</sup> Professor Lash’s conclusions therefore seem undeniable:

Madison . . . was not arguing that the bank charter violated individual rights. In fact, Madison expressly stated that the proposed bank charter would “directly interfere with the rights of the States.” Madison’s reference to the effect of a monopoly on the equal rights of citizens was in support of his argument that the power to charter a bank was an important power and, thus, required enumeration.<sup>233</sup>

Considering that Madison’s argument was based on a conception of federalism, it is significant that, despite the full-blown debate within the Washington administration as well as in Congress, the bill was enacted and signed into law by President Washington.<sup>234</sup> Madison himself

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<sup>232</sup>McAffee, *Federal System*, *supra* note 129, at 116-17. Moreover, Jefferson, a prominent opponent of the national bank and an equally strong proponent of an anti-monopoly provision, did not rely on unenumerated rights or the Ninth Amendment in opposing the national bank. *Id.* at 129-30 & n. 417. *Accord*, Lash, *St. George Tucker*, *supra* note 85, at 1360-61; Banning, *supra* note 231, at 405-406. Maryland also did not rely on individual rights or the Ninth Amendment in arguing the *McCulloch* case before the Supreme Court. *See id.* at 1373.

<sup>233</sup>Lash, *Lost Original Meaning*, *supra* note 45, at 390, *quoting* James Madison, WRITINGS, *supra* note 18, at 483; *accord*, Garrett Ward Sheldon, THE POLITICAL PHILOSOPHY OF JAMES MADISON 81 (2001) (treating Madison’s objection to the bank as based on its “interference with the powers of the states”). Even a strong proponent of using the Ninth Amendment to strictly construe federal power that would impact on individual interests, St. George Tucker, “saw the bank episode as an instance of violating the Tenth Amendment – not the Ninth Amendment.” Lash, *Inescapable Federalism*, *supra* note 54, at 860 n. 223. Tucker did not see the bank “as having anything to do with individual rights,” and therefore perceived only the need to protect “the rights of the states.” *Id.*

<sup>234</sup>*See* Griffin, *supra* note 87, at 299-300. Griffin observes that the House and Senate were “crowded with framers and ratifiers,” *id.* at 299, and concludes that it is “very unlikely that President Washington, the ‘Father of our Country,’ would have signed the bill had it been obvious (as Barnett would have it) that the bank violated the original meaning of the Constitution.” *Id.* at 300.



also signed a subsequent law chartering a Second Bank of the United States, a decision that would seem especially unlikely had he viewed the law as violating a fundamental right of the people.<sup>235</sup> A narrow reading of the Necessary and Proper Clause also became a prominent feature of nineteenth century states' rights constitutionalism.

## **B. The Dispute Over the Alien and Sedition Acts**

The infamous Alien and Sedition Acts, criminalizing sharp criticism of government as seditious libel, “precipitated the most serious constitutional crisis in the period after ratification.”<sup>236</sup> It led to the adoption of the Virginia and Kentucky Resolutions, which “drew on the anticonsolidationist rhetoric that had defined dissenting constitutional discourse since ratification.”<sup>237</sup> Although the text of the Tenth Amendment does not appear to offer any special protection to states, beyond what already appears in article I, Section 8,<sup>238</sup> it came to be viewed by

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<sup>235</sup>See, e.g., GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 102-03 (15<sup>th</sup> ed. 2004); SHELDON, *supra* note 233, at 106-09. Strikingly, one whose views are widely cited in support of the fundamental rights construction of the Ninth Amendment, James Wilson, was just as adamant that there was power to create a national bank – a view he contended for even under the Articles of Confederation.

<sup>236</sup>CORNELL, THE OTHER FOUNDERS, *supra* note 215, at 230. For useful summaries of the debate over the Alien & Sedition Acts, see Kurt T. Lash, *James Madison's Celebrated Report of 1800: The Transformation of the Tenth Amendment*, 74 GEO. WASH. L. REV. 167 (2006) [hereinafter cited as *Report of 1800*]; McAfee, *Federal System*, *supra* note 129, at 130-38.

<sup>237</sup>CORNELL, THE OTHER FOUNDERS, *supra* note 215, at 240.

<sup>238</sup>See the discussion of Madison's presentation of the Tenth Amendment, at *supra* notes 207-09 and accompanying text. Randolph objected that the amendment “does not appear to me to have any real effect, unless it be to excite a dispute between the United States, and every particular state, as to what is delegated.” Letter to George Washington (Dec. 6, 1789), in 5 Documentary History of the Constitution of the United States of America: 1786-1870, at 222, 223 (Dept. Of State ed., 1905), cited in Lash, *Report of 1800*, *supra* note 235, at 172 n. 60.

many as “expressing a rule of narrow, or strict, construction of federal power.”<sup>239</sup> We have seen that Madison relied on the Ninth and Tenth Amendments to justify his opposition to the bill creating a national bank and as requiring a fairly strict construction of federal powers;<sup>240</sup> indeed, Madison read the Ninth Amendment as “a rule of strict construction in order to preserve the principle announced by the Tenth Amendment.”<sup>241</sup> Other commentators, including St. George Tucker, were satisfied that “the Tenth Amendment itself expressed a rule of strict construction.”<sup>242</sup> Lash concludes: “[A]fter 1800 and for the next 150 years, courts and commentators cited both the Ninth and Tenth Amendments as expressing rules of strict construction of federal power.”<sup>243</sup>

Professor Cornell offered these observations:

In both cases, Jefferson and Madison asserted that the protection of individual liberty depended upon preserving the balance of power between the states and the federal government. States’ rights and individual rights continued to be linked in opposition constitutional discourse. The two documents also adopted the compact theory of federalism, in which the states were cast as the original parties of the compact that created the Union.<sup>244</sup>

In support of the Virginia Resolutions, Madison offered the view that the challenged act

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<sup>239</sup>Lash, *Report of 1800*, *supra* note 235, at 168. *See also id.* at 170-172.

