The Lost History of the Ninth Amendment

Kurt T. Lash

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(Based on the Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations.)

To the memory of my father,
Louis Henry Lash, Jr.

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Acknowledgments

I CAN STILL RECALL SITTING IN MY LIVING ROOM chair on a warm fall evening a few years ago and suddenly realizing that Justice Joseph Story's obscure reference to the "eleventh amendment" in *Houston v. Moore* might actually involve an early discussion of the Ninth Amendment—the first such reference in a United States Supreme Court opinion. That single realization led to a cascade of additional discoveries regarding the lost history of the Ninth Amendment, all of which are chronicled in this book.

For help in putting this evidence into its proper historical context, I am indebted to the comments and suggestions on different aspects of this project by historians Stuart Banner, Saul Cornell, Richard Ellis, Mark Killenbeck, David Konig, and Gary Rowe. Christian Fritz has long been a source of guidance and insight, particularly in regard to issues of popular sovereignty at the time of the founding, and I am especially grateful for his help with the evidence discussed in Chapter Six. Whatever historical wrong turns I have made, they are due to my own error and not the counsel of any of these gifted scholars.

At the University of California, Los Angeles, the College of William & Mary, the University of Notre Dame, the University of Minnesota, Pepperdine University, the University of San Diego, and the University of Washington, participants in faculty workshops graciously read different sections of this manuscript and their comments helped refine, and sometimes change, my thinking on various matters. I am especially thankful for the insights of Lawrence Alexander, Amy Barrett, Richard Garnett, Richard Hasen, Heidi Kitrosser, Clark Lombardi, Karl Manheim, Henry Monaghan, James Pfander, Stephen Presser, Michael Rappaport, Lawrence Rosenthal, Theodore Seto, Steven D. Smith, Stephen F. Smith, and Walter Walsh.

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Bill of Rights is evident in my discussion of the Ninth and Fourteenth Amendments in Chapter Eight. For all matters relating to legal theory, my thanks to Lawrence Solum for his critically important suggestions and advice. I especially appreciate his gentle encouragement to move beyond a purely historical discussion and construct a theory of the Ninth Amendment that takes seriously both the text of the amendment and its original understanding.

A number of chapters include material previously published in law reviews, including *The Lost Original Meaning of the Ninth Amendment*, 83 Tex. L. Rev. 331 (2004), *The Lost Jurisprudence of the Ninth Amendment*, 83 Tex. L. Rev. 597 (2005), *The Inescapable Federalism of the Ninth Amendment*, 93 Iowa L. Rev. 801 (2008), *A Textual-Historical Theory of the Ninth Amendment*, 60 Stanford L. Rev. 895 (2008), *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty and "Expressly" Delegated Power*, 83 Notre Dame L. Rev. 1889 (2008), *and Leaving the Chisholm Trail: The Eleventh Amendment and the Background Principle of Strict Construction*, 50 William & Mary L. Rev. (forthcoming 2009). For last minute help on the manuscript, my thanks to research assistants Erin Bogle, Christina Bialek, and Molly McLucas.

I am not the first to explore the history of the Ninth Amendment, and the evidence in this book builds upon important historical work by Professors Randy E. Barnett, Daniel Farber and Thomas McAffee. My conversations and occasional debates with Randy Barnett have been particularly helpful as I have refined my own approach to the historical Ninth.

Finally, my family has played a far more significant role in the writing of this book than one might expect. The reader has been spared innumerable errors due to the brilliant and critical editorial skills of my daughter Katherine. My sons Nat and Benjamin have generously nodded at the dinner table as their father held forth on some new discovery relating to the lost Ninth Amendment. It is my wife Kelly, however, who has played the biggest role of all, with her love, encouragement and graceful spirit giving me joy in this life and faith in the next.

Kurt T. Lash
South Pasadena 2008

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

The Ninth Amendment

In the 1965 case *Griswold v. Connecticut*, Supreme Court justice Arthur Goldberg presented the Ninth Amendment as a possible source of unenumerated individual rights. When he wrote his opinion, Justice Goldberg believed that he was resurrecting a clause that had remained dormant since the adoption of the Bill of Rights in 1791. No one disagreed. In fact, should you pick up a book about the Ninth Amendment, whether written by a conservative or liberal, historian or philosopher, you are almost certain to read that there has been no significant application of the Ninth Amendment in two hundred years.

This is not true. The Ninth Amendment has not languished since its enactment. It has been unlucky.

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Preface: Bad luck

JAMES MADISON MUST HAVE BEEN EXHAUSTED when he sat down to read Hardin Burnley's letter about the goings-on in the Virginia Assembly. It was the fall of 1789. In the previous two years, Madison had helped draft and shepherd through ratification what currently stands as the longest-functioning constitution in the history of the world. Ratification had not been easy, and the vote in the states had been close. The so-called Anti-Federalists had been incensed by what they saw as a dangerous intrusion on the sovereignty of the states, and they had lobbied hard for a second constitutional convention and the adoption of a bill of rights. Although Anti-Federalists had publicly insisted that a new convention was necessary to secure the rights of the people, Madison suspected that their true motivation was to create an opportunity for reshaping the entire Constitution—a scenario that would almost certainly doom the Federalists' effort to establish a strong federal government. Such a doom, of course, would suit the Anti-Federalists just fine, for this would preserve the independent status of the states under the Articles of Confederation.

Madison and the Federalists soon realized that their failure to include a bill of rights in the Constitution was a tactical mistake. To deprive the Anti-Federalists of their most persuasive argument for a new convention, Federalists promised that the newly established federal Congress would add a bill of rights as one of its first official actions. That promise proved to be just enough to turn the tide in favor of the Constitution. True to his word, in the spring of 1789, Madison submitted a draft bill of rights to the House of Representatives and, only a few months later, Congress submitted a list of twelve suggested amendments to the states for their approval. Eight states of a required nine quickly ratified ten of the proposed amendments, leaving the fate of the Bill of Rights to James Madison's home state, Virginia. Although the state was a hotbed of Anti-Federalist sentiment, Madison had good reason to believe that Virginia's ratification would soon follow. Edmund Randolph, the former governor of Virginia, was well respected by all sides

and, thankfully, Randolph supported the proposed Constitution. Federalists could count on him to support the proposed Bill of Rights in order to avoid a second constitutional convention and calamity.

Thus, when Madison sat down to read Burnley's letter, he may have been exhausted, but he probably expected good news from the Virginia assemblyman. If so, his expectations were dashed. A controversy had erupted in the Virginia House of Delegates regarding the meaning of one of the proposed amendments—the clause we now know as the Ninth Amendment. Capitalizing on these objections, Anti-Federalists had quickly raised additional concerns about other provisions in the proposed Bill of Rights, and the entire ratification effort, which until then had seemed assured, ground to a halt. Ordinarily, Madison would have counted on Governor Randolph to help put out any political brushfires. To Madison's dismay, however, Burnley reported that Governor Randolph himself had raised the objection to the Ninth Amendment. As Madison wrote (in an understatement) to President George Washington, Edmund Randolph's objection was "unlucky." It was indeed. Randolph's concerns about the Ninth Amendment ended up delaying the country's ratification of the Bill of Rights for two years. It was not until after Madison delivered a major public speech in which he discussed the meaning and application of the Ninth Amendment that the Virginia Assembly overcame its objections and ratified the Bill of Rights.

And so it was that confusion and concern about the Ninth Amendment temporarily endangered the adoption of one of the most beloved texts in our nation's history. This inauspicious birth of the Ninth Amendment proved telling, for time and again over the next two hundred years, the amendment would be the recipient of bad luck. The victim of historical accident, mistaken identity, dubious advocates, and misplaced documents, the Ninth Amendment today is viewed as an obscure provision in the Constitution that lacks both serious historical application and currently enforceable meaning. Recovering the lost history of the Ninth Amendment not only reveals a robust history, but also points the way toward restoring the Ninth Amendment's original role as a critical—and judicially enforceable—aspect of the Bill of Rights.

As this book explores at length, there are a number of reasons why the original meaning and application of the Ninth Amendment fell into darkness. One of the important themes running through the coming chapters involves understanding how judicial and scholarly assumptions about the original Bill of Rights has affected the interpretation and even the *collection* of historical evidence regarding the Ninth Amendment. The primary reason

that much of this history has been lost, however, is probably a simple quirk of history. When it was first added to the Constitution, what we call the Ninth Amendment was known as the "eleventh article of amendment," reflecting the early practice of referring to provisions in the Bill of Rights according to their placement on an original list of *twelve* proposed amendments. Our Ninth Amendment was the *eleventh* proposed amendment on that original list, and it was conventional to refer to the "eleventh article of amendment" during the ratification debates and for decades afterward. Over time, when it became clear that only ten amendments would be immediately ratified, the convention changed and the eleventh proposed amendment became known as the "Ninth Amendment."

Not generally recognized in constitutional scholarship until relatively recently, even once legal historians became aware of this early convention, it remained exquisitely difficult to tease out historical references to the "eleventh amendment" because of the founding generation's rapid adoption of the *actual* Eleventh Amendment. For example, an electronic search for the term "eleventh amendment" produces a haystack of references to the Eleventh Amendment and no obvious way to separate out the needles of evidence involving the historical Ninth Amendment.

Largely because of this obscured early history, Ninth Amendment scholars have long assumed that the Supreme Court ignored the Ninth prior to the twentieth century. This is not so. The founding generation had not passed away before the Court first grappled with the meaning of the clause. Early Supreme Court justice Joseph Story described the Ninth Amendment in terms closely following those of Madison. Unfortunately, Justice Story also referred to the Ninth as the "eleventh amendment." Thus, despite the fact that Story's discussion of the Ninth was quoted for many years by the best lawyers in the country in arguments before the Supreme Court, as well as by other Supreme Court justices, this early discourse on the Ninth Amendment eventually fell into obscurity. So perplexed were later judges by Story's reference to the "eleventh amendment" that they actually *changed the quote*, replacing the "eleventh amendment" with the "Tenth." As a result, Justice Story's early discussion of the Ninth Amendment was effectively erased. Bad luck.

Had the "eleventh amendment" been discussed in a Supreme Court case of historic significance, lawyers and historians would have had ample opportunity to study and recognize the confusing reference long before now. Unfortunately, early references to the "eleventh amendment" took place during a period of our constitutional history dominated by the opinions of Chief Justice John Marshall. More bad luck. Originally, the Ninth Amendment

was understood and applied as a rule of construction limiting the scope of federal power. This made the Ninth Amendment persona non grata to Chief Justice Marshall, who sought to establish a broad reading of federal authority. Despite being prodded by advocates before the Court, Marshall never once mentioned the Ninth Amendment (in any manner) during his entire career on the bench—a silence all the more effective given Marshall's practice of issuing a single opinion for the entire Court. Even under Marshall, however, the Ninth Amendment came tantalizingly close to immortality. In the famous case *Gibbons v. Ogden*, the defendants expressly raised Ninth Amendment claims to state autonomy—claims that would have been viewed favorably by a newly appointed justice to the Supreme Court who viewed the Ninth Amendment as an important declaration of limited federal power. Justice Smith Thompson, moreover, was willing to issue his own separate opinions. Had he done so in a case as famous as *Gibbons v. Ogden*, any reference to the "eleventh amendment" by now would have been studied and understood by generations of lawyers. Unfortunately, although Justice Thompson was scheduled to join the Court for arguments in *Gibbons*, the unexpected death of his daughter prevented him from attending oral arguments, and he authored no opinion.

There is much more. Although ignored by the Marshall Court, the Ninth Amendment flourished in later nineteenth-century jurisprudence. It had the misfortune, however, of being consistently paired with the Tenth Amendment as one of the twin guarantors of limited federal power. Thus, the Ninth shared the same fate as the Tenth in the constitutional upheaval known as the New Deal revolution, when both amendments were dismissed as mere truisms and the Court abandoned, at least for a while, the idea that federalism constrained the interpreted scope of federal power. By the time Justice Goldberg dusted off the Ninth Amendment in *Griswold v. Connecticut*, 150 years of federalist jurisprudence involving the Ninth Amendment had fallen into shadow, along with the rest of the pre–New Deal analysis of federal power. As a result, the Ninth appeared to have washed up on the shore of the Supreme Court out of nowhere in 1965, having drifted at sea since its enactment in 1791.

There is more to this tale than simply a series of historical accidents and modern misunderstanding. The fate of the Ninth Amendment is inextricably bound to the fate of federalism in the American system of government. Uncovering the lost history of the Ninth simultaneously uncovers key episodes in the history of federal-state relations. Although modern constitutional scholars often view federalist constraints on national power as a matter of judicial preference and political policy, the traditional understanding and

application of the Ninth Amendment suggests that until very recently federalism was treated as a constitutional command—and one with specific textual referents. The Tenth Amendment may indeed be no more than a truism, but the Ninth expressly demands that the enumerated restrictions on federal power found in the Bill of Rights not be treated as an exhaustive list. Historically, courts read these two amendments as imposing a dual constraint on the scope of federal authority to interfere with a broad array of unenumerated rights—individual, majoritarian and collective—retained under the control of the people in the several states.

This suggests that the title of this book may be misleadingly narrow. The project is not just about recovering the history of one amendment; it is also about the history of federalism—a subject generally considered in conflict with the declaration of the Ninth Amendment. Pairing federalism and the Ninth Amendment will seem odd to some and heresy to others. Nevertheless, the central role that federalism played in the adoption of the Bill of Rights is inescapable. Indeed, the man who drafted the Ninth Amendment, James Madison, presented the clause as a key element in balancing the powers of the states and federal government. Over time, Madison's balance was knocked out of kilter by the competing polar claims of nationalists like Alexander Hamilton and John Marshall on the one hand and states' rights advocates like John Taylor and John C. Calhoun on the other. To his dying day, Madison sought to restore and preserve the original balance that he viewed as essential to our constitutional experiment. The story of the Ninth Amendment in many ways is the story of Madison's vision of a middle ground between unconstrained nationalism and unworkable localism.

As far as historical method is concerned, this book involves both *legal* history and legal *history*. In other words, the effort is to recover the history of a principle of law as well as the historical context in which that principle was adopted and evolved. Embedded in this effort is the assumption that legal principles are a subject capable and worthy of historical investigation. Law-office history is a much maligned concept, but it remains an endeavor critical to modern lawyers who practice before the U.S. Supreme Court and, I would assert, constitutes an area of history worthy of scholarly investigation in its own right. It is an undeniable fact that the discussion, adoption, and application of legal principles, in particular *constitutional* principles, has played a critical role in the history of the American people. Although one might be tempted to dismiss all historical legal debate as window dressing for underlying social and political agendas, one cannot escape the impression that the participants in these historical debates sincerely believed that *law mattered*.

By exploring the original understanding and historical application of a legal text, this book follows the approach of other influential works of American legal history written in the last half century and takes seriously the idea that legal principles not only are *shaped* by people and events but also have—and are intended to have—their own *impact on* people and events.

The Supreme Court of the United States has long sought to reconcile its interpretation of the Constitution with the original understanding of the document. All historical accounts of the Constitution, therefore, become part of the contemporary debate regarding the proper judicial construction of governmental power and the protection of individual liberty. This has been particularly true for the Ninth Amendment, which has been the subject of a number of "originalist" historical investigations, all of which have made claims regarding the need to link contemporary meaning to original understanding. This book is no different; it closes with a discussion of how the historical understanding of the Ninth Amendment ought to affect contemporary interpretation of the Constitution. Although this might cause some to dismiss the work as no more than law-office history, I offer it as important precisely *because* it is law-office history. There is nothing ignoble in a lawyer's search for a usable history so long as the history produced is accurate and there is good reason why that history ought to be used.

As is true for all historical investigations of the American Constitution, a history of the Ninth Amendment involves a search for the people's fundamental law. The Ninth Amendment insists that the Constitution not be construed in a manner that denies or disparages the retained rights *of the people*. This is a declaration of popular sovereignty, the idea that the institutions of government must conform their actions to the declared will of a sovereign citizenry. Political institutions may chafe at the limits imposed on their powers, but it is not their prerogative to throw off those limits absent an authentic act by the people themselves. Unless the people have erased the original principles of the Ninth Amendment through later constitutional activity, the text and its original understanding remains an active constraint on the interpretation of governmental power.

Most Ninth Amendment commentators agree with these assertions. Where this book differs from almost all other accounts, however, is in its vision of a *federalist* Ninth Amendment. As will become clear in the following chapters, the founders envisioned an amendment that preserved the retained rights of the people as a collective entity in the several states. What this means, and how it differs from contemporary accounts, is explored in depth in later chapters. For now, suffice it to say that the historical Ninth Amendment

strongly suggests that the Constitution was to be construed in a manner that preserves as much as possible the people's right to local self-government.

Today, the federalism jurisprudence of the Supreme Court is based more on judicial policy than on constitutional text—a fact that leaves the future of federalism poised on the edge of a knife. Establishing a historically grounded *textual* mandate for the limited construction of federal power could play a critical role in issues as diverse as whether states may authorize medicinal use of marijuana, regulate physician-assisted suicide, or define the institution of marriage. These issues cut across political lines—as they should. The right to local self-government has never been the exclusive province of either political party. It remains a right retained by us all.

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ONE

The Enigmatic Amendment

Justice Goldberg and the Ninth Amendment

In a tale that involves a great deal of bad luck, it is appropriate to begin by introducing a rather unlucky member of the U.S. Supreme Court: Justice Arthur Goldberg. Nominated by President John F. Kennedy, Justice Goldberg served on the Court a scant thirty-four months. In 1965, President Lyndon B. Johnson persuaded Goldberg to resign and replace the late Adlai Stevenson as U.S. ambassador to the United Nations. Although Goldberg was reluctant to do so, he ultimately agreed in the hope of helping to negotiate a settlement to the conflict in Vietnam.[1] What Goldberg did not know was that Johnson wanted him off the Court so that Johnson could replace him with Abe Fortas. In 1968, Goldberg gave up trying to alter the president's policy toward Vietnam and resigned his ambassadorship.[2] Although Goldberg longed to return to the Supreme Court, it was not to be. Turning to politics, Goldberg ran an unsuccessful campaign for the governorship of New York and eventually returned to the practice of law. Arthur Goldberg would hold no other significant legal or political office for the remainder of his life (he died in 1990).

Despite his short tenure on the Court, however, Justice Goldberg played an important role in one of the most famous decisions of the twentieth-century

1. *See* Lee Epstein & Jeffrey A. Segal, Advice and Consent: The Politics of Judicial Appointments (2005); David L. Stebenne, Arthur J. Goldberg: A New Deal Liberal 347–48 (1996); Artemus Ward, Deciding to Leave: The Politics of Retirement from the United States Supreme Court (2003). According to Professor Sanford Levinson, Goldberg made a "disastrous decision" in leaving the Court. *See* Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment,* 64 Chi-Kent L. Rev. 131, 134 (1988).

2. Goldberg resigned on July 25, 1965. *See* Susan N. Herman, *Arthur Joseph Goldberg*, *in* The Supreme Court Justices: A Biographical Dictionary 193 (Melvin I. Urofsky ed., 1994).

Supreme Court, *Griswold v. Connecticut*.[3] In fact, there is reason to believe that Goldberg viewed the case as an opportunity to leave his mark on the law. As he later described it, his concurrence in *Griswold* was a self-conscious attempt to "revitalize" the moribund Ninth Amendment.[4] It was Justice Goldberg who pressed Estelle Griswold's lawyer, Thomas Emerson, to consider the right to privacy as one of the "rights retained by the people."[5] Unlike his colleague William O. Douglas, whose lead opinion in *Griswold* mentioned the Ninth Amendment only in passing, Justice Goldberg, in his concurrence, focused on the Ninth, which he believed provided critical support for the constitutional right to privacy. According to Goldberg:

> To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words in the first eight amendments to the Constitution is to ignore the Ninth Amendment, and to give it no effect whatsoever.[6]

Although Justice Goldberg claimed that "this Court has had little occasion to interpret the Ninth Amendment," the fact that the text remained part of the Constitution convinced Goldberg that it should be given some effect. In *Griswold*, the effect was to support the Court's invalidation of Connecticut law.

Although only two other justices signed on to Goldberg's opinion, even the dissenters agreed with his assumption that the Ninth had not received any serious judicial attention since its adoption in 1791. Given the near-universal assumption that the Ninth Amendment had languished since its birth, it is no wonder that Griswold's attorney had to be pressed to discuss the Ninth in his oral arguments before the Supreme Court.[7] Goldberg's 1965

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3. 381 U.S. 479 (1965).

4. *See* Arthur J. Goldberg, *Foreword—The Burger Court 1971 Term: One Step Forward, Two Steps Backward?*, J. Crim. L. Criminology & Police Sci. 463, 467 (1972) ("I take particular satisfaction that . . . Justice White, writing for a majority of the Court, referred to the ninth amendment which I sought to revitalize in my concurring opinion in *Griswold*.").

5. An account of the oral argument in *Griswold* can be found in David J. Garrow, Liberty and Sexuality: The Right to Privacy and the Making of *Roe v. Wade* 237–40 (updated ed. 1998). A recording of the relevant portions of the oral argument can be found online at http://www.oyez.org/cases/1960-1969/1964/1964_496/argument-1/.

6. *Griswold*, 381 U.S. at 491.

7. *See* Garrow, *supra* note 5, at 238.

concurrence in *Griswold* appeared to raise the Ninth Amendment out of general obscurity and breathe new life into the text as a possible source of unenumerated individual rights. Since *Griswold*, the Ninth has been the focus of numerous books and articles, and the amendment itself has played an important supporting role in Supreme Court decisions developing the individual right to privacy.[8]

The emphasis, however, is on *supporting* role. No case, including *Griswold*, has ever actually relied on the Ninth Amendment as the source of a claimed individual right. Instead, the Ninth has been invoked as indirect support of broad interpretations of other constitutional provisions, such as the due process clause of the Fourteenth Amendment. For those new to the vagaries of constitutional law, this might seem odd; the Ninth seems to be a perfect candidate for supporting any one of a number of oft-claimed rights, from sexual autonomy to the right to die. The fact that neither right is listed in the Constitution seems irrelevant in the face of the Ninth's declaration that there are "other" rights retained by the people. Indeed, the Ninth almost seems to insist that such rights be respected *regardless* of their lack of textual pedigree. Despite the occasional judicial nod in this direction, however, the Supreme Court has *never* relied on the Ninth as a source of unenumerated rights. Nor is the modern Supreme Court likely to do so. Understanding why this is so requires knowing something about the Supreme Court's approach to individual rights and the struggle of the Supreme Court to avoid repeating the supposed error of the infamous case *Lochner v. New York*.

Avoiding *Lochner*

The national freedoms with which we are most familiar are generally listed in the first eight amendments to the Constitution—the Bill of Rights. These enumerated

8. An abbreviated list of books on the Ninth Amendment would include Charles L. Black, Jr., Decision According to Law (1981), Daniel A. Farber, Retained by the People: The "Silent" Ninth Amendment and the Constitutional Rights Americans Don't Know They Have (2007), Calvin R. Massey, Silent Rights: The Ninth Amendment and the Constitution's Unenumerated Rights (1995), and The Rights Retained by the People: The History and Meaning of the Ninth Amendment (Randy E. Barnett ed., 1989–1993) (collecting a number of works devoted to the Ninth Amendment). *See also* Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty (2004). Modern Supreme Court majority opinions referring to the Ninth Amendment include *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579 (1980), *Roe v. Wade*, 410 U.S. 113, 153 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 848 (1992).

rights, such as the First Amendment's freedom of speech and religious exercise, protect us from the actions of the federal government. They do not, however, protect us from the actions of the states. When the state police arrest us for making a speech criticizing the governor in a public park, we turn for protection not to the First but to the Fourteenth Amendment, which declares that "no State shall . . . deprive any person of life, liberty, or property, without due process of law." In the first half of the twentieth century, the Supreme Court interpreted the due process clause to have "incorporated" many of the rights listed in the Bill of Rights, including freedom of speech, thus making these rights applicable against state as well as federal officials.

In *Griswold*, the Supreme Court ruled that a state law banning the distribution of contraceptives violated the right to privacy. Unlike other incorporated rights such as freedom of speech and the free exercise of religion, the right to privacy cannot be found anywhere in the Constitution. This lack of textual enumeration prompted the dissenting justices in *Griswold* to criticize the majority for unjustifiably enforcing a right mentioned nowhere in the text. The criticism carried a particular sting. Deeply embedded in the institutional memory of the Supreme Court is the fear of repeating what is today viewed as the monumental mistake of *Lochner v. New York*.[9] Named after an early-twentieth-century Supreme Court ruling that struck down a New York law regulating the number of hours bakers could work in a given week, the *Lochner* Court vigorously enforced the individual's liberty to contract free from undue governmental interference. Although liberty of contract is not specifically mentioned in the text of the Constitution, the Court held that the individual right to agree to work for certain hours and wages was a liberty interest protected under the due process clause of the Fourteenth Amendment. Although this clause appears to provide only procedural safeguards (due *process*), the *Lochner* Court interpreted the text as limiting the very substance of the law when it came to certain fundamental rights.

Liberty of contract was only one of a number of "substantive due process" rights protected by the *Lochner* Court—some of which today remain important aspects of modern individual freedom.[10] Enforcing property and economic

9. 198 U.S. 45 (1905).

10. Among other rights, the *Lochner* Court interpreted liberty under the due process clause to include freedom of speech, *Gitlow v. New York*, 268 U.S. 652 (1925), the right to counsel in a capital trial, *Powell v. Alabama*, 287 U.S. 45 (1932), and the right of parents to control the educational upbringing of their children, *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

rights like liberty of contract, however, brought the Supreme Court into direct conflict with the national political branches during the economic crisis of the Great Depression. President Franklin Delano Roosevelt's attempts to commandeer the national economy in order to stabilize prices and employment were rebuffed by a majority of the Supreme Court, who were convinced that the Constitution placed such economic matters beyond the reach of the federal Congress.[11] In response, Congress considered amending the Constitution to curtail the Court's power of judicial review, and President Roosevelt proposed adding a new member to the Supreme Court for every sitting justice over the age of seventy who refused to retire (the so-called Court-packing plan).[12] Just as the confrontation seemed to reach a boiling point, Justice Owen Roberts suddenly changed his position on federal power and began voting to uphold New Deal legislation.[13] Because the Court no longer posed a threat to the policies of New Deal Democrats, the steam went out of the drive to restructure the judicial branch. Justice Robert's change of heart thereafter became known as the "switch in time that saved nine."[14]

Over the course of a few short years, roughly from 1937 to 1941, the New Deal Court reversed course over a broad spectrum of constitutional doctrines. Older judicial precedents that had limited the scope of federal power to regulate commerce and delegate broad responsibility to executive agencies were swept aside. Judicial enforcement of liberty of contract and individual economic rights, which had hamstrung both state and federal economic regulation, were abandoned.[15] Not only was the New Deal constitutional under this new reading of federal power, but the Court's decisions laid the groundwork for the rise of the modern administrative state. Everything from Social Security to the civil rights acts of the 1960s to environmental statutes like the Clean Water Act, all of which would be suspect

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11. *See, e.g., A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935) (striking down aspects of the National Industrial Recovery Act of 1933).

12. *See* Franklin D. Roosevelt, Radio Address on Reorganizing the Federal Judiciary (Mar. 9, 1937), *in* S. Rep. No. 75-711, app. D at 41 (1937).For a discussion of proposed congressional amendments and the general political response to the Court's striking down of New Deal programs, *see* 2 Bruce A. Ackerman, We the People: Transformations 320 (1998).

13. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

14. *See* The Oxford Companion to the Supreme Court of the United States 204 (Kermit L. Hall, ed.) (2d ed., 2005).

15. *See* United States v. Carolene Products Co., 304 U.S. 144 (1938).

under the approach of the *Lochner* Court, are rooted in the New Deal Court's construction of national power and the abandonment of judicial enforcement of individual economic rights like liberty of contract.

However welcome this dramatic reinterpretation of the federal Constitution may have seemed at the time, it nevertheless cried out for some kind of explanation. *Why* had the Court so suddenly reversed its course? Ever since the New Deal, constitutional scholars have struggled to explain (and justify) the Court's revolution in jurisprudence.[16] A cynic (or a legal realist) might dismiss the episode as reflecting nothing more than the fictional Mr. Dooley's observation that the Court "follows th' iliction returns."[17] As the institution of government charged with defending the people's Constitution, however, the Supreme Court could not afford to be viewed as altering the meaning of the Constitution simply to escape political pressure. Ever since *Marbury v. Madison*, the very idea of an enforceable Constitution has presupposed a Supreme Court willing to stand up to the political branches and strike down unconstitutional laws. It was incumbent upon the New Deal Court, therefore, to explain just where the *Lochner* Court had gone wrong and why the Court's new reading of governmental power more faithfully followed the Constitution.

The New Deal Court's explanation for abandoning *Lochner* and a prior century's worth of jurisprudence first appeared as a footnote in a 1938 case involving the regulation of filled milk. In *United States v. Carolene Products Co.*, the Supreme Court upheld a federal ban on the interstate distribution of "Milnut" (a mixture of condensed skimmed milk and coconut oil) against a claim that the ban interfered with, among other things, liberty of contract.[18] In his majority opinion, Justice Harlan Fiske Stone rejected the earlier approach of the *Lochner* Court and ruled that judicial deference was appropriate in cases involving economic regulation. Such laws were *presumed* constitutional absent a showing that they were wholly irrational. This did not mean, however, that the Court had wholly abandoned its role in protecting

16. Among the many important works discussing the New Deal Court's dramatic reinterpretation of federal power, some of the most influential include 1 Bruce A. Ackerman, We the People: Foundations (1991), Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1962), and John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980).

17. Finley Peter Dunne, Mr. Dooley's Opinions 26 (1901).

18. 304 U.S. 144 (1938).

constitutional liberties. In a footnote destined for constitutional history, Justice Stone suggested that

> [t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.[19]

Justice Stone's footnote 4 suggested that although the Supreme Court would defer to regulation affecting the right to contract, it might not show the same degree of deference to laws abridging one of the liberties expressly listed in the Bill of Rights. By implying that the error of *Lochner* was judicial enforcement of rights having no mention in the actual text of the Constitution, the New Deal Court was able to explain its rejection of *Lochnerian* liberty of contract while continuing to protect particular textual liberties like freedom of speech and religion.

Footnote 4 was no more than dicta—a suggestion, and a tentative suggestion at that. In the early years of the New Deal, it was not clear whether the Court would actually continue to intervene when the political process impinged upon individual rights; the initial signals were not promising. New Deal appointments to the Supreme Court like Justice Felix Frankfurter argued that the Court should almost always defer to the decisions of the political process; to intervene was to risk repeating the countermajoritarian errors of the *Lochner* Court. Accordingly, Justice Frankfurter led a majority of the New Deal Court in upholding the power of local school officials to force children to salute the flag and recite the pledge of allegiance.[20] Only three

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19. 304 U.S. at 152 n.4.

20. *See* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940). According to Justice Frankfurter in *Gobitis*:

> Judicial review, itself a limitation on popular government, is a fundamental part of our constitutional scheme. But to the legislature no less than to courts is committed the guardianship of deeply cherished liberties. Where all the effective means of inducing political changes are left free from interference, education in the abandonment of foolish legislation is itself a training in liberty. To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies, rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people.

Id. at 600 (internal citation omitted).

years later, however, in *West Virginia Board of Education v. Barnette*, the Court reversed itself ruled that refusing to salute the flag was a right protected under the free speech clause of the First Amendment.[21] In an opinion written by Justice Robert Jackson, the Court ruled that the Fourteenth Amendment's due process clause "incorporated" against the states the same principles of freedom of speech that had originally bound only the federal government. This freedom included the right of public-school children to refuse to salute the flag. In response to dissenting justice Felix Frankfurter's claims that the Court had gone back to the bad old days of *Lochner*, Justice Jackson embraced Justice Stone's reasoning in Footnote 4 and distinguished nontextual due process rights like *Lochner*'s liberty of contract from "incorporated" due process rights such as those listed in the first eight amendments:

> In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. . . . It is important to note that, while it is the Fourteenth Amendment which bears directly upon the State, it is the more specific limiting principles of the First Amendment that finally govern this case.[22]

Here, then, was the New Deal Court's official explanation of why *Lochnerian* unenumerated rights had to go and why protection of First Amendment rights ought to remain. Claims that involved no more than a free-floating assertion of liberty invited the Court to fill such a "vague" term with its own preferred set of unenumerated rights (as had the *Lochner* Court with its invocation of "liberty of contract"). Judicial intervention in the political process was not warranted in such cases, and the matter was best left to the control of political majorities. Liberty claims involving rights listed in the first eight amendments, on the other hand, were a different matter. These "textual liberties" had received the positive sanction of the people themselves and thus

21. 319 U.S. 624 (1943).

22. 319 U.S. at 639.

deserved judicial protection. Henceforth, the Supreme Court would limit its enforcement of individual liberties to those textually listed in the Constitution. As for *Lochner*, the case became a watchword for unjustified judicial interference with the political process. To this day, to accuse the Court of *Lochnering* is to level the foulest insult in constitutional law.

The Modern Restoration of Unenumerated Rights

Fast forward two decades. Facing a bench composed of many of the same justices who joined the Court at the time of the New Deal, the lawyers representing Estelle Griswold seemed to be asking the Court to embrace the kind of reasoning it had emphatically rejected in 1938. The right to privacy was not among the specific freedoms declared in the Bill of Rights. By asking the Court to find privacy somewhere in the vague term "liberty," the plaintiffs seemed to be using precisely the kind of *Lochnerian* analysis rejected in *Carolene Products* and *Barnette*. Indeed, New Deal justice Hugo Black pressed Griswold's lawyer Thomas Emerson on precisely this point during oral argument, drawing an immediate denial from Emerson that his client sought a return to the errors of the *Lochner* Court.[23] But without a textual hook in the Constitution upon which to hang the right to privacy, this is exactly what Emerson seemed to be asking.

Well aware of the need to avoid any accusation that the Supreme Court had resurrected the approach in *Lochner v. New York*, Justice William O. Douglas, in his lead opinion, creatively derived the right to privacy from various textual provisions in the Bill of Rights. Within the metaphorical "penumbras" of various texts, Douglas explained, one could identify "emanations" that collectively suggested the existence of an independent right to privacy. His opinion was an awkward attempt to follow the reasoning of footnote 4 and *Barnette* and ground the right to privacy in the text of the Constitution. The attempt was too clever by half. Later courts abandoned Douglas's approach, leaving the quest for penumbras and emanations the stuff of first-year law-school amusement.

For his part, Justice Goldberg believed that he had identified a clause that would more persuasively ground the right to privacy in the text of the Constitution and immunize the decision against the deadly taint of *Lochner*.

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23. *See* GARROW, *supra* note 5, at 238 (discussing the oral arguments in *Griswold*).

The Ninth Amendment declared the existence of "other rights" beyond those listed in the Constitution. Limiting due process rights to those expressly listed in the Bill of Rights violated the clear command of the Ninth and rendered the amendment "without effect." Thus, in an act of legal jujitsu, Goldberg flipped the approach of the New Deal Court on its head.[24] By linking the unenumerated right to privacy to the very-much-enumerated Ninth Amendment, progressive judges and scholars also turned the tables on conservative critics of the Warren Court's "judicial activism." Advocates for judicial restraint insisted that the Court desist from discovering new rights and limit their judgments to interpretations based on the text and original meaning of the Constitution. When it came to the Ninth Amendment, however, the Court's critics were hoist by their own petard: the *Constitution itself* points to rights beyond those listed in the Bill of Rights.[25] The Ninth Amendment appeared to have been added to prevent precisely the cramped reading of liberty advocated by critics of the right to privacy. Thus, when conservative academics like Judge Robert Bork dismissed the Ninth Amendment as unenforceable, this seemed only to confirm critics' belief that it was conservatives who had abandoned the text and original meaning of the Constitution.[26]

In many ways, the Senate hearings on the nomination of Judge Bork to the Supreme Court were a watershed moment in the modern history of the Ninth Amendment, and I discuss the event in the final chapters of this book.[27] It was well known that Judge Bork disagreed with the Court's analysis in

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24. Goldberg's use of the Ninth implied that Justice Jackson erred in *Barnette* when he suggested that the error of *Lochner* was its embrace of nontextual rights. In more recent decisions, some members of the Supreme Court have suggested that *Lochner*'s error was not the embrace of an unenumerated right but its failure to recognize how protecting liberty of contract entrenched the unequal bargaining power of the poor. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 861–62 (1992) (plurality opinion) ("In the meantime, the Depression had come and, with it, the lesson that seemed unmistakable to most people by 1937, that the interpretation of contractual freedom protected in *Adkins* rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare.").

25. *See also* Levinson, *supra* note 1, at 142 (using the same turn of phrase to describe the presumed predicament of judicial conservatives).

26. *See Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 100th Cong. 2844 (1987) [hereinafter *Bork Nomination Hearings*] (testimony of Prof. Philip B. Kurland) ("Judge Bork however would now limit the rights of the individual to those specifically stated in the document, thereby rejecting his claim to be a textualist by ignoring the Ninth Amendment.").

27. *See infra* chapter 10.

Griswold and later right-to-privacy cases like *Roe v. Wade*. In preparation for Judge Bork's testimony, the Senate Judiciary Committee heard from a number of legal experts, including University of Chicago Law School historian Philip Kurland, who argued that the original meaning of the Ninth Amendment supported judicial enforcement of the right to privacy—and that this was one reason to deny Bork a seat on the Supreme Court.[28] Confronted with this testimony, Judge Bork denied that the Ninth had any identifiable meaning capable of judicial enforcement:

> I do not think you can use the ninth amendment unless you know something of what it means. For example, if you had an amendment that says "Congress shall make no" and then there is an ink blot and you cannot read the rest of it and that is the only copy you have, I do not think the court can make up what might be under the ink blot if you cannot read it.[29]

Judge Bork's argument was that the historical meaning of the Ninth Amendment had been completely lost and that judicial enforcement was therefore impossible. The lack of historical application, of course, was a positive advantage to Justice Goldberg and those who agreed with his reading of the Ninth. Even though using the Ninth Amendment in support of the right to privacy was entirely new, there was no need to revisit or overrule prior precedents or judicial analysis of the Ninth. There was no history at all. To Judge Bork, this rendered the Ninth an indecipherable inkblot. To Justice Goldberg, this made the Ninth Amendment uniquely *available*—a jurisprudential blank slate on which to write unenumerated rights. It also provided a textual platform on which to build the right to privacy without repeating the sins of the *Lochner* Court.

No Supreme Court decision, however, has ever directly relied on the Ninth Amendment to establish the existence of an unenumerated individual right; rather, the Supreme Court has chosen instead to locate such rights within the text of the due process clauses of the Fifth and Fourteenth Amendments. Upon reflection, it is not difficult to guess why this is the case. To move completely beyond the text of the Constitution is to stare into the void. In such a

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28. *See Bork Nomination Hearings*, *supra* note 26; *see also* Philip B. Kurland, *Bork: The Transformation of a Conservative Constitutionalist*, CHI. TRIB., Aug. 18, 1987, § 1, at 13 col. 1, *reprinted with footnotes in* Philip B. Kurland, *Bork: The Transformation of a Conservative Constitutionalist*, 9 CARDOZO L. REV. 127 (1987).

29. *Bork Nomination Hearings*, *supra* note 26, at 249 (remarks of Judge Robert H. Bork).

case, there would be no constitutional guidepost to assist the Court in identifying and enforcing one of the "other rights" retained by the people. Constructing such a right out of whole cloth would effectively transfer to the Supreme Court the authority to amend the Constitution—*Lochnering* writ large. However much cynics might claim that the Court does this all the time, the Supreme Court itself has never claimed such authority. It would be forced to do so, however, if it directly applied its current reading of the Ninth Amendment as a guardian of unenumerated individual rights. On the other hand, by declining to do so, the Court has reduced the Ninth to an unenforceable amendment that provides no more than indirect support for judicial interpretation of other clauses in the Constitution. Thus, it appears that by its very insistence that the Ninth Amendment refers to "other" unnamed individual rights, the Court has ensured that the Ninth will play no more than a supporting role in constitutional law. A clause that potentially protects everything, in the end, protects nothing.

In the chapters that follow, I argue that this need not be the fate of the Ninth Amendment. Indeed, it ought not to be, for it reflects a mistaken understanding of what the Ninth Amendment was designed to accomplish. It also contradicts at least a century and a half of discussion and application of the Ninth Amendment by some of the most influential legal minds in our nation's history, including the man who actually framed the amendment. This history was unknown when Justice Goldberg penned his opinion in *Griswold v. Connecticut*—thus his assertion that there had been "little occasion" to consider the amendment since its enactment. In fact, to this day, the consensus view among scholars and judges is that the Ninth Amendment somehow escaped any serious attention for the first two centuries of the U.S. Constitution. As Berkeley law professor Daniel Farber recently lamented, "the Ninth Amendment went into hibernation almost as soon as it was created."[30]

Justice Arthur Goldberg and the legal academy could not have been more wrong.

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30. Farber, *supra* note 8, at 45.

TWO

The Origins of the Ninth Amendment

The Traditional Story of the Ninth Amendment

When the Philadelphia Convention circulated its proposed draft of the Constitution, criticism quickly arose regarding the document's lack of a bill of rights. The omission in the federal document was seized upon by Anti-Federalist pamphleteers with names like "Federal Farmer" and "Brutus," who circulated flyers throughout the states demanding the addition of a bill such as those commonly found in state constitutions.[1] For their part, Federalists defended the omission on two grounds. First, the principle of enumerated powers would sufficiently protect the people from federal invasion of their rights.[2] Second, adding a bill of rights might be construed in a manner that would undermine the principle of limited enumerated powers.[3] As "Publius" wrote in the *Federalist Papers,* "bills of rights . . . are not only unnecessary in

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1. The definitive collection of Anti-Federalist writings is Herbert J. Storing's seven-volume set, The Complete Anti-Federalist (Herbert J. Storing ed., 1981). The works of Federal Farmer and Brutus can be found in 2 The Complete Anti-Federalist, *supra*, at 214–452.

2. As James Madison wrote in the *Federalist Papers*:

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

   The Federalist No. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961).

3. According to James Jackson of Georgia:

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

   Cong. Register (June 8, 1789) (remarks of Rep. James Jackson), *reprinted in* The Complete Bill of Rights: The Drafts, Debates, Sources, & Origins 642 (Neil H. Cogan ed., 1997).

the proposed Constitution but would even be dangerous," for they "would afford a colorable pretext to claim more [powers] than were granted. For why declare that things shall not be done which there is no power to do?"[4] Enumerating certain rights, in other words, might be read to suggest otherwise unlimited federal power.