<sup>240</sup>For a useful review of Madison’s congressional speech opposing the bank, see Lash, *Report of 1800*, *supra* note 235, at 172-75.

<sup>241</sup>*Id.* at 177.

<sup>242</sup>*Id.* at 178. Lash reports that “[a]ccording to Tucker, under the Tenth Amendment, the Constitution ‘is to be construed strictly, in all cases where the antecedent rights of state may be drawn in question.’” *Id.*

<sup>243</sup>*Id.*

<sup>244</sup>CORNELL, *THE OTHER FOUNDERS*, *supra* note 215, at 240.

exercises “a power not delegated by the Constitution.”<sup>245</sup> In his Report on the Virginia Resolutions, he contended that

it will be proper to recollect that, the federal government being composed of powers specifically granted, with reservation of all others to the states or to the people, the positive authority under which the Sedition Act could be passed must be produced by those who assert its constitutionality.<sup>246</sup>

The result of Madison’s Tenth Amendment-based argument for strict construction of federal power was that Madison’s Report of 1800 “became a foundational document for nineteenth-century advocates of states’ rights.”<sup>247</sup>

The principle of a government of limited and enumerated powers continued to be perceived as both securing the autonomy of state and local governments, but also as protecting rights. In his Kentucky Resolutions, Jefferson stated that

“the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people”; and that, no power over the freedom of religion, freedom of speech, or freedom of the press, being

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<sup>245</sup>*Id.* Lash points out that Madison relied on the Tenth Amendment “which declares, that the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people.” Lash, *Report of 1800, supra* note 235, at 182 (citing Madison, Report on the Alien and Sedition Acts (1800), in *Writings* 608 (Jack N. Rakove ed., 1999).

<sup>246</sup>James Madison, *Madison’s Report on the Virginia Resolutions*, 4 Elliot’s Debates, *supra* note 24, at 546, 561. Professor Cornell observed that a leading congressional opponent, Albert Gallatin, contended that the only way to prevent the subversion of the Constitution was to interpret it in strict terms. “In doubtful circumstances the language of the text was to be construed so as to limit power, not increase it.” CORNELL, *THE OTHER FOUNDERS, supra* note 215, at 232. Gallatin even referred to “strict adherence” to the terms of the First Amendment. *Id.*

<sup>247</sup>Lash, *Report of 1800, supra* note 235, at 182. Some have found it almost startling that “the Federalist Alien and Sedition Acts” provoked Madison “to advocate a states’ rights position,” that would be widely perceived as inconsistent with “the understanding of Madison the founder.” Dry, *The Antifederalists and the Constitution, in ANTIFEDERALISTS, supra* note 100, at 41.

delegated to the United States by the Constitution, nor prohibited by it to the states, all lawful powers respecting the same did of right remain, and were reserved to the state or to the people.<sup>248</sup>

As the debate turned in part on the meaning and implications of rights found in the First Amendment, its opponents argued for a broad reading of the First Amendment, as well as a narrow construction of federal power, without offering a separate argument that the law was “improper” (thus violating the Necessary and Proper Clause) or violated the Ninth Amendment. Another consequence of the debate is “that Madison’s Tenth Amendment-based argument against the Acts had the effect of eclipsing the Ninth as the core constitutional provision requiring the strict construction of federal power.”<sup>249</sup>

### C. The Commentaries of St. George Tucker and the Ninth Amendment

In the early years of the American republic, concerns that the national government be one of “limited” powers, thus preserving both personal and states’ rights, became important themes in the constitutional thought of Jeffersonian republicans.<sup>250</sup> Perhaps the first major constitutional commentator, St. George Tucker, a Jeffersonian republican,<sup>251</sup> believed that the Bill of Rights “was

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<sup>248</sup>Thomas Jefferson, Kentucky Resolutions (Nov. 10, 1798), in 5 THE FOUNDERS CONSTITUTION 131 (Philip B. Kurland & Ralph Lerner eds. 1987).

<sup>249</sup>Lash, *Report of 1800*, *supra* note 235, at 182.

<sup>250</sup>Clyde N. Wilson, *Foreward*, in TUCKER, VIEW OF THE CONSTITUTION, *supra* note 55, at xi.

<sup>251</sup>Wilson sees Tucker as “the exponent of Jeffersonian republicanism.” *Id.* at xii (emphasis added). *Accord*, David Thomas Konig, *St. George Tucker and the Limits of States’ Rights Constitutionalism: Understanding the Federal Compact in the Early Republic*, 47 WM. & MARY L. REV. 1279, 1294 (2006) (describing Tucker as an “ardent Jeffersonian”); Robert M. Cover, *Book Review*, 70 COLUM. L. REV. 1475, 1476 (1970) (reviewing ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA, reprint ed. 1969) (asserting that Tucker’s volumes “stand as a singular example of an attempt to translate Jeffersonian

to reassert the limited nature of the new government’s powers and their dependence solely on the delegation of the people of the several sovereign states.”<sup>252</sup> As an advocate of a state-compact theory of the Constitution,<sup>253</sup> Tucker clearly held a “state-centered perspective.”<sup>254</sup> Like other states’ rights commentators of his era, Tucker held the view that “the people” (not in general but those of the several states) had conferred powers on the federal government, “but only those expressly delegated.”<sup>255</sup>

Tucker underscored that the powers of the federal government under the Constitution “are limited,” while “the states, in all unenumerated cases, are left in the enjoyment of their sovereign and independent jurisdictions.”<sup>256</sup> Without question Tucker uses both the Ninth and Tenth Amendments to justify a strict construction of federal powers and does so to secure the rights both of the states and of American citizens.<sup>257</sup> The issue that divides commentators concerns whether Tucker’s strict

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political theory into law,” and concluding that “[n]o other commentator of such pure Jeffersonian pedigree and persuasion ever wrote”).

<sup>252</sup>Wilson, *in* VIEW OF THE CONSTITUTION, *supra* note 55, at xii.

<sup>253</sup>Lash, *St. George Tucker*, *supra* note 85, at 1350; Cover, *supra* note 251, at 1488.

<sup>254</sup>G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE 1815-1835, at 86 (ab. ed. 1991).

<sup>255</sup>Konig, *supra* note 250, at 1299.

<sup>256</sup>TUCKER, VIEW OF THE CONSTITUTION, *supra* note 55, at 93. To Tucker it was clear that “state governments not only retain every power, jurisdiction, and right not delegated to the United States, by the constitution, nor prohibited by it to the states, but they are constituent and necessary parts of the federal government.” *Id.* at 91.

<sup>257</sup>Professor Cornell summarized Tucker’s views this way:

The protection of individual liberty, according to this view, could be

construction of federal power, at least under the Ninth Amendment, centered on securing individual natural rights, or was at least equally, if not exclusively, to the end of preventing an expansive reading of national authority, to the detriment of state autonomy.<sup>258</sup> Lash contends that “both the Ninth and Tenth Amendments have their roots in the state ratification conventions, which called for provisions expressly limiting the construction of federal power to preserve the autonomy of the states.”<sup>259</sup> Accordingly, “[i]n his Bank speech, Madison presented the Ninth Amendment as a rule of construction that preserves the principle enshrined in the Tenth.”<sup>260</sup>

Professor Lash observes that under the federal Constitution retaining a right generally “meant leaving the matter to state control (assuming the Constitution did not also expressly bind the states in

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accomplished only in a properly balanced federal system in which the federal government was limited to those powers expressly delegated by the Constitution. The only means for protecting the integrity of the federal system was to adhere to a philosophy of strict construction. By limiting the scope of federal authority to the narrow grant that the states had made during ratification, federalism and liberty would be preserved.

CORNELL, *THE OTHER FOUNDERS*, *supra* note 215, at 273.

<sup>258</sup> Compare Barnett, *The Ninth Amendment*, *supra* note 27, at 69-71 (reading Tucker as asserting that the Ninth Amendment “provides a rule of construction” when “liberty” is at stake), and BARNETT, *RESTORING*, *supra* note 92, at 242 (Tucker was clear that “the end of constitutional construction is the protection of individual liberty”), with Lash, *Inescapable Federalism*, *supra* note 54, at 815-17 (asserting that the two goals – of preventing enlarged power and securing retained rights – “were inextricably linked”). At least some who concur with Professor Lash – of which I am one – perceive the rights “retained” as those secured by a reading of federal powers that preserves some “state autonomy.”

<sup>259</sup> Lash, *St. George Tucker*, *supra* note 85, at 1351. The conventions, according to Lash, perceived the Constitution as needing “a rule preventing unduly broad construction of enumerated federal authority—a means of ensuring that the people of the individual states would retain significant autonomy over those matters thought best left to local control.” *Id.* at 1355-56.

<sup>260</sup> *Id.* at 1360.

the same matter).”<sup>261</sup> Thus even though the First Amendment prohibits Congress from enacting a law “respecting an establishment of religion,” states were free to establish religion in the decades following adoption of the Bill of Rights.<sup>262</sup> Madison’s use of the Ninth Amendment to justify strict construction of federal power in the bank controversy, notwithstanding the absence of a fundamental rights issue, confirms that the Ninth Amendment came to be conceived as a guarantee of state and local autonomy and a restrained construction of federal power.<sup>263</sup>

It does not appear that Tucker himself conceived of his reliance on the Ninth and Tenth Amendments as consisting of the securing of unnamed rights, independently defined and enforced. In his 1803 commentary, Tucker suggested that “the disquisition of social rights where there is no text to resort to, for their explanation, is a task, equally above ordinary capacities, and incompatible with the ordinary pursuits, of the body of the people.”<sup>264</sup> In defending the Constitution’s Bill of Rights, Tucker concluded that “[b]y reducing speculative truths to fundamental laws, every man of the meanest capacity and understanding may learn of his own rights, and know when they are violated.”<sup>265</sup> Tucker is clearly committed to the strict construction of federal power, but does not

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<sup>261</sup>Lash, *Inescapable Federalism*, *supra* note 54, at 831.

<sup>262</sup>*Id.*

<sup>263</sup>*See supra* notes 206-231 and accompanying text.

<sup>264</sup>1 ST. GEORGE TUCKER, APPENDIX TO BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA 154-55 (Philadelphia: William Young Birch and Abraham Small, 1803) [hereinafter cited as APPENDIX TO BLACKSTONE’S COMMENTARIES].

<sup>265</sup>TUCKER, VIEW OF THE CONSTITUTION, *supra* note 55, at 246.

appear as a likely candidate for explicating implied fundamental rights.

Tucker's commitment to the written Constitution is a standard view of the founding era; it is also, as Professor Cover observed, exemplary of a view that amounted to constitutional positivism.<sup>266</sup> That Tucker, despite his commitment to (and interest in) rights, subscribed to a constitutionally positivist view, is clear from his record as a judge. Among other things, Tucker wrote one of the opinions in *Hudgens v. Wright*,<sup>267</sup> disapproving of Judge Wythe's dictum that read Virginia's Inherent Rights Clause – stating the “free and equal principle” – as invalidating the entire institution of human slavery.<sup>268</sup> From any reasonable positivist perspective, it is difficult to quarrel with the judgment of the court in *Hudgens*, given that the language of the proposed Inherent Rights Clause was amended purposely to avoid threatening slavery.<sup>269</sup>

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<sup>266</sup>See *supra* notes 134-136 and accompanying text.

<sup>267</sup>1 Hen. & M. 134, 11 Va. 134 (Va.), 1806 WL 562 (Va.).