To this, however, the Anti-Federalists had a stinging response. If adding a list of enumerated rights was both unnecessary and dangerous, why then did the drafters feel obligated to add a list of enumerated rights in Article I, Section 9, which contains a number of specific restrictions on federal power?[5] Did not this very act suggest that the framers themselves knew that federal power might be dangerously expanded? Caught on the hooks of their own argument and threatened with calls for a second constitutional convention to redraft the entire document,[6] James Madison and other Federalists ultimately agreed to propose a bill of rights in the First Congress.

Fulfilling a promise to his constituents in Virginia, James Madison submitted a list of proposed amendments to the First Congress. In his speech

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4. THE FEDERALIST No. 84 (Alexander Hamilton), *supra* note 2, at 513. According to James Wilson in the Pennsylvania convention:

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

Debates in the Convention of the State of Pennsylvania (Oct. 28, 1787) [hereinafter Pennsylvania Convention], *in* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 415, 436 (Jonathan Elliot ed., Wash., D.C., 1836) [hereinafter ELLIOT'S DEBATES] (remarks of James Wilson); *see also* Debates in the Convention of the Commonwealth of Virginia (June 14, 1788) [hereinafter Virginia Convention], *in* 3 ELLIOT'S DEBATES, *supra*, at 1, 620 (remarks of James Madison) ("If an enumeration be made of our rights, will it not be implied that everything omitted is given to the general government?"). James Iredell echoed these concerns during the North Carolina convention:

> But when it is evident that the exercise of any power not given up would be a usurpation, it would be not only useless, but dangerous, to enumerate a number of rights which are not intended to be given up; because it 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.

Debates in the Convention of the State of North Carolina (July 29, 1788) [hereinafter North Carolina Convention], *in* 4 ELLIOT'S DEBATES, *supra*, at 1, 167 (remarks of James Iredell).

5. *See* LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 28–30 (1999).

6. *See* Kurt T. Lash, *Rejecting Conventional Wisdom: Federalist Ambivalence in the Framing and Implementation of Article V*, 38 AM. J. LEG. HIST. 197, 215–21 (1994) (detailing the arguments used by Anti-Federalists to demonstrate the need for a second constitutional convention).

introducing these amendments to the House of Representatives, Madison repeated Federalist worries about adding a bill of rights but suggested that these concerns might be addressed through the addition of a particular clause:

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration, and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the general government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the 4th resolution.[7]

The "last clause of the 4th resolution" was Madison's original version of the Ninth Amendment. This clause would prevent the implied "assignment" of unenumerated rights into the hands of the national government. As Supreme Court justice and constitutional-treatise writer Joseph Story later would write, "[The Ninth Amendment] was manifestly introduced to prevent any perverse, or ingenious misapplication of the well known maxim, that an affirmation in particular cases implies a negation in all others."[8]

Beyond the Traditional Story

To this point, I have presented what until recently was the most commonly told story about the historical Ninth Amendment. Based on historical evidence available at the time of decisions like *Griswold*, the traditional account made

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7. James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789) [hereinafter Madison's Bill of Rights Speech], *in* JAMES MADISON: WRITINGS 437, 448–49 (Jack N. Rakove ed., 1999). The "last clause of the 4th resolution" referred to by Madison was an early draft of the Ninth Amendment:

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

   Id. at 443.

8. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 711 (Carolina Academic Press 1987) (1833).

the Ninth Amendment appear to have emerged solely from the mind of James Madison and not from the suggestions emanating from the state ratifying conventions. This, in turn, seemed to distinguish the (supposedly libertarian) principles of the Ninth Amendment from the states' rights concerns that animated the Bill of Rights in general and the Tenth Amendment in particular. In fact, most Ninth Amendment scholars have expressly decoupled the Ninth from the rest of the Bill of Rights and have portrayed the amendment as having nothing to do with the concerns of the state conventions and instead as reflecting uniquely Madisonian concerns about individual natural rights.[9]

Putting aside the oddity of states ratifying an amendment that met none of their concerns, a recently expanded historical record suggests that the Ninth Amendment reflected the same concerns animating the rest of the Bill of Rights: the need to limit the construction of federal power. Consider, for example, the *full* quote from Joseph Story's discussion of the Ninth Amendment in his *Commentaries*: "[The Ninth Amendment] was manifestly introduced to prevent any perverse, or ingenious misapplication of the well known maxim that an affirmation in particular cases implies a negation in all others *and, e converso, that a negation in particular cases implies an affirmation in all others*."[10]

According to Story, the Ninth Amendment had a dual purpose. One purpose was to prevent any implied denial of rights because of their omission from an enumerated list ("an affirmation in particular cases implies a negation in all others"). A *second* related purpose, however, was to avoid any expansion of federal power that might arise by implication because of a limited list of enumerated restrictions on federal power ("a negation in particular cases implies an affirmation in all others"). Just to emphasize the role of the Ninth in preventing unintended expansion of federal power, Story titled his chapter on the Ninth Amendment "Non-Enumerated *Powers*."[11]

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9. *See* Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 Tex. L. Rev. 1, 17 (2006) ("In this regard, within the Bill of Rights, the Ninth Amendment is *sui generis*. . . . Madison's version of the Ninth Amendment was a departure from, rather than an incorporation of, the public meaning of similarly-worded Antifederalist-inspired state proposals. . . ."); *id.* at 75 ("[T]he Ninth Amendment was invented by James Madison. . . ."); *see also* Daniel A. Farber, Retained by the People: The "Silent" Ninth Amendment and the Constitutional Rights Americans Don't Know They Have 44 (2007) ("[The Ninth Amendment] was not about federalism; it was about individual rights."); Levy, *supra* note 5, at 247 ("Madison improvised [his original draft of the Ninth Amendment]. No precise precedent for it existed. It was one of several proposals by Madison that stamped the Bill of Rights with his creativity.").

10. Story, *supra* note 8, at 711 (emphasis added).

11. *Id.* (emphasis added). Story titled the heading for the section on the Tenth Amendment "Powers Not Delegated." *Id.* at 713.

Both Justice Story's discussion of the Ninth and his title for that section of his *Commentaries* are clues to the lost original meaning of the Ninth.[12] To Story, the amendment was as much about limiting federal power as it was about preserving the people's retained rights. Indeed, as we shall see, at the time of the Founding, these were viewed as two sides of the same coin. Limiting federal power, of course, was a critical concern of those members of the state conventions who had to decide whether to ratify the proposed Constitution. It was in response to those concerns that Madison drafted the Ninth Amendment, and his original draft expressly addressed the need to limit the construction of federal power.

The Ninth Amendment did not emerge unsought out of the unique mind of James Madison. Like the rest of the Bill of Rights, the origins of the Ninth Amendment are found in concerns raised by the ratifiers in the state conventions. Let's return then, to the story of the Bill of Rights, only now with an expanded view of the evidence.

The Need to Control the Interpretation of Delegated Federal Power

> *The enumeration in the Constitution, of certain rights, shall not be construed . . . .*
>
> The Ninth Amendment (emphasis added)

The phrase "shall not be construed" forms the core of the Ninth Amendment; it is the hub around which the rest of the text turns. All that the text of the Ninth demands is that the enumeration of rights not be construed in a particular way. This makes the Ninth Amendment rather unique. Unlike most other provisions in the Constitution, the Ninth Amendment neither grants a power nor establishes a right. Its sole textual function is to prohibit a particular erroneous interpretation arising from the existence of *other* provisions in the Constitution.[13] Although the modern eye tends to focus on

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12. As we shall see, Story took a more constricted view of the Ninth than Madison. Nevertheless, Story shared Madison's view that the Ninth was as much about powers as it was about rights.

13. All constitutional provisions, of course, can be understood as rules of interpretation to some degree. For example, the necessary and proper clause can be understood both as a concession of power (the section reads, "Congress shall have power . . . to make all laws which shall be

the Ninth's reference to "other" rights, the men who debated and adopted the Ninth focused their attention on the issue that makes the amendment unique: the proper construction—or interpretation—of the Constitution.

One of the primary concerns raised during the debates over the proposed federal Constitution involved the potentially unlimited scope of power bestowed by provisions such as the necessary and proper clause.[14] The list of powers in Article I, section 8 seemed to justify the extension of federal power "to almost every thing about which any legislative power can be employed. . . . [N]othing can stand before it."[15] Although presumably the federal legislature would be bound by the decisions of the federal judiciary,[16] those courts "will not confine themselves to any fixed or established rules."[17] Instead, they would adopt "certain principles, which being received by the legislature, will enlarge the sphere of their power beyond all bounds."[18] Thus, "we are more in danger of sowing the seeds of

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necessary and proper . . . .") and as a rule of construction (this clause is properly interpreted to allow only those laws which are in fact "necessary and proper"). Similarly, the free speech clause can be understood both as a right and as a rule of construction forbidding any interpretation of congressional power that "abridges freedom of speech." The Ninth Amendment, however, is purely a rule of construction.

14. According to the Anti-Federalist writer Brutus:

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

Essays of Brutus No. 1 (Oct. 18, 1787), *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 1, at 363, 367.

15. *Essays of Brutus* No. 12 (Feb. 7, 1788), *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 1, at 422, 425.

16. *Essays of Brutus* No. 11 (Jan. 31, 1788), *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 1, at 417, 420 ("And I conceive the legislature themselves, cannot set aside a judgment of [the Supreme Court], because they are authorized by the constitution to decide in the last resort."); *see also Essays of Brutus* No. 12, *supra* note 15, at 424 ("[T]he judgment of the judicial, on the constitution, will become the rule to guide the legislature in their construction of their powers.").

17. *Essays of Brutus* No. 11, *supra* note 16, at 420.

18. *Essays of Brutus* No. 12, *supra* note 15, at 423. According to Herbert Storing, the discussion of judicial power by Brutus was "the best in the Anti-Federalist literature." 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 1, at 358.

arbitrary government in this department than in any other."[19] Unrestricted by any fixed rule of interpretation, the inevitably broad construction of federal power by "[t]he judicial power will operate to effect … an entire subversion of the legislative, executive and judicial powers of the individual states."[20]

From the perspective of those who worried about a potentially tyrannical federal government, the proposed Constitution had a serious omission: the lack of any provision expressly prohibiting unduly broad interpretations of federal power. Article II of the Articles of Confederation had contained such an express limitation on federal power, and the new Constitution, critics argued, should contain a similar clause. "There is nothing in the new constitution which either in form or substance bears the least resemblance to the second article of the confederation."[21] "The omission of such a declaration … manifests the design of reducing the several states to shadows."[22] If Federalists like James Wilson were telling the truth about the principle of enumerated federal powers, then, since this doctrine "is the only security that we are to have for our natural rights, it ought at least to have been clearly expressed in the plan of government."[23] According to "Federal Farmer," "we might advantageously enumerate the powers given, and then in general words, according to the mode adopted in the 2d art. of the confederation, declare all powers, rights and privileges, are reserved, which are not explicitly and expressly given up."[24] In the Virginia ratifying convention, Patrick Henry demanded that "a general positive provision … be inserted in the

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19. *Letters from The Federal Farmer* No. 15 (Jan. 18, 1788), *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 1, at 315, 316.

20. *Essays of Brutus* No. 11, *supra* note 16, at 420–21.

21. *Letters from An Old Whig* No. 2 (Oct. 17, 1787), *in* 3 COMPLETE ANTI-FEDERALIST, *supra* note 1, at 22, 23.

22. Letter from Centinel to the People of Pennsylvania, *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 1, at 143, 146–47; *see also* The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents (Dec. 18, 1787), *in* 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 1, at 145, 156 ("The new constitution, consistently with the plan of consolidation, contains no reservation of the rights and privileges of the state governments, which was made in the confederation of the year 1778, by article the 2nd. … The legislative power vested in Congress by the foregoing recited sections, is so unlimited in its nature; may be so comprehensive and boundless [in] its exercise, that this alone would be amply sufficient to annihilate the state governments, and swallow them up in the grand vortex of general empire.").

23. *Essay of a Democratic Federalist*, PA. HERALD, Oct. 17, 1787, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 1, at 58, 58–59.

24. *Letters from the Federal Farmer* No. 16 (Jan. 20, 1788), *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 1, at 323, 324.

new system, securing to the states and the people every right which was not conceded to the general government."[25] George Mason, who had refused to sign the Constitution, agreed that the Constitution needed "some express declaration . . . asserting that rights not given to the general government were retained by the states."[26] According to Mason, "We wish only our rights to be secured. We must have such amendments as will secure the liberties and happiness of the people on a plain, simple construction, not on a doubtful ground."[27]

Although the Federalists denied that the Constitution would authorize unduly expansive interpretations of federal power,[28] even Alexander Hamilton in the *Federalist Papers* conceded that "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents."[29] The Constitution as proposed, however, had no "strict rules," thus making future precedents a matter of grave concern. In exchange for their vote to ratify the Constitution, the state ratifying conventions insisted that this deficiency be remedied. Along with their notice of ratification, the conventions declared their understanding of federal power and submitted proposals expressly limiting the construction of national authority.

The Declarations and Proposals of the State Ratifying Conventions

The proponents of the Constitution insisted that the principle of enumerated powers would limit the expansion of federal authority. Provisions like the necessary

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25. Virginia Convention, *supra* note 4, at 150 (remarks of Patrick Henry).

26. *Id.* at 444 (remarks of George Mason).

27. *Id.* at 271.

28. According to Hamilton in the *Federalist Papers*:

> In the first place, there is not a syllable in the plan under consideration which *directly* empowers the national courts to construe the laws according to the spirit of the Constitution, or which gives them any greater latitude in this respect than may be claimed by the courts of every State. I admit however, that the Constitution ought to be the standard of construction for the laws, and that wherever there is an evident opposition, the laws ought to give place to the Constitution. But this doctrine is not deducible from any circumstance peculiar to the plan of convention; but from the general theory of a limited Constitution; and as far as it is true is equally applicable to most if not to all the State governments. There can be no objection, therefore, on this account to the federal judicature which will not lie against the local judicatures in general, and which will not serve to condemn every constitution that attempts to set bounds to the legislative discretion.

THE FEDERALIST No. 81 (Alexander Hamilton), *supra* note 2, at 482.

29. THE FEDERALIST No. 78 (Alexander Hamilton), *supra* note 2, at 471.

and proper clause, however, were ambiguous enough to allow for unduly broad interpretations of enumerated powers. Accordingly, those state conventions that ratified the Constitution commonly included a statement declaring their understanding that federal power would be strictly construed. New York, for example, submitted the following statement along with its notice of ratification:

> [T]hat every Power, Jurisdiction and Right, which is not by the said Constitution clearly delegated to the Congress of the United States, or the departments of the Government thereof, remains to the People of the several States, or to their respective State Governments to whom they may have granted the same;
>
> And that those Clauses in the said Constitution, which declare, that Congress shall not have or exercise certain Powers, do not imply that Congress is entitled to any Powers not given by the said Constitution; but such Clauses are to be construed either as exceptions to certain specified Powers, or as inserted merely for greater Caution.[30]

The first paragraph declares the principle of enumerated powers—a principle ultimately expressed by the Tenth Amendment. The second paragraph addresses a separate issue: the implied expansion of delegated federal power because of the addition of the Bill of Rights. This dual limitation on federal power both limits the federal government to enumerated powers and prohibits any implied enlargement of federal power because of the addition of an enumerated list of rights. Other states adopted the same strategy of dual restrictions on the construction of federal power. The Virginia convention, for example, proposed the following two amendments:

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

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30. Amendments Proposed by the New York Convention (July 26, 1788), *in* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS, 21, 21–22 (Helen E. Veit et al. eds., 1991); *see also* The Ratifications of the Twelve States—New York, in 1 ELLIOT'S DEBATES, *supra* note 4, at 327, 329 ("Under these impressions, and declaring that the rights aforesaid cannot be abridged or violated, and that the explanations aforesaid are consistent with the said Constitution, and in confidence that the amendments which shall have been proposed to the said Constitution will receive an early and mature consideration—We the said delegates, in the name and in the behalf of the people of the state of New York, do, by these presents, assent to and ratify the said Constitution.").

> *Seventeenth*, That those clauses which declare that Congress shall not exercise certain powers be not interpreted in any manner whatsoever to extend the powers of Congress. But that they may be construed either as making exceptions to the specified powers where this shall be the case, or otherwise as inserted merely for greater caution.[31]

Once again, the first provision limits the federal government to enumerated powers, and the second limits the implied enlargement of federal power because of the addition of a Bill of Rights.[32] North Carolina followed Virginia's approach and submitted the same two proposals.[33]

Concerns about extending the enumerated powers of Congress are related to, but distinct from, preserving the principle of enumerated powers. By limiting the federal government to enumerated powers, the states intended to retain to themselves all nondelegated powers, jurisdiction, and rights. Under this approach, states did not have to list the powers and rights they retained, for they retained *everything* not assigned to federal control. The problem, as the Anti-Federalists pointed out, was that merely declaring the principle of enumerated powers by itself did not control the *interpreted scope* of enumerated federal powers. There being no fixed rules of interpretation for the courts to follow, judicial construction of enumerated powers had no limit.

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31. Amendments Proposed by the Virginia Convention (June 27, 1788), *in* THE COMPLETE BILL OF RIGHTS, *supra* note 3, at 675. James Madison was a member of the committee that drafted the Virginia proposal, and he expressly noted the role the Virginia proposals played in his proposed draft of the Bill of Rights. Letter from James Madison to George Washington (Nov. 20, 1789), *in* 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1185 (Bernard Schwartz ed., 1971).

32. Although New York's proposal addressed the implied abandonment of the principle of enumerated federal powers, Virginia's seventeenth proposal goes further and prohibits any implied enlargement of even those powers that *were* enumerated. Patrick Henry, in the Virginia convention, argued:

> If you will, like the Virginia government, give them knowledge of the extent of the rights retained by the people, and the powers themselves, they will, if they be honest men, thank you for it. . . . But if you leave them otherwise, they will not know how to proceed; and being in a state of uncertainty, they will assume rather than give up powers by implication. A Bill of rights may be summed up in a few words. What do they tell us? That our rights are reserved.

DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA, CONVENED AT RICHMOND, ON MONDAY THE SECOND DAY OF JUNE, 1788, FOR THE PURPOSE OF DELIBERATING ON THE CONSTITUTION RECOMMENDED BY THE GRAND FEDERAL CONVENTION 36 (Richmond, Va., Ritchie & Worsley and Augustine Davis 2d ed. 1805) (remarks of Patrick Henry). Note how Henry links the protection of retained rights to a prohibition on the expansion of implied powers.

33. *See* North Carolina Convention, *supra* note 4, at 246.

Worse, adding a bill of rights might be understood to imply that the only limits to broad readings of federal power were those specific limits listed in Article I and the Bill of Rights. In such a situation, states still would retain all nondelegated powers, but those powers would be few (if any), the federal government having occupied the field. Preventing this from coming to pass required the adoption of *two* provisions, one declaring the principle of enumerated powers and the other denying the implied expansion of federal power because of the addition of specific rights.

This dual approach is most clearly seen in the proposals of Virginia and North Carolina. Other state conventions also recognized the need to control the construction or interpretation of federal power. Pennsylvania suggested a provision that prohibited the federal courts from assuming any "authority, power, or jurisdiction" under any "pretense of construction or fiction."[34] South Carolina declared that "no section or paragraph of the said Constitution warrants a construction that the states do not retain every power not expressly relinquished."[35] These provisions, along with those of North Carolina and Virginia, all sought to limit the interpretation of federal power. When James Madison drafted the Bill of Rights, he referred to and relied on these declarations and proposals.

Madison's Original Draft of the Ninth Amendment

Fulfilling his promise to his constituents in Virginia,[36] Madison drafted and presented to the first House of Representatives a list of proposed amendments to the Constitution. In creating his proposed Bill of Rights, Madison culled through the various proposals submitted by the state conventions and "exclud[ed] every

34. Pennsylvania Convention, *supra* note 4, at 545.

35. The Ratifications of the Twelve States—South Carolina, *in* 1 ELLIOT'S DEBATES, *supra* note 4, at 325, 325.

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

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

Letter from James Madison to Richard Peters (Aug. 19, 1789), *in* CREATING THE BILL OF RIGHTS, *supra* note 30, at 281, 282.

proposition of a doubtful & unimportant nature."[37] Although not all of Virginia's (or any state's) proposals made the final cut, Madison considered the dual strategy of Virginia's "first" and "seventeenth" proposals important enough to add to his list of suggested amendments. Below are Madison's drafts of what would become our Ninth and Tenth Amendments:

> The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people; or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.[38]
>
> The powers not delegated by this constitution, nor prohibited by it to the states, are reserved to the States respectively.[39]

Here is a side-by-side comparison of Virginia's first and seventeenth proposed amendments and Madison's draft Ninth and Tenth Amendments.

Virginia's "Seventeenth"	**Madison's "Ninth"**
Those clauses which declare that Congress shall not exercise certain powers be not interpreted in any manner whatsoever to extend the powers of Congress. But that they may be construed either as making exceptions to the specified powers where this shall be the case, or otherwise as inserted merely for greater caution.	The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.

37. Letter from James Madison to Edmund Randolph (Aug. 21, 1789), *in* 12 THE PAPERS OF JAMES MADISON, CONGRESSIONAL SERIES 348, 348-49 (Charles F. Hobson & Robert A. Rutland eds., 1979).

38. Madison's Bill of Rights Speech, *supra* note 7, at 443.

39. *Id.* at 444.

Virginia's "First"	**Madison's "Tenth"**
That each state in the Union shall respectively retain every power, jurisdiction and right, which is not by this Constitution delegated to the Congress of the United States or to the departments of the Federal Government.	The powers not delegated by this Constitution, nor prohibited by it to the states, are reserved to the states respectively.

With the exception of Madison's reference to the people's retained rights, his original draft of the Ninth Amendment tracks the language of Virginia's seventeenth proposal.[40] Even Madison's unique "retained rights" language cannot be divorced from the concerns of the Virginia convention. In his speech introducing his proposed Bill of Rights to the House of Representatives, Madison spoke of the need to prevent an implied "assignment" of unenumerated rights into the hands of the federal government. Preserving the people's retained rights prevents such an "assignment" and thus fits with Virginia's concerns about the implied extension of federal power. In other words, even if we exclude the major part of Madison's proposal and focus only on the retained-rights language, his proposed amendment *still* reflects the concerns of the Virginia and other state conventions. Viewing the proposed amendment as a whole, including the "enlarged powers" language, simply makes the link to proposals like Virginia's seventeenth more obvious. As Madison wrote in the notes for his speech introducing the Bill of Rights, the Ninth Amendment addressed the concern that adding a bill of rights might "dispar[a]ge other rights—or constructively enlarge" delegated federal power.[41]

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40. I am not the first to notice the relationship between Virginia's seventeenth proposal and the Ninth Amendment. *See* Leslie W. Dunbar, *James Madison and the Ninth Amendment*, 42 VA. L. REV. 627, 631 (1956); *see also* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 121 (1998) (discussing both Virginia's and New York's statements as precursors to the Ninth Amendment).

41. *See* James Madison, Notes for Speech in Congress Proposing Constitutional Amendments (June 8, 1789) [hereinafter Madison's Notes for Bill of Rights Speech], *in* 1 THE RIGHTS

The concern addressed by the Ninth Amendment was not that enumerating rights would imply *new* enumerated powers. The problem was that listing certain rights might be read to imply that the only limits to the interpreted scope of federal power were those particular constraints listed in the Constitution. Such a constructive enlargement of federal power would necessarily diminish the scope of nondelegated powers, jurisdiction, and rights. Madison's draft Ninth Amendment avoided such an implication by following the lead of the Virginia convention and adding a rule of construction that preserved retained rights by prohibiting any enlarged construction of enumerated federal authority.

The People's Retained Rights at the Time of the Founding

> *All power, jurisdiction, and rights of sovereignty, not granted by the people by that instrument, or relinquished, are still retained by them in their several states, and in their respective state legislatures, according to their forms of government.*
>
> Supreme Court Justice Samuel Chase in Campbell v. Morris [42]

The next chapter considers the events surrounding the ratification of the Ninth Amendment. Before we conclude our look at the initial drafting of the Ninth Amendment, however, it is helpful to take a closer look at the text and consider terms that the founding generation likely viewed rather differently from the way we understand them today.

Although much of the debate surrounding the Ninth Amendment focuses on the meaning of "other rights," one of the most critical keys to understanding the amendment lies in its final words, "retained *by the people*." The Ninth's invocation of "the people" reflects the founders' embrace of popular sovereignty, a theory that deeply affected how both the Ninth and Tenth Amendments were understood by the founding generation. As chronicled by

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Retained by the People: The History and Meaning of the Ninth Amendment 64 (Randy E. Barnett ed., 1989).

42. 3 H. & McH. 535, 554 (Md. 1797). While serving on the Supreme Court, Justice Samuel Chase also served as a judge on the courts of his home state Maryland. It was in that capacity that Justice Chase wrote his opinion in *Campbell v. Morris*. *See* Edward S. Corbin, *Samuel Chase*, *in* 2 Dictionary of American Biography at pt. 2, 34-37 (Dumas Malone ed., 1964).

Gordon Wood, the Revolutionary experience created a common belief that the ultimate source of sovereign power was found in the people themselves.[43] In England, by the time of the founding, the Parliament had established itself as the highest representation of the English people.[44] In founding-era America, however, the most recent historical representation of the people had been the colonial assemblies, which continued to meet even when outlawed by the English government. These illegal assemblies or *conventions* of the people came to be viewed as the highest expression of sovereignty.[45] They, not the government, were viewed as best representing the will of the sovereign people. In this way, the concept of popular sovereignty—the American idea of "the people"—first emerged in reference to conventions of the people in the individual states.[46] When a Virginian in 1789 referred to the "sovereign rights of the people," he was just as likely (if not more likely) to be speaking of the local people of Virginia as the national people of the United States.[47]

As far as the people's *rights* are concerned, scholars have long recognized the founders' widespread belief in retained individual natural rights.[48] At the time of the founding, however, there were a variety of rights deemed held by the people in both their individual and collective capacity. Natural rights,

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43. *See* Gordon S. Wood, The Creation of the American Republic, 1776–1787 (1969); *see also* Sean Wilentz, The Rise of American Democracy 32 (2005).

44. *See* 1 Bruce A. Ackerman, We the People: Foundations (1991); Edmund S. Morgan, Inventing the People: The Rise of Popular Sovereignty in England and America (1988).

45. Wood, *supra* note 43, at 319–43.

46. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1446 (1987).

47. *See* 1 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 app. note C at 91 (St. George Tucker ed., Phila., William Young Birch & Abraham Small 1803) [hereinafter Tucker's Blackstone] ("The Convention of Virginia had not the shadow of a legal or constitutional form about it. It derived its existence and authority from a higher source; a power which can supersede all law, dispense with all forms; and whenever it pleases annul one constitution; and set up another; namely the *people* in their sovereign, unlimited and unlimitable authority and capacity.").

48. *See* The Federalist No. 2 (John Jay), *supra* note 2, at 37 (asserting that whenever government "is instituted, the people must cede to it some of their natural rights, in order to vest it with requisite powers"); *see also* The Federalist No. 43 (James Madison), *supra* note 2, at 279 ("[T]he transcendent law of nature and of nature's God . . . declares that the safety and happiness of society are the objects at which all political institutions aim."); Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 Chi-Kent L. Rev. 131, 155 (1988) ("[E]ven moral skeptics . . . do not deny that the founding generation, as a general matter, accepted the idea of natural rights.").

most often associated with the work of John Locke,[49] were divided between those given up in return for the benefits of a stable government and those unalienable natural rights that could not legitimately be delegated away.[50] Political or civil rights involved those positive rights arising not from nature itself but from the nature of government.[51] In addition to individual rights, the people also held collective rights, or rights that could be exercised only by the people in their collective capacity. 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.[52] Collective rights included both the fundamental right to revolution and the right of political majorities to establish law—the fundamental aspect of democratic liberty.

In the period immediately following the Revolution and the adoption of the federal Constitution, all these rights existed on a state level and ran against one's own state government. The need to form a league with other states, however, called into play a new kind of retained right. Under the Articles of Confederation, although the Continental Congress had certain express powers, all nondelegated powers and rights were retained by the individual states. According to Article II, "Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled." This declaration of "states' rights" did not signal the abandonment of popular sovereignty and the embrace of some kind of reified deity called a "state." The reference to the retained rights of the states was a shorthand reference to the retained rights of the people in their respective states.[53] Article II thus preserved a collective right in that it protected the

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49. *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT §23, at 128 (W. Carpenter ed., 1986) (1690).

50. *See* THE FEDERALIST No. 2, *supra* note 48, at 37 (asserting that whenever government "is instituted, the people must cede to it some of their natural rights, in order to vest it with requisite powers").

51. *See* 1 ANNALS OF CONG. 454 (Joseph Gales ed., 1834) (statement of Rep. James Madison).

52. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("[W]henever any Form of Government becomes destructive of these [unalienable rights], it is the Right of the People to alter or to abolish it. . . .").

53. As Madison explained in his report on the Alien and Sedition Acts, references to the rights of states most often assumed the sovereignty of the people of the states, but used the term "states" as a shorthand reference. *See* James Madison, *Report on the Alien and Sedition Acts* (Jan. 7, 1800), *in* JAMES MADISON: WRITINGS, *supra* note 7, at 608, 610.

right of collective local majorities to control matters not delegated to the national Congress.[54]

When the Constitution was first proposed, the immediate issue was whether this new government would erase the sovereign independence of the people in the several states and consolidate U.S. citizens into a single undifferentiated mass.[55] However great the benefits of a national government, the proposed Constitution would never be ratified if it appeared that the cost would be such a consolidation. In response, advocates of the Constitution assured the state conventions that the states would retain a substantial degree of their sovereign independence.[56] As Alexander Hamilton wrote in the *Federalist* No. 32: "The state governments would clearly retain all the rights of sovereignty which they before had, and which were not by that act exclusively delegated to the United States."[57]

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54. The people acting in their collective capacity in the states could either delegate power over an issue to their local state government or place the issue beyond the reach of ordinary political majorities by enshrining it in their state constitution's bill of rights. Both approaches used majoritarian procedures.

55. For just a few of many examples, *see* Address of the Albany Antifederal Committee (Apr. 10, 1788), *in* 6 THE COMPLETE ANTI-FEDERALIST, *supra* note 1, at 122, 123 ("They have formed not a *federal* but a *consolidated* government, repugnant to the principles of a republican government; not founded on the preservation but the destruction of the state governments."); The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents (Dec. 18, 1787), *in* 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 1, at 145, 153–54 ("We dissent, secondly, because the powers vested in Congress by this constitution, must necessarily annihilate and absorb the legislative, executive, and judicial powers of the several states, and produce from their ruins one consolidated government, which from the nature of things will be *an iron handed despotism*, as nothing short of despotic sway could connect and govern these United States under one government."). Speeches by Melancton Smith, Delivered in the Course of Debate by the Convention of the State of New York on the Adoption of the Federal Constitution (June 1788), *in* 6 THE COMPLETE ANTI-FEDERALIST, *supra* note 1, at 148, 151 ("He was pleased that thus early in the debate, the honorable gentleman had himself shewn, that the intent of the Constitution was not a Confederacy, but a reduction of all the states into a consolidated government."). According to Herbert Storing, the threat of consolidation was one of the key arguments made against the Constitution by the Anti-Federalists. *See, e.g.*, 1 THE COMPLETE ANTI-FEDERALIST, *supra* note 1, at 10 ("The Anti-Federalists stood, then, for federalism in opposition to what they called the consolidating tendency and intention of the Constitution—the tendency to establish one complete national government, which would destroy or undermine the states."); *Introduction to Letters by Federal Farmer*, in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 1, at 215 (discussing the importance of the consolidation threat to the author of the Federal Farmer letters).

56. *See* WOOD, *supra* note 43, at 524–32 (discussing the Federalist assurances that the proposed Constitution would not result in the consolidation of the states).

57. THE FEDERALIST No. 32 (Alexander Hamilton), *supra* note 2, at 198.

Writing in the *Cumberland Gazette*, the pseudonymous "Centinel" supported the proposed Constitution because

> we retain all our rights which we have not expressly relinquished to the Union. That section declares that all legislative powers herein given . . . shall be vested in Congress, etc. The legislative powers which are not given therein are sure not in Congress; and if not in Congress, are retained by the several States, and secured by their several constitutions.[58]

Note that Centinel perceived no difference between "[our] retained rights" and the retained powers of the states. Similarly, in the Virginia ratifying convention, Patrick Henry referred to the "retained rights of the people" and the "retained rights of the states" as if they were the same thing.

> If you intend to reserve your unalienable rights, you must have the most express stipulation. For if implication be allowed, you are ousted of those rights. If the people do not think necessary to reserve them, they will be supposed to be given up. How were the congressional rights defined when the people of America united by a confederacy to defend their liberties and rights against the tyrannical attempts of Great Britain? The states were not then contented with implied reservation. No, Mr. Chairman. 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.[59]

Like Centinel, Henry merged the language of individual rights with that of state autonomy. The retained rights of the *people* of America were protected by the Articles' declaration that the *states* retained all nondelegated rights. Retained rights in this context, whatever their specific nature, were collective in regard to the federal government; they were left to the control of the collective people in the states. Henry's equation of retained rights and preserved state autonomy was echoed throughout the state ratifying conventions.

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58. Letter from Centinel, CUMBERLAND GAZETTE (Portland, Maine Territory), Dec.13, 1787, at 1. Available at Archives of Americana, America's Historical Newspapers 1690-1876 (Readex, Newsbank, Inc).

59. DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA, *supra* note 32, at 34 (remarks of Patrick Henry) (emphasis added).

For example, the North Carolina convention declared that "the people have a right to freedom of speech"—an individual right—but then went on to declare that "each state in the union shall, respectively, retain *every* power, jurisdiction and *right*" that is not delegated to the federal government.[60]

Federalist advocates of the proposed Constitution stressed the same idea—the *people* retained collective rights on a state-by-state basis. According to James Madison in the *Federalist Papers*:

> The truth is, that this ultimate redress [political removal at the polls] may be more confided in against unconstitutional acts of the federal, than of the state legislatures, for the plain reason, that as every act of the former, will be an invasion of the *rights* of the latter, these will ever be ready to mark the innovation, to sound the alarm to the people, and to exert their local influence in affecting a change of federal representatives.[61]

To Madison, unconstitutional acts by the federal government are, by definition, an "invasion" of the rights of the states. When these invasions occur, members of the state legislature could be counted on to alert the local populace, who could replace their national representatives at the next election cycle. Madison thus equated the retained rights of the states with the collective interests of the "local" people.

The same language of the retained rights of the collective people in the several states occurred outside the debates over the federal Constitution. In 1791, the same year the Bill of Rights was adopted, the Pennsylvania legislature passed resolutions expressing the "sense" of the assembly that the states need not wait for federal consent to call out the state militia when faced with imminent danger (in this case, Indian attacks), because states "retain the right of taking up arms in their own defense."[62] James Madison's former colleague in the House of Representatives (and a future governor of Georgia) James Jackson wrote a series of essays in 1795 under the name "Sicilius" criticizing the Yazoo land fraud—a controversial decision by Georgia officials to sell off

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60. North Carolina Convention, *supra* note 4, at 244.

61. THE FEDERALIST No. 44 (James Madison), *supra* note 2, at 286 (emphasis added).

62. Senate of Pennsylvania, Mail; Claypool's Daily Advertiser (Phila.), Jan. 16, 1792, at 3, available at Archive of Americana, America's Historical Newspapers, 1690-1876 (Readex, Newsbank, Inc.).

state-owned land to speculators.[63] In his third essay, Jackson considered whether the Georgia legislature had the authority to sell off the state's western lands.[64] He discussed the proper method of determining whether the people have retained or delegated power to their governments:

> It is a part of some constitutions, and understood in them all, that all power, not expressly given, is retained by the people. On this ground it was that Judge Wilson, of the supreme court, whatever opinion his interest may dictate to him now, strenuously argued in the convention of Pennsylvania, against the insertion of a bill of rights, giving the best of reasons for its being left out, that it was impossible to enumerate all the rights of the people, and that by the expression of some the others might be supposed to be delegated. The same arguments prevailed in the House of Representatives of the United States, on the proposed amendments to the United States constitution, where Messrs Madison, Burke, and others, wished to express some of the retained rights, and surely the people of Georgia possess those retained rights, in as great a degree, as those of other states.[65]

This is yet another example of how the rights and powers "retained by the people" could be viewed as rights and powers "retained by the states." Jackson believed that among the unenumerated retained rights of the people of Georgia was the collective majoritarian right to "alienate or mortgage" public land.[66] Notice that his argument about retained rights focuses on the very issue that led to the adoption of the Ninth Amendment. He did not

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63. *See* C. Peter McGrath, Yazoo: Law and Politics in the New Republic, The Case of *Fletcher v. Peck* (1966).

64. *See* George Lamplugh, *"Oh the Colossus! The Colossus!": James Jackson and the Jefferson Republican Party in Georgia, 1796–1806*, 9 J. Early Republic 315 (1989). Jackson was a member of the First Congress when Madison gave his speech against the Bank of the United States. Jackson lost reelection in 1791 but was appointed to the Senate in 1792. *See generally id.* As Lamplugh writes, "In a private letter to James Madison, Jackson linked the Yazoo speculation to funding and assumption, the Bank of the United States, and John Jay's Treaty with Britain as evil fruits of Hamilton's loose construction of the Constitution." *Id.* at 319 (citing a letter from Jackson to James Madison, Nov. 17, 1795). Lamplugh refers to Jackson's *Letters of Sicilius* as the "bible of anti-Yazooists." *Id.* at 319.

65. *See* James Jackson, The Letters of Sicilius, to the Citizens of the State of Georgia, on the Constitutionality, the Policy, and the Legality of the Late Sale of Western Lands, in the State of Georgia 23-24 (Augusta, Ga., John E. Smith 1795).

66. *Id.*

mention the Ninth by name, but it is clear that Jackson considered unenumerated retained rights to include state-level majoritarian rights.[67]

Although "retained rights" often referred to the collective rights of the people in the several states, there are also numerous references to retained individual rights. As just one example, James Madison expressly referred to an individual's freedom of speech as one of the retained natural rights of the people.[68] The adoption of the Constitution, however, complicated the idea of "retained individual rights." When the people of a state retained an individual right by placing it in their state constitution, they removed the issue from state majoritarian politics and placed the matter beyond the reach of state government. Under the federal Constitution, however, retaining a right from the federal government *by definition* meant leaving the matter to the people in the states, who could then further retain it from their own state government or leave the matter within the control of majoritarian state politics.[69] For example, although the First Amendment prohibits any law respecting an

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67. Writing in response to Jackson's Sicilius essays, the author of a "Letter of a Farmer" conceded that Georgia's right to alienate its land was one of the rights the state had retained from the national legislature. This, however, left the Georgia legislature free to sell the land.

> Suppose then we admit to give full weight and credit to those theorists, who declaim against the proceedings of the last legislature, as unconstitutional; that the power of alienating any part of the domain of the state, is one of the retained rights of the people; that it is a power not delegated, either expressly or by implication; and that the attempt of the national legislature to exercise it is usurpation? . . . I take it, the power of each succeeding legislature is equal, where the fundamental laws have undergone no change, and the last much reprobated majority stood as high in their constitutional trust, as the majority of any former, or after assemblage of the national representatives, under the same modification of government; if this is true, and I scarcely think it can be denied, either the power of alienating such part of the domain, as to the legislature shall appear beneficial is delegated . . .

THE LETTERS OF A FARMER TO THE PEOPLE OF GEORGIA: OR, THE CONSTITUTIONALITY, POLICY, AND LEGALITY OF THE LATE SALES OF WESTERN LANDS EXAMINED 7–8 (Charleston, S.C., W.P. Young 1796). Farmer's response illustrates that opposite sides of a contemporary political debate had the same view of retained rights. Such rights belong to the people of each state. The issue dividing Sicilius and Farmer was whether the people of the state had delegated those rights to their state legislature. In a similar vein, *see* JOHN DICKINSON, THE LETTERS OF FABIUS, IN 1788, ON THE FEDERAL CONSTITUTION; AND IN 1797, ON THE PRESENT SITUATION OF PUBLIC AFFAIRS 66 (Wilmington, Del., William C. Smyth 1797), arguing that "[t]he proposition was expressly made upon this principle, that the territory of such extent as that of United America, could not be safely and advantageously governed, but by combination of Republics, each retaining all the rights of supreme sovereignty, excepting such as ought to be contributed to the Union."

68. *See* Madison's Notes for Bill of Rights Speech, *supra* note 41, at 64.

69. Assuming the Constitution did not also expressly bind the states in the same matter.

establishment of religion, the people in the states remained free to either prohibit or allow the establishment of religion in the decades following the adoption of the Bill of Rights.[70] Even if one views the "people" of the Ninth Amendment as a reference to the undifferentiated people of the United States, this "people" retained the right to divide powers and rights between the national and local governments.[71]

Retaining local state governments limited the potentially tyrannical powers of the proposed federal government and ensured that issues regarding personal liberty, be it freedom of speech, the press, or religion, were controlled by trusted local officials. As Samuel Adams put it in a letter to Richard Henry Lee in 1789:

> I mean my friend, to let you know how deeply I am impressed with a sense of the Importance of Amendments; that the good people may clearly see the distinction, for there is a distinction, between the *federal* Powers vested in Congress, and the *sovereign* Authority belonging to the several states, which is the Palladium of the private, and personal rights of the citizen.[72]

Adams expressed a fundamental principle of federalism in the early republic. Individual liberty according to this view is best protected by preserving local control over "private and personal rights." This is why, both before and after 1791, it was commonplace to speak of the "retained rights of the states" and why it was just as common to equate the "retained rights of the people" with the retained rights of the people in their respective states. This idea was understood and embraced by both defenders and detractors of the federal Constitution, and references to the same idea occur both in and outside the debates regarding the federal Constitution.

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70. Massachusetts, for example, did not abandon its official religious establishment until 1833. *See* Leonard Levy, The Establishment Clause 41–42 (2d ed. rev. 1994).

71. As another example, although the First Amendment prohibits federal laws abridging the freedom of speech, no similar restriction is placed upon the states. Thus, James Madison argued that the Sedition Act violated both the First and Tenth Amendments. *See* Madison, *supra* note 53, at 608; *see also* 2 Tucker's Blackstone, *supra* note 47, app. note G at 30 (opposing the Sedition Act, but noting that state courts were open to hear libel claims).

72. Letter from Samuel Adams to Richard Henry Lee (Aug. 24, 1789), in Creating the Bill of Rights, *supra* note 30, at 286, 286. Adams supported the adoption of the Constitution with the addition of appropriate amendments.