<sup>268</sup>The case is usefully discussed in WHITE, *supra* note 254, at 685-87; COVER, JUSTICE ACCUSED, *supra* note 134, at 51-55; Paul Finkleman, *The Dragon St. George Could Not Slay: Tucker's Plan to End Slavery*, 47 Will. & Mary L. Rev. 1213, 1213-216 (2006); Cover, *supra* note 251, at 1493.

<sup>269</sup>See *supra* notes 148-157 and accompanying text. Tucker's state-compact theory almost certainly would mean that “states' rights” would be his priority in a clash between them and human rights. Consider these comments about Jefferson:

In 1819-1820, the nation experienced the crisis of the Missouri Compromise. In the midst of this crisis, it was clear to Jefferson that the threatened rejection of Missouri's bid for statehood unless it abandoned its slave system or opened its border to free blacks represented a violation of the original federal bargain and threatened to undermine Missouri's sovereign power to determine its own domestic affairs. PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* 185 (1998). See Thomas B. McAfee, *Does the Federal Constitution Incorporate the Declaration of Independence?*, 1 Nev. L.J. 138, 152 n. 65 (2001). See also DAVID N. MAYER, *THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON* 288-89 (1994).



#### D. The Other Rights “Retained” by State Constitutions

It has become common to assert that the Ninth Amendment could not have been designed to prevent a bill of rights from undercutting the Constitution’s enumerated powers scheme, given that nineteenth century state constitutions often contained what are often called “mini-Ninth Amendments.”<sup>270</sup> Most recently, Professor Barnett has contended that the state provisions “undercut” the view that the Ninth Amendment was intended “to underscore the limited nature of federal power.”<sup>271</sup> To date, however, no one has responded to the analysis provided in 2001 that provided historical understanding and explanation for the state constitutional equivalents of the Ninth Amendment.<sup>272</sup>

In the single case in which a law was invalidated based solely on reliance on such a state constitutional provision, *In re J.L. Dorsey*,<sup>273</sup> the state court read the provision simply as requiring legislative power to “be derived from an express grant in the constitution.”<sup>274</sup> In short, the court

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<sup>270</sup>JOHN HART ELY, *DEMOCRACY AND DISTRUST* 203 N. 87 (1980), seems to have been the first to make this argument in print. *Accord*, Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171, 187 (1992); Yoo, *supra* note 49, at 1008-09.

<sup>271</sup>BARNETT, *RESTORING*, *supra* note 92, at 243. Barnett does not seek to reconcile this assertion with his own strict construction of federal power whenever it impacts on rights. He does suggest that such provisions show that the Ninth Amendment was a “declaration of rights,” and not “a limitation on enumerated powers.” *Id.* at 244. Yet he does not refer to a single case simply finding implied limitations on federal powers in favor of rights.

<sup>272</sup>*See* McAfee, *Inalienable Rights*, *supra* note 37, at 771-792 (Part entitled “The Other Rights ‘Retained’ by State Constitutions”). For a similar analysis, with similar conclusions, based on federal Ninth Amendment decisions, see Lash, *The Lost Jurisprudence*, *supra* note 80.

<sup>273</sup>7 Port. \*293 (Ala. 2838).

<sup>274</sup>*Id.* \*333. Of course, in the process the Alabama court also asserted that the state’s constitution secures “all these inherent, unalienable rights” from intrusion by the “law making

read the provision as stating that, just as the federal Ninth was designed to secure the national government's enumerated powers scheme, state legislative power was similarly limited to power expressly enumerated. Unsurprisingly, *Dorsey* was accompanied by a dissent that stated the view that dominated the ratification-era bill of rights debate on the subject of state legislative power.<sup>275</sup> Perhaps of greater importance is that "the Supreme Court of Alabama has expressly and specifically rejected the reasoning that supported the holding in *Dorsey*."<sup>276</sup> Most importantly perhaps, in the twentieth century state courts did not rely on Ninth Amendment equivalents to help justify decisions securing unenumerated fundamental rights, such that there were no state court decisions to rely on when Justice Goldberg pointed to the federal Ninth Amendment to justify his concurring in *Griswold v. Connecticut*.<sup>277</sup>

## VI. The Ninth Amendment and Modern Positivism

We have noted that advocates of fundamental, unenumerated rights often write as though it is modern "positivists," who are frequently moral skeptics, who comprise the enemies of the proper historical construction of the Ninth Amendment. They also write as though there were a fairly clear-cut dichotomy between advocates of constitutional positivism and advocates of a constitutional

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power." *Id.* at \*324. The case is treated in some depth in Frost, Klein-Levine, & McAfee, *Courts Over Constitutions*, *supra* note 161, at 364-66.

<sup>275</sup>*Dorsey*, 7 Port. at \*387, \*401 (Collier, C.J., dissenting) ("[W]hile the constitution of the United States is an enabling charter, the constitution of the States are instruments of restraint and limitation upon powers already plenary.").

<sup>276</sup>Frost, Klein-Levine, & McAfee, *Court Over Constitution*, *supra* note 152, at 366 (citing *Johnson v. Robinson*, 192 So. 412, 415 (Ala. 1939)).

<sup>277</sup>381 U.S. 479, 486 (1965) (Goldberg, J., concurring).

jurisprudence based on natural law and natural rights. There is little doubt that issues related to the presumed difficulties in identifying and justifying reliance on natural rights that cannot be found in constitutional text play a role in motivating some to oppose open-ended constitutional adjudication based on the Ninth Amendment. But when the question is posed as to whether “we can reconcile our natural law past with our textualist present,” and “whether we even want to,”<sup>278</sup> it is not at all clear that such a dichotomy accurately describes either modern views or competing readings of the history.<sup>279</sup> The point is illustrated in the interpretive views offered by two leading Ninth Amendment theorists who have debated over the original meaning of the amendment.