Just as common, of course, was the general belief in individual natural rights.[73] For those in favor of a national government, there also was the insistence that some matters belonged under the supreme authority of a new and empowered national government.[74] But neither a belief in natural rights nor the growing support for a national government erased the general assumption that the protection of individual rights was primarily a local rather than a national concern. It was no accident, in other words, that the Bill of Rights bound only the federal government.[75] Although the first eight amendments did in fact protect personal rights, the intent and effect of those protections was to leave control over such matters in the majoritarian hands of the people in the states. As Madison put it in a letter to Spencer Roane, "In establishing that [federal] Govt. the people retained other Govts. capable of exercising such necessary and useful powers as were not to be exercised by the General Govt."[76]

In 1791, of course, the concept of the "people" was neither uniformly understood nor uncontroversial.[77] The very notion of popular sovereignty was relatively new, and the adoption of a federal Constitution created the conundrum of divided or dual sovereignty. The Constitution's opening

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73. *See, e.g.*, Madison's Notes for Bill of Rights Speech, *supra* note 41, at 64 (referring to freedom of speech protected under his proposed amendment as a "natural right"); *see also* Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

74. *See, e.g.*, THE FEDERALIST No. 15 (Alexander Hamilton) (discussing the weaknesses of government under the Articles of Confederation).

75. Although Madison attempted to protect rights such as speech and religious liberty against state action, his effort died in the Senate. *See* AMAR, *supra* note 40, at 22.

76. Letter from James Madison to Spencer Roane (Sept. 2, 1819), *in* JAMES MADISON: WRITINGS, *supra* note 7, at 733, 736–37.

77. Both Edmund Morgan and Gordon Wood have traced the development of popular sovereignty in Revolutionary America. *See* MORGAN, *supra* note 44; WOOD, *supra* note 43. Even though the concept of popular sovereignty was broadly embraced, the early decades of the Constitution witnessed ongoing disputes regarding the authority of the people to oversee the ongoing operations of government, *see* CHRISTIAN G. FRITZ, AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA'S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR (2008), and the authority to establish the meaning of the Constitution, *see* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004). One of the most intractable issues, of course, was whether the people were solely national, *see* Joseph Story, 1 Commentaries on the Constitution of the United States 283 n.2 (1833) (Fred. B. Rothman & Co., 1991) JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES,or independent bodies within the several states, *see* 1 TUCKER'S BLACKSTONE, *supra* note 47, app. note D (View of the Constitution of the United States), or both, *see* THE FEDERALIST No. 39 (James Madison). It is not necessary to delineate the precise parameters of the people circa 1791, only that the Constitution was defended on the grounds that it would *not* consolidate the people of the United States into a single undifferentiated mass.

declaration of "We the People" remained critically ambiguous in regard to whether this referred to "we the (single national) people of the *United* States," or to "we the (many) people of the United *States*."[78] It was precisely because the term was capable of these different meanings that the Federalists were compelled to assure the state conventions that the term did not imply a consolidation of the states and a transformation of the people into a single undifferentiated mass.[79]

The Dual Nature of Retained Rights

From a modern perspective, one of the least intuitive aspects of the Ninth Amendment involves the nature of "retained" rights. Today, almost all individual constitutional rights apply against both the state and federal governments. Although the Bill of Rights originally bound only the federal government, over time, the Supreme Court applied these rights against state governments through what is known as the incorporation doctrine—the idea that the Fourteenth Amendment's restrictions on state action "incorporate" a number of rights originally applicable against only the federal government. Because we live and breathe the idea that constitutional rights bind all branches and levels of government, it is natural to read the term "retained rights" as referring to individual rights that are protected against any form of governmental abridgment, be it state or federal.

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78. *See, e.g.*, Debate in the Massachusetts House of Representatives on the Suability of the State (Sept. 23, 1793) (remarks of Dr. Jarvis), *in* INDEP. CHRON. & UNIVERSAL ADVERTISER, Oct. 17, 1793, at 1 ("It is true sir, that the words of the preamble, recognize the power and authority of the people, but they also confirm the existence and independence of the states – for it is not the people generally, but the people of the United States, which are described in that very preamble, as the author of the Constitution"). *See generally* Amar, *supra* note 46, at 1450.

79. Although some Anti-Federalists complained that the Tenth Amendment's reference to "the people" might be read as consolidating the nation into a single unitary mass, moderates had no difficulty in reading the clause as reserving nondelegated powers to the people of the individual states. *Compare* Letter from Richard Henry Lee to Patrick Henry (Sept. 14, 1789), *in* CREATING THE BILL OF RIGHTS, *supra* note 30, at 295, 296 (complaining about the language of the Tenth Amendment), *with* Letter from Edmund Randolph to George Washington (Dec. 6, 1789), *in* 5 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786–1870, at 222, 223 (Wash., D.C., Dep't of State 1905) ("The twelfth [Tenth] amendment does not appear to me to have any real effect, unless it be to excite a dispute between the United States, and every particular state, as to what is delegated. It accords pretty nearly with what our convention proposed.").

Such was not the case at the time of the founding. For example, although the establishment clause denied the federal government the power to establish a religion, the people in the several states remained free to do so, and many did for decades after the adoption of the Bill of Rights. Prior to the adoption of the federal Constitution, the people of each state had to decide which rights would be protected from state governmental abridgment. The establishment of a new federal system of government, however, created a new set of choices when it came to retained rights. It was now possible to retain a right from both the federal and state governments, or retain a right from only the federal government and leave it under the control of political majorities in a given state. The establishment of religion is just one example. Matters retained as of right from federal abridgement but left to local majoritarian control potentially included everything from religious rights to the right to regulate local commerce and agriculture to the right to charter a bank. All the rights discussed in this chapter were capable of being retained from the federal government and left to the political process in the several states.

In fact, with the exception of those rights that were expressly denied to the states under the Constitution, all powers and rights denied to (or retained from) the federal government necessarily remained in the hands of the people in the states. This was the opinion of Chief Justice John Marshall in *Barron v. Baltimore*,[80] and it seems amply supported by both the text and the history of the Constitution. According to Alexander Hamilton in the New York ratifying convention, "[W]hatever is not expressly given to the federal head is reserved to its members."[81] The sovereign people of the states "have already delegated their sovereignty and their powers to their several governments; and these cannot be recalled and given to another without an express act."[82] The federalist nature of retained rights applied even to those rights that we—and the founders—associate most closely with the individual natural rights of the people. For example, when the federal government passed the Alien and Sedition Acts criminalizing disparagement of the national government, James Madison complained that the Sedition Act violated both the First Amendment's protection of speech (which he characterized as a retained natural right) *and* the Tenth

80. 32 U.S. (7 Pet.) 243 (1833).

81. Alexander Hamilton, New York Ratifying Convention (June 28, 1788), *in* XXII Documentary History of the Ratification of the Constitution 1982 (John P. Kaminski & Gaspare J. Saladino, eds., 1988).

82. *Id.*

Amendment's reservation of all nondelegated powers to the states.[83] Again, one can expect vigorous debates within a state regarding whether a matter retained from federal control ought *also* to be retained from the control of state governments (witness the state-level debates over religious establishments in the years following the adoption of the Constitution). This does not alter the fact that such a choice was for the people of each state to make for themselves.[84]

The Ninth Amendment, of course, speaks of retained rights but does not expressly state whether it refers to rights retained from only the federal government or to rights retained from both the federal and state governments. Like a number of other provisions in the Bill of Rights, the Ninth Amendment employs passive language that does not name the specific institution bound by its injunction. This leaves the Ninth Amendment, under the rule of *Barron v. Baltimore*, applicable against the federal government only. Again, given that it was the state conventions that insisted on a bill of rights because of their fears about federal power, and given that the sole attempt to include a provision that expressly bound the states failed, Marshall's conclusion in *Barron* seems correct. Even today, almost all Ninth Amendment scholars agree that the Ninth's provisions bind only the federal government and not the states. But this seemingly uncontroversial conclusion has important implications for our understanding of retained rights. The necessarily dual nature of retained rights means that the Ninth Amendment preserves local (or state-level) self-government. As we shall see, on this point Madison was quite clear.

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83. *See* James Madison, *Report on the Alien and Sedition Acts* (Jan. 7, 1800), in JAMES MADISON: WRITINGS, *supra* note 7, at 659.

84. Although scholars occasionally cite early Supreme Court cases like *Calder v. Bull* as evidence that the founding generation believed in natural rights even in regard to state government, no case, including *Calder*, suggested that the people of a given state could not make their own determination regarding what was and was not a natural right. At most, courts could apply a presumption in favor of common-law rights in the absence of an express statement to the contrary from the state legislature. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) ("It is against all reason and justice, for a people to entrust a Legislature with such powers; and, therefore, it cannot be *presumed* that they have done it.") (emphasis added).

THREE

Debating the Ninth Amendment

James Madison's 1791 Speech on the Bank of the United States

Roger Sherman was perplexed. Two days earlier he had listened to James Madison deliver a speech to the House of Representatives on the proposed Bank of the United States. Although most members treated the issue as a dispute over policy, Madison declared that chartering such a bank would violate the people's constitutional rights. Having thought about the matter, Sherman now wrote a short note to Madison objecting to his claim that the bank threatened the retained rights of the people. According to Sherman, Congress had the general power to regulate the nation's finances and "to make such rules and regulations as they may judge necessary & proper to effectuate these purposes." The only issue was whether chartering a Bank was "a proper measure for effecting these purposes." And wasn't this, Sherman pressed Madison, "a question of *expediency* rather than of rights?"[1]

Madison emphatically disagreed. The broad construction of federal power relied upon by the bank's advocates threatened the retained power and *rights* of the people. In his speech before the House, Madison reminded the representatives of the recent struggle to ratify the Constitution and how the state ratifying conventions had been promised a federal government of limited power. The states had ratified the Constitution, but had done so on the understanding that the delegated powers of government would be narrowly construed, and most had demanded the addition of amendments that would make this understanding an express part of the Constitution. Madison referred the House to the pending Bill of Rights as fulfilling the promise that federal power would receive a limited construction.

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1. Memorandum from Roger Sherman to James Madison (Feb. 4, 1791), *in* 13 The Papers of James Madison, Congressional Series, 382 (Charles F. Hobson & Robert A. Rutland eds., 1981).

> The explanatory amendments proposed by Congress themselves, at least, would be good authority with [the state proposals]; all these renunciations of power proceeded on a rule of construction, excluding the latitude now contended for. These explanations were the more to be respected, as they had not only been proposed by Congress, but ratified by nearly three-fourths of the states. He read several of the articles proposed, remarking particularly on the 11th [the Ninth Amendment] and 12th [the Tenth Amendment]. [T]he former, as guarding against a latitude of interpretation—the latter, as excluding every source of power not within the constitution itself.[2]

What Madison called the eleventh and twelfth articles, we know as the Ninth and Tenth Amendments. The Tenth, according to Madison, "exclud[ed] every source of power not within the constitution itself," and the Ninth "guarded against a latitude of interpretation"—unduly broad constructions of enumerated power. As the language of the Ninth Amendment makes clear, this was not a matter of political "expediency." Preventing latitudinary interpretations of federal power preserved the people's retained rights.

Although Madison failed to derail Hamilton's drive to establish a national bank, the Bank of the United States remained controversial for decades, with Madison's speech repeatedly introduced as evidence against its constitutionality.[3] For his part, Madison never wavered from his belief that the bank

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2. James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791) [hereinafter Madison's Bank Speech], *in* JAMES MADISON: WRITINGS 480, 489 (Jack N. Rakove ed., 1999).

3. *See* "An American," DUNLAP'S AM. DAILY ADVERTISER (Phila.), Feb. 16, 1791, at 2 (noting that "state governments and the people retained all powers not expressly granted by the Constitution" and praising Madison's effort against the bank). The *Richmond Enquirer* reprinted the speech in its entirety when the charter was up for renewal in 1810. See *The Bank Bill Under Consideration*, ENQUIRER (Richmond, Va.), Jan. 4, 1810, at 4. Both Dunlap's American Daily Advertiser and The Richmond Enquirer available at Archives of Americana, America's Historical Newspapers 1690-1876 (Readex, Newsbank, Inc.). Members of Congress also referred to Madison's speech in the congressional debates over renewal. *See* 22 ANNALS OF CONG. 584 (1811) (statement of Rep. William Burwell) ("[The subject of the bank was] more thoroughly examined in 1791, and more ably elucidated than any other since the adoption of the Government. The celebrated speech of Mr. Madison, to which I ascribe my conviction, has been recently presented to us in the newspapers, and gentlemen must be familiar with it."); *id.* at 696 (statement of Rep. William T. Barry) (referring to Madison's "perspicuous and luminous argument that has been so justly celebrated as defining and marking out the proper limits of power assigned to the general government"). St. George Tucker planned to add a note to his revised edition of *Blackstone's Commentaries* acknowledging the Supreme Court's decision upholding the Second Bank of the United States

exceeded the delegated powers of Congress.[4] Although his colleagues disagreed about whether chartering a bank was "necessary and proper," there was no disagreement about Madison's reading of the Ninth and Tenth Amendments. In fact, Madison's speech may have helped achieve a far more important victory than prevailing on the matter of a national bank. When Madison spoke, the Bill of Rights had not yet been ratified and needed the approval of one more state in order to meet the amendment requirements of Article V. Madison's home state of Virginia, however, remained undecided. Concerns had been raised about the meaning of one particular provision, the Ninth Amendment. As a result, the issue of ratification had been placed on indefinite hold. It was not until after Virginia congressman James Madison delivered his bank speech describing the meaning and effect of the Ninth Amendment that the logjam broke and Virginia finally ratified the ten amendments that we call the Bill of Rights.

We will probably never know the precise role that Madison's speech played in Virginia's decision to ratify the Bill of Rights. The politics of Virginia ratification were complicated, with Anti-Federalists withholding their votes in the hope of a second national convention and moderates torn between the need to establish a stronger national government and concerns about overweening federal power. Nevertheless, the debates in Virginia regarding the proposed Ninth Amendment, and Madison's explanation of the amendment,

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in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), but directing readers to Madison's speech. According to his handwritten notes, Tucker planned to add the following addendum: "See also, the late President Madison's Speech in Congress in February 1791 against the Bill for establishing a Bank, published in the Richmond Enquirer, vol: 6: no:73. January 4, 1810." *See* St. George Tucker, Notes for a Revised Version of 1 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, Appendix, Note D ("View of the Constitution of the United States"), at 140, 287 (St. George Tucker ed., Philadelphia, William Young Birch & Abraham Small 1803). The annotated pages of Tucker's Blackstone which were to be the basis for his revised edition are located in the Tucker-Coleman Papers, Special Collections Research Center, Swem Library, College of William and Mary.

4. Although years later Madison signed the bill for the Second Bank of the United States, he insisted that he did so on the basis of precedent and not a change in his view of congressional power. *See* Letter from James Madison to Charles Jared Ingersoll (June 25, 1831), *in* The Mind of the Founder: Sources of the Political Thoughts of James Madison 393 (Marvin Meyers ed., rev. ed. 1981). Madison specifically rejected the reasoning of John Marshall's opinion upholding the constitutionality of the bank in *McCulloch v. Maryland*. *See* James Madison, Detached Memoranda, *in* James Madison: Writings, *supra* note 2, at 745, 756.

provide some of the most important evidence of the original meaning of the Ninth available in the historical record.

The Redrafting of Madison's Original Bill of Rights

Originally, Madison proposed integrating his proposed amendments into various parts of the Constitution. Four of these proposals are especially relevant to our discussion of the Ninth Amendment. To begin with, Madison proposed adding the following declaration to the preamble of the Constitution:

> 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.[5]

Madison also proposed adding a list of rights to Article I, Section 9 of the Constitution, a number of which became aspects of the first eight amendments, including freedom of speech, the right to bear arms, and freedom from unreasonable searches and seizures. At the end of this list, Madison suggested adding his version of what would become the Ninth Amendment:

> The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be construed so as to diminish the just importance of other rights retained by the people; or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.[6]

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5. James Madison, Resolutions (June 8, 1789), *in* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 11, 11–12 (Helen E. Veit et al. eds., 1991).

6. *Id.* at 13.

Finally, Madison suggested adding "immediately after article 6th," the end of the substantive clauses of the Constitution, the following general interpretive rules:

> The powers delegated by this constitution, and appropriated to the departments to which they are respectively distributed: so that the legislative department shall never exercise the powers vested in the executive or judicial; nor the executive exercise the powers vested in the legislative or judicial; nor the judicial exercise the powers vested in the legislative or executive departments.
>
> The powers not delegated by this constitution, nor prohibited by it to the states, are reserved to the states respectively.[7]

On July 21, 1789, the House of Representatives referred Madison's proposed Bill of Rights to a select committee made up of one member from each state, with Madison representing Virginia.[8] Although their proceedings were not recorded, we know that the committee considered different versions of the Ninth Amendment—versions that themselves illuminate the origin and purpose of the amendment.

Roger Sherman's Draft Bill of Rights

A member of the committee in charge of rewriting Madison's proposed amendments, Roger Sherman of Connecticut originally opposed the adoption of a bill of rights.[9] When it became clear that amendments would go forward despite his objections, Sherman suggested that they be added at the end of the document, rather than incorporated into Article I, Section 9, as Madison proposed.[10] Sherman apparently went so far as to draft his version

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7. *Id*. at 14.

8. The members were James Madison (Virginia), John M. Vining (Delaware), Abraham Baldwin (Georgia), Roger Sherman (Connecticut), Aedanus Burke (South Carolina), Nicholas Gilman (New Hampshire), George Clymer (Pennsylvania), Egbert Benson (New York), Benjamin Goodhue (Massachusetts), Elias Boudinot (New Jersey), and George Gale (Maryland).

9. Leonard W. Levy, Origins of the Bill of Rights 145 (1999).

10. Letter from Roger Sherman to Henry Gibbs (Aug. 4, 1789), *in* Creating the Bill of Rights, *supra* note 5, at 271; *see also* Levy, *supra* note 9, at 145–46 (relating that Sherman

of how such a bill might look.[11] Sherman's draft bill is important for a couple of reasons. First, his proposal to create a stand-alone bill of rights ultimately was accepted. Second, even though his particular version was not adopted, Ninth Amendment scholars have argued that Sherman's draft contains important evidence regarding the framers' understanding of the Ninth Amendment. Here are the relevant portions of Sherman's draft:

> 1. The powers of government being derived from the people, ought to be exercised for their benefit, and they have an inherent and unalienable right, to change or amend their political constitution, when ever they judge such change will advance their interest and happiness.
>
> 2. The people have certain natural rights which are retained by them when they enter into society, Such are the rights of conscience in matters of religion; of acquiring property, and of pursuing happiness and safety; Of speaking and writing and publishing their sentiments with decency and freedom; of peaceably assembling to consult their common good, and of applying to Government by petition or remonstrance for redress of grievances. Of these rights therefore they shall not be deprived by their government of the United States.
>
> . . . .
>
> 11. The legislative, executive and judiciary powers vested by the Constitution in the respective branches of government of the united States, shall be exercised according to the distribution therein made, so that neither of said branches shall assume or exercise any of the powers peculiar to either of the other two branches.
>
> And the powers not delegated to the government of the united States by the Constitution, nor prohibited by it to the particular states, are retained by the states respectively. Nor shall any [limits on[12]] the exercise of power

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"opposed interspersing [the amendments] within the main body of the Constitution because that would leave the mistaken impression that the Framers had signed a document that included provisions not of their composition").

11. There is some question regarding whether this draft reflects the views of Sherman himself or stands only as the report of a congressional committee of which Sherman was secretary. *See* Christopher Collier, *The Common Law and Individual Rights in Connecticut Before the Federal Bill of Rights*, 76 Conn. B.J. 1, 63 (2002). Any additional evidence indicating that it was the committee that drafted this version of the Bill of Rights would only further support the conclusions that I draw in this book regarding the likely federalist understanding of the Ninth Amendment.

12. Sherman's draft "eleventh" provision contained gaps that scholars fill in different ways.

> by the government of the united States the particular instances here in enumerated by way of caution be construed to imply the contrary.[13]

Sherman edited Madison's proposed preamble and placed parts of it (acquiring property and pursuing happiness) into a second provision that lists retained natural rights, including what we know as First Amendment rights (freedom of religion, speech, the press, assembly, and petition). The final two paragraphs, presented as a single amendment, address the separation of governmental powers. The first paragraph provides for horizontal separation of powers across the three branches of the national government. The second paragraph provides for vertical separation of powers between the national and state governments. You will probably recognize this second paragraph as a *combination* of Madison's proposed drafts of the Ninth and Tenth Amendments.[14] The enumerated-powers declaration repeats Madison's draft Tenth Amendment almost verbatim. The closing sentence declares a rule of construction that embodies the same principle as Madison's original version of the Ninth, though in slightly different language.

Sherman's language is inelegant (and to a certain extent garbled), but the effort is fairly straightforward. Like the proposals emanating from the state conventions and Madison's two proposed amendments, Sherman's proposal presents a dual strategy of limiting federal power: first, congress possesses only delegated powers; second, the addition of a list of specific limitations on those powers (the addition of the Bill of Rights) shall not be read to imply otherwise unlimited federal power.

I have reproduced what I believe to be a neutral draft. *See* Roger Sherman's Proposed Committee Report, 21-28 July, 1789, *in* CREATING THE BILL OF RIGHTS, *supra* note 5, at 266, 268. The various ways scholars have filled the gaps, however, have no effect on the above discussion regarding the significance of Sherman's proposal.

13. *Id.* at 267-68. Sherman's draft can be found in the Madison Papers in the Library of Congress. *See id.* at 268.

14. In this way, Sherman's draft echoes the proposal of South Carolina, which also combined both the rule of construction and the principle of enumerated powers in a single phrase: "that no Section or paragraph of the said Constitution *warrants a construction* that the states do not retain every power not expressly relinquished by them and vested in the General Government of the Union." *See* THE COMPLETE BILL OF RIGHTS 675 (Neil H. Cogan ed., 1997) (emphasis added). The editor of *The Complete Bill of Rights* erroneously referred to this provision as involving only the Tenth Amendment. Other scholars have recognized Sherman's eleventh as a combination of the Ninth and Tenth Amendments. *See* Thomas B. McAffee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1303 n.333 (1990).

The Significance of Sherman's Draft

Sherman's draft bill of rights was rejected. Indeed, it was unknown until not too long ago, when it was discovered among the papers of James Madison in the Library of Congress.[15] The draft would remain no more than a historical curiosity were it not for the claims of some Ninth Amendment scholars that Sherman's draft represents a clear example of how the Ninth was specifically intended to protect retained individual natural rights. It is not that that these scholars are wrong about the founders' commitment to natural rights. The problem has been an erroneous reading of Sherman's draft that obscures how his proposal illustrates an assumed link between the Ninth and Tenth Amendments.

When Sherman's draft bill of rights first came to light, Ninth Amendment scholars were quick to claim that it supported a libertarian individual-rights view of the Ninth Amendment. As evidence for this claim, scholars like Georgetown Law School professor Randy Barnett pointed to Sherman's statement regarding "certain natural rights which are retained" by the people.[16] This provision, claimed Professor Barnett, "reflects the sentiment that came to be expressed in the Ninth."[17] The final paragraph of Sherman's proposed bill, Barnett claimed, "closely resembles what came to be the *Tenth*."[18] Other scholars have repeated Barnett's attempt to link the Ninth Amendment with Sherman's reference to retained natural rights.[19]

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15. *See* Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty 55 (2004).

16. *Id.*

17. Randy E. Barnett, *Introduction: James Madison's Ninth Amendment* [hereinafter Barnett, *James Madison's Ninth Amendment*], *in* 1 The Rights Retained by the People: The History and Meaning of the Ninth Amendment 1,7 n.16 (Randy E. Barnett ed., 1989); *see also* Barnett, *supra* note 15, at 54–55. Most recently, Barnett appears to have backed away from his earlier attempt to link Sherman's reference to natural rights directly with the Ninth Amendment. *See* Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 Tex. L. Rev. 1, 40 (2006) [hereinafter Barnett, *The Ninth Amendment*] ("To be clear, I do not claim that Sherman's proposed second amendment is a precursor of the Ninth Amendment. Instead, it shows rather dramatically how those in Congress during the drafting process thought of natural rights."). To date, however, Barnett has never specifically addressed Sherman's *actual* draft of the Ninth Amendment and instead insists that Sherman's proposed second amendment calls into question a "states' rights" reading of the Ninth. *Id.*

18. Barnett, *James Madison's Ninth Amendment*, *supra* note 17, at 7 n.16.

19. *See* 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, 516 (2007).

The problem, of course, is that Sherman's reference to retained natural rights appeared not in his draft of the Ninth Amendment, but as part of Sherman's version of the *First* Amendment. As reproduced above, that clause combines aspects of Madison's proposed preamble with a number of rights that were ultimately listed in the First Amendment. Nor was Sherman's characterization of these rights as "retained natural rights" unique—Madison's own notes for his speech introducing these proposed rights to the House of Representatives described them as "natural rights retained [such] as speech."[20]

Ninth Amendment scholars like Randy Barnett have been right to emphasize the founding-era embrace of individual natural rights. It is misleading, however, to use Sherman's draft of the First Amendment as evidence for the original meaning of the Ninth Amendment without discussing Sherman's *actual* draft of the Ninth. Although Professor Barnett characterizes Sherman's final paragraph as a version of the Tenth Amendment, in fact it goes much further and clearly combines Madison's drafts of the Ninth *and* Tenth Amendments. This makes the paragraph significant for a number of reasons, not the least of which is that it suggests that Sherman viewed the two amendments as containing closely related principles. This contradicts those scholars who insist that the drafting history of the Ninth indicates that it was unrelated to the concerns of the state conventions regarding local autonomy and limited federal power.

In his version of the Ninth and Tenth Amendments, Sherman not only combined the two provisions, but he also trimmed away Madison's reference to "other" rights retained by the people. It is unlikely that Sherman believed that he was altering the fundamental meaning of the clause, since his effort was merely to show how the proposed amendments could be listed at the end of the Constitution. Substantive alterations in the proposals would have only distracted the committee's attention from Sherman's primary goal. Presumably, then, Sherman saw nothing controversial about combining the principles of Madison's draft Ninth and Tenth Amendments (as some state conventions had suggested doing). Sherman also apparently believed that the language he preserved from Madison's original draft best represented the principles underlying that particular amendment—preventing any implied

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20. James Madison, Notes for Speech in Congress Proposing Constitutional Amendments (June 8, 1789), *in* 1 THE RIGHTS RETAINED BY THE PEOPLE, *supra* note 17, at 64.

enlargement of federal power because of the addition of an enumerated list of rights.

Because I know the issue will be of some importance to a number of readers, I want to emphasize that Sherman's draft of the Ninth Amendment does *not* suggest that he rejected the idea of retained natural rights. It is clear he did not. Our effort, however, involves recovering the original understanding of the Ninth Amendment. Most Ninth Amendment scholars have presumed that the Ninth protects individual natural rights and so tend to view any reference by the framers to "retained natural rights" as an example of principles that would ultimately inform the Ninth Amendment. A second related assumption often follows closely behind the first: any provision that limits federal power to interfere with local matters in the states must relate to the Tenth Amendment and not the Ninth. Both of these assumptions are called into question by Sherman's draft bill of rights. Here is an example of at least one member of the select committee who viewed the Ninth as representing a principle independent of the general concern about preserving individual natural rights (the subject of Sherman's second proposed amendment) and intimately related to the principle underlying the Tenth Amendment. It also stands as an example of how the framers could simultaneously believe in protecting retained natural rights *and* prefer an overtly federalist version of the Ninth Amendment.

Finally, Sherman's draft of the Ninth and Tenth Amendment undermines a common argument that Madison's original placement of the clauses in different sections of the Constitution suggests that he believed they represented very different principles. Daniel Farber, for example, has made much of the fact that Madison originally envisioned placing the Ninth at the end of a list of individual rights and placing the Tenth alongside the separation-of-powers principle at the end of the Constitution. To Farber this indicates that the Ninth was about preserving individual rights and had nothing to do with the principles underlying the Tenth Amendment. This argument fails for a number of reasons, not the least of which is that it is expressly refuted by Madison himself—on several occasions. But Farber's argument also fundamentally misconceives the nature of retained rights at the time of the founding. Because the Bill of Rights bound only the federal government, by definition all the rights retained under the Bill of Rights were left to local (state) control absent an express restriction in the Constitution. Thus, although the First Amendment prohibits federal regulation of religion, the states remained free to regulate (and establish) religion however they saw fit under their own state constitutions. It does not matter how far apart one

places the retained rights of the Ninth and the reserved powers of the Tenth; at the time of the founding, they both had the operative effect of preserving the autonomy of the people in the states. States' rights advocates in the First Congress understood this and accordingly supported both proposed amendments on these grounds.[21] The fact that Sherman placed the amendments in a single paragraph simply illustrates the inevitably close relationship of these twin limits on federal power. Ultimately, of course, the select committee placed the amendments side-by-side as the closing declarations of the Bill of Rights.

Far from supporting the standard libertarian reading of the Ninth Amendment, Sherman's draft bill of rights suggests a vision of the Ninth quite different than that assumed by most Ninth Amendment scholars. On the other hand, although Sherman's idea about adding the rights as a separate bill was accepted, his particular drafting of the amendments was not. In fact, his treatment of Madison's original version of the Ninth was completely reversed: instead of jettisoning the language regarding "other" retained rights, the committee deleted Madison's original reference to enlarged construction of federal power and kept the language regarding retained rights. The following became the final version of the Ninth Amendment:

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

There are no records of the committee's discussions or reasoning, so we do not know why the committee decided to delete Madison's original language

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21. As South Carolina representative William L. Smith wrote to Edward John Rutledge,

> I shall support the Amendmts. proposed to the Constitution that any exception to the powers of Congress shall not be so construed as to give it [Congress] any powers not expressly given, & the enumeration of certain rights shall not be so construed as to deny others retained by the people—& the powers not delegated by this Constn. nor prohibited by it to the States, are reserved to the States respectively; if these amendmts. are adopted, they will go a great way in preventing Congress from interfering with our negroes after 20 years or prohibiting the importation of them. Otherwise, they may even within the 20 years by a strained construction of some power embarass us very much.

Letter from William L. Smith to Edward Rutledge (Aug. 10, 1789), *in* CREATING THE BILL OF RIGHTS *supra* note 5, at 273, 273. Smith wrote this letter in August 1789, after the select committee had edited Madison's original draft. It is clear from his letter, however, that his views were based on the language of Madison's original proposals. As a member of the First Congress, Smith would have been well aware of Madison's proposed (separated) placement of the two provisions.

regarding the implied enlargement of federal power. Although some scholars claim that the "powers" language was moved to the Tenth Amendment, this is not the case. The committee left Madison's proposed Tenth Amendment unchanged. All we know is that the committee chose a pared-down version of Madison's Ninth Amendment that contained language unlike any suggested by the state conventions. Although most states nevertheless quickly ratified the Ninth Amendment, the altered language of the final version raised concerns in Madison's home state of Virginia.

The Virginia Debates

History has not left us a great deal of information about Hardin Burnley.[22] A Virginia politician and member of the Virginia House of Delegates, Burnley's greatest claim to fame was his service as acting governor of Virginia—for three days.[23] In the late 1780s, however, he was James Madison's eyes and ears in the Virginia House of Delegates, and his reports on the Virginia debates have been preserved along with the papers of James Madison. His views were considered important enough for Madison to send them along verbatim to George Washington, whose eyes that fall were also upon the Virginia Assembly.

It fell to Burnley to report to James Madison that the effort to ratify the Bill of Rights had ground to a halt in the Virginia House. The man they had counted on to shepherd the Bill of Rights through the Virginia Assembly had himself thrown a wrench into the works by objecting to two of the twelve proposed amendments. Burnley was not altogether sure about the exact nature of Governor Edmund Randolph's complaints, but they were clearly focused on the "eleventh" proposed amendment—what we know as the Ninth Amendment. Randolph's objections were all the more surprising given that months earlier he had seen and approved of Madison's original draft of the Bill of Rights. Although stylistic changes had been made to the original draft, as far as Madison was concerned, nothing of substance had changed.

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22. His first name occasionally spelled "Harden," Burnley was a member of the Virginia Council of State (the governor's cabinet), lieutenant governor, and, briefly, governor of Virginia. *See* ENQUIRER (Va.), Mar. 17, 1809), 1809, at page 3 (obituary), available at Archive of Americana, America's Historical Newspapers (Readex, Newsbank, Inc.).

23. *See* Virginia.gov, Facts and History: Governors, http://www.virginia.gov/cmsportal2/facts_and_history_4096/facts_4104/governors.html (last visited Nov. 26, 2008).

Why raise objections now, at such a critical point in the process to quiet remnant opposition to the new Constitution?[24]

Burnley may not have been sure about the exact nature of Randolph's concerns, but he understood enough to know that Randolph preferred Madison's original version of the Ninth Amendment—which more closely tracked Virginia's seventeenth proposed amendment. Randolph had seen that earlier version, and, when he compared it with the final version of the Ninth submitted with the rest of the Bill of Rights, Randolph saw the opportunity slipping away for the addition of an important and express limitation on federal power. Although Randolph had no real complaints about the other proposed amendments, his concerns about the Ninth were enough to persuade him to temporarily delay the assembly's vote on the Bill of Rights. Anti-Federalists in the Virginia Assembly who wished to derail the addition of a Bill of Rights in order to keep up pressure for a second convention were delighted. Echoing Randolph's concerns, they quickly piled on a list of their own complaints, thereby delaying ratification for another two years. Although historians have long known about Burnley's letters to Madison, and thus Randolph's reported concerns, no previous work on the Ninth Amendment has investigated the actual debate in the Virginia Assembly, or even Randolph's particular concerns. What follows, then, is part of the newly recovered history of the Ninth Amendment.

Putting this story in context requires backing up a bit. Randolph's concerns had to do with changes made in the wording of the amendment as it made its way with the rest of the Bill of Rights from original proposal to submitted text. Much of what occurred to the Ninth Amendment between Madison's original draft and the ultimate version submitted to the states is somewhat shrouded in mystery because the proceedings of the select committee, which redrafted Madison's original proposals, were not recorded. Just untangling the available evidence has proved difficult for Ninth Amendment scholars. For example, scholars have not always been clear—or correct—about which of the provisions considered by the committee were actually early drafts of the Ninth Amendment. Before considering Virginia's reaction

24. See Akhil Reed Amar, America's Constitution 318 (2005) (discussing the role of the Bill of Rights in "cementing" loyalty to the new Constitution and heading off calls for a second convention); *see also* Kurt T. Lash, *Rejecting Conventional Wisdom: Federalist Ambivalence in the Framing and Implementation of Article V*, 38 Am. J. Legal Hist. 197 (1994).

to the final draft of the Ninth, we first need to clear up some misinformation about the work of the committee that produced that draft.

The Concerns of Edmund Randolph

As a member of the Philadelphia Convention, Edmund Randolph originally refused to sign the proposed Constitution. Randolph did not oppose the idea of a national government, but he believed that unduly broad interpretations of "ambiguous" provisions like the necessary and proper clause would "gather to a dangerous length" and ultimately "injure the states." "This is my apprehension," Randolph declared to the Virginia ratifying convention, "and I disdain to disown it."[25]

Despite his doubts, Randolph nevertheless subsequently supported the Constitution, trusting that federal power could be constrained through the adoption of appropriate amendments. As James Madison wrote to Thomas Jefferson in December 1787, men like Edmund Randolph "do not object to the substance of the Govern. but contend for a few additional guards in favor of the rights of the states and of the people."[26] Madison helped secure Virginia's ratification by assuring doubters like Randolph that he and the rest of the new Congress would support a bill of rights.[27] Both Madison and Randolph in fact helped draft the Virginia convention's proposed amendments, including a proposal that Madison substantially copied for his original draft of the Ninth Amendment.

The proposed amendments that Madison submitted to the House were published in local newspapers, and he sent a copy directly to Randolph.[28]

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25. 10 The Documentary History of the Ratification of the Constitution: Ratification of the Constitution by the States (Virginia, No. 3) 1353 (John P. Kaminski & Gaspare J. Saladino eds., 1993) (remarks of Edmund Randolph).

26. Letter from James Madison to Thomas Jefferson (Dec. 9, 1787), *in* 10 The Papers of James Madison, Congressional Series 310, 312 (Robert A. Rutland & Charles F. Hobson, eds., 1977).

27. Paul Finkleman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 Sup. Ct. Rev. 301, 325; *see also* Letter from James Madison to Edmund Randolph (Apr. 10, 1788), *in* 11 The Papers of James Madison 18-19 (Robert A. Rutland & Charles F. Hobson, eds. 1978).

28. *See* Amendments to the New Constitution, Proposed by the Hon. Mr. Madison, Gazette U.S. (New York), June 13, 1789, at 71, available at Archive of Americana, America's Historical Newspapers, 1690-1876 (Readex, NewsBank, Inc.); Congressional Intelligence: House of Representatives, Daily Advertiser (New York), June 12, 1789, at 2, available at

Neither Randolph nor anyone else in Virginia voiced any complaint about Madison's proposed Bill of Rights, including his original draft of the Ninth and Tenth Amendments. Instead, upon receiving Madison's proposals, Randolph wrote Madison that "[t]he amendments proposed by you, are much approved by the *strong* foederalists here and at the metropolis."[29]

Toward the end of the summer of 1789, Congress submitted to the states the final form of twelve proposed amendments. Although he had approved of Madison's original draft, the altered language of the Ninth apparently caught Randolph completely by surprise. As reported by Virginia House member Hardin Burnley:

> On the two last [the Ninth and Tenth Amendments] a debate of some length took place, which ended in rejection. Mr. E. Randolph who advocated all the other[] [amendments] stood in this contest in the front of opposition. His principal objection was pointed against the word *retained* in the eleventh proposed amendment, and his argument if I understood it was applied in this manner, that as the rights declared in the first ten of the proposed amendments were not all that a free people would require the exercise of; and that as there was no criterion by which it could be determined whither any other particular right was retained or not, it would be more safe, & more consistent with the spirit of the 1st & 17th amendments proposed by Virginia, that this reservation against constructive power, should operate rather as a provision against extending the powers of Congress by their own authority, than as a protection to rights reducable to no definitive certainty.[30]

According to Burnley, Randolph insisted on a "reservation against constructive power" (as opposed to a provision guarding retained rights).

Archive of Americana, America's Historical Newspapers, 1690-1876 (Readex, NewsBank, Inc.). Letter from James Madison to Edmund Randolph (June 15, 1789), *in* 12 THE PAPERS OF JAMES MADISON, CONGRESSIONAL SERIES 219 (Charles F. Hobson & Robert A. Rutland, eds. 1979).

29. Letter from Edmund Randolph to James Madison (June 30, 1789), *in* 12 THE PAPERS OF JAMES MADISON, *supra* note 28, at 273 (emphasis in original). Randolph wrote to Madison again on July 19, 1789, and again, said nothing about the Bill of Rights in general or the Ninth Amendment in particular. *See* Letter from Edmund Randolph to James Madison (July 19, 1789), *in* 12 THE PAPERS OF JAMES MADISON, *supra* note 28, at 298.

30. *See* Letter from Hardin Burnley to James Madison (Nov. 28, 1789), *in* 12 THE PAPERS OF JAMES MADISON, *supra* note 28, at 455, 456.

Although the original draft of the Ninth Amendment expressly contained such language, the final version did not—an omission that so concerned Randolph that he opposed the ratification of both the Ninth and Tenth Amendments. In his letters to George Washington, Edmund Randolph elaborated on his objections. Although he did not think that the Tenth Amendment was particularly troublesome, it would be an inadequate limitation on federal power.[31] What was needed was a second provision expressly limiting the implied expansion of federal power. As Randolph complained to Washington, the final version of the Ninth "is exceptionable to me," for it opened the door to complaints that Congress was dealing in bad faith and had attempted "to administer an opiate, by an alteration, which is merely plausible."[32] Instead of this merely "plausible" limitation on federal power, Randolph preferred a provision "more safe, & more consistent with the spirit of [Virginia's] 1st and 17th amendments." Accordingly, Randolph advised rejecting both the proposed the Ninth and Tenth in order to maintain pressure on Congress to produce a more "federalist" amendment. As he wrote to Washington:

> I confess I see no propriety in adopting [the Ninth and Tenth Amendments]. But I trust that the refusal to ratify will open the road to such an expression of foederalism, as will efface the violence of the last year, and the intemperance of the enclosed letter, printed by the enemies to the constitution."[33]

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31. According to Randolph:

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

Letter from Edmund Randolph to George Washington (Dec. 6, 1789), *in* 5 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786-1870 at 222, 223 (Wash., D.C., Dep't of State 1905) [hereinafter DOCUMENTARY HISTORY OF THE CONSTITUTION]. Notice that Randolph has no objection to the addition of the words "or to the people" in the final draft of the Tenth Amendment. It was only the hyper (and strategically) sensitive Anti-Federalists who saw this addition as posing any danger to the states.

32. *Id.* at 223.

33. Letter from Edmund Randolph to George Washington (Nov. 26, 1789), *in* 5 DOCUMENTARY HISTORY OF THE CONSTITUTION, *supra* note 31, at 216, 216. The "enclosed letter" to which Randolph referred was the report of Virginia's Anti-Federalist representatives in Congress who insisted that the proposed Bill of Rights was utterly inadequate. *See id.* at 216.

To Randolph, the Ninth was meant to answer concerns about the implied enlargement of federal power to the injury of the states. This was the purpose of Virginia's first and seventeenth proposed amendments, and this principle had been expressly stated in Madison's original drafts of the Ninth and Tenth Amendments. Although the final draft of the Tenth was fine, an additional rule limiting the construction of enumerated federal power was required. Because the final draft of the Ninth only *plausibly* accomplished this goal, it would have been better to use the clearer language of Virginia's original proposals. Randolph thus was willing to temporarily hold up ratification of the Bill in the hope of obtaining a clearer, more "foederal" draft of the Ninth Amendment.

The Letters of Hardin Burnley and James Madison

When Madison heard about Randolph's actions in the Virginia House, he was mystified. Although the final language of the Ninth had been altered, it continued to advance the same principles as Virginia's seventeenth proposal. As Madison immediately reported to George Washington:

> The difficulty started [against] the amendments is really unlucky, and the more to be regretted as it springs from a friend to the Constitution. It is a still greater cause of regret, if the distinction be, as it appears to me, altogether fanciful. If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing whether the latter be secured by declaring that they shall not be abridged, or that the former shall not be extended.[34]

Notice Madison's response to Randolph's concerns about the Ninth Amendment. Randolph thought that the Ninth was insufficiently "federalist" because it used the language of *rights* instead of the language of limited *power* (as had Virginia's seventeenth). Madison, however, insisted that Randolph's distinction between rights and powers was "fanciful." If the goal is to establish a line between delegated power and retained rights, then limiting power

34. Letter from James Madison to George Washington (Dec. 5, 1789), *in* 5 Documentary History of the Constitution, *supra* note 31, at 221, 221–22.

or retaining rights amount to the same thing.[35] Accordingly, Randolph was wrong to complain about the altered language of the Ninth—the final draft remained just as "federalist" as the original.

Madison's letter clears up a number of issues regarding the final version of the Ninth Amendment. Madison was a member of the committee that edited the original draft of the Ninth. According to his letter, removing the language prohibiting the implied enlargement of federal power did not alter the substantive meaning and effect of Madison's original draft. The final version of the Ninth Amendment remained a response to state conventions' concerns about unduly broad construction of federal power. Although the redundant language of "enlarged power" had been removed, the remaining language established the principle of limited federal power as a matter of the people's retained *rights*. Randolph therefore was wrong to believe that the final version departed from the concerns that animated Virginia's seventeenth proposed amendment—a proposal that Madison also helped draft. If anything, the final draft established the point in more emphatic (and judicially enforceable) language.

The letters of Burnley and Madison directly contradict a family of Ninth Amendment scholarship that claims that the "powers" language of Madison's

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35. Some scholars point out that we no longer view rights and powers as two sides of the same coin. *See, e.g.*, Randy Barnett, *James Madison's Ninth Amendment*, *supra* note 17, at 1, 3. However, even if this approach has been abandoned by modern courts, it appears that the founders broadly shared the view that rights and powers were directly related concepts. For example, James Wilson declared in the Pennsylvania Convention, "In all societies, there are many powers and rights which cannot be particularly enumerated. A bill of rights annexed to a constitution is an enumeration of the powers reserved. If we attempt an enumeration, everything that is not enumerated is presumed to be given." Pennsylvania Convention (Oct. 28, 1787), *in* THE COMPLETE BILL OF RIGHTS, *supra* note 14, at 647, 648 (remarks of James Wilson); *see also* Virginia Convention (June 24, 1788), *in* THE COMPLETE BILL OF RIGHTS, *supra* note 14, at 655, 656 (remarks of James Madison) ("If an enumeration be made of our rights, will it not be implied that every thing omitted is given to the general government?"). James Iredell made a similar point at the North Carolina Convention:

> But when it is evident that the exercise of any power not given up would be a usurpation, it would be not only useless, but dangerous, to enumerate a number of rights which are not intended to be given up; because it 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.

North Carolina Convention (July 29, 1788), *in* THE COMPLETE BILL OF RIGHTS, *supra* note 14, at 649, 649 (remarks of James Iredell); *see also* CALVIN R. MASSEY, SILENT RIGHTS: THE NINTH AMENDMENT AND THE CONSTITUTION'S UNENUMERATED RIGHTS 67 (1995) ("To many of the Founding generation it seemed axiomatic that rights began where powers ended, and powers began where rights ended.").

original draft of the Ninth was discarded because drafters wished to focus the amendment on individual rights.[36] Because Madison's letter so clearly refutes this line of argument, these scholars have gone to great lengths to either disparage,[37] creatively reconstruct,[38] or simply ignore[39] this evidence in order to preserve their argument that removing the "powers" language altered the substantive meaning of Madison's original draft. All these efforts

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36. *See, e.g.*, DANIEL FARBER, RETAINED BY THE PEOPLE: THE "SILENT" NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON'T KNOW THEY HAVE 42 (2007) ("The deletion of [the powers] language is significant because it disproves one misreading of the Ninth Amendment, which tries to twist it into an effort to restrict federal powers rather than to recognize unenumerated rights. If the idea was to restrict federal power, that language was there as part of Madison's draft. The fact that this specific language was deleted shows that the remaining language had a different purpose."); *id.* at 205 ("We can be confident that the Ninth Amendment, in the form it was actually adopted, was *not* addressed to this concern [limiting the construction of federal power]. Madison's initial version *had* responded to this concern . . . but that language was dropped from the final version of the Amendment.").

37. Some scholars have flatly rejected Madison's explanation of the Ninth as incorrect and insisted that "Madison knew better." *See* Leslie W. Dunbar, *James Madison and the Ninth Amendment*, 42 VA. L. REV. 627, 633–34 (1956). Randy Barnett calls Madison's letter "somewhat confusing." BARNETT, *supra* note 15, at 250. According to John Hart Ely, Madison's views of powers and rights amount to "what we would today regard as a category mistake, a failure to recognize that rights and powers are not simply the absence of one another but that rights can cut across or 'trump' powers." *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 36 (1980). Our effort, of course, is to recover the founding-era understanding of the Ninth Amendment, rather than critique that era's understanding in terms of a modern understanding of powers and rights. To do otherwise is to engage in anachronism.

38. *See* BARNETT, *supra* note 15, at 250 ("In this letter, Madison is once again seen combining in a single sentence two parallel ideas that require disentangling. In this instance he is speaking of two complimentary strategies for accomplishing the single objective of protecting the retained rights of the people: (a) enumerate powers and (b) protect rights. An expressed declaration of 'rights retained . . . that shall not be abridged' has the same *purpose* as an expression that 'powers granted . . . shall not be extended.' The object of both strategies is that 'the rights retained . . . be secure.'").

39. Daniel Farber's recent book on the Ninth Amendment ignores Madison's letter altogether—despite its being one of the few pieces of historical evidence in which the drafter of the Ninth Amendment expressly discussed the meaning of the final draft of the amendment. *See* FARBER, *supra* note 36. Neither has Farber's occasional coauthor Suzanna Sherry addressed the Madison-Burnley correspondence in her work on the Ninth Amendment and unenumerated rights. *See, e.g.*, Suzanna Sherry, *Textualism and Judgment*, 66 GEO. WASH. L. REV. 1148 (1998); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1984). Similarly, Randy Barnett's most recent discussion of the Ninth Amendment refers to the concerns of Randolph and the Anti-Federalist members of the Virginia Assembly, but never mentions Madison's direct response to those concerns in his letter to Washington. *See* Randy Barnett, *Kurt Lash's Majoritarian Difficulty: A Response to* A Textual-Historical Theory of the Ninth Amendment, 60 STAN. L. REV. 937, 951 (2008).

are committed to the idea that the final draft of the Ninth Amendment had nothing to do with the concerns of the state conventions in general or the need to limit the construction of federal power in particular. Ironically, the scholars who press this particular argument unwittingly embrace Randolph's initial concerns about the final draft and ignore Madison's assurances to the contrary. Madison insisted that limited powers and retained rights were two sides of the same coin. The principle underlying the "enlarged powers" language was not discarded or transferred to the Tenth; it was deleted because it was redundant.[40] This meant that, as far as Madison and Burnley were concerned, the final draft of the Ninth continued to express the underlying principle of Virginia's seventeenth proposed amendment.

In an attempt to get around the seemingly clear meaning of the letter, Professor Barnett argues that Madison's letter to Washington exhibits "Madison's typically complex phraseology,"[41] and actually refers to two different means of accomplishing the single end of preserving individual natural rights. This reading allows Professor Barnett to limit the focus of the Ninth to individual rights and distance the clause from the concerns of the state conventions. Madison's letter, however, is neither complex nor concerned with preserving individual natural rights. Professor Barnett misses this point by failing to consider the subject of Madison's letter—the concerns of Edmund Randolph. Randolph sought to limit the power of the federal government to intrude upon the remnant sovereignty of the states. Madison believed that Randolph's concerns were "fanciful" because he read the final language of the Ninth as answering Randolph's federalism-based concerns. Hardin Burnley agreed with Madison about the Ninth's protection of states' rights and said so in a letter (which Madison passed on to Washington) that makes this point as clear as is humanly possible:

> But others among whom I am one see not the force of [Randolph's] distinction, for by preventing an extension of power in that body from which danger is apprehended safety will be insured if its powers are not too

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40. As Madison makes clear in his speech opposing the Bank of the United States, limiting the power of the federal government to intrude upon matters left to the people of the states was in fact a retained right of the people. *See* James Madison, Speech on the Bank Bill (Feb. 2, 1791), *in* 13 PAPERS OF JAMES MADISON, *supra* note 1, at 372, 381 (arguing that passing the bank bill would establish a precedent "leveling all the barriers which limit the powers of the general government, and protect those of the state governments").

41. Barnett, *The Ninth Amendment*, *supra* note 17, at 54.

> extensive already, & so by protecting *the rights of the people & of the States*, an improper extension of power will be prevented & safety made equally certain.[42]

Here Burnley, a ratifier in the Virginia Assembly, expressly described the Ninth Amendment as protecting the rights of the "the people *and* of the states." Indeed, if Madison and Burnley were not talking about how the Ninth guards state autonomy, then their entire exchange becomes nonsensical (it would mean, for one thing, that Randolph was right to be concerned).[43] The central point of their letters was that Randolph had wrongly criticized the Ninth as inadequately "federalist." Preserving the retained rights of the people would necessarily constrain federal power and adequately protect the retained rights of the people and the states. Keeping the letters' subject in view has the happy effect of rendering Madison's prose quite clear: preventing an extension of power and retaining rights amount to the same thing.

The Virginia Senate Report

Given that they were in constant touch throughout this period,[44] we can assume that Madison's assurances regarding the Ninth Amendment were

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42. Letter from Hardin Burnley to James Madison (Nov. 28, 1789), *supra* note 30, at 219.

43. Randy Barnett dismisses Burnley's comment about states' rights because "Burnley himself clearly distinguishes between 'the people' and 'the states' and the actual words of the Ninth Amendment refer only to the former." Barnett, *The Ninth Amendment*, *supra* note 17, at 55. This, of course, begs the very question under discussion: whether the ratifiers understood the retained rights of the Ninth to include states' rights. Burnley expressly thought that they did, and claimed that others did as well.

44. In 12 The Papers of James Madison, *supra* note 28, *see* Letter from Edmund Randolph to James Madison (May 19, 1789), at 167; Letter from James Madison to Edmund Randolph (May 31, 1789), at 189; Letter from James Madison to Edmund Randolph (June 15, 1789), at 219; Letter from James Madison to Edmund Randolph (June 17, 1789), at 229; Letter from James Madison to Edmund Randolph (June 24, 1789), at 258; Letter from Edmund Randolph to James Madison (June 30, 1789), at 273; Letter from James Madison to Edmund Randolph (July 15, 1789), at 291; Letter from Edmund Randolph to James Madison (July 19, 1789) at 298; From Edmund Randolph to James Madison (July 23, 1789), at 306; Letter from Edmund Randolph to James Madison (Aug. 18, 1789), at 345; Letter from James Madison to Edmund Randolph (Aug. 21, 1789), at 348; Letter from Edmund Randolph to James Madison (Sept. 13, 1789), at 401; Letter from Edmund Randolph to James Madison (Sept. 26, 1789), at 421; Letter from Edmund Randolph to James Madison (Oct. 10, 1789), at 434. In 13 The Papers of James Madison, *supra* note 1, *see* Letter from Edmund Randolph to James Madison (Mar. 1790), at 79.

promptly communicated to Randolph.[45] In any event, we know that Randolph quickly abandoned his opposition to ratifying the Ninth and Tenth Amendments.[46] Unfortunately, the damage was done. Anti-Federalists managed to exploit the delay and put off a final vote on ratifying the Bill of Rights.[47] Although the House ultimately voted in support of the amendments, ratification ran into trouble in the Anti-Federalist–dominated Senate, where Randolph's original concerns were "revived."[48] The Senate majority resisted ratification and produced a report echoing Randolph's concerns and expanding them to include criticisms of the First, Sixth, Ninth, and Tenth Amendments.[49]

The complaints of the Senate majority have to be taken with more than a grain of salt. The Anti-Federalists wanted to derail ratification of the Bill of Rights in order to maintain the pressure for a second constitutional convention.[50] They had every reason to exaggerate their concerns about the proposed amendments.[51] Nevertheless, even the exaggerated claims and concerns of

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45. *See* Letter from James Madison to Edmund Randolph (Oct. 7, 1787), *in* 10 THE PAPERS OF JAMES MADISON, *supra* note 26, at 185; Letter from James Madison to Edmund Randolph (Oct. 21, 1787), *in* 10 THE PAPERS OF JAMES MADISON, *supra* note 26, at 199; Letter from James Madison to Edmund Randolph (Nov. 18, 1787), *in* 10 THE PAPERS OF JAMES MADISON, *supra* note 26, at 252.

46. *See* Letter from Edmund Randolph to George Washington (Dec. 15, 1789), *in* 5 DOCUMENTARY HISTORY OF THE CONSTITUTION, *supra* note 31, at 225.

47. *See* Letter from Edward Carrington to James Madison (Dec. 20, 1789), *in* 5 DOCUMENTARY HISTORY OF THE CONSTITUTION, *supra* note 31, at 227.

48. Letter from James Madison to George Washington (Jan. 4, 1790), *in* 5 DOCUMENTARY HISTORY OF THE CONSTITUTION, *supra* note 31, at 230, 231.

49. *See* LEVY, *supra* note 9, at 42 (discussing the Anti-Federalist opposition to the Bill of Rights in the Virginia Senate). I have written elsewhere in detail about the debate in the Virginia legislature. *See* Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 Tex. L. Rev. 331, 371 (2004). Prior to my original article on the Ninth Amendment, this first public debate regarding the meaning of the Ninth Amendment had escaped the notice of Ninth Amendment scholars.

50. *See* STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788–1800, at 135 (1993). For a general discussion on the struggles for and against a second convention, *see* Lash, *supra* note 24.

51. Leonard Levy described the Senate Report as "grossly misrepresenting the First Amendment (then the third)." LEVY, *supra* note 9, at 42. Madison's source in the Virginia Assembly, Hardin Burnley, reported that the Virginia Anti-Federalists "are not dissatisfied with the amendments so far as they have gone, but are apprehensive that the adoption of them at this time will be an obstacle to the chief object of their pursuit, the amendment on the subject of direct taxation." Letter from Hardin Burnley to James Madison (Dec. 5, 1789), *in* 12 THE PAPERS OF JAMES MADISON, *supra* note 28, at 460. Madison himself was not troubled by the Senate report, because he believed that the Senate had gone too far,

the Virginia Senate majority may shed some light on the original meaning of the Ninth Amendment.

In its report, the Virginia Senate objected that the Ninth Amendment had not been "asked for by Virginia or any other State," and that it "appears to us highly exceptionable."[52]

> If the 11th Article [the Ninth Amendment] is meant to guard against the extension of the powers of Congress by implication, it is greatly defective, and does by no means comprehend the idea expressed in the 17th article of amendments proposed by Virginia; and as it respects personal rights, might be dangerous, because, should the rights of the people be invaded or called in question, they might be required to shew by the constitution what rights they have *retained*; and such as could not from that instrument be proved to be retained by them, they might be denied to possess. Of this there is ground to be apprehensive, when Congress are already seen denying certain rights of the people, heretofore deemed clear and unquestionable.[53]

The Senate report seems to suggest that there are two possible readings of the Ninth. If it was an attempt to address the concerns addressed by Virginia's seventeenth proposal, it was "greatly defective." If, on the other hand, it was

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particularly in regard to the purported objections to the First Amendment (which the report listed as the third). *See* Letter from James Madison to George Washington (Jan. 4, 1790), *supra* note 48, at 231 (expressing his opinion that the Senate's failure to ratify "will have the effect . . . with many of turning their distrust towards their own Legislature," and noting that the "miscarriage" of the third article in particular "will have this effect").

52. Journal of the Senate of the Commonwealth of Virginia 63 (1828) (entry of Dec. 12, 1789).

53. *Id.* at 63–64. The Senate's reported objections to the twelfth were as follows:

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

Id. at 64. This exaggerated concern about the Tenth Amendment does not appear to have been shared by anyone other than those seeking to force a second constitutional convention. *See, e.g.,* Letter from Edmund Randolph to George Washington (Dec. 6, 1789), *in* 5 Documentary History of the Constitution, *supra* note 31, at 222, 223 (Edmund Randolph noting that the Tenth Amendment "accords pretty nearly with what our convention proposed").

an attempt to secure the people's retained rights, then it was ineffective (and might be "dangerous").[54] Regarding the latter, the Senate majority complained that if the amendment was an attempt to secure retained personal rights, it was ineffective because the plaintiff in such a case would be unable to establish the existence of such a right from the text of the Constitution.[55] As previously discussed, even if the Senate were referring *only* to individual natural rights (and there is no reason to think that the Anti-Federalist Senate would be concerned *solely* with retained individual natural rights), then these rights would be retained by the people of the individual states. This concern, in other words, fits within the Senate's general concerns regarding state autonomy.

The Virginia Senate's *first* thought regarding the proposed Ninth Amendment was that it was an attempt to address the same concerns that animated Virginia's seventeenth proposed amendment. The Virginia Senate insisted that if this was the case, the proposed Ninth Amendment was inadequate. The Senate's language here is an exaggerated restatement of Randolph's preference for the language of Virginia's seventeenth.[56] The entire Senate report, in fact, was given to exaggeration. Among other things, the report argued that the proposed free exercise clause "does not prohibit the rights of conscience from being violated or infringed," and the establishment clause allows Congress "to levy taxes, to any amount, for the support of religion or its preachers; and any particular denomination of Christians might be so favored and supported by the General government, as to give it a decided

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54. Randy Barnett reads these alternate complaints and concludes that the Senate report establishes that the final version of the Ninth "represents a change in meaning from the protection of state powers to the protection of 'personal rights.'" The report, however, actually presents *two* possible meanings: one in line with the state proposals but defective; the other *also* in line with the state concerns but ineffective. Even if the amendment were meant to protect the "retained rights of the people," such rights could include the people's retained right to local self-government.

55. This probably echoes a concern originally voiced by Randolph in the House. Burnley's letter to Madison collapses this argument with Randolph's second and independent complaint that the best approach to limiting power is to use the language of Virginia's seventeenth proposal. Even Burnley wasn't sure that he had adequately presented Randolph's concerns. *See* Letter from Hardin Burnley to James Madison (Nov. 28, 1789), *supra* note 30, at 219 (indicating that he may not have understood the precise nature of Randolph's objection).

56. Randolph found the proposed Ninth Amendment "exceptionable" and sought called for a new proposal "more safe & more consistent with the spirit of [Virginia's] 1st and 17th amendments." *See* Letter from Edmund Randolph to George Washington (Dec. 6, 1789), *in* 5 Documentary History of the Constitution, *supra* note 31, at 222, 223.

advantage over others."[57] Finally, the report claimed that the free speech and press clauses did not "declare and assert the right of the people to speak and publish their sentiments."[58] It is difficult to take these criticisms seriously. According to the constitutional historian Leonard Levy, the Senate report "grossly misrepresented" the First Amendment, and Madison himself believed that the Senate had overplayed its hand and that its report would backfire.[59] In fact, the Virginia Anti-Federalist effort to derail the Bill of Rights ultimately failed.

On the other hand, despite the obviously overheated rhetoric, the Senate report does represent *possible* readings of the Ninth Amendment. Even if the Senate had an incentive to exaggerate, the senators also had an incentive not to stray so far from reason as to discredit their position (though this may have happened anyway). Thus, the complaints of the Senate majority should be granted at least some plausibility given their goal of winning over a sufficient number of moderates to prevent Virginia's ratification of the Bill of Rights. For example, the Senate correctly pointed out that the final language of the Ninth did not track the language of any proposal submitted by the state conventions. This left the Senate in the position of guessing at the purpose of the altered language. The fact that the Senate could not decide on the precise object of the Ninth Amendment raises the possibility that the final version of the Ninth was hopelessly ambiguous. It might be an attempt to preserve the autonomy of the states but, then again, it might not. Given the reaction of the Senate majority, perhaps the final language of the Ninth was so unclear as to render the amendment without *any* commonly accepted public meaning.

Before abandoning the search for original understanding altogether, however, we must keep some facts in mind. To begin with, no other state legislature complained about the final language of the Ninth. All the states knew that Madison's original version of the Ninth expressly limited federal power

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57. JOURNAL OF THE SENATE OF THE COMMONWEALTH OF VIRGINIA 63 (1828) (entry of Dec. 12, 1789).

58. *Id.*

59. See LEVY, *supra* note 9, at 42. Madison himself was not troubled by the Senate report, because he believed that the Senate had gone too far, particularly in regard to the purported objections to the First Amendment (which the report listed as the third). *See* Letter from James Madison to George Washington (Jan. 4, 1790), *supra* note 48, at 231 (expressing his opinion that the Senate's failure to ratify "will have the effect . . . with many of turning their distrust towards their own Legislature").

(his proposals had been widely published in newspapers across the country). Only in Virginia were concerns raised about the final version of the Ninth. Also, we know that Virginians like Madison and Burnley believed that the final version guarded the same principles as those expressed in Virginia's seventeenth (thus the unreasonableness of Randolph's complaint). If others shared this reading of the Ninth (as Burnley claimed), then this explains the general lack of concern by moderates and proponents of the Bill of Rights. We also know that despite his concerns, Randolph conceded that the federalist reading was at least "plausible," and, quite likely after hearing from Madison, Randolph soon abandoned his opposition. Finally, not only did the Senate majority have every reason to exaggerate concerns about the Ninth Amendment, but their efforts to prevent ratification failed. In sum, although the Senate report is important, it should not be given undue weight.

Nevertheless, given that moderates like Edmund Randolph initially were thrown by the final language of the Ninth, one cannot completely dismiss the complaints of the Virginia Senate. Even if other states were satisfied, the Virginia legislature remained temporarily undecided about the Ninth Amendment and the rest of the Bill of Rights. The ambiguous nature of the Amendment needed to be addressed, if only to satisfy Virginia moderates.

Enter James Madison.

Madison's Speech on the Bank of the United States

Perhaps the most important source of historical evidence regarding the public understanding of the Ninth Amendment is Madison's speech opposing the First Bank of the United States. Delivered by the person who drafted the Ninth Amendment, the speech includes both an explanation and an application of the Ninth. And it was delivered while Virginia remained undecided about the Ninth and the rest of the Bill of Rights. To put the speech in perspective, no other provision in the Bill of Rights received anything near this kind of public discussion. Madison's speech establishes his view that the Ninth Amendment was meant to limit unduly broad interpretations of federal power. More than a mere passive statement of principle, to James Madison the Ninth was a judicially enforceable rule of construction.

Madison's speech was made in connection with one of the first debates over the interpretation of federal power: whether the enumerated powers of

Congress included the power to incorporate a national bank.[60] Nationalists like Alexander Hamilton argued for a broad reading of federal power, relying in particular on the necessary and proper clause.[61] Madison, however, strongly disagreed. Although he had joined Hamilton in calling for the creation of a strong national government,[62] Madison believed that the broad reading of federal power used to support the bank betrayed the assurances Federalists had made to the state conventions in order to win their support for the Constitution.

Madison's major argument against the bank was delivered in a speech before the House of Representatives on February 2, 1791.[63] After some brief remarks regarding the merits of incorporating a bank, Madison presented an extended argument regarding the bank's constitutionality. He began by laying out the proper rules of constitutional interpretation:

> [1] An interpretation that destroys the very characteristic of the government cannot be just. . . .
> [2] In controverted cases, the meaning of the parties to the instrument, if to be collected by reasonable evidence, is a proper guide.
> [3] Contemporary and concurrent expositions are a reasonable evidence of the meaning of the parties.
> [4] In admitting or rejecting a constructive authority, not only the degree of its incidentality to an express authority, is to be regarded, but the degree of its importance also; since on this will depend the probability or improbability of its being left to construction.[64]

These rules were developed and applied in the main body of Madison's speech. For example, Madison explained in the next section of his speech

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60. For an extensive discussion of the issues surrounding the bank bill, *see* ELKINS & MCKITRICK, *supra* note 50, at 223–244.

61. Alexander Hamilton, The Second Report on the Further Provision Necessary for Establishing Public Credit (Dec. 13, 1790), *in* 7 THE PAPERS OF ALEXANDER HAMILTON 305 (Harold C. Syrett ed., 1963).

62. Along with John Jay, Madison and Hamilton were joint authors of the *Federalist Papers*.

63. *See* James Madison's Speech on The Bank Bill (Feb. 2, 1791), *in* 13 PAPERS OF JAMES MADISON, *supra* note 1, at 372. *See also*, Congress. House of Representatives. The Bank Bill Under Consideration (Feb. 2, 1791), Whole No. 190, page 757, GAZETTE OF THE UNITED STATES (Phila.), Feb. 23, 1791, available in Archive of Americana, America's Historical Newspapers (Readex, Newsbank, Inc.).

64. James Madison's Speech on The Bank Bill (Feb. 2, 1791), *in* 13 PAPERS OF JAMES MADISON, *supra* note 1, at 374.

that the "characteristic of government" to be preserved under rule 1 involved the reserved autonomy of the states. The "parties to the instrument" referenced in rule 2, whose understanding is a proper guide to constitutional interpretation, are the state ratifying conventions. Promises made to those conventions about the limited nature of federal power are the "expositions" of rule 3. Finally, rule 4 is an interpretive canon that Madison derived from the Constitution itself: the more important the power, the more likely it is that the parties would have expressly listed it in the text rather than left such an important matter to implication.

After laying out the appropriate approach to interpreting the Constitution, Madison addressed the specific arguments in support of the national bank. Attempts to locate the power to incorporate a bank in the general welfare clause "would render nugatory the enumeration of particular powers; would supersede all the powers reserved to the state governments."[65] In response to those who argued that Congress could act for the "general welfare" so long as it did not interfere with the powers of the states, Madison argued that chartering a bank "would directly interfere with the rights of the States to prohibit as well as to establish banks."[66]

Addressing the necessary and proper clause, Madison argued that deriving the power to charter a bank as necessary and proper to borrowing money would open the door to an unlimited list of "implied powers" and required a "latitude of interpretation . . . condemned by the rule furnished by the Constitution itself."[67] Madison believed that the manner in which powers were enumerated in the Constitution established an implicit "rule" requiring the express enumeration of all "great and important power[s]."[68] Declaring that "it cannot be denied that the power proposed to be exercised

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65. *Id.* at 375.

66. *Id.*

67. *Id.* at 378.

68. *Id.* ("The examples cited, with others that might be added, sufficiently inculcate nevertheless a rule of interpretation, very different from that on which the bill rests. They condemn the exercise of any power, particularly a great and important power, which is not evidently and necessarily involved in an express power."). *See also* Congress. House of Representatives (Tuesday, Feb. 8). The Bank Bill Under Discussion, GAZETTE OF THE UNITED STATES (Phila.), Apr. 20, 1791, Whole No. 206, page 821, available in Archive of Americana, American's Historical Newspapers (Readex, Newsbank, Inc.) (reporting Madison's statements during the debates over the bank bill that "[t]he power of granting Charters, he observed, is a great and important power, and ought not to be exercised, without we find ourselves expressly authorized to grant them").

is an important power,"[69] Madison then listed a number of significant aspects of the bank charter, including the fact that it "gives a power to purchase and hold lands" and that "it involves a monopoly, which affects the equal rights of every citizen."[70] To Madison, these effects established that the power to charter a bank was a "great and important power" that required express enumeration.[71]

In the final section of his speech, Madison addressed the original understanding of federal power represented to the conventions that ratified the document. In one of the first constitutional arguments based on original understanding, Madison reminded the House that the original objection to a bill of rights had been the fear that it would "extend[] federal power "by remote implications."[72] State conventions had been assured that the necessary and proper clause would not be interpreted to give "additional powers to those enumerated."[73] Madison "read sundry passages from the debates" of the state conventions in which "the constitution had been vindicated by its principal advocates, against a dangerous latitude of its powers, charged on it by its opponents."[74] These state conventions had agreed to ratify the Constitution only on the condition that certain explanatory amendments would be added to make express what the Federalists claimed were principles already implicit in the original structure of the Constitution. Madison reminded his audience about the declarations and proposals submitted by the state conventions that insisted on a narrow construction of federal power.[75]

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69. James Madison's Speech on The Bank Bill (Feb. 2, 1791), *in* 13 PAPERS OF JAMES MADISON, *supra* note 1, at 378.

70. *Id.* at 379.

71. *Id.* ("From this view of the power of incorporation exercised in the bill, it could never be deemed an accessary or subaltern power, to be deduced by implication, as a means of executing another power; it was in its nature a distinct, an independent and substantive prerogative, which not being enumerated in the constitution could never have been meant to be included in it, and not being included could never have been rightfully exercised.").

72. *Id.* at 380.

73. *Id.*

74. *Id.*

75. *Id.* ("The explanatory declarations and amendments accompanying the ratifications of the several states formed a striking evidence, wearing the same complexion. He referred those who might doubt on the subject, to the several acts of ratification.").

Madison then arrived at the argument that he believed concluded the issue. The proper rule of interpretation—implied in the structure of the Constitution, represented by the Federalists to the state conventions, and demanded to be made express by those same conventions—found textual expression in the proposed Ninth and Tenth Amendments:

> The explanatory amendments proposed by Congress themselves, at least, would be good authority with them [the state proposals]; all these renunciations of power proceeded on a rule of construction, excluding the latitude now contended for. These explanations were the more to be respected, as they had not only been proposed by Congress, but ratified by nearly three-fourths of the states.[76] He read several of the articles proposed, remarking particularly on the 11th and 12th [our Ninth and Tenth Amendments]. [T]he former, as guarding against a latitude of interpretation—the latter, as excluding every source of power not within the constitution itself.[77]

Madison summed up his argument in a manner that establishes, without any further question, that he read the Ninth Amendment as preserving the autonomy of the states:

> In fine, if the power were in the constitution, the immediate exercise of it cannot be essential—if not there, the exercise of it involves the guilt of usurpation, and establishes a precedent of interpretation, levelling all the barriers which limit the powers of the general government, and protect those of the state governments.[78]

Madison's speech is an extended dissertation on the proper rules of constitutional interpretation—and how that interpretation ought to be informed by the expectations of the state conventions. Justifying the bank required an unduly broad reading of federal power. The state conventions had been *assured* that there would be no "latitudinary" readings of federal power; they had ratified the Constitution with the express *understanding* that that would

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76. Ratification was still pending in Virginia.

77. *Id.* at 380–81.

78. *Id.* at 381.

be the case, and they secured amendments *ensuring* that this would be the case. The Ninth Amendment expressly prohibited this latitude of interpretation and thus preserved the expected degree of state autonomy.[79] Finally, Madison read the Ninth and Tenth Amendments as working together to preserve the federalist separation of power between the national government and the states.

The Significance of Madison's Speech

Madison's speech helps explain why he supported the final version of the Ninth Amendment, which focused on "retained *rights*." Where others (like Roger Sherman) might see disputes over national power as one of political expediency, Madison insisted that liberty itself is threatened by unduly broad assertions of federal power. From Madison's perspective, protecting the states from federal encroachment simultaneously protected the retained rights of the people. As Madison wrote in the *National Gazette* the year after delivering his bank speech, "[E]very public usurpation is an encroachment on the private right, not of one, but of all."[80] Today, such views seem counterintuitive (or worse). States' rights rhetoric is associated with the slaveholding states of the Confederacy and twentieth-century southern intransigence in the face of efforts to desegregate public schools. In 1789, however, independent state governments stood as sentinels whose role was to warn the people

79. As Madison's colleague, Nathaniel Niles, remarked a few months later, "Congress have very extensive powers, but they are not at liberty to infringe on certain rights retained by the states." Congress of the United States. House of Representatives, FED. GAZETTE, and PHILA. DAILY ADVERTISER, Jan. 10, 1792, at 2, available at Archive of Americana, America's Historical Newspapers (Readex, Newsbank, Inc.). In his early work on the Ninth Amendment, Randy Barnett claimed that Madison's reference to the bank's infringing on the equal rights of citizens is an example of Madison's reliance on the Ninth to protect individual natural rights. *See* Randy Barnett, Implementing the Ninth Amendment, *in* 2 RIGHTS RETAINED BY THE PEOPLE, *supra* note 17, at 1, 15. I have critiqued this argument in detail elsewhere. *See* Kurt T. Lash, *The Inescapable Federalism of the Ninth Amendment*, 93 IOWA L. REV. 801, 848–54 (2008). In brief, Madison's reference to the equal rights of citizens is part of a general argument that the power to create a monopoly was a great and important power that required express enumeration. At no point in his speech did Madison claim that the proposed bank would violate individual natural rights; instead, Madison expressly argued that the power to create such monopolies was left to the states under the Ninth and Tenth Amendments.

80. James Madison, *Charters*, NAT'L GAZETTE, Jan. 19, 1792, *reprinted in* JAMES MADISON: WRITINGS, *supra* note 2, at 502, 503.

should a case arise involving federal "usurpation."[81] Within the first decade, this hypothetical threat became real in the controversy over the federal Alien and Sedition Acts. In their efforts to preserve freedom of speech against federal prosecutions for seditious libel, men like James Madison and Thomas Jefferson insisted that such laws violated the reserved autonomy of the states. Both the Ninth and Tenth Amendments would be pressed into service against the acts in order to protect the retained rights of the people.

81. *See* THE FEDERALIST No. 44, at 286 (James Madison) (Clinton Rossiter ed., 1961); 1 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 app. note D at 153 (St. George Tucker ed., Philadelphia, William Young Birch & Abraham Small 1803).

FOUR

On Text and Historical Understanding

LET'S STEP BACK A MOMENT. The vision of the Ninth Amendment presented in the last two chapters conflicts not only with the standard accounts of the Ninth in modern scholarship and Supreme Court opinions but also with the broader modern understanding of the nature of federal power. Moreover, although I have addressed the wording of the Ninth as part of the ongoing historical narrative, many readers will probably remain skeptical that the history I have presented truly fits with the actual text of the Ninth Amendment. Finally, and probably most of all, some readers will doubt any historical account that seems to render the Ninth Amendment redundant in light of the common understanding of the Tenth Amendment—the provision most often associated with preserving the autonomy of the states.

In many ways, this altogether reasonable skepticism reflects just how far we have come since the founding and how necessary it is to recover the lost history of the Ninth Amendment. An important part of the story covered in later chapters involves how the original meaning of the Ninth came to be buried under subsequent assumptions about national power and so-called states' rights. But understanding just what happened at the time of the founding is particularly important—if only because the Supreme Court often looks to the founding in support of its modern interpretation of the Constitution and legal scholars and courts will thus be especially interested in the origins and early understanding of the Amendment. If the history presented here seems jarringly out of line with text of the Ninth Amendment and the original Constitution as a whole, there will be little reason to follow the rest of the story and much reason to doubt the enterprise as a whole.

Before we proceed, then, it is important to address just how the federalist vision of the Ninth that I have presented in the last two chapters fits with the actual text of the amendment and how the amendment fits alongside the Tenth. Doing so requires both a deeper and a broader look at the amendment. Deeper, because it requires revisiting some earlier points about the final language of the text; broader, because it expands our vision beyond the

Ninth and considers aspects of the original Tenth Amendment that also may have been forgotten or lost.

Reconciling History and Text: A Theory of the Original Ninth Amendment

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

All interpretive methods begin with the text. Although not self-defining, the very idea of a written, enforceable constitution presupposes a degree of agreement regarding language and grammar sufficient to allow judicial enforcement over time.[1] From the perspective of popular sovereignty, the text is how *the people* speak from one generation to the next. Some scholars suggest that interpreting a written text, by its very nature, requires a form of originalist analysis.[2] Regardless, analysis of the text sets the ground rules for any viable theory of constitutional meaning. Let's begin, then, at the beginning: the opening lines of the Ninth Amendment.

"The *enumeration* in the Constitution, of certain rights, ..."

According to dictionaries from the period, the meaning of "enumeration" at the time of the founding was no different from that commonly understood today: to enumerate meant "to number," and an enumeration was simply "a numbering or count."[3] The opening phrase, "the enumeration in the Constitution, of certain rights," thus seems clear enough. The "certain rights" enumerated in the Constitution includes, at the very least, the rights "numbered"

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1. *See* Keith E. Whittington, Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review 50–61 (1999).

2. *See id.*

3. William Perry, The Royal Standard English Dictionary 224 (Worcester, Mass., Isaiah Thomas 1st Am. ed. 1788), *microformed on* Early American Imprints, Series I, No. 21385 (NewsBank, Inc.); *see also* John Entick, Entick's New Spelling Dictionary 150 (Wilmington, Del., Peter Brynberg 1800), *microformed on* Early American Imprints, Series I, No. 37375 (NewsBank, Inc.) ("a number or counting over").

or listed in the first eight amendments to the Constitution. It also seems likely that the reference includes the rights numbered in Article I, Section 9 (habeas corpus, protection against ex post facto laws, etc.).

To the extent that additional support is necessary, this reading is supported by the history we explored surrounding the adoption of the Ninth. Federalists like James Madison initially resisted adding a bill of rights on the grounds that enumerating (or listing) certain rights might be read to imply that all unenumerated (unlisted) rights were assigned to the government.[4] Anti-Federalists responded that such a list of enumerated rights already existed in Article I, Section 9—thus making the need for some kind of explanatory amendment even more necessary.[5] In his speech introducing his proposed amendments to the House of Representatives, Madison explained that the Ninth Amendment was meant in part to address concerns about the implied relinquishment of rights because of the enumeration of other rights in the Constitution.[6] The general language of the Ninth tracks this concern by prohibiting erroneous inferences arising from the enumeration of *any* right in the Constitution, including those added after the adoption of the Ninth itself.[7]

But what of those rights previously enumerated in the original Constitution, such as those listed in Article I, Section 10? These rights forbid the states from impairing the obligation of contracts or passing any bill of attainder or ex post facto law. Because these rights are also among those rights "enumerate[d] in the Constitution," they fall within the literal meaning of the Ninth Amendment. If these rights are part of the "enumeration . . . of certain rights," then one way to read the full text of the Ninth would be as follows:

> The enumeration in the Constitution of certain rights [including those enumerated against the states in Article I, Section 10] shall not be

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4. *See* James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789) [hereinafter Madison's Bill of Rights Speech], *in* JAMES MADISON: WRITINGS 437, 448–49 (Jack N. Rakove ed., 1999).

5. *See* LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 28–30 (1999) (discussing how the Anti-Federalists used the inclusion of restrictions on federal power in the Constitution to argue for a bill of rights).

6. *See* Madison's Bill of Rights Speech, *supra* note 4, at 448–49.

7. Subsequent amendments might change the scope of the Ninth, but nothing in the original text or history precludes the application of the Ninth's rule of construction to later amendments. As I discuss in chapters 8 and 11, the Fourteenth Amendment may have changed what constitutes a right retained by the people in the states, but neither its text nor its history suggests an abrogation of the basic rule of construction announced by the Ninth Amendment.

> construed to deny or disparage others retained [against the states] by the people.

Although such a reading is textually possible, it should be clear, from our exploration of the history behind the adoption of the amendment, that such a reading is highly implausible as a matter of original understanding. Madison, for example, read the Ninth as working alongside the Tenth to preserve state prerogatives. We also know that Madison failed in his attempt to add a provision to the Bill of Rights that would have expressly bound the states to respect certain individual rights.[8] It seems unlikely, to put it mildly, that an express restraint on state action would fail but a text of unlimited unenumerated restraints on the states would receive supermajoritarian support. As Chief Justice John Marshall concluded in *Barron v. Baltimore*, the overall structure of the Constitution suggests that general language in the Bill of Rights (such as that found in the Fifth and, for our purposes, the Ninth Amendment) binds only the federal government, not the states.[9] Marshall's conclusion fits with the history presented in the previous chapters, as well as with Madison's explanation that the Ninth worked in tandem with the Tenth Amendment to preserve the right to local self-government.

There is, however, a way to read the phrase "the enumeration . . . of certain rights" in a manner that includes all rights listed in the Constitution, including those listed against the states in Article I, Section 10, without embracing the historically implausible interpretation described above. For example, one could read the text as follows:

> The enumeration in the Constitution of certain rights [including those enumerated against the states in Article I, Section 10] shall not be construed to deny or disparage others retained by the people [in the several states].

According to this reading, the fact that some rights are enumerated against the states shall not be construed to disparage or deny other rights left under local (state) control. For example, the fact that the people in the states have delegated away *some* powers and rights shall not be read to suggest they have delegated away *all* powers and rights. This reading does in fact

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8. *See* Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction (1998).

9. 32 U.S. (7 Pet.) 243, 247–50 (1833).

fit with the available historical record, and, as we shall see, this is how courts and commentators read the Ninth Amendment in the early years following its adoption and for decades afterward.

"... shall not be *construed* ..."

This phrase forms the core of the Ninth Amendment; it is the hub around which the rest of the text turns. The Ninth Amendment was the first provision added to the Constitution that solely addressed the issue of interpretation.[10] All constitutional provisions, of course, can be understood as rules of interpretation to some degree. For example, the necessary and proper clause can be understood both as a concession of power (the clause reads, "Congress shall have power . . . [t]o make all Laws which shall be necessary and proper. . . .")[11] and as a rule of construction (this clause is properly interpreted to allow only those laws that are, in fact, "necessary and proper"). Similarly, the free speech clause can be understood both as a right and as a rule of construction forbidding any interpretation of congressional power that "abridg[es] freedom of speech."[12] The Ninth Amendment, however, is neither a grant of power nor a source of rights.[13] All that the Ninth Amendment does is forbid interpreting particular provisions in a particular way. This is what makes the Ninth Amendment unique: its sole textual function is to control the interpretation of *other* provisions.[14]

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10. The second was the Eleventh Amendment.

11. U.S. Const. art. I, § 8, cl. 18.

12. U.S. Const. amend. I.

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

14. This single focus on constitutional interpretation might seem anomalous to us today, but at the time, methods of interpretation were of critical concern. Today, constitutional treatises present interpretive methodology as a side (and an apparently unresolvable) issue. At the time of the founding, however, treatises on the Constitution focused much of their primary analysis on proper interpretive method. Early constitutional treatises spent a great deal of time exploring the basic principles of constitutional interpretation. *See, e.g.*, 1 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 app. note D (View of the Constitution of the United States) at 140–339 (St. George Tucker ed., Philadelphia, William Young Birch & Abraham Small

As do a number of provisions in the Bill of Rights, the Ninth Amendment uses the passive voice ("shall not be construed"), leaving it unclear *who* shall not construe the Constitution in the forbidden manner. We might be tempted to conclude that according to Chief Justice Marshall's reasoning in *Barron v. Baltimore*,[15] the Ninth's rule of construction binds only the officials of the federal government. But this is required neither by the text of the Ninth nor by *Barron*.[16] Marshall's denial of a Fifth Amendment claim against the states in *Barron* was based on his reading of the text and the history behind the adoption of the Bill of Rights, which indicated that the framers did not intend these rights to limit the powers of the state governments. The rule of the Ninth Amendment (properly construed), however, does not limit the powers of the state governments. Like the rest of the Bill of Rights, the Ninth's rule of construction serves to limit the powers of the *federal* government. State officials would be as bound to follow this rule of construction as any federal official. For example, suppose that a state judge is faced with a claimed federal constitutional right nowhere enumerated in the Constitution. The Ninth Amendment would prevent the state judge from concluding that just because the right was not enumerated in the federal Constitution, it was not a right retained by the people. All officials, whether state or federal, are bound by

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1803) [hereinafter TUCKER'S BLACKSTONE]; JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Carolina Academic Press 1987) (1833). The debates over the proposed Bill of Rights ultimately focused on the Ninth's rule of construction, and two years after the Bill of Rights was ratified, another amendment was added to the Constitution that also declared a rule of constitutional interpretation. According to the Eleventh Amendment: "The Judicial power of the United States *shall not be construed* to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI (emphasis added). In fact, the issue of proper constitutional interpretation loomed far greater in the minds of the founders than did any particular enumerated power or right. The Federalists, for example, believed that proper interpretation of enumerated powers obviated the need for a list of particular rights. *See, e.g.*, THE FEDERALIST NO. 84, at 513-14[page] (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("For why declare that things shall not be done which there is no power to do? Why for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?"). Anti-Federalists who criticized the lack of a bill of rights did not so much disagree with the Federalists on substantive rights as they feared that proper interpretation of the Constitution would be ignored without a list of rights declaring the proper interpreted scope of federal power—a list added "for greater caution."