#### **A. Randy E. Barnett**

Professor Barnett, to use one example, appears to be genuinely committed to the idea that the Ninth Amendment protects all the natural liberty claims of individuals—all the “rights” that the framers perceived them as having brought with them to the social contract that is governed by the Constitution.<sup>280</sup> But notice that Professor Barnett’s interpretation is based on the historical and

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<sup>278</sup>Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171, 222 (1992).

<sup>279</sup>It is now clear that Professor Sherry has opted for constitutional textualism, albeit without rejecting a broad (if pragmatic) reading of the Ninth Amendment. *See, e.g.*, Daniel A. Farber & Suzanna Sherry, *Desperately Seeking Certainty: The Misguided Quest for Constitutional Foundations* 138-39 (2002) (critiquing Ronald Dworkin’s “moral reading” of the American Constitution). *See* McAfee, *Foundations*, *supra* note 133.

<sup>280</sup>Indeed, one senses that Barnett does not really view the text we call the Ninth Amendment as particularly crucial to reaching the conclusion that he does. Thus he suggests that if “courts are bound by the original meaning of the constitutional text,” and yet the text “does not provide any protection of unenumerated rights,” those embracing such an interpretation “may have won the constitutional battle, yet lost the legitimacy war.” Randy E. Barnett, *Getting Normative*, *supra* note 115, at 111. This would be because “[t]hey would have succeeded only in proving that the constitution now in effect does not provide what it must provide to make laws that are justified and

textual claims that the framers identified the other rights “retained” in the Ninth Amendment by reference to social contract political theory. If this historical and textual perspective were not enough of itself to make Professor Barnett a “positivist,” it seems clear that his conclusion that the federal Bill of Rights, and the Ninth Amendment, did not apply as limits on the powers of state and local government would be sufficient.<sup>281</sup> A result, he observes, was that “at the founding period and for decades thereafter, the propriety of state laws received minimal federal scrutiny.”<sup>282</sup> The question raised is: if the rights we retain in entering the social contract “entail enforceable claims on other persons (including those who call themselves ‘government officials’),”<sup>283</sup> why would these rights limitations not apply to local and state government officials? Moreover, Barnett has been emphatic that the framers of the Constitution and Bill of Rights held to the principle that

those who enter into social compacts cannot deprive or divest their posterity of these natural rights regardless of the powers they may delegate to government. They are, in other words, inalienable.<sup>284</sup>

And according to Barnett, the framers viewed these constitutional principles as part of the supreme

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bind in conscience.” *Id.* Though he nowhere explicitly admits it, Barnett is effectively contending that virtually every American constitution – those governing in the various states – are completely illegitimate.

<sup>281</sup>Barnett, *The Ninth Amendment*, *supra* note 32, at 72 (“one should not lose sight of the fact that originally the Ninth Amendment, like the rest of the Bill of Rights, was applicable only to the federal government;” the Fourteenth Amendment “substantially altered the constitutional structure”); *id.* at 74 (“there was no federal jurisdiction to protect the rights retained by the people from infringement by state governments” until the Fourteenth Amendment). *See supra* note 35.

<sup>282</sup>BARNETT, *RESTORING*, *supra* note 92, at 320.

<sup>283</sup>Barnett, *Getting Normative*, *supra* note 115, at 106.

<sup>284</sup>Barnett *The Ninth Amendment*, *supra* note 27, 40.

law of the land, and not as a mere restatement of unenforceable political principle.

The only way to justify Barnett's idea that the Bill of Rights, and the Ninth Amendment, did not limit the powers of the states, is by concluding that Justice John Marshall correctly decided *Barron v. Mayor of Baltimore*.<sup>285</sup> If Justice Marshall was right, however, it was as a matter of positive constitutional law, as is illustrated by the existence of so-called Barron contrarians during the decades following the decision, who often relied on the "declaratory" nature of rights found in the federal Bill of Rights to justify their decision to ignore its holding.<sup>286</sup> But if the Ninth Amendment refers to inalienable natural rights, Professor Barnett at least owes readers an explanation as to why it limits only the national government, given the argument that the amendment embodies a decision to "vest these rights in the people, rather than in any government."<sup>287</sup> There is a

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<sup>285</sup>32 U.S. (7 Pet. 243 (1833)). For defenses of *Barron*, see DOUGLAS W. KMIEC & STEPHEN B. PRESSER, *THE AMERICAN CONSTITUTIONAL ORDER: HISTORY, CASES, AND PHILOSOPHY* 752 (2d ed. 2004) (finding "that the Court is correct on this point, as a glance at any of the better histories of the period will confirm"); Thomas B. McAfee, *Reed Dickerson's Originalism – What it Contributes to Contemporary Constitutional Debate*, 16 S.I.U. L.J. 617, 651-57 (1992).

<sup>286</sup>AMAR, *CREATION AND RECONSTRUCTION*, *supra* note 13, at 145-156. Professor Amar observes that:

From the 1830s on, antislavery crusaders began to develop, contra *Barron*, a "declaratory" interpretation of the Bill of Rights that viewed the Bill, not as creating new or merely federalism-based rules applicable only against federal officials, but as affirming and declaring preexisting higher-law norms applicable to all governments, state as well as federal. According to this declaratory view, for example, although the First Amendment directly regulated Congress, it also affirmed a preexisting right to free expression.

Akhil Reed Amar, *The Creation, Reconstruction, and Interpretation of the Bill of Rights*, in *THE NATURE OF RIGHTS*, *supra* note 91, at 163, 165.