15. 32 U.S. (7 Pet.) 243, 247–50 (1833).

16. *Id.* at 250.

their oaths to support the Constitution, and this includes respecting the rule of construction announced by the Ninth Amendment.

"The enumeration . . . of certain rights, shall not be construed to *deny or disparage* [other rights]"

We know that one of the central purposes of the Ninth Amendment was to avoid the implication that the Bill of Rights was an exhaustive list of rights.[17] The mere fact that a right was not specifically enumerated did not mean that the right did not exist. Put another way, the fact that some rights are enumerated must not be construed to suggest that rights *must* be enumerated: the *fact* of enumeration shall not imply the *necessity* of enumeration.

But the text does more than prohibit this erroneous basis for denying rights. It also forbids construing the fact of enumeration in a manner that *disparages* other rights. As distinguished from outright denial, "disparagement" suggests a lessening or diminishment of retained rights.[18] The disparagement clause

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17. *See* Madison's Bill of Rights Speech, *supra* note 4, at 448–49.

18. According to a founding-era dictionary by Samuel Johnson, "to disparage" meant "to treat with contempt; to lessen; to disgrace in marriage." *See* Samuel Johnson, A School Dictionary 53 (New Haven, Ct., Edward O'Brien 1797), *microformed on* Early American Imprints, Series I, No. 30640 (NewsBank, Inc.). Other contemporary dictionaries contained similar definitions, generally defining the term as cheapening or lessening in comparison with something else. *See, e.g.*, Perry, *supra* note 3, at 203 ("to treat with contempt; to lessen"); Thomas Sheridan, A Complete Dictionary of the English Language 211 (5th ed., Philadelphia, William Young 1789), *microformed on* Early American Imprints, Series I, No. 45588 (NewsBank, Inc.) (to "injure by union with something inferior in excellence"). Newspapers and sermons generally used the term to mean "to insult." *See, e.g.*, Letter from Alexander Hamilton to the Vice President of the United States and President of the Senate (Jan. 20, 1795), *in* 1 American State Papers: Finance 320, 337 (Walter Lowrie & Matthew St. Clair Clarke eds., Wash., D.C., Gales & Seaton 1834) ("It is in vain to disparage credit, by objecting to its abuses."); Letter from Alexander Hamilton to the Honorable Speaker of the House of Representatives (Feb. 13, 1793), *in* 1 American State Papers: Finance, *supra*, at 202, 209 ("It has been alleged, to disparage the management under the present. . . ."); *Miscellanies*, Worcester Mag., July 17, 1788, at 1 ("And least of all does it become [a man] to disparage the [female] sex."); Op-Ed., *Of Imprecations*, Boston Gazette & Country J., May 5, 1788, at 4, *microformed on* Early American Newspapers Series 1-3 (NewsBank, Inc.) ("[I]ll men never gain credit but disparage themselves [through their use of oaths and insults]."); Roger Viets, Rector of Digby, A Sermon on the Duty of Attending the Public Worship of God (Apr. 19, 1789), *microformed on* Early American Imprints, Series I, No. 22223 (NewsBank, Inc.) ("'Tis as easy to commend our neighbor as to disparage him"). All these uses (to insult, lessen, cheapen by inferior comparison) carry the connotation of diminishment.

thus prevents an unwarranted diminishment of retained rights because of their lack of enumeration. Theoretically, such disparagement might occur in at least two different ways. For example, the fact of enumeration might be read to suggest a hierarchy of rights, with enumerated rights occupying a higher status than unenumerated rights. The disparagement clause prevents this by declaring that the fact of enumeration shall not imply the *superiority* of enumeration. Additionally, disparagement might refer to treating unenumerated rights as having a narrower scope than enumerated rights. To prevent this, the Ninth declares that the fact of enumeration shall not be construed to imply that unenumerated rights have a lesser scope than enumerated rights.

These two methods of disparagement (hierarchy and limited scope) are but different ways of expressing the same idea. For example, courts strongly disfavor content-based laws that restrict the enumerated freedom of speech in a public forum. In such situations, courts apply what is called "strict scrutiny" and demand that the government show that its law is the least restrictive means of accomplishing a compelling governmental interest.[19] Suppose, however, that a federal court refused to provide the same level of scrutiny for an *unenumerated* right on the grounds that only enumerated rights should receive strict scrutiny. For the purpose of our analysis, it does not matter what degree of scrutiny is actually applied, only that the level of scrutiny is less for unenumerated rights. The simple fact that scrutiny is lower because of the fact of nonenumeration is enough to render this interpretation a violation of the Ninth Amendment. This interpretation lessens the "strength" of the retained right and renders it less immune to governmental regulation. Put another way, this approach disparages the unenumerated right.

In a similar manner, the disparagement clause prevents treating enumerated rights as superior to unenumerated rights. For example, suppose the people of a given state pass a law providing a means by which marriage contracts may be dissolved (such as no-fault divorce). The law is challenged on the grounds that it violates Article I, Section 10, which prohibits any state law impairing the obligation of contracts. In such a case, if a court holds that the contract clause trumps the people's collective right to regulate marriage *because* one is enumerated and the other is not, then this construction violates the Ninth Amendment.

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19. *See, e.g.*, Ashcroft v. ACLU, 542 U.S. 656 (2004) (applying strict scrutiny to laws regulating speech on the Internet on the basis of adult content); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) (explaining the doctrine and rationale behind applying strict scrutiny in the public forum).

It construes the fact of enumeration in a manner that disparages nonenumeration.[20] This rule does not control the outcome of the case; it merely prohibits one particular interpretive approach to resolving the issue.

The Ninth Amendment and Enumerated Rights

A common argument regarding the Ninth Amendment is that it supports, in some way, a particular (and generally broad) interpretation of enumerated rights such as those provided by the due process and the privileges or immunities clauses of the Fourteenth Amendment.[21] In terms of the text, however, the Ninth has nothing to say about how enumerated rights ought to be construed beyond forbidding a construction that denies or disparages *un*enumerated rights. Consider the following argument:

> *The due process clause of the Fourteenth Amendment incorporates only those rights enumerated in the first eight amendments.*

Some judges and scholars argue that this limited reading of the Fourteenth Amendment violates the Ninth Amendment by "denying or disparaging" other unenumerated rights.[22] In fact, the above argument does not affect

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20. This example is drawn from the discussion by Chief Justice John Marshall in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 627–28 (1819).

21. *See, e.g.*, Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty (2004).

22. Randy Barnett, for example, criticizes footnote 4 of *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), for limiting the content of the substantive due process clause to just those incorporated rights that are listed in the text of the Constitution. *See* Barnett, *supra* note 21, at 254 ("[T]he pure Footnote Four approach is undercut by the original meaning of both the Ninth and Fourteenth Amendments."); *id.* ("Also inconsistent with the Ninth Amendment is the third and current Footnote Four-Plus approach that elevates some unenumerated rights to the exalted status of 'fundamental' while disparaging the other liberties of the people as mere 'liberty interests.'"); Casey L. Westover, *Structural Interpretation and the New Federalism: Finding the Proper Balance Between State Sovereignty and Federal Supremacy*, 88 Marq. L. Rev. 693, 707 (2005) ("Of course, there is no 'right to privacy' provision in the Bill of Rights or elsewhere in the Constitution, but, as Justice Douglas rightly pointed out, that cannot end the analysis—'[t]he Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."'"); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 848 (1992) (citing the Ninth Amendment in support of a right to procure an abortion under the Fourteenth Amendment);

unenumerated rights in any manner at all. A limited reading of the enumerated right to due process says nothing about whether *other* rights are retained beyond those encompassed by the enumerated rights of the Fourteenth Amendment. It neither denies their existence nor disparages their scope. For example, during the nineteenth century, courts often considered whether a claimed right fell within an enumerated right in the federal or state constitution. Even if the court read the enumerated federal rights narrowly, there remained the additional question whether the claimed right was nevertheless an unenumerated natural right retained by the people of a given state as a matter of state law. *Calder v. Bull* and *Fletcher v. Peck* are both examples of this methodology.[23]

In terms of the literal semantic meaning of the text, then, a narrow construction of an enumerated right does not deny or disparage unenumerated rights. Accordingly, reading the due process clause of the Fourteenth Amendment to incorporate nothing but the particular rights enumerated in the Bill of Rights does not violate the rule of construction declared by the Ninth Amendment. Whatever unenumerated rights may be, by definition they exist outside the parameters of enumerated rights.[24]

On the other hand, consider the following argument:

> *The fact that a claimed right is listed nowhere in the Constitution, including the Bill of Rights and the Fourteenth Amendment, means that there is no such retained right.*

Unlike a limited reading of an enumerated right, this argument goes further and relies on the fact of enumeration to deny the existence of other rights retained by the people. This violates the Ninth Amendment's rule of construction. In this situation, it is not the limited construction of enumerated rights that denies or disparages other unenumerated rights. Instead, it

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Roe v. Wade, 410 U.S. 113, 152 (1973) (citing the Ninth Amendment in support of a woman's unenumerated due process right to obtain an abortion); Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (Goldberg, J., concurring) (suggesting that the Ninth Amendment supports reading unenumerated rights into the due process clause).

23. *See* Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 Tex. L. Rev. 331, 401–09 (2004) (discussing the state-law approach to natural rights in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), and *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810)).

24. As I discuss later, there may be an implied meaning of the Ninth that affects the scope of enumerated rights, but such an implied secondary meaning depends on the primary semantic meaning.

is the refusal to recognize rights beyond those enumerated that denies or disparages those rights. Again, it matters nothing to the Ninth Amendment how broadly or narrowly enumerated rights are read, only that they not be construed to deny or disparage other rights retained by the people.

The above involves the literal or "semantic" reading of the Ninth Amendment.[25] This primary meaning of the text must be distinguished from secondary constructions of the amendment that are not expressly declared by the text but seem to be implied. For example, the Ninth Amendment does not expressly declare the existence of retained rights, but the text seems necessarily to imply the existence of such rights; otherwise, there would be no reason to protect such rights from denial or disparagement. We can call this a necessary implication arising from the text of the amendment—and thus part of the primary interpretation of the text. A second kind of implied meaning may be a reasonable, though not necessary, implication of the text. Recognizing this reasonable implication is a matter of construction, as opposed to interpretation, as it arises from something beyond the text itself—for example, from information we have about the events that gave rise to the text or the likely public understanding of what the text was meant to accomplish. Secondary meanings or constructions are thus highly dependent on our understanding of the history behind the text.

For example, depending on one's view of the history behind the Ninth Amendment, the clause could be read as implying either a broad *or* a narrow reading of provisions such as the due process and privileges or immunities clauses. The choice depends on the original public understanding of the Amendment.[26] If the Ninth was understood, for example, as protecting *only* unenumerated individual natural rights, then the amendment could be read as lending circumstantial support to a similar reading of the Fourteenth Amendment. Until now, of course, this is precisely the constructed meaning

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25. I am indebted to the work of Lawrence Solum regarding the distinction between semantic constitutional interpretation and secondary constitutional *construction*. *See* Lawrence B. Solum, Semantic Originalism (forthcoming). Lawrence B. Solum, *Semantic Originalism* (Illinois Pub. Law Research Paper No. 07-24, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244.

26. Randy Barnett, for example, links the Ninth to concerns about individual natural rights and relies on this reading to support a similar reading of the privileges or immunities clause. This is implicit in his argument that the incorporation doctrine of *Carolene Products* footnote 4 (which involves an interpretation of the Fourteenth Amendment's due process clause) violates the principles of the Ninth Amendment. *See* Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 Tex. L. Rev. 1, 14 (2006).

ascribed to the Ninth Amendment. The history presented in the prior chapters, however, suggests a very different set of secondary or constructed implications. As a clause broadly understood to work alongside the Tenth as a guardian of the people's right to local self-government, the Ninth Amendment can be read to imply a background rule of strict construction of federal power. Obviously, such a reading would not provide implied support for a broad reading of the due process clause of the Fourteenth Amendment but instead would have to be *reconciled* with the federal rights and powers granted by that Amendment.[27]

In sum: The text of the Ninth Amendment prevents interpretations of enumerated rights that negatively affect the unenumerated retained rights of the people. Neither unduly narrow nor excessively broad interpretations of enumerated rights violate the Ninth Amendment as long as the fact of enumeration is not relied upon to suggest the necessity or superiority of enumeration. It is possible to use the Ninth as implied or indirect support for general theories of broad—or narrow—constructions of enumerated rights, but these secondary theories depend on the original meaning of the Ninth Amendment. Because the historical record suggests a state-protective understanding of the amendment, the Ninth ought *not* to be used in support of broadly interpreted restrictions on the retained rights of the people in the states. This, of course, was Madison's declared understanding of the Ninth Amendment in his speech opposing the Bank of the United States.

The Other Rights Retained by the People

Much of the discussion surrounding the Ninth involves the nature of the "other[] [rights]" retained by the people. The meaning of the term is not self-evident, if only because the idea of enforceable rights has undergone conceptual development since the founding.[28] Even if one limits the investigation to the founding period, common usage of the term "rights" included—and this

27. I say more about how to reconcile the Ninth and Fourteenth Amendments in chapters 8 and 11.

28. *See, e.g.*, Wesley Newcomb Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, and Other Legal Essays 23–64 (Walter Wheeler Cook ed., 1919) (introducing a typology of rights that remains influential in contemporary legal and political theory).

is a nonexclusive list—(1) alienable and unalienable natural rights,[29] (2) positive rights,[30] (3) individual rights,[31] (4) collective revolutionary rights,[32] (5) majoritarian democratic rights, and (6) the retained rights of the sovereign states.[33] Any or all of these may have been understood as constituting the retained rights of the people.

The innovation of a federal system of government adds yet another wrinkle to our understanding of retained rights circa 1791. Under the Articles of Confederation, "each state retain[ed] its sovereignty, freedom, and independence, *and* every power, jurisdiction, and right [not] expressly delegated to the United States."[34] It then remained up to the people of each state whether to delegate those retained powers and rights to their state government, or retain them to the people of the state under their individual state constitution. For example, the New York convention phrased the retained rights of the people in that state as follows:

> [T]he powers of government may be reassumed by the people, whenever 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 . . . .[35]

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29. *See* The Declaration of Independence para. 2 (U.S. 1776) (referring to the unalienable rights of "Life, Liberty and the pursuit of Happiness); *see also* John Locke, Second Treatise on Government (C.B. Macpherson ed., Hackett Publishing Co. 1980) (1690).

30. *See* Madison's Bill of Rights Speech, *supra* note 4, at 448–49 (speaking of the positive rights secured under the proposed Bill of Rights, such as trial by jury).

31. 1 Annals of Cong. 760 (Joseph Gales ed., 1834) (statement of Rep. Egbert Benson) (discussing the unenumerated individual right of a man to "wear his hat if he pleased" or "go to bed when he thought proper").

32. *See* Madison's Bill of Rights Speech, *supra* note 4, at 441 (proposing an amendment declaring "that the people have the indubitable, unalienable, and indefeasible right to reform or change their government").

33. *See* Articles of Confederation art. II ("Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.").

34. *Id.* (emphasis added).

35. Declaration of the New York Convention (July 26, 1788), *in* 1 The Rights Retained by the People: The History and Meaning of the Ninth Amendment 356 (Randy E. Barnett ed., 1989).

As New York's declaration illustrates, at the time of the founding the people of the United States had a variety of choices when it came to "retained rights." They could (1) retain rights from the federal government but leave them to state control; (2) retain rights from state governments but delegate them to federal control; or (3) retain them from both state and federal control. Each of these scenarios involves rights retained by the people in one form or another. We are left, then, with a variety of rights that could be retained in a variety of ways.

Although scholars often associate the "other retained rights" of the Ninth with individual natural rights,[36] the text itself carries no such limitation. Certainly, no founder (including James Madison) limited the protections of the Ninth to a particular kind of right.[37] As a matter of both text and history, the "other[] [rights] retained by the people" remains an unrestricted term. It can be read quite broadly, potentially including everything from freedom of speech to the right to sleep on one's left side to the right of local majorities to decide public education policy. In other words, the "other rights" of the Ninth potentially include all rights capable of being retained by the people, whether natural, positive, individual, majoritarian, or even governmental.[38] For example, James Madison viewed the Ninth as protecting the right of the people in the states to establish local banks free from federal interference. This is not an individual natural right but a collective right of political majorities within a state.[39]

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36. *See generally* Calvin R. Massey, Silent Rights: The Ninth Amendment and the Constitution's Unenumerated Rights 67 (1995); Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty 242 (2004); Suzanna Sherry, *The Ninth Amendment: Righting an Unwritten Constitution*, 64 Chi.-Kent L. Rev. 1001 (1988).

37. *See also* 2 The Documentary History of the Ratification of the Constitution: Ratification by the States (Pennsylvania) 388 (John P. Kaminski ed., 1976) (remarks of James Wilson) ("In all societies, there are many powers and rights, which cannot be particularly enumerated.").

38. *See* Emmerich de Vattel, Le Droit des Gens, ou Principes de la Loi Naturelle, Appliqués à la Conduite et aux Affaires des Nations et des Souverains [The Law of Nations, or Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns], Preliminaries, Section 15 (N.Y., S. Campbell 1796) (1758) ("The natural society of nations cannot subsist, unless the natural rights of each be duly respected.").

39. By collective rights, I mean those rights that cannot be exercised by a single individual acting alone (unlike, say, the freedom of expression). Collective rights may be exercised by the citizens of the state acting in their sovereign capacity, such as during constitutional conventions. Or collective rights may be exercised by political majorities at a city, county, or state level. All collective rights are majoritarian in the sense that they are decided

This is a critical point. Much scholarly work has gone into establishing that retained rights at the time of the founding included individual natural rights.[40] I think such work is persuasive. However, a great deal turns on whether individual rights were the *only* rights retained under the Ninth Amendment and whether all retained rights (individual and otherwise) were left to the control of state majorities. History tells us that the original meaning of the term "rights" in the Ninth Amendment was *inclusive*—it referred to all rights not delegated to the national government. Put another way, the historical record suggests that the text of the Ninth Amendment should be given its full (or plain) meaning. Because the text imposes no limits on the rights retained by the people, neither should we.

Here, an objection might be raised regarding the views of the founders and majoritiarian politics. It is well known, for example, that founders like James Madison believed that individuals should be protected against majoritarian politics, particularly in regard to state-level majorities.[41] Accordingly, some scholars have argued that Madison would have opposed any provision in the Constitution or Bill of Rights that placed the retained rights of political majorities above the retained rights of individuals. This argument, however, both overstates Madison's objections to majoritarian politics and misunderstands the role of personal objections in determining the likely public meaning of constitutional text. To begin with, although many founders were concerned with the potential chaos and injustice of raw democratic politics, they nevertheless accepted the justice of majoritarian politics in general and of majoritarian voting procedures in particular. As much as Madison, for example, hoped that broadening the electoral map would result in the election of the "better sort," he did not deny the justice of allowing the majority to choose both their representatives and their fundamental law.[42]

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through majoritarian voting procedures, whether at a convention or at the polls. However, it remains up to the people of a state to decide whether a matter remains subject to the ordinary majoritarian political process or is exempted from the political process by way of the state constitution.

40. *See* BARNETT, *supra* note 36; MASSEY, *supra* note 36.

41. *See* AMAR, *supra* note 8, at 22.

42. *See, e.g.*, The Federalist No. 10 (Madison), *supra* note 14, at 80 ("To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and form of popular government is then the great object to which our inquiries are directed.").

On the other hand, Madison did attempt to place a provision in the Bill of Rights that would have bound state majorities to respect certain fundamental rights like freedom of speech and religious freedom.[43] This effort reflects Madison's commitment to individual rights, but the fact that his effort *failed* points to a broader consensus that the Bill of Rights should limit the power of federal, not state, majorities. Madison himself, of course, embraced this view of the Bill of Rights in its final form. Indeed, both Madison and the Federalists found themselves having to repeatedly assure the state ratifying conventions that the proposed Constitution would preserve to the states all nondelegated sovereign powers and rights.[44] These are assurances that all such "retained" sovereign prerogatives would remain in the hands of the people in the states, and this, of course, is an expressly majoritarian assurance. Whatever Madison's (and other founders') views regarding the tyranny of majorities in the states, what we seek is the original meaning of the Ninth Amendment as it was likely understood by the ratifiers in the state conventions. They would have understood that *all* nondelegated powers and rights were left to the collective control of popular majorities in the states.

"... others *retained* by the people"

A *retained* right is a right withheld from governmental control.[45] The opposite of a retained right is an *assigned* right—one delegated to governmental control. Madison explained the distinction in his speech introducing his proposed Ninth Amendment to the House of Representatives:

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration, and it might follow by

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43. *Id.*

44. *See, e.g.,* The Federalist No. 32 (Hamilton), *supra* note 14, at 198 ("[A]s the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States."); The Federalist No. 39 (Madison), *supra* note 14 at 245 ("[the federal government's] jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects.").

45. According to founding-era dictionaries, "to retain" meant "to hold in custody," PERRY, *supra* note 3, at 438, or simply "to keep," SHERIDAN, *supra* note 18, at 501.

> implication, that *those rights which were not singled out, were intended to be assigned into the hands of the general government*, and were consequently insecure.[46]

According to Madison, the concern about adding a bill of rights was that all unenumerated rights would be "assigned" to the general government. It was to avoid this erroneous delegation of power that Madison proposed the Ninth Amendment. Preventing the erroneous denial or disparagement of retained rights, by definition, means preventing the erroneous enlargement of governmental power over that particular subject. This is an important point regarding the fit between the history and the text. In his bank speech, Madison treated the Ninth as limiting the construction of federal power, but the text of the Amendment speaks only of retained *rights*. The word "retained," however, carries with it the necessary negative implication that retained rights are not *assigned*—making Madison's argument regarding limited federal power as much a matter of textual interpretation as original understanding.

The Dual Nature of Retained Rights

We know that, in theory, rights may be retained against either federal or state governments (or both). For example, although the First Amendment prohibits the federal government from establishing religion, the people retained the right to establish religion on a state level subject only to the constraints of state law.[47] Thus, the people of Massachusetts retained from the federal government the right to tax people for the support of churches and clergy but nevertheless assigned that right into the hands of their state government (and continued to do so until 1833).[48] Prior to the adoption of the Fourteenth Amendment, the right to regulate religion at a local level remained a collective right retained by the people of each state, who could decide for themselves

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46. Madison's Bill of Rights Speech, *supra* note 4, at 448–49.

47. *See* Steven D. Smith, Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom 21 (1999).

48. *See* John Witte, Jr., *"A Most Mild and Equitable Establishment of Religion": John Adams and the Massachusetts Experiment*, 41 J. Church & St. 213 (1999).

whether to leave the matter to majoritarian politics or place the subject off-limits in the state constitution.

Under the federal Constitution, retained rights thus had a dual nature. They could be both retained and delegated at the same time, depending on the level of government at issue (federal or state). This dual nature of retained rights was highlighted in one of our earliest constitutional controversies. When the Adams administration passed the Alien and Sedition Acts, Madison joined others in criticizing the acts as violating the First *and* Tenth Amendments.[49] Madison argued that, because the First Amendment denied the federal government control over the retained right to freedom of speech, the Tenth Amendment left seditious libel under the control of the people in the several states.[50] In this way, the Sedition Act violated both the individual right to free speech and the people's collective right to regulate speech on a state level.[51]

Libertarian theories of the Ninth Amendment (which claim that the Ninth Amendment protects *only* unenumerated individual rights) miss this critical dual nature of retained rights. Retained rights may be individual, majoritarian, or collective, and the Ninth Amendment ensures that *all* such rights are left under the control of the people in the states.[52] For example, suppose that one of the retained rights of the people is the right of armed self-defense. Any attempt by the federal government to deny or disparage this right because it is not specifically enumerated would violate the Ninth Amendment. As a retained individual right, it would be left to the people of each state to determine how and when the right to armed self-defense would (or would not) be regulated. Although one might argue that the principles of natural law

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49. *See* James Madison, Report on the Alien and Sedition Acts (Jan. 7, 1800), *in* JAMES MADISON: WRITINGS, *supra* note 4, at 608. Despite its title, Madison's report actually focused on the controversial Virginia Resolutions of 1798. *See id.* at 608. ("The committee have deemed it a more useful task to revise with a critical eye the resolutions which have met with this disapprobation.").

50. *See* Madison, *supra* note 49, at 610–11 (explaining and defending the claim in the Virginia Resolutions of 1798 that the Alien and Sedition Acts violated the rights of the states).

51. The Sedition Act involved an enumerated right (freedom of speech), but retained unenumerated rights would work in the same way. *All* rights retained from federal control would be left to the control of the people in the several states.

52. The Supreme Court has ruled that the Second Amendment provides an enumerated individual right to armed self-defense in the District of Columbia. *See* District of Columbia v. Heller, No. 07-290 (June 26, 2008).

preclude denying the right even on a state level, this would be a matter for state courts and, ultimately, the people of each individual state to decide.[53]

Suppose further that the federal government in 1792[54] decided that the right to armed self-defense was a natural right and that states were not adequately protecting this fundamental right. Accordingly, Congress passed the "Federal Armed Self-Defense Act" granting individual citizens in every state the right to armed self-defense, regardless of any state law to the contrary. Unless the law is a necessary and proper means for advancing an enumerated federal responsibility, the act would violate the reserved powers of the states as guaranteed by the Tenth Amendment. *All powers* not delegated (or prohibited) are reserved to the states. This is true even if one accepts the proposition that the personal right to armed self-defense is a retained natural right of the people.

In this way, a retained right might be individual in nature but collective in terms of the combined effect of the Ninth and Tenth Amendments. Although later constitutional amendments (such as the Fourteenth) may limit the category of rights left to the people in the several states, this does not change the operative effect (much less the original purpose) of the Ninth and Tenth Amendments.

". . . by the people"

The Ninth Amendment ends with a declaration of popular sovereignty—the retained rights protected by the amendment are those of the *people*. The Tenth Amendment closes with the same reference to the people. The Constitution as a whole thus opens and closes with an announcement that it is the *people* who establish constitutions and that it is the *people* who

53. This is precisely how the Supreme Court approached claims of natural rights in cases such as *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). *See* VATTEL, *supra* note 38, at section 20 ("A nation then is mistress of her own actions so long as they do not affect the proper and perfect rights of any other nation — so long as she is only *internally* bound, and does not lie under any *external* and *perfect* obligation. If she makes an ill use of her liberty, she is guilty of a breach of duty; but other nations are bound to acquiesce in her conduct, since they have no right to dictate to her."). The work of Vattel was well known at the time of the founding and was frequently cited by early constitutional theorists such as St. George Tucker. *See, e.g.*, TUCKER'S BLACKSTONE, *supra* note 14, app. note D at 151 (linking the work of Vattel with the principles of the Ninth and Tenth Amendments).

54. Thus putting aside for the moment the potential impact of the Fourteenth Amendment.

retain all rights and powers not delegated under that constitution. In this regard, the Ninth and Tenth serve as double exclamation points.

What is odd about contemporary interpretations of the Ninth and Tenth Amendments is that they treat the people of the Ninth as a completely different entity from the people of the Tenth. The people of the Ninth are generally viewed in an atomistic manner—autonomous individuals who exercise (only) individual rights. The people of the Tenth Amendment, however, have long been viewed as a collective entity residing in each of the several states. This dichotomous treatment of the same term places the Ninth and Tenth Amendments at odds with one another, with the Ninth protecting individuals against laws passed by popular majorities in the states and the Tenth preserving the rights of popular majorities to pass the same laws. According to this approach, in a given case, the values of only one of these amendments can prevail.

Obviously there is nothing in the *text* of the Ninth and Tenth Amendments that requires separate and distinct interpretations of "the people." Simply as a matter of interpretive consistency, one would expect the same term added by the same people at the same time to mean the same thing. When we add the context of the historical record, it seems safe to assume that the ratifiers understood the two amendments as making the same reference to the sovereign people in the states. Madison, of course, expressly took this position in his speech against the Bank of the United States, as did many others in the founding generation. Together, these two amendments preserve all nondelegated powers and rights to the decision-making authority of the people in the states, who may then leave the matter to the majoritarian political process or exempt the subject from the political process by placing it in the state constitution.

This approach follows even if one conceives of the federal Constitution as a combination of both national and state sovereigns, as did James Madison.[55] The people may divide sovereign power between the national government and the pre-existing states, and leave all nondelegated powers in the hands of the people in the several states. It is not necessary, in other words, to resolve the vexing issue of antebellum America regarding the precise status of "the people" of the United States. For his part, James Madison believed

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55. *See* THE FEDERALIST No. 39 (James Madison), *supra* note 14, at 246 ("The proposed Constitution . . . is, in strictness, neither a national nor a federal Constitution, but a composition of both").

that the Constitution had created a balance of national and state authority—but he never wavered from the view that all nondelegated powers and rights remained under the control of the people in the states. As the history of the Ninth Amendment unfolds in the coming chapters, we will see that this view of the Ninth and Tenth Amendments did not change until more than one hundred years after their adoption.

Redundancy

One of the common arguments against a federalist reading of the Ninth Amendment is that it renders the Ninth Amendment redundant with the Tenth. Despite its repeated appearance in the literature, this argument not only misunderstands the original meaning of both the Ninth and the Tenth Amendments but also misapplies the presumption against redundancy.

The presumption against redundancy is exactly that—a *presumption*. It can be overcome by either textual or historical evidence. If the people wish to include redundant provisions in the Constitution, nothing prevents their doing so. In fact, a number of provisions in the Bill of Rights are redundant to one extent or another. For example, the Supreme Court has long read the free exercise and free speech clauses of the First Amendment as both protecting the right to expressing one's beliefs.[56] In fact, the founding generation broadly understood the entire Bill of Rights as a (redundant) restatement of delegated power *properly interpreted*. The Bill of Rights was added to make express the promises that had already been made regarding the proper construction of delegated federal authority. There is nothing, in other words, that necessarily renders suspect the historical account presented in the first few chapters of this book even if the result is a Ninth Amendment broadly redundant in terms of principles contained within the Tenth Amendment.

But the fact of the matter is that the amendments were *not* viewed as redundant. They were viewed as closely *related*, a different matter that is further explored in the next two chapters. For now, both the text and the

56. *See* Rosenberger v. University of Virginia, 515 U.S. 819 (1995) (prohibiting discrimination on the basis of religious viewpoint in the distribution of public university funds for student publications). *See also*, Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) ("government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince.").

historical record indicate the distinct roles of the two amendments, even if there remains a degree of overlap.

The Tenth Amendment prevents the federal government from assuming the same kind of broad police powers exercised by the states—a reading of federal power that would essentially displace the state governments as independent entities. This purpose is achieved by declaring that all non-delegated (and non-prohibited) powers are reserved to the states. By itself, however, a declaration that the federal government has only delegated power is not enough to preserve the right of local self-government to the people in the states. Delegated power, after all, is subject to judicial construction; it might be so broadly construed as to give the federal government general police powers as a matter of fact, even if not as a matter of expressly delegated authority—particularly if the addition of a list of enumerated rights were construed as constituting the *only* limits to the extension of delegated power.

In order to prevent this unconstrained extension of delegated authority, the Ninth Amendment guarantees that the federal government cannot claim that the only limits to its delegated powers are those few restrictions expressly enumerated in the Constitution. While these express provisions limit the construction of federal power, the people yet retain other rights which may not be denied or disparaged by unduly broad interpretations of delegated national authority. As James Madison explained, the Tenth Amendment denies "every source of power not within the constitution itself," and the Ninth guards "against a latitude of interpretation" of those powers that *are* included in the Constitution.

Although this distinguishes the purposes of the Ninth and Tenth Amendments, it does not render the two clauses wholly separate and distinct either in meaning or in application. As dual constraints on the interpretation of federal power, there is bound to be a degree of overlap in their operation. An unduly broad interpretation of federal power, for example, can threaten the underlying principles of both the Ninth and Tenth Amendments by denying or disparaging a retained right of the people *and* by exceeding the delegated powers of Congress (properly understood).

It is also possible to read the Tenth Amendment as implying the very rule of strict construction of federal power expressly announced by the Ninth. At the time of the founding, it was a broadly accepted principle of the law of nations that all delegated sovereign power was to be strictly construed.[57]

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57. *See* VATTEL, *supra* note 38, at Book I, Chap. 2 sect. 16 (On the duty of self-preservation); *see also id.* at Book 2, sections 305, 308 (on the need to narrowly construe "odious" delegations of sovereign power).

Although Madison's original draft of the Tenth Amendment did not include the final version's declaration of the people's reserved sovereign authority ("... or to the people"), the addition of that language was supported (indeed, *suggested*) by Anti-Federalists who sought to establish the principle that federal authority had been delegated by the sovereign people in the states[58]—a principle which arguably calls for a narrow construction of delegated sovereign power.

In fact, we know that after the adoption of the Bill of Rights, a tradition quickly developed whereby the Ninth *and* Tenth Amendments, both singly and as a pair, were presented as declaring a rule of strict construction of federal power. From the founding era onward, the historical record is filled with examples of the Ninth and Tenth Amendments being cited in tandem, and the Tenth Amendment cited alone, in support of a limited reading of national authority. It is because the Tenth Amendment has so often been cited as independently calling for a narrow construction of federal authority that any similar reading of the Ninth Amendment appears to render the Ninth a superfluous addition to the Constitution.

But whatever the possible implications of reserved sovereign power, and whatever tradition emerged after the adoption of the Bill of Rights, the *texts* of the Ninth and Tenth Amendments are distinct, and both are distinctly federalist in meaning and operation. One declares a truism: non-delegated non-prohibited power is reserved to the delegating people. The other declares a rule of construction: those powers which are delegated are not to be construed as having no other limits besides those enumerated in the Constitution. Such a reading would have the effect of denying or disparaging the people's retained rights—rights which, by definition, were retained by the people in the states. This is how the two amendments were explained by the man who drafted them, and this is how they were understood for more than one hundred and fifty years.

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58. *See* Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty and "Expressly" Delegated Power*, 83 Notre Dame L. Rev. 1889 (2008).

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The Eleventh Amendment as a Retained Right of the People

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Eleventh Amendment

IT MIGHT SEEM ODD to consider the history of the Eleventh Amendment in a book devoted to the history of the Ninth. Even more than the Tenth, the Eleventh Amendment has been viewed as expressing principles in direct conflict with those assumed to inform the Ninth Amendment. Scholars and courts generally present the Ninth as justifying judicial protection of individual rights against state action.[1] The Eleventh Amendment, on the other hand, has been interpreted as *preventing* courts from protecting individual rights against state action.[2] There could not be two more conflicting principles in all of contemporary constitutional law.

But just as an investigation of the history behind the Ninth Amendment revealed important connections with the Tenth, so too a deeper understanding of the principles which led to the adoption of the Eleventh Amendment indicates the existence of a background rule of strict construction that informed the original understanding of the Ninth, Tenth and Eleventh Amendments. These provisions share more than just side by side placement in the Constitution: they each seek to preserve non-delegated power, jurisdiction and rights under the control of the sovereign people in the states.

A key premise of the opening chapters of this book is that public commitment to retaining the independent sovereign states under the proposed

1. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

2. *See* Hans v. Louisiana, 134 U.S. 1 (1890).

Constitution was so strong that Federalists were compelled to make assurances regarding the retained powers and rights of the states in order to secure ratification. Where some historians might characterize "states' rights" interpretations of the Constitution as nothing more than Anti-Federalist "spin" by the losers of the ratification debates, this book claims that it was the *proponents* of the Constitution who promised a strict construction of federal power and the preservation of the remnant sovereignty of the people in the states. The Ninth Amendment thus declared what had already been promised: whatever the specific enumeration of rights in the Constitution, federal power was to be interpreted in a manner that preserved the full scope of the people's retained rights. As described in the previous chapter, preserving retained rights, by definition, meant leaving the issue to the decision-making authority of the sovereign people in the several states. This was no accident; this was the point.[3]

If any doubt remained about the founding generation's commitment to the idea of retained state-level sovereignty, it seems fully answered by the events that led to the adoption of the Eleventh Amendment. The amendment represented the first act of popular sovereignty under the new Constitution, and it demanded that federal courts respect the rule of strict construction promised by the Federalists and declared in the Bill of Rights. The history recounted in this chapter provides important independent support for the idea that the founding generation understood "the people" of the Ninth and Tenth Amendments to refer to the sovereign people in the states—people who had delegated away important powers with the adoption of the Constitution, but who nevertheless retained their sovereign existence after 1787. This understanding of retained sovereignty included important assumptions about the proper construction of delegated federal power, including the delegated power of federal courts. The Eleventh

3. Ninth Amendment scholar Randy Barnett concedes that the Ninth Amendment did not authorize federal judicial enforcement of individual rights against the states, but claims this was due only to a lack of "jurisdiction," and not a commitment to preserve non-delegated matters under local control. This jurisdictional barrier against enforcement against the states was removed, according to Barnett, with the passage of the Fourteenth Amendment. *See* Randy E. Barnett, RESTORING THE LOST CONSTITUTION: The Presumption of Liberty 66 (2004) (the ninth and fourteenth amendments "refer to the same set of unenumerable rights though they differ on the jurisdiction created for the protection of these rights"). The history presented in this book suggests that limited judicial interference with popular decision-making in the states was not merely an aspect of originally limited federal jurisdiction but was instead one of the understood *purposes* of the Ninth Amendment.

Amendment does not stand alone: it serves alongside and mutually reinforces the declared principles of the Ninth and Tenth Amendments.

The Traditional Story of the Eleventh Amendment

The traditional story of the Eleventh Amendment goes something like this: the amendment emerged from the "profound shock" caused by the Supreme Court's decision in *Chisholm v. Georgia* allowing individuals to sue state governments for recovery of a debt in federal court.[4] Panicked by the prospect of financially ruinous suits in federal court, states quickly secured the Eleventh Amendment to the Constitution which denies federal courts jurisdiction over any suit brought against a state by an out of state resident. Although the text of the Amendment refers only to suits by out-of-state residents, about a century later in *Hans v. Louisiana* the Supreme Court expanded the doctrine of state sovereign immunity to include immunity from suits brought against a state by its own residents.[5] Although a number of exceptions have been carved into the general rule of state sovereign immunity, the modern Supreme Court continues to adhere to the broad principle of immunity announced in *Hans*.[6]

Both the reasoning of *Hans* and the Supreme Court's modern sovereign immunity jurisprudence has been subject to relentless criticism, with most Eleventh Amendment scholars calling for a far more limited construction of the Amendment more in keeping with the particular facts and opinions in *Chisholm v. Georgia*.[7] Although the criticisms of current state-sovereign-immunity doctrine

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4. *See* 1 Charles Warren, The Supreme Court in United States History 96 (reprint Beard Books 1999) (1922) ("[*Chisholm*] fell upon the country with a profound shock. Both the Bar and the public in general appeared entirely unprepared for the doctrine upheld by the Court."); *see also* Hans, 134 U.S. at 11 ("[*Chisholm*] created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the States.").

5. See Hans v. Louisiana, 134 U.S. 1 (1890).

6. *See, e.g.,* Alden v. Maine, 527 U.S. 706 (1999) (striking down an attempt by Congress to abrogate state sovereign immunity through an exercise of their power under Article I of the Constitution in order to allow citizens to sue their own state in state court).

7. *See, e.g.*, William A Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 Stan. L. Rev. 1033, 1034 (1983) ("The eleventh amendment was passed in the 1790's in order to overrule a particular case—*Chisholm v. Georgia*."); John Manning, *The*

are many and varied, they can generally be described as rejecting calls for a narrow construction of Article III and favoring instead a narrow construction of the Eleventh Amendment. As I explain below, this flips the history of the Eleventh Amendment on its head.

Article III in the Ratifying Debates

In prior chapters, we considered how promises of a narrow construction of federal power played a critical role in the Federalist defense of the Constitution. Not surprisingly, these promises played a similar role in the Federalist defense of Article III. As written, the article appeared to authorize suits against a state brought by out-of-state residents in federal court. Section 2 of Article III, for example, authorizes federal courts to hear suits "between a State and citizens of another state."[8] A suit brought by an out-of-state resident against a state for recovery of debt clearly seems to fall within the plain meaning of the text. The implications of such delegated power, however, were profound. It was a commonly accepted principle at the time of the founding that a sovereign was presumptively immune from civil process.[9] The plain meaning of Article III thus appeared to suggest that states were no longer sovereign under the Constitution and would be treated no differently from ordinary corporations—entities whose very existence was at the sufferance of a superior authority.

Anti-Federalists were quick to point out the danger lurking behind the words of Article III. At the Virginia convention, for example, George Mason warned that Article III would allow the "sovereignty of the state to be arraigned like a culprit, or private offender."[10] According to "Brutus," the grant

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Eleventh Amendment and the Reading of Precise Constitutional Texts, 113 YALE L.J. 1663, 1680 (2004) ("No one questions that the nation adopted the Eleventh Amendment in response to *Chisholm*.").

8. U.S. CONST. art. III, § 2.

9. The great Federalist Chief Justice John Marshall himself conceded this principle of sovereign immunity. *See* Cohens v. State of Virginia, 19 U.S. 264, 380 (1821) (Marshall, C.J.) ("a sovereign independent state is not suable, except by its own consent. This general proposition will not be controverted.")

10. 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES (VIRGINIA, No. 3) 1406 (John P. Kaminski & Gaspare J. Saladino eds., 1993) (remarks of George Mason).

of judicial power in this section of Article III threatened to "crush the states."[11] The response of Federalist advocates of the Constitution was the same as it was on others claims that the proposed Constitution threatened the states: the text would be narrowly construed to preserve the independent sovereign existence of the states. James Madison, for example, conceded that the wording of Article III "does not stand in that form which would be freest from objection. It might be better expressed."[12] Nevertheless, Madison insisted that

> [i]t is not in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court. . . . It appears to me that this can have no operation but this—to give a citizen a right to be heard in the federal courts; and if a state should condescend to be a party, this court may take cognizance of it.[13]

This is a straightforward example of strict construction: the operational meaning of a term otherwise capable of a broad interpretation is narrowed to preserve the presumed sovereign status of the states. The text allowed federal courts to hear suits between states and individuals, but only where a state was a plaintiff or had otherwise consented to be sued by an individual.

In his effort to derail ratification and trigger a second national convention, the Anti-Federalist Patrick Henry mocked Madison's narrow construction of

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11. Essay of Brutus No. 13 (Feb. 21, 1788), *in* 2 The Complete Anti-Federalist 428, 431 (Herbert J. Storing, ed. 1981).

12. *Id.* at 1409 (remarks of James Madison).

13. *Id.* at 1414 (remarks of James Madison). Calvin Johnson claims that Madison and other Federalists "misdescribed" Article III in the ratification conventions and in the *Federalist Papers*. *See* Calvin H. Johnson, Righteous Anger at the Wicked States: The Meaning of the Founders' Constitution 269 (2005). Other scholars have similarly dismissed or minimized Madison's comments regarding Article III. John Gibbons, for example, found Madison's argument to be "ambiguous" in regard to state sovereign immunity. *See* John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889, 1906 (1983). As this chapter explores, there is good reason to believe men like James Madison, John Marshall and Alexander Hamilton were actually telling the truth when they insisted that a proper construction of Article III would reserve to the states all aspects of sovereignty not expressly delegated away. But whatever the merits of claimed "misdescriptions" of Article III, the effort here is to recover the likely general public understanding of the text. If the ratifiers broadly accepted Federalist assertions about Article III, then those assertions become part of the original understanding.

Article III as "perfectly incomprehensible" and in conflict with the "clear expression" of the text.[14] In response, the future Supreme Court chief justice John Marshall declared that he shared Madison's limited reading of Article III. Narrow construction of Article III would be appropriate given the special situation of the states:

> With respect to disputes between a state and the citizens of another state, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a state will be called at the bar of the federal court. . . . It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states. I contend this construction is warranted by the words. But, say they, there will be partiality in it if a state cannot be defendant—if an individual cannot proceed to obtain judgment against a state, though he may be sued by a state. It is necessary to be so, and cannot be avoided.[15]

At the same time as Madison and Marshall were defending Article III in Virginia, Alexander Hamilton was defending Article III in New York. The day after Marshall delivered the remarks quoted above to the Virginia convention, Alexander Hamilton published the first installment of the *Federalist* No. 81. Apologizing that the subject "may rather be a digression from the immediate subject of this paper," Hamilton's "Publius" thought it appropriate to "take occasion to mention here a supposition which has excited some alarm upon very mistaken grounds."

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States and the danger intimated must be merely ideal. . . . The contracts between a nation and individuals are

14. *See* 10 The Documentary History of the Ratification of the Constitution, *supra* note 10, at 1422–23 (remarks of Patrick Henry).

15. *Id.* at 1433 (remarks of John Marshall).

> only binding on the conscience of the sovereign, and have no pretensions to a compulsive force.[16]

Hamilton based his argument on a rule of construction derived from the nature of retained sovereignty. Sovereigns are presumed to be immune from suit by individuals without their consent. Absent an express delegation of power in the Constitution, this aspect of sovereign power is presumed to be retained by the people in the several states. In other words, even though Article III could be construed to authorize such suits in federal court, it nevertheless ought not to be so construed absent express language to the contrary. As Hamilton explained to the New York ratifying convention:

> [W]hatever is not expressly given to the Federal Head, is reserved to the members. The truth of this principle must strike every intelligent mind. . . . [The people] have already delegated their sovereignty and their powers to their several Governments; and these cannot be recalled and given to another, without an express Act.[17]

Along with its notice of ratification, the New York convention appended a declaration explaining that it ratified the Constitution "[u]nder the[] impression[]" that "the judicial power of the United States, in cases in which a State

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16. THE FEDERALIST No. 81, at 487–88 (Alexander Hamilton) (Clinton Rossiter ed., 1961). As they have with Madison's above remarks, anti-sovereign-immunity scholars have struggled with Hamilton's statement in *The Federalist* No. 81. *See, e.g.*, Gibbons, *supra* note 13, at 1912 ("Reading [Hamilton] to acknowledge the existence of a general principle of state sovereign immunity extending even to claims arising under federal law—as the profound shock school does—wrenches this isolated statement from its context."). As explained below, the contemporary readers of *The Federalist* No. 81 had no problem understanding its promise of a narrow construction of Article III in order to preserve the retained sovereign rights of the states.

17. Convention of New York: Speech on the Senate of the United States, *in* 2 THE WORKS OF ALEXANDER HAMILTON 77–78 (Henry Cabot Lodge ed., federal ed. 1904). In *The Federalist* No. 32, Hamilton wrote:

> > An entire consolidation of the states into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them would be altogether dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States.
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> THE FEDERALIST No. 32 (Alexander Hamilton), *supra* note 16, at 198.

may be a party, does not extend to criminal prosecutions, or to any suit by any person against a State."[18]

In Massachusetts, the ratifying convention debated the same issue. In response to Anti-Federalist concerns that individuals might haul nonconsenting states into federal court, the Federalist Rufus King apparently delivered a two-hour speech explaining why Article III "could not possibly bear [this] construction."[19] "Rufus King, Esq. [had] 'pledged his honour,' in the state convention, 'that the convention at Philadelphia never discovered a disposition to infringe on the government of an individual state; and that in his opinion no Congress on earth would dare invade the sovereignty of this commonwealth.' On the strength of this gentleman's opinion, [Article III] was assented to but by a small majority."[20]

All these renunciations of Anti-Federalist claims about Article III rely on a narrow construction of the text. Article III could be read broadly—as Madison put it, Article III "might be better expressed." Nevertheless, the text should not, and would not, be read so broadly at the expense of the retained sovereign authority of the states. The record, of course, is not unanimous in this regard. Edmund Randolph, for example, expressed his belief that Article III ought to be read to allow suits by individuals against the states.[21] In the ratification debates, however, such views were a decided minority. More common by far were denials of such power, and most common of all was the declaration that strict construction would apply to Article III just as it would to the rest of the Constitution.

These promises of a narrow construction of Article III are well known but often dismissed by scholars on a variety of grounds, from reflecting a mistaken understanding of Article III to outright prevarication on the part of

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18. New York Declaration of Rights and Form of Ratification (July 26, 1788), *reprinted in* 18 The Documentary History of the Ratification of the Constitution, *supra* note 10, at 297, 300.

19. "Democrat," Mass. Mercury, July 23, 1793, *reprinted in* 5 The Documentary History of the Supreme Court of the United States, 1789–1800: Suits Against States 393, 393, 395 n.3 (Maeva Marcus ed., 1985).

20. "Marcus," Mass. Mercury, July 13, 1793, *reprinted in* 5 The Documentary History of the Supreme Court, *supra* note 19, at 389, 389–90.

21. Debates in the Convention of the Commonwealth of Virginia (June 10, 1788), *in* 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 1, 207 (Jonathan Elliot ed., Wash., D.C., 1836) [hereinafter Elliot's Debates] (Remarks of Edmund Randolph) ("I admire that part [of the Constitution] which forces Virginia to pay her debts.").

men like Hamilton and Marshall in their efforts to say *anything* to secure the ratification of the Constitution. One cannot know, of course, what was in the minds of particular founders. Certainly, it is hard to reconcile Hamilton's promises in the state ratifying conventions (and in the *Federalist Papers*) with his later nationalist interpretations of federal power. And, in an earlier time, the fact that the Federalists may have had un(or under)expressed private intentions would have been relevant to determining the "original intentions of the framers." Contemporary constitutional historians, however, seek the original *public understanding* of the Constitution, and this effort is far more concerned with what the ratifiers thought they were embracing than with what the founders may have privately hoped they were accomplishing. In this regard, then, the promises of the Federalists in the ratifying conventions cannot be dismissed, whatever misunderstanding or misdirection may have been involved.

For the moderates in the state conventions, whose votes were critical to securing the ratification of the Constitution, Federalist promises of narrow or strict construction were important but by themselves inadequate. Those doubters who remained on the fence regarding the Constitution seem to have agreed with the Virginian Anti-Federalist George Mason, who insisted that "[w]e must have such amendments as will secure the liberties and happiness of the people on a plain, simple construction, not on a doubtful ground."[22] James Madison and the Federalists ultimately conceded the point—limitations on the construction of federal power needed to be made an express part of the national Constitution. Relying on Federalist promises that a bill of rights would be among the items on the agenda of the new Congress, most states decided to ratify the Constitution, but did so declaring their understanding of the document and submitting a list of suggested amendments. We know that Madison distilled these proposals into a list of twelve amendments, ten of which were ultimately ratified, and two of which specifically addressed the proper construction of federal power.

But even before the Bill of Rights was added to the Constitution, suits had already been filed against the states. In a new world full of unpaid debts,

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22. Debates in the Convention of the Commonwealth of Virginia (June 14, 1788), *in* 3 ELLIOT'S DEBATES, *supra* note 21, at 271; *see also Letters of Centinel* No. 2, *in* 2, THE COMPLETE ANTI-FEDERALIST 143, 147 (Herbert J. Storing ed., 1981) ("Mr. Wilson tells you, that every right and power not specifically granted to Congress is considered as withheld. How does this appear? Is this principle established by the proper authority? Has the Convention made such a stipulation? By no means.").

eager clients, and willing lawyers, this should come as no surprise. The fact that federal courts entertained such suits, however, caused a cry of alarm—and accusations of betrayal.

Suits Against the States

It did not take long for the new Supreme Court to consider the issue of state suability. The issue presented itself in the very first case on the Court's inaugural docket, *Van Staphorst v. Maryland*. The case involved a long-standing contract dispute between the Dutch Van Staphorst brothers and the State of Maryland. Frustrated at the state's unwillingness to offer satisfactory terms, the Van Staphorsts filed suit against the state in the Supreme Court of the United States, and the case was scheduled to be heard in February 1791. Their own lawyer advised them to settle because a "suit against a state cannot avail. . . . A state is not an individual—The states being individually sovereign."[23] Although the Maryland legislature did not contest the case, it eventually concluded that allowing the case to go to trial "may deeply affect the political rights of this state, as an independent member of the union."[24] Accordingly, the state eventually came to terms with the Van Staphorsts and settled out of court.[25]

The case generated the first significant public discussion of state suability since the ratification of the Constitution in 1787. An observer at the opening proceedings of the new Supreme Court was startled to find the Court hearing a case brought by "a Foreigner, against the state of Maryland."[26] The observer's shocked reaction predates *Chisholm* by two years and initiates a theme that would be heard throughout the states until the adoption of the Eleventh Amendment:

> Should this action be maintained, one great national question, will be settled;—that is, that the several States, have relinquished all their

23. Letter from Pierce Butler to Messrs. Van Staphorsts and Hubbard (Sept. 23, 1791), *in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 34, 34.

24. REPORT OF THE COMMITTEE OF WAYS AND MEANS, MARYLAND HOUSE OF DELEGATES (Dec. 13, 1791), *reprinted in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 35, 35.

25. 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 20.

26. Letter from an Anonymous Correspondent, INDEP. CHRON. (Phila.) (between Feb. 13 and 19, 1791), *reprinted in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 20, 20.

> SOVEREIGNITIES, and have become mere corporations, upon the establishment of the General Government: For a Sovereign State, can never be sued, or coerced, by the authority of another government.[27]

Looking on from Massachusetts, the state attorney general James Sullivan shared the same troubled reaction and published his remonstrance against such suits in a pamphlet titled *Observations upon the Government of the United States of America*.[28] To Sullivan, the issue "whether the separate states, as states, are liable to be called to answer before any tribunal by civil process" necessarily involved the subsidiary question "[w]hether we are an assemblage of Republics, held together as a nation by the form of government of the United states, or one great Republic, made up of diverse corporations."[29]

> A corporation cannot be corporally punished, or be imprisoned, but it may be disenfranchised, and lose its privileges for misuse of them. This is called a civil death. But this process of punishment carries with it the full and complete idea of subordination to a superior power, which is quite inconsistent with every idea of any kind of sovereignty.[30]

Although Article III could be construed to authorize suits brought by foreigners against the states, this was not a necessary construction. The party-diversity provisions of Article III could be understood to apply only where states appeared as plaintiffs, as opposed to defendants.[31] A strict construction of Article III was appropriate because it preserved the independent sovereign existence of the states:

> If the paragraphs above recited, by having the construction which I have given them, can be fully satisfied, and be rendered consistent with the other parts of the system they belong to; and if a contrary, or more enlarged construction would render them incompatible with, and derange the

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27. *Id.* at 21.

28. James Sullivan, Observations upon the Government of the United States of America (Boston, Samuel Hall 1791), *reprinted in* 5 The Documentary History of the Supreme Court, *supra* note 19, at 21.

29. *Id.* at 21.

30. *Id.* at 29.

31. *Id.* at 26.

> whole system, and compel us to affix new meanings to the language of it, then I think I may conclude that my construction is right.[32]

Written only a few months after Madison's speech opposing the Bank of the United States, Sullivan's *Observations* adopted some of the same rules of constitutional construction—in particular, the need to strictly construe federal power in order to avoid an "interpretation that destroys the very characteristic of the Government."[33] Sullivan's argument laid out the general defense that would be repeated time and again over the coming months: subjecting states to suits by individuals without their consent rendered the states no different from "corporations" and could not be reconciled with the promise of retained state sovereignty. Interpreting Article III as authorizing suits against the states by foreigners was not a necessary construction of the article and violated the promise that federal power would be narrowly construed wherever it threatened the independence of the states.[34]

The public debate triggered by the *Van Staphorst* case was just the beginning. More cases soon emerged, including *Oswald v. New York*, *Hollingsworth v. Virginia*, and *Chisholm v. Georgia*. The public debate intensified accordingly.

Justice James Iredell and *Oswald v. New York*

Oswald v. New York had its roots in New York's hiring of John Holt to serve as state printer in the years immediately following the Revolution.[35] After Holt died, the administrator of his estate, Eleazer Oswald, sued the State of

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32. *Id.* at 26–27.

33. *See* James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791), *in* JAMES MADISON: WRITINGS 480, 482 (Jack N. Rakove ed., 1999).

34. Sullivan's *Observations* triggered an extended response by "Hortensius," who argued that the plain meaning of the text allowed such suits and that requiring states to pay their debts to individuals was simply a matter of justice. *See* HORTENSIUS, AN ENQUIRY INTO THE CONSTITUTIONAL AUTHORITY OF THE SUPREME FEDERAL COURT, OVER THE SEVERAL STATES, IN THEIR POLITICAL CAPACITY. BEING AN ANSWER TO OBSERVATIONS UPON THE GOVERNMENT OF THE UNITED STATES OF AMERICA (Charleston, S.C., W. P. Young 1792), *reprinted in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 36, 39.

35. *See* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 57.

New York in the U.S. Supreme Court for Holt's unpaid services.[36] The suit was filed in the Supreme Court in February 1791, and the case was eventually scheduled to be heard during the February 1792 term.[37] Even before the Court had the chance to hear the case, a widely published article raised the hue and cry about "an important question" before the Court regarding "[w]hether a state can be compelled to appear and answer to a process" issued by the Supreme Court.[38] Governor George Clinton and the state legislature ignored the original summons, leading Oswald to seek a writ of *distringas* compelling New York to respond.[39] It was at this point that Justice James Iredell sketched his initial thoughts about the power of the federal courts to hear individual suits against a nonconsenting state.

Justice Iredell's "Observations on State Suability" seems to have been originally planned as an opinion in *Oswald*. Because the Court ultimately dismissed Oswald's motion on other grounds, Iredell saved his notes and incorporated some of the passages into his later opinion in *Chisholm v. Georgia*.[40] Justice Iredell began by addressing an apparent deficiency in the motion—Article III authorizes suits between a state and a citizen from another state, but there was reason to believe that the plaintiff in this case was a resident of New York. If that were so, then the Court lacked jurisdiction to hear the case.[41] Nevertheless, because the case might return to the Court, and because the "great question" raised by the case came before the Court "judicially," even if not "necessarily," Iredell continued his observations in order "state my sentiments on the subject as clearly and fully as I am able."[42]

"The question," Iredell wrote, "comes to this—What controversy of a civil nature can be maintained against a state by an individual?"[43] Answering this question required identifying the "principles the courts of the United States are bound to determine in [the] execution of the various parts of their jurisdiction."[44]

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36. *Id.* at 57–58.

37. *Id.* at 60.

38. *Id.* at 60 (quoting an article from the *Pennsylvania Gazette* (Phila.) dated Feb. 1, 1792).

39. *Id.*

40. *Id.* at 76.

41. James Iredell, Observations on State Suability, *in* THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 76, 79.

42. *Id.*

43. *Id.* at 81.

44. *Id.*

This required construing the scope of Article III, a task Justice Iredell believed ought to be guided by the law of nations. According to Iredell, construction of the Constitution fell within the same category as construction of treaties between foreign powers since the Constitution "form[ed] out of several independent Governments a new one composed of *definite Powers*."[45] In every area "where authority has been surrendered to the general Government, the states as such have no right to exercise their sovereignty separately."[46] However, "[i]n every instance where authority has *not* been so surrendered, the separate states remain *sovereign* & *independent*: for they have done nothing to divest that sovereignty."[47] It required the "true construction" of the Constitution "to determine in any particular instance . . . whether the Sovereignty of the state be or not be retained."[48]

The plaintiffs viewed the state as occupying the same status as a corporation, an entity capable of suing and being sued, but Iredell rejected the analogy. Although some degree of state sovereignty had been "abridged by the Constitution of the U.S.," it remained the case that "whenever considered as a state, it is a Sovereign power."[49] And how could corporate-law-based judgments be enforced against a sovereign power? Corporations could be dissolved "through negligence or abuse of its Franchise. . . . Is there any authority in the U.S. to dissolve one of the American states?—God forbid—no Man will pretend such a thing."[50]

> [W]hat right [then] have we to proceed against any one of the states, by applying the law applicable to *dependent corporate bodies*, the mere creatures of Governmental Authority, to a *State Sovereignty*, dependent in no particular whatever on the United States but in certain cases voluntarily and solemnly surrendered? & in every other particular retaining all the attributes and real power of Sovereignty and Independence. I presume therefore no general law as to corporations will apply to this case.[51]

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45. *Id.* at 82.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 87.
50. *Id.* at 88.
51. *Id.*

Iredell believed that a suit against a state for recovery of debt was analogous to similar suits against corporations. In this, both advocates and opponents of state suability were in agreement. Treating a state like a corporation, however, was incompatible with the idea of retained sovereignty, at least as sovereignty was understood according to the law of nations. And this was the critical point: the states ought to be treated as independent sovereign entities because the Constitution itself was created through the exercise of independent delegations of sovereign power by the people in the several states. Following the approach of Emmerich de Vattel, Iredell presumed that a sovereign people would not delegate power in a manner destructive of sovereignty itself.

Iredell's basic conclusions were not generally denied by proponents of state suability. Instead, the conclusions were embraced as positive outcomes—yes, suing a state was analogous to suing a corporation, and yes, such a suit denied the states any claim to "equal sovereignty" with that of the national (or any other) government. To proponents, however, this was both a just and a reasonable reading of Article III. To opponents of state suability, on the other hand, such a reading betrayed the ratifiers' understanding that Article III would be narrowly construed in order to preserve the retained sovereignty of the states.[52] In adopting this reasoning, Iredell echoed the arguments of James Sullivan regarding Article III and James Madison regarding *all* delegated sovereign power.

Chisholm v. Georgia

The background controversy in *Chisholm v. Georgia* involved the estate of a man who had delivered goods to the State of Georgia but had never been paid.[53] The initial suit, *Farquhar v. Georgia*, was filed in federal district court in early 1791 but was subsequently dismissed on the grounds that the

52. *See* George Clinton, Address to the New York Legislature (Jan. 7, 1794), *in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 93, 93 ("[The Supreme Court's decision in *Chisholm*] involves so essentially the sovereignty of each state, that no observations on my part can be necessary to bespeak your early attention to the subject matter of them. It may be proper, however, to suggest, that our Convention, when deliberating on the federal Constitution, in order to prevent the Judiciary of the United States from extending itself to questions of this nature, expressly guarded against such a construction, by their instrument of ratification.").

53. 2 U.S. (2 Dall.) 419 (1793).

Supreme Court had exclusive jurisdiction over cases in which a state was a party.[54] When Chisholm refiled his case in the Supreme Court in early 1792,[55] word quickly spread that the Supreme Court was scheduled to hear a case involving "questions of magnitude" that "may affect the interests of states and individuals."[56]

There is a voluminous literature on the *Chisholm* case, and there is little reason to replicate a detailed analysis of the case and its opinions. This is not just because others have already done so. The fact is that neither the particular circumstances before the Court in *Chisholm* nor the extended opinions of the justices had any perceptible effect on the debates that led to the adoption of the Eleventh Amendment. The opinions themselves were unavailable for months after the decision was handed down. But that did not prevent the public debate from going forward unabated. What was important about *Chisholm* was not its particular facts or the particular reasoning of the justices. All that mattered was that the Supreme Court had finally handed down an opinion in one of the many cases involving individual suits against the states and that the Court had construed Article III to allow such suits to proceed in federal court. That was all anyone needed to know. The facts of the case were irrelevant, and no one seemed disposed to defer to the reasoning of the justices—even when their opinions were published. Nor did the decision trigger any kind of immediate action on the part of the states. As we shall see, it was not until Massachusetts found itself sued in federal court that this New England state took the lead in coordinating a national response to the Supreme Court's decision in *Chisholm*.

Still, it is worth spending a brief time reviewing the opinions in *Chisholm*, if only to remedy a commonly repeated, but completely erroneous, assertion about Justice Iredell's dissent and his position on the constitutional issue before the Court. The burden of this book is to explain the common understanding of the founders that delegated federal power was to be narrowly construed in order to preserve the retained rights of the people in the states. This rule applied to *all* delegated federal power, including power delegated to the federal courts. Justice Iredell expressly adopted this view in his *Chisholm* dissent—though much of his analysis is missing from the official report of

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54. *See* 5 The Documentary History of the Supreme Court, *supra* note 19, at 128.

55. *Id.* at 130.

56. Gen. Advertiser (Phila.), Aug. 6, 1792, *reprinted in* 5 The Documentary History of the Supreme Court, *supra* note 19, at 158, 158.

the case. It is only appropriate that his views be rescued along with the rest of the lost history of the Ninth Amendment.

The Supreme Court justices handed down their decision from the bench on February 18, 1793: four justices (John Blair, William Cushing, James Wilson, and Chief Justice John Jay) ruled in Chisholm's favor, and one justice (James Iredell) dissented. The opinions of Justices Blair and Cushing were short and pedestrian: the text of Article III clearly allows suits between a state and a party from out of state; this case involves a suit between a state and a party from out of state; ergo, jurisdiction lies.[57] The opinions of Justice James Wilson and Chief Justice John Jay were more substantial, and to this day, they remain the most well known and commonly discussed in the literature.[58] Justice Wilson opened his opinion by announcing that the case was "of uncommon magnitude" and involved the question whether a state "*claiming* to be sovereign" was "amenable to the jurisdiction of the Supreme Court of the United States[.] This question, important in itself, will depend on others, more important still; and, may, perhaps, be ultimately resolved into one, no less radical than this: 'do the people of the United States form a Nation?'"[59] Unlike Justice Iredell, Justice Wilson rejected the law of nations as providing guidance to the Court: that body of law involved disputes between a "society" of nations, whereas the United States was a single consolidated nation.[60] To Wilson, the very idea that states retained any degree of independent

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57. Indeed, asserted Justice Blair, reading Article III in a narrower manner would itself violate the Constitution:

> It seems to me, that if this Court should refuse to hold jurisdiction of a case where a State is Defendant, it would renounce part of the authority conferred, and, consequently, part of the duty imposed on it by the Constitution; because it would be a refusal to take cognizance of a case where a State is a party.

Chisholm, 2 U.S. (2 Dall.) at 451 (1793) (Blair, J.).

58. *See, e.g.*, Randy E. Barnett, *The People or the State?* Chisholm v. Georgia *and Popular Sovereignty*, 93 VA. L. REV. 1729, 1731, 1734 (2007); Manning, *supra* note 7, at 1676 n.52 (2004).

59. *Chisholm*, 2 U.S. at 453 (Wilson, J.) (emphasis added).

60. According to Wilson:

> A cause so conspicuous and interesting should be carefully and accurately viewed from every possible point of sight. I shall examine it; 1st. By the principles of general jurisprudence. 2nd. By the laws and practice of particular States and Kingdoms. From the law of nations little or no illustration of this subject can be expected. By that law the several States and Governments spread over our globe are considered as forming a society, not a NATION.

Id.

sovereignty was based on a feudal conception of sovereignty that was "degrading to man."[61]

Although every bit as much the nationalist as James Wilson, Chief Justice John Jay presented his position in far less strident tones. Like Wilson, Jay grounded his construction of the Constitution on the idea that the people of the United States were a single undifferentiated mass—and it was from this single national people that the Constitution came into being.[62] The guiding purposes of the document were found in the preamble—particularly, the framers' declared intent to "establish Justice" and "insure domestic Tranquility." From these broad propositions, Jay concluded that Article III must be "construed liberally":

> If the Constitution really meant to extend these powers only to those controversies in which a State might be Plaintiff, to the exclusion of those in which citizens had demands against a State, it is inconceivable that it should have attempted to convey that meaning in words, not only so incompetent, but also repugnant to it; if it meant to exclude a certain class of these controversies, why were they not expressly excepted . . . [?][63]

Under Jay's "liberal" reading of Article III, the only exceptions to general delegations of federal jurisdiction in favor of the states are those "expressly enumerated." This is precisely the opposite of the rule of strict construction that excludes the application of federal power against the states unless such power is expressly enumerated or is required by unavoidable implication. It is this opposing rule of construction that formed the basis of Justice Iredell's dissent. Finally, Jay carefully distinguished the case of the national government from that of the states: although states could be compelled to answer in federal court, a suit against the national government was a completely different matter.[64]

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61. *Id.* at 457–58.

62. *Id.* at 470–71 (Jay, C.J.).

63. *Id.* at 476.

64. *Id.* at 478 (distinguishing the case in favor of suits against the states from the "very different" case of a suit against the United States).

The Constitutional Argument of Justice James Iredell

Modern Eleventh Amendment scholars tend to emphasize the nationalist opinions of men like James Wilson and John Jay[65] and diminish the contributions of Justice James Iredell and his *Chisholm* dissent.[66] As some have put it, Justice Iredell's comments on the Constitution amounted to no more than a minute in an argument of an hour and a half.[67] Even the most recent scholarly accounts of the amendment presume that Alexander James Dallas's report of the case contains a full discussion of Iredell's opinion on the constitutional aspect of the case and that Iredell did not commit himself on the constitutional issue.[68] This is doubly misleading, for not only did Iredell's

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65. *See, e.g.*, Barnett, *supra* note 58, at 756 (holding up the opinions of Wilson and Jay as best representing the original "individualist" conception of popular sovereignty).

66. The assumption that Iredell had little to say about the constitutional issues in *Chisholm* are ubiquitous in Eleventh Amendment scholarship. For just a few examples, *see* Johnson, *supra* note 13, at 267, asserting that "Justice James Iredell, dissenting, did not reach the constitutional issue," Fletcher, *supra* note 7, at 1058, asserting that "Justice Iredell, the lone dissenter, was unwilling to hold that a state was liable in *assumpsit*, but he explicitly reserved judgment on whether a state could be made liable under federal law," Gibbons, *supra* note 13, at 1923–24, describing Justice Iredell's opinion as involving statutory construction and a policy-based "warning" about holding states liable in federal court, Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 Nw. U. L. Rev. 1027, 1084 (2003), claiming that Justice Iredell "avoided the tough constitutional question and found his answer in the common law," and John V. Orth, *History and the Eleventh Amendment*, 75 Notre Dame L. Rev. 1147, 1155–56 (2000), noting that "Justice Iredell certainly spent by far the largest part of his dissent in *Chisholm* looking for legislative authorization for the exercise of jurisdiction over suits against states."

67. *See* Orth, *supra* note 66, at 1150 (2000) ("In a dissent taking at least an hour and a quarter to deliver, Iredell's "extra-judicial" comments on the constitutional question occupied barely a minute at the very end."); *see also* David P. Currie, The Constitution in the Supreme Court: The First Hundred Years, 1789–1888, at 17 (1985) (stating that Iredell took the position that states could not be sued but "without explaining why"; 1 Julius Goebel, History of the Supreme Court of the United States: Antecedents and Beginnings to 1801, at 730 (1971) ("Iredell was not prepared to enter upon a construction of the Constitution"); Barnett, *supra* note 58, at 1735 ("[Justice Iredell] devoted the bulk of his opinion to the question of whether the Supreme Court has jurisdiction to hear a breach of contract case in the absence of express authorization either by the Constitution itself or by Congress" and addressed the constitutional issue "only in passing."); John V. Orth, *The Truth About Justice Iredell's Dissent in* Chisholm v. Georgia *(1793)*, 73 N.C. L. Rev. 255 (1994).

68. *See* Manning, *supra* note 7, at 1679–80. Alexander Dallas was the editor of what became the official United States Reports. *See* Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective On Marshall Court Ascendancy*, 83 Mich. L. Rev. 1291, 1295 (1985).

published dissent contain important conclusions about the nature of the Constitution, but we also now know that Iredell prepared a separate and extensive essay on the constitutional issue in *Chisholm* that Iredell may have delivered as part of his oral remarks.

In the published version of his dissent, Iredell repeated an argument first made in his notes for *Oswald*, and he rejected any analogy between suits against the states and common-law suits against corporations. Such an analogy ignored the basic difference between a corporation, whose existence depends on the discretion of the government, and a sovereign state, whose existence depends on no one but itself and its people, and which retains all sovereign power not delegated under the federal Constitution.[69] The only other area of the common law relevant to the issue of federal-state relations involved the proper interpretation of treaties between sovereigns, and this was not helpful (to put it mildly) to the plaintiff's case.[70] Finally, even if Congress had passed a law providing a process by which an individual might sue a state, Iredell doubted that such an act would be constitutional: "I think every word in the Constitution may have its full effect without involving this consequence, and that nothing but express words or insurmountable implication (neither of which, I consider, can be found in this case) would authorize the deduction of so high a power."[71] This, of course, is a restatement of the rule of strict construction. Although Eleventh Amendment scholars are right to characterize the published version of Iredell's opinion as mainly dealing with statutory construction, his conclusions throughout the opinion are

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69. James Iredell's Supreme Court Opinion (Feb. 18, 1793), *reprinted in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 164, 184.

70. *Id.* at 184–85. In his *Oswald* essay, Iredell expanded on this reference to the law of nations (which the editors of *The Documentary History of the Supreme Court* believe referred to the work of Emmerich de Vattel):

> 2. As to the Conventional Law of Nations.
>
> (see the definition) [editor's note explaining that Iredell intended to add a quotation from Vattel's *Law of Nations*]
>
> This therefore is that part of the Law of Nations which applies to the construction of Treaties the United States have with a foreign power.
>
> Under this head may also probably with propriety be included the *Constitution of the United States*.
>
> I consider that Constitution as forming out of several independent Governments a new one composed of *definite Powers*.

Iredell, *supra* note 41, at 82.

71. James Iredell, Observations on "This Great Constitutional Question" (Feb. 18, 1793), *in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 186, 185.

based on constitutional interpretive theory. Consider, for example, Iredell's explanation for why common-law suits against the sovereign in England were analogous to suits against the American states:

> Every State in the Union, in every instance where its Sovereignty is not delegated to the United States, I consider to be as completely Sovereign, as the United States are in respect to the powers surrendered. The United States are Sovereign as to all the powers of Governments actually surrendered: Each State in the Union is Sovereign to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such *as the States have surrendered to them*: Of course, the Part not surrendered must remain as it did before.[72]

There are several critical assumptions about state and federal power contained in this brief statement. Justice Iredell described the federal government as having derived its powers from the sovereign states, with all nondelegated power retained by the states. This has implications not only for the application of the common law to the states but also for the construction of delegated federal power. Most of all, it directly contradicts Justice Wilson's and Justice Jay's description of the federal Constitution as having been derived from a sovereign national people. When Justice Iredell spoke of sovereign states, it was a shorthand reference to the sovereign people in the several states. Like most of the founders, Iredell embraced the concept of popular sovereignty, a concept that applies first and foremost to the collective people of a state[73]—and this from a *Federalist* justice.

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72. *Id.* at 172.

73. In *Penhallow v. Doane's Administrators*, 3 U.S. (3 Dall.) 54, 93 (1795), Justice Iredell wrote,

> In such governments, therefore, the sovereignty resides in the great body of the people, but it resides in them not as so many distinct individuals, but in their politic capacity only. . . . I conclude, therefore, that every particle of authority which originally resided either in Congress, or in any branch of the state governments, was derived from the people who were permanent inhabitants of each province in the first instance, and afterwards became citizens of each state; that this authority was conveyed by each body politic separately, and not by all the people in the several provinces, or states, jointly, and of course, that no authority could be conveyed to the whole, but that which previously was possessed by the several parts; that the distinction between a state and the people of a state has in this respect no foundation, each expression in substance meaning the same thing; consequently, that one ground of argument at the bar, tending to show the superior sovereignty of Congress, in the instance in question, was not tenable, and therefore that upon that ground the exercise of the authority in question cannot be supported.

Justice Iredell's rejection of Edmund Randolph's use of the common law of corporations was explicitly based on the constitutional status of the sovereign states and the prior and continued existence of a separate sovereign people within the states:

> A Corporation is a mere creature of the King, or of Parliament. . . . It owes its existence, its name, and its laws, . . . to the authority which creates it. A state does not owe its origin to the Government of the United States, in the highest or in any of its branches. It was in existence before it. It derives its authority from the same pure and sacred source as itself. *The voluntary and deliberate choice of the People*. . . . A State, though subject in certain specified particulars to the authority of the Government of the United States, is in every other respect totally independent upon it. The People of the State created, The People of the State can only change, its Constitution.[74]

Finally, there is Iredell's telling reference to the law of nations. Some scholars have noted Iredell's reference, but no Eleventh Amendment scholar appears to have investigated Iredell's meaning, much less considered its critical role in Iredell's theory of constitutional interpretation. In fact, Iredell's reference to the law of nations ties together his claims in the North Carolina ratifying convention about the proper interpretation of federal power, his discussion of the law of nations in his *Oswald* "Observations," and his view of the proper construction of Article III in *Chisholm*. In the following passage, Iredell responds to Randolph's use of the law of nations to support the general policy of state suability:

> No part of the Law of Nations can apply to this case, as I apprehend, but that part which is termed "The Conventional Law of Nations"; nor can this any otherwise apply than as furnishing rules of Interpretation, since unquestionably the People of the United States had a right to form what kind of Union, and upon what terms they pleased, without reference to any former examples.[75]

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74. Iredell, *supra* note 41, at 183; *see also* GOEBEL, *supra* note 67, at 729 (explaining that this section of Justice Iredell's opinion "is an explicit recognition of the transfer of royal prerogatives to the states").

75. Iredell, *supra* note 71, at 184–85.

At first glance, this is an exceedingly odd statement. It begins with a reference to a body of law common to all nations, and ends with a reference to the people's sovereign right to ignore all former (and foreign) examples and create a completely unique republic. How exactly does a rule of interpretation furnished by the "Conventional Law of Nations" relate to the people's right to form a union wholly unlike any other nation?

Part of the answer can be found by revisiting Iredell's discussion of the law of nations that he wrote some months earlier in conjunction with the *Oswald* case. There, Iredell listed three categories of the law of nations: necessary, conventional, and customary.[76] The only applicable area to Iredell involved the conventional law of nations, or "that part of the Law of Nations which applies to the construction of the treaties the United States have with foreign Powers."[77] At this point in his *Osborne* manuscript, Iredell planned to insert a definition from Emmerich de Vattel's *Law of Nations*.[78] Published in 1758, Vattel's *Le Droit des Gens*[79] deeply influenced the founding generation, and his treatise would continue to be well cited in legal scholarship and judicial opinions for the next one hundred years.[80] In his section on the proper construction of treaties, Vattel explained that because sovereigns are presumed to have retained all sovereign powers not expressly delegated away, delegations of sovereign power must be strictly construed.[81] Although Vattel developed his theory in the context of continental politics, in his *Oswald* essay Justice Iredell argued that Vattel's approach to delegated sovereign power nevertheless provided the best model for construing the powers of the federal government.

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76. Iredell, *supra* note 41, at 81.

77. *Id.* at 82.

78. *Id.* at 82 nn.7, 8.

79. Emmerich de Vattel, Le Droit des Gens, ou Principes de la Loi Naturelle, Appliqués à la Conduite et aux Affaires des Nations et des Souverains [The Law of Nations, or Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns] (N.Y., S. Campbell 1796) (1758).

80. For a discussion of Vattel's influence on the founding generation, *see* Daniel G. Lang, Foreign Policy in the Early Republic: The Law of Nations and the Balance of Power (1985), as well as Francis Stephen Ruddy, International Law in the Enlightenment, The Background of Emmerich de Vattel's Le Droit des Gens (1975).

81. *See* Vattel, *supra* note 79, bk. 1, chap. 2, § 16 (on the duty of self-preservation); *see also id.* at bk. 2, chap. 17, §§ 305, 308 (on the need to narrowly construe "odious" delegations of sovereign power).

The Constitution, Iredell pointed out, "form[ed] out of several independent Governments a new one composed of *definite Powers*.[82] In every area "where authority has been surrendered to the general Government, the states as such have no right to exercise their sovereignty separately."[83] However, "[i]n every instance where authority has *not* been so surrendered, the separate states remain *sovereign* & *independent*: for they have done nothing to divest that sovereignty."[84] Although sovereigns across the ocean might have permitted themselves to be sued for recovery of debt, whether the sovereign people of the United States had done so was a matter of constitutional construction—a construction that took into account the people's right to form whatever manner of government (and governmental liability) they pleased. As Iredell put it, "true construction" of the Constitution required determining in "any particular instance . . . whether the Sovereignty of the state be or not be retained."[85]

Vattel had written that delegated authority required a clear or express delegation—absent such a clear statement, power was presumed to be retained by the sovereign. In the published version of his *Chisholm* dissent, Iredell adopted this same point about strict construction and the presumed retention of all power not clearly or expressly delegated away:

> I think every word in the Constitution may have its full effect without involving this consequence ["a compulsive suit against a state for recovery of money"], and that nothing but express words, or an insurmountable implication (neither of which, I consider, can be found in this case) would authorize the deduction of so high a power.[86]

Iredell stressed the need to apply strict construction (a clear statement rule) in any case involving a claimed delegation of a "high power." This echoes one of Madison's primary rules of construction in his speech on the Bank of the United States, a rule that Madison claimed had been promised to the ratifiers of the Constitution. In fact, in his draft notes on the constitutional issues in *Chisholm*—notes that have gone almost completely unnoticed in

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82. Iredell, *supra* note 41, at 82.

83. *Id.*

84. *Id.*

85. *Id.*

86. Chisolm v. Georgia, 2 U.S. (2 Dall.) 419, 449–50 (1793) (Iredell, J.).

Eleventh Amendment literature—Iredell laid out almost the identical Madisonian rules of construction.

James Iredell's "Observations on This Great Constitutional Question"

Prepared in conjunction with his opinion in *Chisholm*, Iredell's "Observations on This Great Constitutional Question" may have been delivered orally along with the rest of his opinion.[87] The essay was not widely available until it was published in 1994 as part of the fifth volume of *The Documentary History of the Supreme Court*, which might account for its omission in most historical discussions of *Chisholm*.[88] The commonly repeated insistence that Iredell did not address the constitutional issue in *Chisholm* is an indication that many scholars remain unaware of Iredell's "Observations."

Just as Madison opened his speech on the Bank of the United States with the general rules of constitutional interpretation, Iredell set forth his rules of constitutional construction in the opening passages of his "Observations":

> [1] I conceive before any authority can be deemed to be conveyed under this great Instrument, the words must be either clear & express for that purpose, or carry with them a fair and reasonable implication.
> [2] That in proportion to the greatness & importance of the surrender, ought to be the requisite of greater clearness in the expression.
> [3] That where every word can be fully satisfied, without implying a grant of a very high authority, that authority ought not to be understood to be conveyed.
> [4] That when the consequences ensue from one construction, inconsistent with the known basis on which the Constitution was formed & adopted, that construction shall not be received, if there be another at

87. *See* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 186 (editorial note).

88. Almost all scholarly analysis of *Chisholm* and Iredell's opinion in that case either omits or is simply unaware of Iredell's extended comments on the constitutional question before the Court. *See, e.g.*, 1 GOEBEL, *supra* note 67, at 729–30. A rare exception is Caleb Nelson's article *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1578 n.86 (2002).

> least equally natural & more consistent with the principles of the Constitution, which can take place.[89]

As had Madison, Iredell insisted that claimed federal power must be consistent with the overall principles of the Constitution, principles which themselves must be based on the original understanding of the constitution (the "known basis" on which the Constitution was adopted).[90] Most importantly, both men insisted that the more important the claimed power, the greater the need for an express delegation of authority, for it was unlikely that important matters would have been "left to construction." Madison believed that this rule of strict construction (particularly when it came to important powers) became an express part of the Constitution through the adoption of the Ninth and Tenth Amendments. Iredell found the same rule within the commonly accepted law of nations of Emmerich de Vattel. In his 1803 treatise on the Constitution, St. George Tucker would write that both views were correct.[91]

Chief Justice John Jay had argued that, absent an express statement to the contrary, Article III should be construed "liberally" to include all possible cases involving states and individuals—including cases in which states were a defendant. From Iredell's perspective, however, this flipped the proper rule of construction on its head. If a power did not exist before the Constitution was enacted, one simply could not say that the power "continue[d] unless *excluded*." Instead, the rule should be that the power "does not exist, if not conveyed by this Instrument."[92] And, Iredell fairly erupted, "if ever there was a case, *where the Convention should have spoken out explicitly,* if they meant what is ascribed to them__this certainly was the case__Where whole Sovereignties are to be brought to the Bar of Justice in the very same manner, & without any distinction, as single Individuals."[93]

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89. Iredell, *supra* note 71, at 187.

90. *See* 1 Annals of Cong. 1944 (Joseph Gales ed., 1834) (statement of Rep. James Madison).

91. *See* 1 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 app. note D (View of the Constitution of the United States) at 151 (St. George Tucker ed., Phila., William Young Birch & Abraham Small 1803) [hereinafter Tucker's Blackstone] (citing Vattel and the Ninth and Tenth Amendments in support of the general rule of strict construction of federal power).

92. Iredell, *supra* note 71, at 189.

93. *Id.* at 189 (underlining and underscoring in original).

"Observations on This Great Constitutional Question" should put to rest once and for all the notion that Justice Iredell avoided taking a position on the constitutional issue of state suability and retained state sovereignty. Not only do this essay and his notes for the *Oswald* case present a carefully thought out and constitutionally based opposition to individual suits against the states, but his interpretive approach matched that of James Madison and embraced the very rule of construction that Madison and the Federalists promised the ratifiers in the state conventions.