<sup>287</sup>Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, in *1 RIGHTS RETAINED*, *supra* note 48, at 291, 335.

large group of legal scholars who have read the Ninth Amendment as applying by its terms to limiting the powers of the states.<sup>288</sup>

Barnett correctly concludes, of course, that Justice Marshall was right in holding that the Bill of Rights was never intended to limit the powers of state governments. It is noteworthy, moreover, that Madison sought to add a couple of amendments that would limit the powers of the states in favor of individual rights,<sup>289</sup> and that none of these were adopted.<sup>290</sup> Most of the framers of the Constitution not only perceived the doctrine of popular sovereignty as embodying sufficient authority for “the People” to decide whether to “retain” or “surrender” popular rights,<sup>291</sup> but thoughtful early Americans held the view that “the People” of each and every state were empowered to determine whether any given right would be retained or surrendered to the state as a matter of state constitutional law.<sup>292</sup>

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<sup>288</sup>*E.g.*, CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED* (1997); Bennet B. Patterson, *The Forgotten Ninth Amendment*, in 1 *RIGHTS RETAINED*, *supra* note 48, at 107, 114-30; Norman G. Redlich, *Are There Certain Rights . . . Retained by the People?*, 37 *N.Y.U.L. Rev.* 787, 805-806 (1962).

<sup>289</sup>Madison would have added to article I, section 10: “No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.” 1 *Annals of the Congress of the United States* (Joseph Gales ed., 1834). Madison’s proposals are also at 1 *BARNETT, RIGHTS RETAINED*, *supra* note 48, at 55. That Madison was insightful and recognized the need to limit the states if the rights of the people were to be secured is clear in the history. *See* McAfee, *supra* note 204, at 655-56 (noting that Thomas Tudor Tucker opposed Madison on the ground that “the states were interfered with too much already”).

<sup>290</sup>*See* McAfee, *supra* note 204, at 656 (setting forth basis for conclusion that “Madison’s attempt to add to the limits imposed on the states failed”).

<sup>291</sup>*See supra* note 91 and accompanying text.

<sup>292</sup>*See supra* note 173 and accompanying text (referring to Professor Lutz’s amply supported

Strange as it may seem, Professor Barnett asserts quite confidently that the right to “alter and abolish” a form of government deemed to be “adverse or inadequate to the purpose of its institution,” is among mankind’s “unalienable” rights secured by the Ninth Amendment.<sup>293</sup> Beyond the right to alter or abolish, Barnett contended that the Ninth Amendment’s “retained rights” include at least the right to religious freedom, the right to defend life, liberty and property, the right to emigrate, the right of assembly, and the right to free speech.<sup>294</sup> The conclusion: it is clear to Barnett that “[n]o originalist of any stripe should accept less than the protection of all these liberties.”<sup>295</sup> There is only one problem: there cannot possibly be *both* a strongly – and invariably, given the idea of “inalienability” – protected right to religious freedom as well as a strongly protected right for the community to “alter or abolish” a form of government the community has come to deem inadequate to the purpose of its institution.<sup>296</sup>

Professor Barnett does not appear even to be aware that there is an unresolved tension

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claim that state constitutions’ drafters “assumed that government had all power except for specific prohibitions contained in a bill of rights”).

<sup>293</sup>BARNETT, RESTORING, *supra* note 92 at 257-58, *citing* 1 Annals 452 (Madison’s proposed amendment to be added to the preamble). Barnett does not explain how to reconcile his own reliance on the collective right to “alter or abolish” government with the view that the “consent of the governed” is simply a fiction that does not contribute to the legitimacy of government. *See supra* note 92 and accompanying text.

<sup>294</sup>*Id.*

<sup>295</sup>*Id.* at 258.

<sup>296</sup>As an illustration, Professor Lash observes that “although the First Amendment prohibits any law respecting an establishment of religion, states remained free to establish religion as they pleased in the decades following the adoption of the Bill of Rights (and they did).” Lash, *Inescapable Federalism*, *supra* note 54, at 831.

between his insistence that the Ninth Amendment refers to inalienable natural rights and his equally adamant claim that the inquiry called for merely authorizes “supplementation” of the Constitution’s “express terms in ways that do not contradict their original meaning.”<sup>297</sup> If one takes seriously the task of engaging in the natural rights adjudication suggested by Barnett’s reading of the Ninth Amendment, it would raise doubts about the constitutional validity of all morally controversial enactments of positive law, including provisions of our written Constitution. Consequently if a Supreme Court justice were convinced that “equal representation of jurisdictions of unequal population violates the principle of one person, one vote,” Professor Barnett should explain why that justice should not hold that “the equal representation of the fifty states in the Senate” is unconstitutional.<sup>298</sup> Barnett has to date not supplied anything approaching an adequate ground for reading a provision dedicated to “inalienable liberty rights” as one that creates an “exception” that invariably upholds positive law that happened also to be written – and ratified – as fundamental law.<sup>299</sup>

Sooner or later, we must choose which is more central to our constitutionalism: (1) the content of the decision made, which might include the precise elements of the rights characterized as “inalienable,” or (2) the “authority” to make the decision about the appropriate content of our rights and the appropriate limits on government power, an authority traditionally thought to be held by the

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<sup>297</sup>BARNETT, RESTORING, *supra* note 92, at 108.

<sup>298</sup>The example is borrowed from Michael W. McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 CHI.-KENT L. REV. 89, 97 (1988). For analysis of an attempted response to this objection, see McAfee, *Utopian Vision*, *supra* note 129, at 534-47.

<sup>299</sup>For similar analysis of another advocate of the unenumerated fundamental rights construction of the Ninth Amendment, see McAfee, *Foundations*, *supra* note 155, at \_\_\_\_.



sovereign people as they ratified (or chose not to ratify) proposed constitutions.<sup>300</sup> If we choose to construe apparently open-ended rights clauses as enforceable at the highest level of generality, it is a decision to be ruled by judges.<sup>301</sup> Some contend that it is a matter of choosing to be governed by the natural rights we properly have and deserve. But others, such as Professor Soper, observe that when judges feel free to implement natural law, “the system remains positivist in the most significant sense, with the judge simply serving as the sovereign in place of the legislature.”<sup>302</sup> Read consistently with the history of the inherent rights clause of the Virginia Bill of Rights, the question is not simply whether a right is properly understood to be “inalienable,” but whether there was

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<sup>300</sup>As I once observed,

[t]he very concept of inalienable rights is one that limits, at least in moral and political theory, the power of the people. But the founders were just as clear that the power of sovereignty is unlimited as they were that there are inalienable rights. So we now face a fundamental question: we can treat the founders as speaking the sentiments of an unlimited sovereign people on the applicability of a particular right, or we can choose to view their powers as substantively limited by the “inalienable” right—but we cannot have it both ways.