Vassal v. Massachusetts and the Call for Amendment

Although some supported the majority's decision in *Chisholm*, the reaction in the main was broadly, and strongly, negative. The decision was "generally reprobated here by Gentlemen of first information," wrote Philadelphia resident William Few to Georgia governor Edward Telfair.[94] The underlying principles of the case were "so incompatible" with "the intentions of the framers of the Constitution that it must be resisted"; otherwise, it would "eventually tend to exterminate the small remainder of state Sovereignties."[95] John Wereat had spoken with "New-England delegates who were unanimously of opinion that an explanation of that part of the Constitution should be made."[96] Massachusetts representative Theodore Sedgwick reportedly declared that "he could not have believed that any professional Gentleman would have risqued his reputation on such a forced construction of the clause in the Constitution."[97] An anonymous writer to the *Boston Independent Chronicle* reminded readers that when Article III had been discussed in convention, Federalists had dismissed warnings about suits against the states "as an absurdity in terms." Now, the writer sardonically noted, "the Chief Justice has made that to be right, which was at first doubtful, or improper."[98]

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94. Letter from William Few to Edward Telfair (Feb. 19, 1793), *in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 221.

95. *Id.*

96. Letter from John Wereat to Edward Telfair (Feb. 21, 1793), *in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 222–23.

97. *Id.*

98. Letter from an Anonymous Correspondent, INDEP. CHRON. (Boston), April 4, 1793, *reprinted in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 228.

Despite the broad opposition to the decision, the Georgia state government did not immediately respond. Having been served with the order of the Court, Governor Telfair instead appears to have authorized counsel to represent Georgia at the Supreme Court's next term in August.[99] At that time, the Court granted Georgia's motion to postpone further argument on the matter until February 1794.[100] The State of Georgia took no further action until the fall, and only then after having received news that Massachusetts sought to rally the states in supporting a constitutional amendment. The road to the Eleventh Amendment thus leads us to Massachusetts and that state's response to *Vassal v. Massachusetts*.

Vassal v. Massachusetts

A Loyalist who eventually ended up living on the outskirts of London, William Vassal fled Boston at the outbreak of hostilities with England. Vassal claimed that his property and belongings had been wrongfully confiscated under state anti-Loyalist laws, and he spent years in court seeking both the return of his property and proceeds from the sale of his belongings. In early 1793, Vassal gave up seeking justice from the Massachusetts legislature and brought suit against the state in the Supreme Court of the United States.[101] The suit was never argued; Massachusetts refused to appear in court to defend itself, and the case was finally dismissed in 1797.[102] Although the Supreme Court never heard the case, Vassal's suit put into motion a series of events that culminated in Massachusetts's leading the country in adopting the Eleventh Amendment to the Constitution.

Massachusetts had already proved itself quick to perceive a threat to the state's autonomy in suits like Vassal's. Two years earlier, Massachusetts attorney general James Sullivan had published his *Observations upon the Government of the United States*, prompting the first extended public discussion on whether Article III authorized individual suits against the states.[103] Sullivan's *Observations* was written in response to a case brought against the

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99. 5 The Documentary History of the Supreme Court, *supra* note 19, at 135.

100. *Id.*

101. *Id.* at 352–64.

102. *Id.* at 352.

103. *See supra* notes 28–34 and accompanying text.

State of Maryland.[104] Now, with Massachusetts facing its own suit in federal court, the response was swift indeed. A little more than one week after Vassel filed suit,[105] and only one day after the Supreme Court issued its decision in *Chisholm*,[106] Massachusetts congressman Theodore Sedgwick proposed the following amendment to the Constitution:

> That no state shall be liable to be made a party defendant, in any of the judicial courts, established, or which shall be established under the authority of the United States, at the suit of any person or persons, whether a citizen or citizens, foreigner or foreigners, or of any body politic or corporate, whether within or without the United States.[107]

The next day, Massachusetts senator Caleb Strong submitted his own proposed amendment in the Senate:

> The Judicial Power of the United States shall not extend to any suits in law or equity commenced or prosecuted against any one of the United States by Citizens of another State or by Citizens of any foreign State.[108]

No recorded action was taken on Sedgwick's proposal in the House. In the Senate, after a motion to postpone consideration was defeated, "further consideration thereof was postponed."[109] Because both proposals were submitted with less than two weeks left in the congressional session,[110] it seems likely that the members thought that the matter required more time to craft a proper response. Some members wished to postpone the discussion in the

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104. *Van Staphorst v. Maryland*, discussed *supra* under "Suits Against the States."

105. Vassal filed suit on February 11, 1793. *See* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 364.

106. *Chisholm* was decided February 18, 1793. *See id.* at 164.

107. *See Proceedings of the United States House of Representatives*, GAZETTE OF THE UNITED STATES, Feb. 19, 1793, *reprinted in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 605–06. There is no record of such a motion in either the *House Legislative Journal* or the *Annals of Congress*. *Id.* 606. However, the fact that Sedgwick's motion was reported in two different newspapers, including one recording a second to Sedgwick's motion to introduce the amendment, makes the reports seem credible.

108. Resolution in the United States Senate (Feb. 20, 1793), *in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at, 607–08.

109. *Id.* at 608 n.1.

110. 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 398.

hope of generating support for a broader declaration of limited federal power. Virginia governor Henry Lee had requested that Senators James Monroe and John Taylor propose their own amendment on the subject of state suability. The two senators resisted, however, explaining in a letter that it was too late in the session and that they hoped to use the time between sessions to generate support for a "more general" amendment that would address not only Article III but also "the exercise of constructive powers" such "as that exemplified in the establishment of the Bank" (among others).[111] Senator Strong's proposal thus was too "partial." In their opinion, "the doctrine of constructive powers . . . in the latitude contended for, to convert the national government from a limited into an unlimited one, should be suppressed in its infancy."[112]

In March, the Massachusetts House of Representatives appointed a committee to study the *Chisholm* decision and report on its potential impact on the state. The committee was unable to procure a copy of the decision, however, and postponed issuing their report until the next session. By that time, the committee had managed to get a copy of the justices' opinions, and in June 1793, the Joint Committee of the Massachusetts General Court published a series of resolutions in Boston's *Independent Chronicle* that declared that individual suits against state governments were "inconsistent with that sovereignty which is essential to all Governments" and that the Supreme Court's application of Article III in *Chisholm* was "repugnant to every idea of a Federal Government."[113] Having concluded "that the late decision of the Supreme Judicial Court of the United States, hath given a construction to

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111. Letter from James Monroe and John Taylor to Henry Lee (Feb. 20, 1793), *in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 606. Among other issues of concern at the time was the widespread resentment to Hamilton's funding program.

112. Letter from James Monroe and John Taylor to Henry Lee (March 2, 1793), *in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 608; *see also* Letter from Mercy Otis Warren to George Warren (Oct. 16, 1793), *in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 444 (reporting that she overheard that the initial attempt to amend the constitution was delayed in the hopes of adding to it an additional amendment "exclud[ing] all holders in the bank from a seat in Congress"). Some scholars have attributed the delay as an indication that the issue was of "no moment" to Congress. *See* Gibbons, *supra* note 13, at 1927. The issue, however, had already been the subject of substantial debate, and, as the text indicates, the delay could just as likely reflect the lateness of the date and the efforts by men like Monroe and Lee to secure a broader restriction on federal power.

113. 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 230.

the Constitution, very different from the idea which the Citizens of this Commonwealth en[tertained of it at the time it was adopted]," the legislature insisted that Article III be modified and explained to better reflect its original understanding.[114]

The joint committee report was scheduled to be discussed at the next session of the legislature (the General Court) in January 1794. The ailing governor John Hancock decided that the matter could not wait and took the extraordinary step of calling for a special session of the legislature to be held in mid-September.[115]

Massachusetts Sounds the Alarm

> *It is therefore high time to agree on measures, whereby to effect an amendment in the Federal Constitution, in order that the Judicial Court may not construe it in a different manner from that which the States intended.*
>
> William Widgery, Speech in the Massachusetts House of Representatives, September 23, 1793[116]

On September 18, 1793, Governor Hancock addressed the special session. Too ill to deliver the speech himself,[117] the secretary of state read the Governor's address which presented the assembly with three options: (1) acquiesce, (2) add an amendment explaining the proper construction of the Constitution, or (3) add an amendment removing power granted under the Constitution.[118] Option 2, by declaring the proper construction of the Constitution, suggested that the Court in *Chisholm* erred both in its reasoning and in its result.

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114. *Report of a Joint Committee of the Massachusetts General Court*, INDEP. CHRON. (Boston), June [20], 1793, *reprinted in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 230–31.

115. *See Proclamation by John Hancock*, INDEP. CHRON. (Boston), July 9, 1793, *reprinted in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 387.

116. William Widgery, Speech in the Massachusetts House of Representatives (Sept. 23, 1793), *in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 427, 430.

117. *See* 5 DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 352, 366 (editorial note).

118. John Hancock, Address to the Massachusetts General Court (Sept. 18, 1793), *in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 416–17.

In the opening of his address, Governor Hancock rejected the idea that "the People of this Commonwealth, when they, by their representatives in Convention, adopted the Constitution of a General Government, expected that a State should be held liable to answer on compulsory civil process, to every individual resident in another state, or in a foreign Kingdom."[119] The Supreme Court had decided otherwise, but this was an issue that Hancock could not "consider as settled."[120] Although Hancock declined to take an official position on the issue, he nevertheless presented an extended analysis of why the Supreme Court had erred in *Chisholm*. Extending federal judicial power in cases such as Vassal's would reduce the states to "mere corporations," under the centralized authority of the national government. Such a "consolidation of all the states into one government, would at once endanger the Nation as a Republic, and eventually divide the States united, or eradicate the principles which we have contended for."[121] Such weighty matters were not to be left in the hands of the Supreme Court. Hancock conceded that when the Constitution was first proposed, he "considered it as being by no means explicit in the description of the powers intended to be delegated."[122] He trusted, however, "that the wisdom of the People would very soon render every part of it definite and certain." Passing an amendment clarifying the proper construction of Article III would do just that.

Following Governor Hancock's address, the Massachusetts General Court referred the matter to a joint committee, which weakly reported back "that it is not expedient that a state should be suable by individual citizens of other States, or subjects of foreign states," and advised Massachusetts's representatives in Congress "to endeavor, to effect such alterations in the Constitution" as would remove the "inexpediency."[123] The report said nothing about the proper construction of the Constitution or whether the Supreme Court had erred in *Chisholm*, and it was immediately rejected by

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119. *Id.* at 416.

120. *Id.*

121. *Id.* at 419.

122. *Id.*

123. Report of a Joint Committee of the Massachusetts General Court (Sept. 23, 1793), *reprinted in* 5 The Documentary History of the Supreme Court, *supra* note 19, at 424, 424.

the House.[124] In its place, an overwhelming majority of the House approved a new set of draft resolves expressly declaring that the Court had departed from the original understanding of the ratifiers in the state convention and calling for an amendment mandating the proper construction of Article III.

House member John Davis objected to the General Court's presuming to know the original understanding of the people in convention.[125] Davis further warned the assembly against mandating the proper construction of the Constitution: doing so "might authorize a construction in some future instances, which would be hostile to the rights and privileges of the people. We should be very careful, therefore, how we encourage, and especially how we insist on a construction of the Constitution, repugnant to the plain sense and meaning of the words."[126] To the vast majority of the assembly, however, it was the Court's construction that threatened the retained rights and privileges of the people, and they very much wanted to authorize a different construction for this and future cases. Accordingly, although the language expressly declaring the original sense of the people was removed, the language of compelled construction was not.

> Resolved, That a power claimed, or which may be claimed, of compelling a State to be made a defendant in any Court of the United States, at the suit of an individual or individuals, is in the opinion of the legislature unnecessary and inexpedient, and in its exercise dangerous to the peace, safety and independence of the several States, and repugnant to the first principles of the Federal Government: Therefore
>
> Resolved, That the [state's representatives in Congress] obtain such amendments to the Constitution of the United States as will remove any clause or article of the said Constitution which can be construed to imply or justify a decision that a State is compellable to answer in any suit by an individual or individuals in any Court of the United States.[127]

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124. *Id.*

125. Account of John Davis's Speech in the Massachusetts House of Representatives by the Independent Chronicle (Sept. 23, 1793), *in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 431, 433 ("[I]t is not becoming now to declare, what was then the sense of the people.").

126. *Id.* at 432.

127. Resolution of the Massachusetts General Court (Sept. 27, 1793), *in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 440.

The Massachusetts resolutions concluded with a call for the governor "to communicate the foregoing Resolves to the Supreme Executives of the several States, to be submitted to the consideration of their respective Legislatures."[128] Although the final draft did not expressly state that the Court's decision in *Chisholm* contradicted the original understanding of the ratifiers, the implication was hard to miss. The judgment in *Chisholm* was "repugnant to the first principles of the Federal Government." Not only was the Court's construction "unnecessary and inexpedient," but it was "dangerous to the peace, safety and independence of the several States." Thus the need to remove any possibility of any similar "constructions" in the future. In his letter transmitting the resolves to the governors of the several states, Samuel Adams was blunt. "It is easily discerned," wrote Adams, "that the power claimed [by the Supreme Court], if once established, will extirpate the federal principle, and procure a consolidation of all the Governments."[129]

The States Respond

Other states quickly followed suit. In Georgia, having received the alarm from Massachusetts, Governor Edward Telfair declared to the state legislature that "[n]otwithstanding [that] certain amendments have taken place in the federal Constitution, it still rests with the state legislatures, to act thereon as circumstances may dictate, so as to make it more definite."[130] According to Telfair, "[W]ere [such] actions admissible under such grievous circumstances, an annihilation of [the state's] political existence must follow."[131] Soon after the governor's address, a legislative committee issued its report suggesting that "an Act of the Legislature of the state ought to be passed, declaratory of the retained sovereignty thereof" and that a notice be sent to other states "requesting their concurrence in a proposal for an explanatory amendment to the Constitution of the United States, in the second section of the third article."[132]

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128. *Id.*

129. Letter from Samuel Adams to the Governors of the States (Oct. 9, 1793), *in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 442, 443.

130. Edward Telfair, Address to the Georgia General Assembly (Nov. 4, 1793), *in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 234–35.

131. *Id.* at 235.

132. Proceedings of the Georgia House of Representatives (Nov. 9, 1793), *in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 235. The Georgia

In Virginia, Governor Henry Lee embraced the Massachusetts resolves[133] and sent word to the Virginia Assembly that "[a] consolidation of the states was expressly disowned by the framers and by the adopters of the Constitution, because it was evident to the whole people that such a political Union was by no means suited to their circumstances."[134] Any attempt to determine "the meaning and extent of any power delegated by the Constitution" had to refer to the "chief object" of the Constitution, "which is a confederation of the states and not a consolidation."[135] However, "[a]dmit that a state can be sued and you admit the exercise of a right incompatible with Sovereignty and consonant to consolidation."[136] Governor Lee therefore recommended that the assembly send a memorial to Congress containing their "disavowal of the right of the Judiciary to call a State into Court" and instructing their senators "to press the passage of a law explaining and detailing the power granted by the constitution to the Judiciary so far as State are affected."[137] If successful, this would "forever crush the doctrine asserted by the supreme Judiciary of the Union respecting the Suability of a State."[138] Lee's letter to the Speaker was discussed by the House of Delegates, who, two days later, passed a set of resolutions declaring that the Supreme Court's decision in *Chisholm* was "dangerous to the sovereignty and independence of individual states" and calling upon their representatives to seek an amendment "as will remove or explain any clause or article of the said constitution, which can be construed to imply or justify a decision, that a state is compellable to answer in any suit, by an individual or individuals, in any court of the United States."[139]

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legislature also considered, but apparently never passed, a bill declaring that anyone who entered the state attempting to enforce a judgment in favor of *Chisholm* "[is] hereby declared to be guilty of felony, and shall suffer death, without the benefit of clergy, by being hanged." *Id.* at 236.

133. *See* Letter from Henry Lee to the Speaker of the Virginia House of Delegates (Nov. 13, 1793), *in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at, 334, 338 (indicating that he had "lately received" a letter from the Massachusetts Lieutenant Governor regarding that state's decision to seek a constitution amendment).

134. *Id.* at 334-35.

135. *Id.* at 335.

136. *Id.*

137. *Id.*

138. *Id.*

139. Proceedings of the Virginia House of Delegates (Nov. 28, 1793), *in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 338–39. The resolves were subsequently sent to the governors of the several states. *See id.* at 339 n.3.

Despite the concurrence of a strong majority of the Virginia Senate, six state senators dissented. To this group, not only did the resolutions "deny what the Constitution expressly warrants," but the resolutions also wrongly "censure[d] the judiciary of the United States" by asserting that they had "acted in a manner . . . clearly improper."[140] Although the dissenters disagreed with the majority's conclusion, they apparently understood the import of the resolutions. The language declared the proper construction of Article III and implied that *Chisholm* was wrongly decided.

Pennsylvania's Pro-*Chisholm* Resolves

Most states, though not all, agreed that an amendment was the proper response to suits like *Vassal* and *Chisholm*. Of these states, almost every one followed the example of Massachusetts, Virginia, and Georgia and called for an amendment clarifying the proper construction of Article III.[141] Amid the

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140. Proceedings of the Virginia Senate (Dec. 4, 1793), *in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 339.

141. *See* Resolution of the Connecticut General Assembly (Oct. 29, 1793), *in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 609; Proceedings of the South Carolina Senate (Dec. 17, 1793), *in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 610–11. In New York, the issue of state suability became caught up with local politics, with Governor Clinton calling for resistance to suits like *Oswald v. New York* and the political backers of John Jay's bid for the governorship arguing that the suit should be defended. *See* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 60–67 (editorial note). Jay, of course, would soon resign his position as chief justice of the United States and take the helm as New York governor. The state itself became the first to ratify the Eleventh Amendment. *See id.* at 625. The Maryland House of Delegates adopted the Massachusetts General Court's declaration that finding such power in Article III was "repugnant to the first principles of a federal government," and called for an amendment that "will remove any part" of the Constitution "which can be construed to justify a decision that a state is compellable to answer in any suit by an individual or individuals in any court of the United States." Proceedings of the Maryland House of Delegates (Dec. 27, 1793), *in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 611. North Carolina declared that the power claimed by the Supreme Court in *Chisholm* "was not generally conceived by the representatives of this State in the Convention which adopted the Federal Constitution as a power to be vested in the Judiciary," and called for an amendment "as will remove or explain any clause or article of the said Constitution which can be construed to imply or justify a decision that a State is compellable to answer any [such] suit by an individual. Resolution of North Carolina General Assembly (Jan. 11, 1794), *in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 615. Finally, a joint session of the New Hampshire General Court tasked the state's federal representatives with obtaining "such amendments in the Constitution of the United States, as to prevent

flood of resolves calling for an amendment controlling the construction of Article III, however, were some islands of dissent. In addition to the minority in the Virginia Senate, a committee in the Delaware Senate reported that they did not think "it would be proper for the Legislature of this state, to adopt any plan that might tend to prevent the suability of a State."[142]

Most interesting was the choice of the Pennsylvania Assembly. Pennsylvania adopted Hancock's third option, which assumed that the decision in *Chisholm* was correct but nevertheless concluded that the exercise of such power was inexpedient and thus should be removed from the Constitution. Presenting Samuel Adams's letter to the state legislature, Pennsylvania governor Thomas Mifflin instructed the legislators thus:

> The discussion of this question . . . will unavoidably lead you to consider, even though the power thus claimed (and supported, indeed, by a decision in another case of a similar nature) has been legitimately delegated by the Constitution to the Supreme Federal Tribunal; whether experience, the attributes of state sovereignty, and the harmony of the Union, do not require that it be abolished."[143]

Following the governor's lead, a legislative committee presented a set of resolutions that avoided the language of proper judicial construction and instead proposed an amendment that assumed the federal courts had been granted power under Article III to hear individual suits against the states:

> Resolved, That the Senators and Representatives of this state, in the Congress of the United States, be requested to unite with members of Congress representing other states, in taking measures agreeably to the fifth article of the Constitution of the United States, to obtain such amendments to the said Constitution as will abridge the general government of

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the possibility of a construction which may justify a decision that a state is compellable to the suit of an individual or individuals in the courts of the United States." Proceedings of a Joint Session of the New Hampshire General Court (Jan. 23, 1794) *in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 618.

142. Proceedings of the Delaware Senate (Jan. 10, 1794), *in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 614. The Senate thought that state suability was proper as a matter of equal justice. The Senate did not address the original understanding of the article. *See id.*

143. 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 613 n.3.

> the power of compelling a state to appear at the suit of an individual citizen or foreigner, as a defendant, in the court of the United States."[144]

Although no other state followed this approach, the Pennsylvania resolution is important because it illustrates the preferred wording of those who believed that the Supreme Court had properly construed the Constitution. The amendment does not call for a particular construction (thus implying judicial error). Instead, the resolves call for an amendment removing a previously granted power. This tracks the governor's defense of the Court's decision in *Chisholm* by avoiding any implied criticism of the Court—indeed, the resolution implies support for the Court's approach to interpreting the Constitution, even as it supports removing an otherwise appropriately enforced power. In rejecting the proposed language of proper judicial construction, the Pennsylvania resolves thus point to a very different view of the proper construction of federal power, one more in keeping with the view of fellow Pennsylvanian Justice James Wilson than with the dissenting view of James Iredell. The draft of the Eleventh Amendment ultimately submitted to the states, however, embraced the language of proper construction. Though other states quickly ratified the amendment, Pennsylvania did not.[145]

The Drafting and Adoption of the Eleventh Amendment

In February 1793, Massachusetts senator Caleb Strong had proposed the following amendment:

> The Judicial Power of the United States shall not extend to any suits in law or equity commenced or prosecuted against any one of the United States by Citizens of another State or by Citizens of any foreign State.[146]

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144. Proceedings of the Pennsylvania House of Representatives (Dec. 30, 1793), *in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 612–13. The House never voted on the committee resolutions, being preempted by the submission of the proposed Eleventh Amendment. *See* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 613 n.3.

145. Of the existing states, neither Pennsylvania nor New Jersey took action on the proposed Eleventh Amendment.

146. Resolution in the United States Senate (Feb. 20, 1793), *in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 607–08.

A year later, a national debate had crystallized opposition to state suability around a simple proposition: the Supreme Court had failed to construe Article III in a manner that preserved the retained sovereignty of the states. The problem was not buyer's remorse over a power previously granted, but a failure to follow a construction promised. Accordingly, when the Third Congress met one year later on January 2, 1794, Caleb Strong withdrew his previous proposal and reworded it to focus on the issue of proper *construction*:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.[147]

On January 14, Albert Gallatin moved to amend the text to exclude suits "arising under [U.S.] treaties."[148] Gallatin's proposal would have exempted the *Vassal* case and others like it. It was rejected.[149] One other attempted modification would have allowed suits against the states in future cases, but not those cases arising before the ratification of the amendment.[150] It too was rejected. Strong's original version was then approved (with only two votes against).[151] There was one final attempt to amend the proposal in the House of Representatives and limit its application to only those states that had

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147. Resolution in the United States Senate (Jan. 2, 1794), *in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 613.

148. Proceedings of the United States Senate (January 14, 1794), *in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 617.

149. *Id.* Different scholars have suggested various reasons for the proposed and rejected amendments to Strong's suggested amendment. *See, e.g.,* James Pfander, History and State Suability: An "Explanatory" Account of the Eleventh Amendment, 83 Cornell L. Rev. 1269, 1361-64 (1998) (arguing that the rejected alternatives to Strong's proposal might reflect an intent to preserve federal question jurisdiction over suits brought by an individual against a state). Although I believe the proposed and rejected amendments actually support the reading of the Eleventh Amendment presented in this chapter, my primary argument is that whatever the motivations behind the rejected amendments, the relevant understanding is that broadly shared by the group who ratified the final text. With very few exceptions, this group would have had no knowledge of the rejected versions, and who instead would have read the final version of the amendment, with its declaration regarding the proper construction of Article III, in the light of an extended national public debate regarding the suability of the states.

150. *Id.*

151. *Id.*

made adequate provision for such suits in their own state courts—it too failed.[152] Finally, on March 4, 1794, the House voted 81 to 9 to concur with the Senate's acceptance (23 to 2) of Strong's proposal.[153] Strong's version of the Eleventh Amendment thus was adopted without a single amendment and submitted to the states for ratification about a week later. In less than a year, a sufficient number of states had ratified the Eleventh Amendment to make it an official part of the Constitution.[154]

The Eleventh Amendment as the Voice of the People

> *Citizens, rouse! Let us before the general court comes together, call town meetings and county conventions on this business and take the sense of the PEOPLE on a question as big with the fate of our interest and liberties as any one that has agitated the public mind since the peace with Britain.*
>
> "Marcus," MASSACHUSETTS MERCURY, July 13, 1793[155]

Given the rise in scholarly literature regarding the role played by "the people themselves" in determining the meaning of the Constitution, it is remarkable that the case of the Eleventh Amendment has received so little attention. The adoption of the Eleventh Amendment was the first true act of American popular sovereignty under the Constitution. No doubt, part of the reason is the negative historical baggage that has since become associated with the idea of state sovereignty. At the time, however, resistance to any construction of federal power that threatened the retained rights of the people in the

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152. Proceedings of the United States House of Representatives (Mar. 4, 1794), *in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 620.

153. *Id.* at 622; *see also* 4 ANNALS OF CONG. 30–31, 476–78 (1794).

154. *See* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 19, at 625–28. In this early period, the process by which states notified the national government regarding ratification had not yet been codified, leading to a delay in the official notice of the Eleventh's ratification. *See id.* at 601. This fact has occasionally led historians to misstate the amount of time states took to act on the proposed amendment. *See, e.g.*, 1 GOEBEL, *supra* note 67, at 737 ("[I]t was close to four years before a sufficient number of states had ratified [the Eleventh Amendment]."). The record indicates, however, that the amendment was ratified in less than a year—including by a state that had originally been on record as opposing the amendment.

155. "Marcus," MASS. MERCURY, July 13, 1793, *supra* note 20, at 390.

states was viewed as essential for the preservation of individual liberty. In a forthcoming chapter, we will confront a historical example that seems to validate the widespread belief at the time of the founding that federalism was inextricably linked to freedom. Those who debated and adopted the Eleventh Amendment needed no convincing—it was abundantly clear to them that erasing the sovereign status of the states would inevitably threaten individual freedom by removing a critical constraint on the interpretation of federal power.

In the first constitutional treatise, St. George Tucker recognized the Eleventh Amendment as representing an act by the sovereign people themselves in response to an unconstitutional extension of federal power. Published eight years after the adoption of the Eleventh Amendment, Tucker's essays on American constitutional law (published in the appendixes of his edition of Blackstone's Commentaries), *View of the Constitution,* for decades served as the authoritative work on the federal Constitution and remained influential throughout the nineteenth century. In his discussion of the Eleventh Amendment, Tucker linked the meaning of the clause to the principles underlying the Tenth Amendment:

> [The judicial power] does not extend to any case that may arise between a state and its own citizens or subjects; nor to any case between a state, and foreign citizens or subjects, or the citizens of any other state [here Tucker cites the Eleventh Amendment] . . . so every such case, whether civil or criminal, and whether it arises under the law of nations, the common law, or law of the state, belongs exclusively, to the jurisdiction of the states, respectively. And this, as well as from the reason of the thing, as from the express declarations contained in the twelfth and thirteenth articles of the amendments to the constitution.[156]

To Tucker, the "reason of the thing" as much established the restrictions of the Eleventh Amendment as the text itself. Tucker, of course, insisted that states could not be divested of their retained sovereign rights by "implication," but only by their own written consent given "in the most express terms."[157] Elsewhere in his treatise, Tucker addressed the question of "what would be the consequences in case the federal government should

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156. 1 Tucker's Blackstone, *supra* note 91, app. note E at 422.

157. *Id.* at 423.

exercise powers not warranted by the constitution."[158] Tucker answered the question by quoting James Madison and using the adoption of the Eleventh Amendment as an example of the people correcting the errors of their government:

> Where [the usurpation] may affect a state, the state legislature, whose rights will be invaded by every such act, will be ready to mark the innovation and sound the alarm to the people [here Tucker cites the *Federalist Papers*]: and thereby either affect a change in the federal representation, or procure in the mode prescribed by the constitution, further "declaratory and restrictive clauses," by way of amendment thereto. An instance of which may be cited in the conduct of the Massachusetts legislature: who, as soon as that state was sued in federal court, by an individual, immediately proposed, and procured an amendment to the constitution, declaring that the judicial power of the United States shall not be construed to extend to any suit brought by an individual against a state.[159]

To Tucker, the Eleventh Amendment represented a mobilized uprising of the people themselves against an unconstitutional assertion of power by the people's agents, the federal government. The result of this uprising was an amendment that nicely captured the nature of the people's complaint. This was not buyer's remorse over a power previously granted, but an objection to power erroneously *construed*.[160] The Ninth and Tenth Amendments had been

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158. *Id.* app. note D at 153.

159. *Id.* at 153. Tucker's rewording of the amendment as preventing suits by *any* individual against a state was echoed by others in the founding generation. *See* United States v. Peters, 3 U.S. (3 Dall.) 121, 126 (1795) (oral argument of Alexander James Dallas) ("[T]he language of the proposed amendment, is, that 'the judicial power of the United States shall not be construed to extend to any suit, etc.' by individuals against a state; which furnishes, at least, a legislative opinion of the exemption of sovereigns from such process.").

160. Notice that the wording of the Eleventh Amendment, just like the Ninth, prevents any implied expansion of federal power because of the addition of the particular restriction on federal power. If the amendment merely declared that the federal courts did not have the authority to hear a certain category of diversity suits, the text might be read to imply that this was the *only* sovereignty-based restriction on the federal judicial power. Some modern scholars, in fact, have read the text in just this manner. *See* Manning, *supra* note 7. The language of the Eleventh was chosen in a manner that prevents exactly that kind of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another) rule of construction. The powers of the federal judiciary need not be altered; like all delegated federal authority, the judicial power must be properly construed.

added to prevent just this kind of "latitudinous" interpretation of federal power. Years later, responding to yet another broad interpretation of federal judicial power by the Supreme Court, James Madison criticized the Court for failing to adopt a narrow construction of Article III as called for by the "expository language [added] when the constitution was adopted."[161] There was, of course, only one amendment added at the time of the founding that called for the narrow construction of enumerated federal power: the Ninth Amendment. The Eleventh was added, in the words of Georgia governor Edward Telfair, because "[n]otwithstanding certain amendments [that] have taken place in the federal Constitution," the Supreme Court had broadly construed Article III, thus necessitating an amendment that would make the principles of the Ninth and Tenth Amendments "more definite."

Chisholm was but an early example of the new federal government neglecting the "expository language" of the Ninth and Tenth Amendments. Before the decade closed, the people would conclude that more than new constitutional language was required to restore a federal government of limited enumerated power.

161. *See* Letter from James Madison to Spencer Roane (May 6, 1821), *in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 362, 366–67 (Marvin Meyers ed., 1973) ("On the question relating to involuntary submissions of the States to the Tribunal of the Supreme Court, the Court seems not to have adverted at all to the expository language when the Constitution was adopted; nor to that of the Eleventh Amendment, which may as well import that it was declaratory, as that it was restrictive of the meaning of the original text.").

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SIX

Federalism and Liberty, 1794–1803

Introduction: The 1799 Remonstrance of John Page

In the late 1790s, a political storm was brewing in the United States. After a decade of controversial nationalist policies, the time approached when the Federalist Party would be swept from office in the so-called revolution of 1800. A number of Federalist actions fueled this outpouring of public opposition: Hamilton's nationalist funding program, which rewarded speculators at the expense of ordinary people;[1] compelled individual suits against the states;[2] a unilateral presidential declaration of neutrality, followed by John Jay's seeming capitulation to the British in the peace treaty of 1794;[3] the Federalist policy against the expressive activities of "Democratic Societies" in Pennsylvania;[4] and even the recent rendition of an American citizen to Great Britain without any process in American courts.[5] Together, these events created a palpable sense in the minds of many that something had gone terribly awry in the original vision of a *limited* federal government.

The last straw for many was the decision by the Adams administration to authorize the presidential deportation of suspicious aliens and to outlaw any speech critical of the national government. The Alien and Sedition Acts came to represent the worst nationalist tendencies of the Federalist Party.

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1. *See* Sean Wilentz, The Rise of American Democracy: Jefferson to Lincoln 48 (2005) (describing Madison's and Jefferson's reactions to Hamilton's funding program).

2. *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) (construing Article III of the Constitution to allow federal courts to hear suits brought by individuals against nonconsenting states).

3. Wilentz, *supra* note 1, at 66–68.

4. Christian G. Fritz, American Sovereigns: The People and America's Constitutional Tradition Before the Civil War 153-189 (2008).

5. *See* Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 Yale L.J. 229 (1990).

Using the cover of state legislative assemblies to avoid prosecution under the Sedition Act, Virginians James Madison and Thomas Jefferson conspired to produce the Virginia and Kentucky Resolutions—declarations of retained state sovereignty and remonstrances against the expansive interpretations of federal power claimed by the Federalist Party. These resolutions would become the battle cry of the Democratic-Republicans in their successful democratic overthrow of what had been the dominant political party since the adoption of the Constitution.

Like so many of the battles in this first decade, the debate over the Alien and Sedition Acts involved the proper construction of federal power.[6] Federalists claimed to have broad authority to enact any law necessary and proper for a well-functioning national government. The First Amendment posed no obstacle, for it forbade only those laws that *abridged* freedom of speech and it was no "abridgement" to punish speech that threatened insurrection or encouraged resistance to the exercise of federal authority. The fact that there was no express power delegated to Congress to regulate speech of any kind did not matter. Congress was not limited to only *expressly* delegated powers; the drafters of the Tenth Amendment had left out the restrictive word "expressly" and simply reserved to the states all powers not within the scope of federal responsibility. In this case, federal responsibility included the power to enforce the unenumerated principles of the common law regarding seditious speech.

To the advocates of limited federal power, this not only was a betrayal of promises made to the state ratifying conventions; it was balderdash. The fact that the particular word "expressly" was omitted from the Tenth Amendment did not alter the fact that federal power was not to be so broadly construed

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6. As Christian Fritz has recently pointed out, questions of *constitutionalism* as well as questions of constitutional law haunted the early years of the American republic. *See* Fritz, American Sovereigns, *supra* note 4, at 6. The former involved disputes regarding the precise nature of "the people" and the role the people were to play (if any) in overseeing the daily operations of constitutional government. *Id.* at 6-8. As Professor Fritz points out, these are questions not fully resolvable by an analysis of the text of the Ninth and Tenth Amendments, or any other text in the Constitution. *See id.* at 192-93. While I agree that some aspects of the early debates over the federalist structure of the Constitution involved supra-textual disagreements over the precise nature of "the people as sovereigns," one of the burdens of this book is to explore how federalism informed the original understanding of particular constitutional texts. Put another way, although the original understanding of constitutional text cannot answer all questions regarding the nature of "the people" whose powers and rights are guarded by the Ninth and Tenth Amendments, I believe it nevertheless answers a great deal more than most scholars have previously thought.

that it infringed upon the retained rights of the people. In his 1799 campaign pamphlet, John Page argued that the Alien and Sedition Acts were "not only unnecessary, impolitic and unjust," but that they also exceeded the powers delegated to the federal government under the Constitution.[7] According to Page:

> The power therefore which congress has claimed and exercised in enacting the alien act, not having been granted by the people in their constitution, but on the contrary having been claimed and hitherto wisely and patriotically exercised by the state legislatures, for the benefit of individual states, and for the safety of the general government, must be amongst those powers, which not having been granted to congress, nor denied to the states, are declared by the 11th and 12th articles of the amendments to the constitution to be reserved to the states respectively, and therefore the alien act is an encroachment on those rights, and must be unconstitutional.[8]

John Page was a member of the First Congress, which helped frame and submit the Bill of Rights, and he was present when Madison delivered his speech on the Bank of the United States. Like Madison, Page read the Ninth and Tenth Amendments (which he referred to as "the 11th and 12th") as jointly establishing a rule of construction limiting the power of the federal government to intrude upon matters intended to be left to the people in the states. In this, Page joined Madison and a host of other founders who saw in the Ninth Amendment a guarantee of limited national power.

This view had not gone uncontested. During the first decade of the Constitution, the levers of federal power were in hands of men like Alexander Hamilton, John Adams, James Wilson, and John Jay—men who held a very different and far more nationalist vision of federal power and the sovereign people. The inevitable clash between nationalist and federalist understandings of the Constitution helped fuel the emergence of the first two major

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7. John Page, Address to the Freeholders of Gloucester County, at Their Election of a Member of Congress, to Represent Their District, and of Their Delegates, and a Senator, to Represent Them in the General Assembly of the Commonwealth of Virginia, April 24, 1799, at [9] (Richmond, Va., John Dixon 1799) (no pagination in text). Page was a member of Congress from 1789 to 1797, and governor of Virginia from 1802 to 1805.

8. *Id.* at [13]–[14].

political parties in America. At the center of the dispute between the Federalists and the nascent Democratic-Republicans was a disagreement over the proper conception of the people of the United States. Were we a single *national* people who had delegated general authority to the national government? Or were we a *federalist combination* of both national and state people(s), whose delegations to the national government were limited and whose local powers had been broadly retained? The first decade of the Constitution would end with an embrace of Madisonian federalism over Hamiltonian nationalism. But this too would be only a temporary resolution. The rise of the Marshall Court would bring with it a restoration of Hamiltonian nationalism. The eighteenth century as a whole, in fact, would see numerous pendulum swings in political and judicial construction of federal power.

Today, of course, we live in an age in which the views of John Marshall and Alexander Hamilton have broadly prevailed over those of James Madison. Madison's view of the Ninth and Tenth Amendments has long since been displaced and forgotten. Arguments favoring states' rights carry with them the baggage of history, having been put forth in defense of slavery and segregation and in opposition to the great civil-rights revolution of the late twentieth century. Recovering the lost history of the Ninth Amendment cannot deny the historical abuse of local autonomy. What it can do, however, is show that the concept of federalism is not, and has not been, necessarily opposed to individual freedom. In fact, in the first great constitutional debate on individual liberty, it was Madison and federalism that sided with the angels.

Both the previous chapter on the Eleventh Amendment and this chapter on the Alien and Sedition Acts illustrate something generally missed—or misrepresented—about republican constitutional theory in the early republic. The so-called compact theory of the Constitution, the idea that the Constitution represents a compact between the states and the national government, is often presented as having emerged out of the proslavery ideology of the 1830s and viewed in opposition to the (entirely) more reasonable theories of Chief Justice John Marshall. This school of constitutional history places the initial seeds of southern secessionist theory in the naive hands of James Madison and Thomas Jefferson, who embraced the inflammatory language of states' rights and interposition in their Virginia and Kentucky Resolutions. According to this view, compact theory is a post hoc political invention that departs from the original understanding of the Constitution and that arose years after the founding as part of a political effort to displace the Federalist Party in the election of 1800.

The previous chapter on the Eleventh Amendment has already challenged this "alien-invader" theory of strict construction and the federalist compact theory of the Constitution. It shows how the theory of retained state sovereignty—and the need to strictly construe delegated federal power—was broadly accepted before the ink was dry on the Bill of Rights. Indeed, it was the basis of the first true act of the people under Article V, the adoption of the Eleventh Amendment, an event that occurred long before the battles over the Alien and Sedition Acts, and certainly long before the nullification crisis and the rise of Calhounian states' rights (and proslavery) theory. The adoption of the Eleventh Amendment was part of the same political movement, and driven by the same constitutional theory, that led to the adoption of the Bill of Rights—amendments that were meant to declare an unexpressed prior understanding regarding the limited nature of delegated sovereign power. If nationalism can find its roots in the policies of Alexander Hamilton and the decisions of John Marshall, federalism can find its roots in the declarations of the state ratifying conventions and the speeches of James Madison. Both conceptions of the people and the Constitution were present at creation, and both battled for dominance in the first decade of the Constitution. The decade closed not with the establishment of a newly created theory of limited federal power but with the popular vindication of a theory that had existed since the time of the founding.

Constitutional Party Politics in the First Decade

When the members of the First Congress took their seats in Federal Hall in New York City, they did so as representatives of a government that had won approval by a dangerously thin margin. The ratification debates had illustrated the malleability of the Constitution's text, and the precise scope of federal power remained a matter to be worked out over time. No one believed that the Constitution established a clearly defined line between federal and state authority, but the general expectation of the ratifiers was that the system would be one of dual sovereignty. The federal government had to be strong enough to provide for the common defense, and individual states had to be independent enough to provide a check on unduly broad assertions of federal power. An example of the latter, of course, is the coordinated efforts of the state legislatures to secure the Eleventh Amendment.

Although the Constitution won approval by a narrow majority, the Federalist Party dominated the new national government. Federalists controlled

the House and the Senate, and a Federalist (and national hero) served as chief executive. Appointments to the new federal courts were under the complete control of the dominant party in the political branches, and not surprisingly, the courts were almost completely filled with members of the party that had backed the Constitution. The membership of the Supreme Court in particular was packed with those who had exhibited "a record of attachment to the new federal Constitution"[9]—strong *Federalists*, in other words.

In this first decade of the Constitution, at least initially, members of the national government did not think of party membership in the way we do today. In the modern politics of the United States, the competing national parties represent opposing ideas regarding the proper use of national power, but both parties are broadly acknowledged as representing *legitimate* conceptions of the Constitution (thus the acquiescence of the losing party in national elections, even in the face of considerable controversy). In the 1790s, however, to be a member of the Federalist Party was to be a member of the party that proposed the Constitution, favored a national government, and was led by the almost-deified General George Washington—himself a living symbol of Independence. In these early years of the republic, former Anti-Federalists were easily dismissed as the losers of the recent great national debate and presumptive opponents of the Union.[10]

Given the context of a country only recently divided between those who favored and those who opposed a new constitution and national government, it was inevitable that opposition to the policies of the Federalist Party would be characterized as a challenge to the Constitution itself. Not yet having developed the tradition of a loyal opposition, it was all too easy to see sedition lurking in every effort to oppose the policies of the new national government.

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9. *See* 1 Julius Goebel, History of the Supreme Court of the United States: Antecedents and Beginnings to 1801, at 553 (1971); *see* also Letter from George Washington to James McHenry (Nov. 30, 1789), *in* 30, The Writings of George Washington from the Original Manuscript Sources, 1745–1799, at 471 (John C. Fitzpatrick ed., 1939) [hereinafter Writings of George Washington] (indicating Washington's preference for men who had shown "sentiments . . . in favor of the General Government" in choosing federal district court judges).