McAfee, *Inalienable Rights*, *supra* note 37, at 780-81.

<sup>301</sup>*See, e.g.,* Rosen, *Flag Burning Amendment*, *supra* note 107 (contending that Ninth Amendment is properly read as invalidating proposed amendment authorizing flag desecration laws). *But see* Frost, Klein-Levine, & McAfee, *Courts Over Constitutions*, *supra* note 161, at 358 (taking opposing view).

<sup>302</sup>Philip Soper, *Some Natural Confusions About Natural Law*, 90 Mich. L. Rev. 2393, 2415 (1992). Many assume that since Jefferson recognized “inalienable” rights, his priority would be on the rights that cannot be given up. But Jefferson “accepted that ‘every man, and every body of men on earth, possesses the right of self-government,’” and that “‘the law of the *majority* is the natural law of every society of men . . . [and] natural rights, may be abridged or modified in its exercise, by their own consent, or by the law of those who depute them.’” Shain, *Rights Natural and Civil in the Declaration of Independence*, in *THE NATURE OF RIGHTS*, *supra* note 91, at 116, 126 (citing 17 THE PAPERS OF THOMAS JEFFERSON 195 (Julian Boyd et al. ed. 1950–)).

sufficiently widespread agreement that it should be secured by the written constitution as a limitation on the exercise of government power. The framers did not equate constitutional and “inalienable” rights, and they distinguished moral and legal claims.<sup>303</sup>

It is also true, of course, as Barnett notes, that “state court judges began to scrutinize the propriety of state legislation under the ‘law of the land’ provisions in state constitutions to ensure that such legislation served the general public, as opposed to a faction or special interest.”<sup>304</sup> But substantive due process decisions have been controversial all the way through American history, and are not generally thought to embody the original meaning of the due process clause.<sup>305</sup> More

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<sup>303</sup>For a general critique of basing constitutionalism on the idea of “inalienable rights,” see McAfee, *Utopian Vision*, *supra* note 129.

<sup>304</sup>BARNETT, RESTORING, *supra* note 92, at 320 n. 3. For additional perspective on Nineteenth Century substantive due process decision-making see Frost, Klein-Levine, & McAfee, *supra* note 147, at 371-92. Despite being an advocate for some substantive due process decision-making, Professor Conkle concludes that the evidence is against the view that substantive due process was “embraced by the original, objective public meaning of the clause,” and concludes that its values “emerge from a process of nonoriginalist decisionmaking.” Daniel O. Conkle, *Three Theories of Substantive Due Process*, 84 N. C. L. REV. 63, 77-78 (2006).

<sup>305</sup>Early in this decade I wrote:

Even a modern advocate of unenumerated rights has concluded that “the very phrase ‘*substantive due process*’ teeters on self-contradiction,” and hence “provides neither a sound starting point nor a directional push to proper legal analysis.” Akhil Reed Amar, *Foreward: The Document and the Doctrine*, 114 Harv. L. Rev. 26, 123 (2000). See also *id.* at 122-23 (describing recent unenumerated rights case as “invoking the nonmamallian whale of substantive due process, a phantasmogorical beat conjured up by judges without clear textual warrant”); Charles Black, Jr., *A New Birth of Freedom 3* (1997) (describing substantive due process as “paradoxical, even oxymoronic”). Professor Black is also not known as an opponent of unenumerated rights.

centrally, however, it remains true that the view of state legislative power that dominated the 1787-1788 debate over ratification has remained the predominant view in America's state courts. Typical is Louisiana's assertion that "a state constitution's provisions are not grants of power but instead are limitations on the otherwise plenary power of the people of a state exercised through its Legislature," which "may enact any legislation that the state constitution does not prohibit."<sup>306</sup> And Kansas stated that "[w]here the constitutionality of a statute is involved, the question is, therefore, not whether the act is authorized by the constitution, but whether it is prohibited thereby."<sup>307</sup>

The real problem confronting Professor Barnett, however, is not his positivism, but his history. The notion that valid moral claims, or natural rights, might appropriately limit legislative power, seems on its face to receive some support from Virginia's Inherent Rights Clause.<sup>308</sup> But the Inherent Rights Clause itself was almost never viewed as stating enforceable limits on legislative power, and, consistent with Lockean tradition favoring legislative supremacy,<sup>309</sup> the general rule that

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*Have an Unwritten Constitution?*, 80 Ore. L. Rev. 1245, 1273 n. 130 (2001).

<sup>306</sup>*Bd of Dirs. v. All Taxpayers*, 529 So. 2d 384, 387 (La. 1988).

<sup>307</sup>*State ex rel. Schneider v. Kennedy*, 587 P.2d 844, 850 (Kan. 1978). A decision like *Kennedy* is what explains Oliver Wendell Holmes' quip that, for him, when the issue concerns the scope of state legislative power, "the question always is where do you find the prohibition—not, where do you find the power." VIII OWEN M. FISS, *HISTORY OF THE SUPREME COURT: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910*, at 181 (1993) (quoting Letter from Oliver Wendell Holmes, Jr., to James B. Thayer, Nov. 1, 1893). The opposite view, in Holmes' mind, was "dangerous and wrong." *Id.* See Frost, Klein-Levine, & McAfee, *Courts Over Constitutions*, *supra* note 161, at 385-86.

<sup>308</sup>For scholars who read the Inherent Rights Clause as providing for enforceable natural rights, see *supra* note 147.

<sup>309</sup>See, e.g., *supra* note 133 and accompanying text. Cf. Paul Peterson, *Antifederalist Thought in Contemporary American Politics*, in *ANTIFEDERALISM*, *supra* note 100, at 111, 127

the states' legislatures held plenary power, subject only to specific limitations spelled out in the state constitutions' Declarations of Rights, came to be understood as requiring power-constraining texts if rights were to be protected.<sup>310</sup> Madison sought to supply such texts in his proposed federal Bill of Rights, and the equivalent of Virginia's Inherent Rights Clause is precisely what Madison proposed for a "prefix" to the Constitution that retreated to hortatory language and was not intended to be an operative provision of the Constitution.<sup>311</sup> Notwithstanding claims offered by Professor Barnett, the Inherent Rights Clause had nothing to do with the Ninth Amendment, which was designed to reaffirm the indirect protection of rights provided by the system of enumerated and limited powers – this is why it became, with the Tenth Amendment, one of the twin guardians of federalism.

## **B. Kurt T. Lash**

Professor Lash and Professor Barnett sometimes appear to hold substantially the same basic interpretation of the Ninth Amendment. Each has stated that the Ninth Amendment's reference to other rights includes the natural rights referred to as "inherent" in the Virginia Bill of Rights, and each describes his view as embodying a "Federalist" reading of the amendment that favors relatively strict construction of national powers, especially when the exercise of national powers threatened the other rights secured by the Ninth Amendment. Each agrees that the other rights "retained" by the people, against the national government, included the uniquely *individual rights* the people are appropriately viewed as holding, based on nature (or sometimes custom). But Lash is insistent that

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(observing that Federalist proponents of the Constitution favored a strong executive "to guard against the very system of legislative supremacy favored by the Antifederalists").

<sup>310</sup>Frost, Klein-Levine, & McAfee, *Courts Over Constitutions*, *supra* note 161, at 362-69.

<sup>311</sup>*See supra* notes 146-149 and accompanying texts.

the other retained rights of greatest importance were the rights held collectively by the people of each state:

In addition to individual rights were collective rights, those held by the people as a collective entity. The most famous of these is announced in the Declaration of Independence, which declared the people's unalienable right to alter or abolish their form of government. In the period immediately following the Revolution, all these rights ran against one's own state government<sup>312</sup>

Thus Lash contends that “[a]t the time of the Founding, it was possible to embrace natural rights and a strong belief in the collective right of the people to local self-government.”<sup>313</sup>

So when North Carolina proposed both a “natural rights” provision and the rough equivalent of Article II of the Articles of Confederation, Lash concludes that the “approach conceives of retained rights in a collective manner, rather than an individual Libertarian sense. Rights and powers not delegated to the federal government remain under the collective control of the people of the individual states.”<sup>314</sup> Lash therefore perceives Barnett’s interpretation of the Ninth Amendment as somewhat narrowly “referring to nothing more than *individual* rights.”<sup>315</sup> By contrast, Lash

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<sup>312</sup>Lash, *Inescapable Federalism*, *supra* note 54, at 826-27. Indeed, Lash supplies a lengthy quotation from the work of St. George Tucker directly connecting the right to alter or abolish a form of government with the Ninth Amendment, *id.* at 859-60 – a quotation that, as he put it, “explodes Professor Barnett’s claim that ‘no direct or indirect evidence’ supports Amar’s claim about the Ninth Amendment protecting this collective right of the people.” *Id.* at 860 n. 217, citing Barnett, *The Ninth Amendment*, *supra* note 32, at 22.

<sup>313</sup>Lash, *Lost Original Meaning*, *supra* note 45, at 363. Illustrative was that the federal right not to have an “established” religion simply did not apply to the states, which frequently did establish religions. *See supra* note 260 and accompanying text.

<sup>314</sup>*Id.* at 364.

<sup>315</sup>Lash, *Inescapable Federalism*, *supra* note 54, at 824. Acknowledging that Barnett sometimes states he believes in “collective rights,” Lash contends that “his overall theory makes

underscores his agreement with Professor Barnett that the popular (and collective) right to “alter or abolish” the form of government one lives under is among the other rights “retained” by the Ninth Amendment.<sup>316</sup> But it is also clear that he understands what this means and implies.

One implication is that “the concepts of ‘powers’ and ‘rights’ are inextricably linked; a delegated right is an extension of power, and a retained right is a reservation of power.”<sup>317</sup> Moreover, even the Tenth Amendment’s reference to the “retained rights of the states,” Lash’s research reveals, acted as “a shorthand reference to the retained right of the people in their respective states to local self-government.”<sup>318</sup> The collective right of the people to self-government within the states would thus mean that the Ninth Amendment would secure a state’s right to determine whether a given *individual right* should be secured by the state’s constitution. This collective right, moreover, was undoubtedly limited to some degree by the Fourteenth Amendment, but the “degree of impact the Fourteenth Amendment has on the Ninth” is necessarily “based on an interpretation of the enumerated rights and powers of the Fourteenth.”<sup>319</sup> In short, the disagreement between Barnett and Lash is ultimately a dispute over the proper reading of a positivist written Constitution that turns on which scholar has more accurately construed its text in historical context.

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such a reading impossible.” *Id.*

<sup>316</sup>*See supra* notes 291-294 and accompanying text.

<sup>317</sup>Lash, *Inescapable Federalism*, *supra* note 54, at 860.

<sup>318</sup>Lash reports that Madison explained that “references to the rights of states can be understood as references to the sovereign people of a given state.” *Id.* at 827 n. 88 (Citing James Madison, Report on the Virginia Resolutions (Jan. 1800), in 6 *The Writings of James Madison* 348 (Gaillard Hunt ed., 1906) [hereinafter *Writings of Madison*]).

<sup>319</sup>Lash, *Inescapable Federalism*, *supra* note 54, at 879. For an analogous view of the impact

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of the Fourteenth Amendment, see McAfee, *Inalienable Rights*, *supra* note 37.