10. In some cases, of course, the dismissal was quite warranted. There were continued efforts by some Anti-Federalists to thwart the adoption of the Bill of Rights and trigger a second constitutional convention. *See supra* chapter 3 (discussing Anti-Federalist opposition to the Bill of Rights).

The growing political division in the country might have been ameliorated somewhat had the policies of the first national government taken a more moderate course. Alexander Hamilton and those sharing his nationalist ideals, however, would have nothing of it. Moving quickly to establish the nation's credit, Hamilton led Washington and like-minded colleagues in the Federalist Party to embrace a string of controversial and aggressive nationalist strategies to secure the financial (and international) standing of the country. He may have been right to do so. What this chapter addresses is not the wisdom of those policies but the response of the Federalist Party to the inevitable backlash.

Prequel to the Sedition Controversy: The Whiskey Rebellion

Alexander Hamilton's plan for establishing the credit of the United States required both the assumption of state war debts and a system of taxation to finance payments on such debts.[11] The choice of leveling an excise tax on whiskey made sense to Hamilton because there was a robust market for the commodity and any resultant suppression of alcohol consumption, to Hamilton at least, was all to the better.[12] The tax hit rural farmers hard, however. Already suffering from economic constriction in the aftermath of the Revolutionary War, farmers relied on whiskey both as a means of rising above mere subsistence living and as barter in a society squeezed for cash.[13] The tax was bound to raise resentment from this group. The matter was even further inflamed, however, by the widespread feeling that the tax was used to pay off speculators who had purchased depreciated promissory notes from ordinary families and war veterans at a fraction of their face value and now sought to reap a windfall payoff from the United States. It was thus a combination of factors, both financial and political, that fueled resistance to Hamilton's tax.

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11. *See* Stanley Elkins & Eric McKitrick, The Age of Federalism 116–17, 462 (1993); Wilentz, *supra* note 1, at 44–45, 62.

12. *See* Fritz, *supra* note 4, at 162–64.

13. *Id. See also*, William Hogeland, The Whiskey Rebellion: George Washington, Alexander Hamilton, and the Frontier Rebels Who Challenged America's Newfound Sovereignty 64–70 (2006).

And resistance there was. Having despaired of political relief, protesters took to blocking roads and tarring and feathering tax collectors.[14] Local officials often refused to enforce the tax, as did U.S. attorneys in areas where opposition was the strongest.[15] The standoff with the federal government escalated to the point of bloody confrontations with officials attempting to enforce the tax,[16] and ended only when George Washington himself led 15,000 troops into western Pennsylvania in a successful show of force that quelled the rebellion.[17]

The "Self-Created Societies" and the Federalist Response

Following the enactment of the federal excise tax in 1791, groups of Pennsylvania citizens began to meet in an effort to organize their opposition. These grassroots gatherings culminated in calls for a convention to meet in Pittsburgh in order to determine "the sense of the people." The goal was to produce a petition to Congress expressing "with decency and firmness" the people's opposition to the excise tax.[18] From the perspective of Alexander Hamilton, however, the entire effort was an "inflammatory" act that displayed an "unfriendly temper" toward the national government.[19] Writing to John Jay, Hamilton declared that "'legal measures to obstruct the operation of a law' is a contradiction in terms. I therefore entertain no doubt, that a high misdemeanor has been committed."[20]

Hamilton notified President Washington that he intended to "immediately submit to the Attorney General for his opinion, whether an indictable offense has not been committed by the persons who were assembled at Pittsburgh."[21] Hamilton also published a letter (with President Washington's

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14. *See* ELKINS & MCKITRICK, *supra* note 11, at 462; Richard A. Ifft, *Treason in the Early Republic: The Federal Courts, Popular Protest, and Federalism During the Whiskey Insurrection*, *in* THE WHISKEY REBELLION: PAST AND PRESENT PERSPECTIVES 165, 166 (Steven R. Boyd ed., 1985).

15. *See* FRITZ, *supra* note 4, at 165–66.

16. ELKINS & MCKITRICK, *supra* note 11, at 463.

17. *Id.*

18. FRITZ, *supra* note 4, at 166 (quoting records of a meeting in Brownsville, Pennsylvania).

19. *Id.* at 167.

20. Letter from Alexander Hamilton to John Jay (Sept. 3, 1792), in 12 THE PAPERS OF ALEXANDER HAMILTON: JULY–OCT. 1792, at 316 (Harold C. Syrett ed., 1967).

21. Letter from Alexander Hamilton to George Washington (Sept. 1, 1792), *in* 12 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 20, at 312.

approval) declaring that the Pittsburgh meetings were "conducted without moderation or prudence [and] are justly chargeable with the excesses, which have been from time to time committed." This, to Hamilton, linked the assemblies with violent insurrection and "serv[ed] to give consistency to an opposition which has at length matured to a point that threatens the foundations of the Government & of the Union; unless speedily & effectually subdued."[22]

President Washington shared Hamilton's assessment of the dangerous tendencies of self-created societies. When a second Pittsburgh convention met and adopted resolutions and a petition calling for the repeal of the excise tax and declaring that they would use "every other legal measure that may obstruct the operation of the [excise] law,"[23] Washington had had enough. On September 15, 1792, President Washington issued a proclamation denouncing the protest meetings.[24] The proclamation actually issued from the pen of Alexander Hamilton, whose initial draft had described the Pittsburgh meeting as illegal and criminal.[25] Washington removed Hamilton's more inflammatory language, but nevertheless declared that the Pennsylvania assemblies were "subversive of good order, [and] contrary to the duty that every citizen owed to his country." They were, in fact, "dangerous to the very being of government."[26] Accordingly, Washington "admonish[ed] and exhort[ed] all persons whom it may concern, to refrain and desist from all unlawful combinations and proceedings whatsoever having for object or tending to obstruct the operations of the laws."[27]

Hamilton continued to press Washington to take more aggressive action and vigorously prosecute "delinquents and offenders."[28] Ultimately, U.S. attorney general William Rawle initiated prosecutions in federal court against a number of Pennsylvanian distillers—an act that triggered a bloody

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22. Letter from Alexander Hamilton to George Washington (Aug. 5, 1794), in 17 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 20, at 32.

23. FRITZ, *supra* note 4, at 168 (quoting "Broadside of Minutes of Aug. 21, 1791, Meeting," reprinted in 12 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 20, at 309 n.5).

24. Proclamation (Sept. 15, 1792), *in* 32 WRITINGS OF GEORGE WASHINGTON, *supra* note 9, at 150. The final proclamation is reprinted in 12 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 20, at 330 n.1.

25. FRITZ, *supra* note 4, at 169.

26. Proclamation (Sept. 15, 1792), *supra* note 24, at 150–51.

27. *Id.* at 151.

28. FRITZ, *supra* note 4, at 169.

confrontation between tax protesters and troops protecting federal excise tax collector John Neville in which several protestors were killed.[29] To Federalists, of course, the violence was only a confirmation of their position that aggressive criticism can cause illegal obstruction and seditious rebellion. John Marshall, for one, fully supported the administration's views about the designing men of western Philadelphia and defended the president's actions in his biography of Washington, *The Life of George Washington*. There, Marshall placed the responsibility for the violent actions of "deluded men" on the expressive activities of tax protesters:

> [Insurrectionists] made similar excursions into the contiguous counties of Pennsylvania, lying east of the Alleghany mountains [western Pennsylvania], where numbers were ready to join them. These deluded men, giving too much faith to the publications of democratic societies, and to the furious sentiments of general hostility to the administration, and particularly to the internal taxes, with which the papers in the opposition abounded, seem to have entertained the opinion, that the great body of the people were ready to take up arms against their government, and that the resistance commenced by them would spread throughout the union, and terminate in a revolution.
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> In the intemperate abuse which was cast on the principal measures of the government, and on those who supported them; in the violence with which the discontents of the opponents to those measures were expressed; and especially in the denunciations which were uttered against them by the democratic societies; the friends of the administration searched for the causes of that criminal attempt which had been made in the western parts of Pennsylvania, to oppose the will of the nation by force of arms. Had those misguided men believed that this opposition was to be confined within their own narrow limits, they could not have been so mad, or so weak as to have engaged in it.[30]

From the sidelines, men like James Madison grew increasingly concerned about the Federalist Party's pretensions to power and their efforts to

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29. *Id.* at 170; ELKINS & MCKITRICK, *supra* note 14, at 463; Thomas P. Slaughter, THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION 176–83 (1988).

30. 5 JOHN MARSHALL, THE LIFE OF GEORGE WASHINGTON 180, 187–88 (reprint 1925).

suppress political dissent. Signaling what would be a lifelong disagreement with John Marshall regarding the proper exercise of national power, Madison insisted that Washington's singling out of the Pennsylvania dissenters for public criticism was "perhaps the greatest error of his political life."[31] Madison rejected the idea that the Pennsylvania protest meetings violated any law. Accordingly, because the actions were "innocent in the eye of the law[, they] could not be the object of censure to a legislative body." This was a matter of the people's retained rights:

> When the people have formed a constitution, they retain those rights which they have not expressly delegated. It is a question whether what is thus retained can be legislated upon. Opinions are not the objects of legislation. You animadvert on the *abuse* of reserved rights—how far will this go? It may extend to the liberty of speech and of the press.[32]

To Madison, the very idea of censoring public meetings flipped the concept of popular sovereignty on its head. "If we advert to the nature of republican government," Madison reminded the assembly, "we shall find that the censorial power is in the people over the government, and not in the government over the people." "The press," Madison believed, "would not be able to shake the confidence of the people in the government. In a republic, light will prevail over darkness, truth over error—he had undoubted confidence in this principle."[33]

Writing to James Monroe about the Federalist attempt to suppress the self-created societies, Madison insisted that "no two principles can be either more indefensible in reason or more dangerous in practice" than the idea that the legislature could issue "arbitrary denunciations [that] punish what the law permits" and the idea that "the Government may stifle all censures whatever on its misdoings." The government would never consider any criticism or "censures to be just." Thus, "if it can suppress censures flowing from one lawful source it may those flowing from any other—from the press and

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31. Letter from James Madison to James Monroe (Dec. 4, 1794), *in* 15 THE PAPERS OF JAMES MADISON, CONGRESSIONAL SERIES 405, 406 (Thomas A. Mason et al. eds., 1985).

32. James Madison, Speech in Congress on "Self-Created Societies" (Nov. 27, 1794), *in* JAMES MADISON: WRITINGS 551, 551 (Jack N. Rakove ed., 1999).

33. *Id.* at 552.

from individuals as well as from Societies."[34] Even if the members of the House were convinced that the self-created societies were worthy of censure, exercising such a power would set a dangerous precedent for the future:

> Governments are administered by men—the same degree of purity does not always exist. Honesty of motives may at present prevail—but this affords no assurance that it will always be the case—at a future period a Legislature may exist of a very different complexion from the present; in this view, we ought not by any vote of ours to give support to measures which now we do not hesitate to reprobate.[35]

Madison's concerns proved prescient. The Federalist response to the so-called Whiskey Rebellion was only a rehearsal for a later and more significant move against political dissent: the passage of the Alien and Sedition Acts. The popular rejection of these acts (and the Federalist Party) signaled the end of the initial Federalist effort to entrench a wholly nationalist view of the Constitution. In its place, a more Madisonian view of delegated power informed political and scholarly commentary on the Constitution for much of the next two decades. This was not a new view. Madison had declared it from the beginning, and the people in the states had acted on it in the adoption of the Eleventh Amendment. Most of all, the principle itself was declared in the text of the Constitution through the adoption of the Ninth and Tenth Amendments, amendments embraced by the Democratic-Republicans in their struggle against the Alien and Sedition Acts.

The Sedition Act

As the first decade of the Constitution wore on, the fracture between those groups supporting a broad interpretation of national power (and a wholly national people) and those calling for a limited construction of delegated federal power in order to preserve both liberty and local autonomy hardened into the outlines of the first dueling political parties in American history. The nascent Democratic-Republican Party stressed the retained rights and

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34. Letter from James Madison to James Monroe (Dec. 4, 1794), *supra* note 31, at 407.

35. James Madison, Speech in Congress on "Self-Created Societies" (Nov. 27, 1794), *in* JAMES MADISON: WRITINGS, *supra* note 32, at 552.

powers of the people in the states and sympathized with the revolutionaries of France—the ideological children, as it were, of the American Revolution. The Federalist Party, on the other hand, varied in its approach to national power but, as a group, favored expansive federal authority and viewed the American Constitution as an analogue to the British parliamentary system of government. Republican propagandists characterized the Federalists as Anglophilic monarchists, and their Federalist counterparts painted the Republicans as French-loving anarchists. The mutual suspicion of these emerging political parties intensified after 1793 when war broke out between Britain and France.

Rejecting calls for an alignment with our Revolutionary partner, France, President George Washington declared a position of American neutrality between the dueling Europeans. Republican disappointment over this move intensified into public outrage when Washington's special envoy to Great Britain, John Jay, negotiated a treaty that restored commercial and diplomatic relations with Britain but that was widely viewed as capitulating to Britain's demands at the expense of American sovereignty.[36] Nor were Republicans the only ones outraged by Washington's Neutrality Proclamation and the administration's tilt toward Britain. The French government claimed that Washington's actions obstructed the 1778 Franco-American Alliance, and it expressed its displeasure by capturing American merchant ships, engaging in a number of sea battles with the U.S. Navy, and expelling the American envoy.[37] In a diplomatic move–cum–tactical disaster, the French minister Edmund Genet toured the United States seeking to rouse popular support for France—a move broadly criticized as foreign interference in American affairs (or worse, as a sign of French intrigue against the standing government). Finally, as if only to ensure the hostility of much of the American public, the French foreign minister, Charles-Maurice de Talleyrand, refused to meet with American envoys sent to repair the growing breach between the two countries, without first receiving a bribe—the so-called XYZ Affair.

When combined with the seemingly seditious activities of Genet, this affront to American dignity (and the implied disparagement of American sovereignty) created a climate easily exploited by the Federalist Party in their efforts to oppose the rising fortunes of the Democratic-Republicans. In 1798,

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36. WILENTZ, *supra* note 1, at 66–68.

37. *See* JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 183 (1996).

in a move motivated by both political and national-security concerns, the Federalist national legislature passed (and the Federalist president, John Adams, signed) the Alien and Sedition Acts. The Alien Act authorized the president to summarily deport any dangerous foreign residents. The Sedition Act criminalized seditious libel against the federal government—a broad category of speech which, at the time, included encouraging disaffection with the government. Democratic-Republicans immediately assailed both laws as unconstitutional attempts by Federalists in power to prevent the enfranchisement of immigrants[38] and to suppress rival publications.[39]

Viewing the laws as "so palpably in the teeth of the constitution as to [show] they mean to pay no respect to it,"[40] Vice President Thomas Jefferson secretly collaborated with James Madison to produce a set of resolutions denouncing the Alien and Sedition Acts.[41] Just as the Massachusetts resolutions had called for a coordinated response to the *Chisholm* decision, the Virginia and Kentucky Resolutions urged other states to combine their efforts in opposition to the acts.[42] James Madison arranged for John Taylor of South Carolina, an ardent Republican and state delegate, to submit his anonymous resolutions in the Virginia Assembly.[43] Jefferson followed suit, sending his resolutions with John Breckinridge to the Kentucky legislature.[44] Both sets of resolutions were ghostwritten in order to avoid any political backlash and possible prosecution under the Sedition Act.[45]

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38. JOHN C. MILLER, CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS 47 (1951) ("The purpose of this law was to make the Republican party wither on the vine by cutting off its supply of foreign-born voters.").

39. Republican editors of the New York *Time Piece*; the Boston *Independent Chronicle*; the (Bennington) *Vermont Gazette*, the New London, Connecticut, *Bee*; the New York *Mount Pleasant Register*, the New York *Argus*, and the Philadelphia *Aurora* were prosecuted under the Sedition Act. *See* JAMES ROGER SHARP, AMERICAN POLITICS IN THE EARLY REPUBLIC: THE NEW NATION IN CRISIS 218 (1993).

40. Letter from Thomas Jefferson to James Madison (June 7, 1798), *in* 8 THE WORKS OF THOMAS JEFFERSON 431, 434 (Paul Leicester Ford ed., 1904).

41. Adrienne Koch & Harry Ammon, *The Virginia and Kentucky Resolutions: An Episode in Jefferson's and Madison's Defense of Civil Liberties*, 5 WM. & MARY Q. 145, 161 (1948).

42. *Id.* at 159–60.

43. *Id.* at 159.

44. *Id.* at 155–56.

45. *Id.* at 147–48. *See also*, David N. Mayer, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 357 n.66 (1994) ("the very act of drafting those Resolutions was in violation of the Sedition Act").

In Virginia, the House of Delegates engaged in an eight-day debate on "Mr. Taylor's Resolutions."[46] On December 21, 1798, the Virginia House adopted the resolutions 100 to 63,[47] and arranged for their publication as an address of the General Assembly to the people of Virginia.[48] The Federalist minority also prepared and distributed their own address. Submitted to the full assembly on behalf of the minority by Henry Lee, the "Address of the Minority in the Virginia Legislature"[49] contained a constitutional defense of the Alien and Sedition Acts. Although the authorship of this minority report has never been certain, there is good reason to agree with John Marshall's biographer Albert Beveridge that the address was drafted by none other than the future chief justice himself.[50] Whether or not Marshall was in fact the

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46. *See* 6 JOURNAL OF THE HOUSE OF DELEGATES OF THE COMMONWEALTH OF VIRGINIA 21, 23–24, 26–27, 29–31 (1798–1799); *see also* THE VIRGINIA REPORT OF 1799–1800: TOUCHING THE ALIEN AND SEDITION LAWS; TOGETHER WITH THE VIRGINIA RESOLUTIONS OF DECEMBER 21, 1798, THE DEBATE AND PROCEEDINGS THEREON IN THE HOUSE OF DELEGATES OF VIRGINIA AND SEVERAL OTHER DOCUMENTS ILLUSTRATIVE OF THE REPORT AND RESOLUTIONS (Richmond, Va., J.W. Randolph 1850) [hereinafter VIRGINIA REPORT].

47. 6 JOURNAL OF THE HOUSE OF DELEGATES OF THE COMMONWEALTH OF VIRGINIA 32 (1798–1799).

48. *Id.* at 88–90.

49. The Address of the Minority in the Virginia Legislature to the People of that State; Containing a Vindication of the Constitutionality of the Alien and Sedition Laws [hereinafter The Address of the Minority] (Augustine Davis ed., 1799) (Richmond, Va.).

50. *See* ALBERT J. BEVERIDGE, 2 THE LIFE OF JOHN MARSHALL 402 (1916). When the Address of the Minority in the Virginia Legislature was first published, a number of statesmen immediately attributed the address to Marshall. William Vans Murray, minister to the Netherlands, read the address in a Federalist newspaper and wrote to fellow minister to Prussia, John Quincy Adams, that he too believed Marshall had authored the address. *See* Letter from Williams Vans Murray to John Quincy Adams (Apr. 5, 1799), *in* ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1912, at 535 (Worthington C. Ford ed., 1913). In his reply, Adams admitted that although unconvinced and biased against the idea of Marshall writing such an excellent defense, "[t]he question had occurred likewise to [his] mind whether J. Marshall did not write the address." Letter from John Quincy Adams to Williams Vans Murray (Apr. 13, 1799) (on file with the Massachusetts Historical Society). In his correspondence to both Alexander Hamilton and Rufus King, then the minister to Britain, Senator Theodore Sedgwick reported that Marshall had penned the address, with the later letter indicating an increased confidence that Marshall was the author. *See* Letter from Theodore Sedgwick to Alexander Hamilton (Feb. 7, 1799), in 22 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 20, at 469–70; Letter from Theodore Sedgwick to Rufus King (Mar. 20, 1799), *in* 2 THE LIFE AND CORRESPONDENCE OF RUFUS KING 579, 581 (Charles R. King ed., N.Y., G.P. Putnam's Sons 1895). Marshall's authorship remains under dispute. *Compare* Editorial Note, *in* 12 The Papers of John Marshall 512-521 (disputing Marshall's authorship and naming Henry Lee as the likely author of the address) (Charles F. Hobson ed., 2006), *with* Kurt T. Lash & Alicia Harrison, *Minority Report: John Marshall and the Defense of the Alien and Sedition*

author, the address expands upon the nationalist theories of Alexander Hamilton and articulates many of the same principles of expansively defined federal power later employed by John Marshall in cases like *McCulloch v. Maryland* and *Gibbons v. Ogden*.

The Address of the Minority in the Virginia Legislature

The Minority Address provided both a constitutional defense of the Alien and Sedition Acts and a remonstrance against the Virginia Resolutions. Like most constitutional arguments of the day, the address began by laying out the proper rules of constitutional interpretation: The Constitution should not be read like a statute "which is capable of descending to every minute detail." Instead, the nature of the document suggests that it contains a number of "general expressions, making the great outlines of a subject."[51] It would be wrong, therefore, to limit the constitutional powers of Congress to just those powers expressly listed in the Constitution. After all, the address pointed out, the framers of the Tenth Amendment copied Article II of the Articles of Confederation, but "wisely omitted" Article II's term "expressly."[52] This suggested that the delegated powers of Congress went beyond those expressly described in the text of the Constitution. In sum, delegated federal power should be "fairly, but *liberally*" construed.[53]

Applying this rule of liberal construction to the Constitution, the author of the address turned to the necessary and proper clause as justifying the use of federal power to prevent public discord and "licentiousness."[54] Given that punishment of "actual resistance" to federal law was entirely necessary and proper, only a "strange," "unreasonable and improvident construction" of the necessary and proper clause would exclude the punishment of acts "which obviously lead to and prepare resistance." As an example of how speech critical of the government can lead to outright rebellion, the author pointed out

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Acts, 68 Ohio St. L.J. 435 (2007) (disputing Lee's authorship and arguing that the evidence strongly suggests Marshall played at least some role in drafting the address).

51. The Address of the Minority in the Virginia Legislature to the People of that State; Containing a Vindication of the Constitutionality of the Alien and Sedition Laws 7 (Augustine Davis, ed., 1799).

52. *Id.*

53. *Id.*

54. *Id.* at 11.

the role seditious publications played during the recent Whiskey Rebellion by inciting resistance to federal law.[55] Finally, the author used the First Amendment itself as evidence of federal power to regulate seditious speech. After all, it would have been unnecessary to modify "the legislative powers of Congress concerning the press, if the power itself does not exist."[56]

Having concluded that the delegated powers of Congress include the authority to regulate seditious speech, the author of the address then turned to the specific restrictions of the free speech clause of the First Amendment. Rejecting the idea that the clause forbids any law restricting speech, the author pointed out the use of different restrictive terms in regard to religion and the press. Although the First Amendment declares that Congress shall make "*no law respecting* an establishment of religion," it need only avoid "*abridging* the freedom of speech or of the press."[57] Thus, Congress may regulate the press so long as it avoids "abridging" its freedom of the press. Under common law, freedom of the press meant no more than freedom from "previous restraint."[58] The only issue was whether the same common-law principles that protected state magistrates from seditious libel also applied to libel leveled at federal magistrates. Since the people of each state participated in choosing both their state and federal officials, it made no sense to apply common-law protections to one set of magistrates but not to the others.[59]

The author concluded the constitutional arguments by stressing that all sides of the debate should express their opinions "with moderation and with decency"—an obvious criticism of the Virginia Resolutions.[60] Rather than incite hatred of the people's national government through resolutions, opponents of the acts should trust the courts to decide whether the acts violate the Constitution. In words strikingly similar to those enshrined in our constitutional canon a few decades later, the author declared: "It is [the courts'] province and their duty to construe the constitution and the laws."[61]

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55. *Id.* at 11–12.

56. *Id.* at 12.

57. *Id.* at 12.

58. *Id.* at 13.

59. *Id.* at 13–14.

60. *Id.* at 14.

61. *Id.*; *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

James Madison's *Report of 1800*

In his Virginia Resolutions, Madison called on the states to join with Virginia and Kentucky in declaring "that the acts aforesaid are unconstitutional; and that the necessary and proper measures will be taken by each, for cooperating with this state, in maintaining unimpaired the authorities, rights, and liberties, reserved to the states respectively, or to the people." His resolutions declared that the Alien and Sedition Acts were a "deliberate, palpable, and dangerous exercise of other powers not granted by the said compact [the Constitution]."[62] Because the "acts aforesaid [were] unconstitutional," the states therefore were "duty bound to interpose for arresting the progress of the evil."[63] Accordingly, the "General Assembly doth solemnly appeal to the like dispositions of the other States, in confidence that they will concur with this Commonwealth," and will "cooperat[e] with this State, in maintaining unimpaired the authorities, rights, and liberties reserved to the States respectively, or to the people."[64]

This was no ordinary objection to an act of Congress. Earlier controversies like that involving the Bank of the United States had raised the issue of proper interpretation of enumerated federal powers. In this case, however, Virginia accused the federal government of deliberately exercising an extra-constitutional power, and the assembly called upon other states to join them in "interposing"[65] against enforcement of the acts. This was a potentially inflammatory action that could be viewed as threatening the continued stability of the Union.[66] In fact, the resolutions were rejected (albeit more narrowly than commonly thought[67]) by most other states, whose assemblies

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62. James Madison, Virginia Resolutions Against the Alien and Sedition Acts (Dec. 21, 1789) [hereinafter Virginia Resolutions], *in* JAMES MADISON: WRITINGS, *supra* note 32, at 589, 589.

63. *Id.* at 591, 589.

64. *Id.* at 591.

65. Although today "interposition" is often equated with the later and more aggressive doctrine of "nullification," Madison appeared to use the term as a description of the state legislature's role in "sounding the alarm" to the people in the several states. This action does not deny the validity of the federal act, but seeks to coordinate a political response at the polls or trigger a movement towards a constitutional amendment. *See* Fritz, AMERICAN SOVEREIGNS, *supra* note 4, at 193-94.

66. Indeed, had the resolutions been promulgated outside the legislative assembly with its attendant common-law immunity, the speaker could well have been prosecuted under the Sedition Act.

67. *See* FRITZ, *supra* note 4, at 202 (noting that "the negative responses of state legislatures to the resolutions reflected Federalist legislative majorities but obscured a frequently sizable Republican dissent").

issued stinging rebukes against Virginia and Kentucky's supposedly unjustified and dangerous tilt toward disunion. The backlash put the Democratic-Republicans on the defensive at just the moment when they had hoped political opposition to the acts would lead to victory in the presidential elections of 1800. It was politically important that the resolutions received a strong defense, and Madison provided one in spades with his "celebrated" *Report of 1800*.[68]

Although Madison's report addressed the proper construction of federal power, his arguments were based on the First and Tenth Amendments, not the Ninth. Some scholars have argued that this indicates that Madison did not read the Ninth Amendment as a rule of construction protecting the states from federal usurpation, for had he taken such a view, he would have cited the Ninth Amendment in his report.

That argument, however, misunderstands the purpose of Madison's report. The Virginia Resolutions were short and to the point: Congress had done more than merely adopted a "latitudinary" construction of its enumerated powers. Congress had clearly and intentionally sought to exercise an unenumerated power.[69] That is not a Ninth Amendment issue of extended delegated power—that is a Tenth Amendment issue of *non*delegated power. It was because of this serious and "palpable" violation of the Constitution that Virginia believed a coordinated act of opposition was warranted. In his defense of the resolutions, Madison could not rely on Ninth Amendment arguments of undue construction of an enumerated power. Such a complaint

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68. The report came to be known as Madison's "Celebrated Report" soon after it was written. *See* U.S. v. Burr, 25 F. Cas. 55, 129 (1803) (argument of Mr. Wirt); Hunter v. Martin, 4 Munf. 1, 15 (Va. 1813); The Ohio, 1855 WL 3878, at *3 (Ohio Dist., 1855) (Westlaw pagination). Although sometimes titled "Report on the Alien and Sedition Acts," *see* JAMES MADISON: WRITINGS, *supra* note 32, at 608, it is important to understand that Madison's Report of 1800 was actually a *defense* of his earlier Virginia Resolutions. The defensive posture of the report is established in its opening paragraphs. After lightly criticizing the tone of some of the objections to the Virginia Resolutions, Madison conceded that a defense was in order:

> The committee have deemed it a more useful task, to revise with a critical eye, the resolutions which have met with this disapprobation; to examine fully the several objections and arguments which have appeared against them; and to enquire whether there be any errors of fact, of principle, or of reasoning, which the candour of the General Assembly ought to acknowledge and correct.

James Madison, Report on the Alien and Sedition Acts, *in* JAMES MADISON: WRITINGS, *supra* note 32, at 608, 608.

69. Virginia Resolutions, *supra* note 62, at 589, 590.

would not justify the more serious assertions of the Virginia Resolutions, and it would reduce the issue to the same level as the controversy over the Bank of the United States—a controversy that Madison did not believe warranted coordinated state opposition.[70] He accordingly tied all the arguments in his report to the basic point that Congress had exercised a power nowhere granted in the Constitution.[71]

Madison's *Report of 1800* profoundly influenced states' rights theorists in the decades between Jefferson's election and the Civil War. St. George Tucker referred to Madison's report numerous times in his 1803 constitutional treatise, *View of the Constitution of the United States*.[72] When Jonathan Elliot compiled the materials for his magisterial 1836 work, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, among the few postadoption sources that he added was "[t]he Report on the Virginia Resolutions, by Mr. Madison."[73] It was not unusual for nineteenth-century courts to refer to what was known as Madison's "celebrated report" in

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70. In fact, the resolutions themselves distinguished earlier disputes over broad constructions of federal power from the current objections to the Alien and Sedition Acts. *See id.* at 589–90.

71. Again, this tracks the basic approach of the Virginia Resolutions, which declared:

> That the General Assembly doth particularly protest against the palpable and alarming infractions of the Constitution in the two late cases of the "Alien and Sedition Acts," . . . the first of which exercises a power nowhere delegated to the Federal Government and which, by uniting legislative and judicial powers to those of [the] executive, subvert the general principles of free government, as well as the particular organization and positive provisions of the Federal Constitution; and the other of which acts exercises, in like manner, a power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden by one of the amendments thereto—a power, which more than any other, ought to produce universal alarm, because it is levelled [*sic*] against that right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right.

Id. at 590.

72. *See, e.g.*, 1 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 app. note D (View of the Constitution of the United States) at 287 n.* (St. George Tucker ed., Phila., William Young Birch & Abraham Small 1803) (reprinted ed. The Lawbook Exchange 1996) [hereinafter Tucker's Blackstone]; *see also id.* at 288, 302–03, 307.

73. 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution, at iii (table of contents), 546 (Jonathan Elliot ed., Wash., D.C., 1836) [hereinafter Elliot's Debates].

discussing the scope of federal law.[74] So influential was Madison's *Report of 1800* that in *Smith v. Turner*[75] —one of the so-called *Passenger Cases*—Justice John McKinley treated Madison's report as equally authoritative a guide to the proper interpretation of the Constitution as the *Federalist Papers* and the records of the Philadelphia Convention.[76] Even those commentators who rejected Madison's limited construction of federal power nevertheless felt constrained to acknowledge Madison's report, if only to refute it.[77]

As a canonical document in states' rights advocacy, the *Report of 1800*, particularly its use of the Tenth Amendment, had the effect of establishing that amendment as equal, and often superior, to the Ninth Amendment as an expression of strict construction. The Tenth's explicit reference to the reserved powers of the states, moreover, made the Tenth a more rhetorically acceptable provision than the Ninth to those, like St. George Tucker, who sought to construe the Constitution as a compact between the federal government and the people in the several states (and not the undifferentiated American people). Madison's *Report of 1800* did not wholly displace the Ninth Amendment as the textual basis for strict construction of federal power; rather, the report cemented in popular and professional understanding the Tenth Amendment as a text suggesting, if not demanding, a strict interpretation of enumerated federal powers.

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74. *See, e.g.*, U.S. v. Burr, 25 F. Cas. 55, 129 (1803) (argument of Mr. Wirt); Hunter v. Martin, 4 Munf. 1, 15 (Va. 1813); Stunt v. The Ohio, 3 Ohio Dec. Reprint 362, 1855 WL 3878, at *3 (Ohio Dist., 1855) (Westlaw pagination); Fong Yue Ting v. United States, 149 U.S. 698, 748–50 (1893) (Field, J., dissenting); Piqua Bank v. Knoup, 6 Ohio St. 342, 369–72 (1865).

75. Smith v. Turner, 48 U.S. (7. How.) 283 (1849).

76. According to Justice McKinley:

> In the face of this fact, the debates in the Convention, certain numbers of the Federalist, together with Mr. Madison's report to the legislature of Virginia in 1799—eleven years after the adoption of the Constitution—are relied on. . . . I have been unable to find anything in the debates of the Convention, in the Federalist, or the report of Mr. Madison, inconsistent with the construction here given.

Id. at 453 (McKinley, J., concurring) (relying on Madison's report, the *Federalist Papers*, and the convention debates to ascertain the meaning of the words "migration" and "importation"); *see also* State v. Hunt, 20 S.C.L. (2 Hill) 1, 71 (S.C. Ct. App. 1834) ("Mr. Madison, in his report upon the Virginia Resolutions, has remarked upon the various meanings of the word 'States,' shewing the correctness of these views. It is indeed true 'he says,' that the term 'States' is something used in a vague sense, and sometimes in different senses according to the subject to which it is applied.").

77. *See, e.g.*, 1 Joseph Story, Commentaries on the Constitution of the United States 287–88 & n.1 (Fred B. Rothman & Co. 1991) (1833).

The history of the Tenth Amendment as an independent federalist rule of construction is an important story in its own right.[78] The fact that Madison focused on the Tenth Amendment in his *Report on the Virginia Resolutions*, however, neither undermines Madison's description of the Ninth Amendment in his speech on the Bank of the United States nor conflicts with the many other examples of federalist applications of the Ninth Amendment during the same period. Madison's speech shows how the principles of the Tenth might overlap with those of the Ninth, but that cannot come as any surprise. Madison himself linked the two as supporting the general rule of limited interpretation of federal power in his speech on the Bank of the United States. We also know that postadoption courts and commentators saw the two amendments as expressing closely related principles of preserved state autonomy.[79]

But most importantly, we now know that the Alien and Sedition Acts were themselves subjected to lengthy Ninth Amendment– *and* Tenth Amendment–based critiques in private letters, public newspaper editorials, legislative debates, and constitutional treatises, whose authors included those involved in the framing of the Constitution and the most influential constitutional commentators of the day.

The Ninth Amendment and the Alien and Sedition Acts

Although Madison focused on the Tenth Amendment in his *Report of 1800* in order to defend his original resolutions, other opponents of the Alien and Sedition Acts saw both the Ninth and Tenth Amendments as calling into question the constitutionality of the acts. I have included extended excerpts from these sources to provide context and also because they explode the myth that the Ninth Amendment played no role in the fight against the acts.

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78. There are aspects of the Tenth Amendment's text that could be read as calling for a narrow construction of federal power. *See* Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and "Expressly" Delegated Power*, 83 Notre Dame L. Rev. 101 (2008). I believe that James Madison had the best account of the Ninth and Tenth Amendments, however, with the Ninth representing the rule of narrow construction and the Tenth declaring the principle of enumerated federal power.

79. This will become abundantly clear in later chapters.

In a letter published in Boston's *Independent Chronicle* from Virginia senator Stevens Thomson Mason to the imprisoned Matthew Lyon,[80] Mason declared that Lyon's prosecution under the Sedition Act violated the Ninth Amendment—and the promises made by Federalists during the ratifying conventions. His letter echoes in many ways the same analysis provided by James Madison in his speech against the Bank of the United States: in response to warnings about unconstrained federal power, Federalists promised the state ratifying conventions a government of limited enumerated power, and made these promises an express part of the Constitution through the adoption of the Bill of Rights in general and the Ninth Amendment in particular.

> Your letter (which is rapidly running through all the papers) will tend more to open the eyes of our fellow-citizens than all the speeches of all the republican orators in the last two sessions of Congress. Their warnings against the arbitrary designs of domestic usurpation, covered by the pretext of necessity, arising from foreign dangers, were considered as idle forebodings never to be realized. But your care affords a fulfillment of those predictions, and brings men seriously to enquire why, and by what authority, is this thing done?
>
> In the minds of Virginians, particularly, it sinks deep; because we well remember that when the constitution was proposed for our adoption, and the want of a bill of rights complained of, we were told that personal liberty never could be endangered under the constitution; that it was merely a government of states, having only a power over general concerns; that those barriers which were provided by the state constitutions to protect civil and religious liberty, were unnecessary in that instrument, because it contained no delegation of power which could possible affect their rights. Nay it would be dangerous to attempt their security by a bill of rights, lest it might imply that any such powers were contemplated to be given to the general government; and, that should anything in the enumeration be omitted which was necessary to be secured, it might be seized on by implication.

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80. At the time, Lyon was corresponding from prison with Stevens Thomson Mason. *See, e.g.*, Letter from Matthew Lyon to Senator Stevens Thomson Mason (Oct. 14, 1798), *in* Francis Wharton, State Trials of the United States During the Administrations of Washington and Adams 339 (Phila., Carey and Hart 1849).

> This idea we find afterwards to have been fully embraced by the eleventh amendment [the Ninth Amendment], when it was found necessary to reconcile the constitution, even to those majorities who had adopted it, by incorporating provisions equivalent to a Bill of Rights, on the subject of religious freedom, the trial by jury, the liberty of speech, and of the press; rights heretofore held sacred in America, but which shall soon pass away and be forgotten, like the dream of the night, unless the people shall be aroused by such flagrant violations of our social compact as are now passing in review before them.[81]

Mason's letter was widely published in newspapers around the country.[82] Mason himself was in a position to know about the Federalist promises to the states—he was a member of the Virginia House of Delegates that ratified the Ninth and Tenth Amendments. James Callender later included an extended extract of Mason's letter, including the key reference to the Ninth ("eleventh") amendment, in his pamphlet *The Prospect Before Us*.[83] Callender's work was itself widely distributed—which led to Callender's prosecution under the Sedition Act.[84]

The same Ninth Amendment–based argument against the Sedition Act was raised in the congressional debates in the Sixth Congress over whether to repeal the act. There, future Speaker of the House Nathaniel Macon declared that the combination of the Ninth and Tenth Amendments rendered the Sedition Act unconstitutional:

> If Congress can constitutionally pass the law now in question, can they not also pass a law to abridge the freedom of speech, to prevent the people from peaceably assembling to petition for a redress of grievances, and by the same arguments make an establishment of religion? But what means the freedom of the press? It must mean that, as there was no law existing to abridge it, that Congress should not thereafter pass one, and that it should remain exactly as the Government found it. But in order to make

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81. Letter from Stevens Thomson Mason to Matthew Lyon, *reprinted in* INDEP. CHRON., Dec. 10–13, 1798, at 2.

82. *See* AURORA GEN. ADVERTISER, Dec. 1, 1798, at 2; GREENLEAF'S N.Y. J. & PATRIOTIC REG., Dec. 5, 1798, at 4; ALEXANDRIA ADVERTISER, Dec. 14, 1798, at 3.

83. *See* 2 JAMES CALLENDER, THE PROSPECT BEFORE US 152 (1800).

84. *See* James Morton Smith, *Sedition in the Old Dominion: James T. Callender and the Prospect Before Us*, 20 J. S. HIST. 157 (1954).

> it more clear if possible, and to give more perfect satisfaction to the people, another amendment was introduced in the following words: "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." Mr. M. said he conceived this clause was introduced to prevent any power being assumed by implication, and consequently that Congress have no power to pass any law, unless that law be specially granted, or absolutely necessary to carry to carry a delegated power into effect. Again, the 11th amendment has these words—"The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people." From these clauses it appears quite clear that the law is a violation of the Constitution.[85]

Treatise writers like Tunis Wortman excoriated defenses of the Sedition Act, which, like the Virginia Assembly's minority address, construed the enumerated rights of the First Amendment as suggesting otherwise unlimited power over speech and the press.[86] "How is it possible," wrote Wortman in his 1800 treatise on freedom of the press, "that sentences altogether negative and restricting can destroy the limitations of the original Constitution, or be construed into a positive enlargement and extension of authority?"[87] Such an argument flew in the face of the "eleventh and twelfth articles of amendment[, which] expressly declare, that the enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people; and 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." These amendments, Wortman insisted, were "strictly declaratory," and "amount to nothing more than would have resulted from a fair and regular interpretation of the Constitution."[88] Such a

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85. 10 Annals of Cong. 405 (1800) (discussion of the Ninth (eleventh) Amendment in the debate over repealing the Alien and Sedition Acts; remarks of Nathaniel Macon).

86. *See* Tunis Wortman, A Treatise, Concerning Political Enquiry, and the Liberty of the Press (N.Y., George Forman 1800). According to Leonard Levy, Wortman was "one of the leading democratic theoreticians of his time." Albert Gallatin supported the publication of Wortman's book by helping secure subscriptions to the book by Republican members of Congress. *See* Leonard Levy, *Liberty and the First Amendment, 1790–1800*, 68 Am. Hist. Rev. 22, 33 n.51 (1962).

87. Wortman, *supra* note 86, at 225.

88. *Id.* at 225–26.

fair construction embraced the general rule of "expressly delegated power." According to Wortman:

> [T]he objects of federal jurisdiction are specifically defined. The powers vested in the general Government are such as are expressly and particularly granted by the Constitution, or such that flow in obvious and necessary consequence from the authorities which are thus expressly conferred. Powers claimed by implication should be such as follow from evident and necessary construction, and not in consequence of distant or conjectural interpretation. Much latitude cannot be admitted upon the occasion without endangering public liberty and destroying the symmetry of our political system.[89]

In this passage, one can hear echoes of Madison's warning about "latitudinous" interpretations, James Iredell's call for express enumeration or "insurmountable implication," and both men's insistence that no interpretation of federal power is permissible which alters the basic nature of the document.

Finally, and perhaps most significantly, in a 1799 pamphlet, John Page argued that the Alien and Sedition Acts were "not only unnecessary, impolitic and unjust, but unconstitutional."[90] I quoted part of Page's essay earlier in this chapter. What follows is a closer look at this work, one previously missed by Ninth Amendment scholars, which explains how the last two amendments in the Bill of Rights worked together to preserve individual liberty. According to Page, the acts violated the retained rights of the states as protected by the Ninth and Tenth Amendments (which he referred to as the 11th and 12th articles):

> The power therefore which congress has claimed and exercised in enacting the alien act, not having been granted by the people in their constitution, but on the contrary having been claimed and hitherto wisely and patriotically exercised by the state legislatures, for the benefit of individual

89. *Id.* at 212. Wortman went on to cite the First, Ninth, and Tenth Amendments as "relat[ing] to the immediate subject of discussion [the power of the federal government to enact libel laws]." *Id.* at 220. He also rejected the idea that particular restrictions on power can be construed to imply otherwise affirmative powers, and cited the eleventh and twelfth articles of amendments as declaratory provisions that did not alter previous grants of power.

90. PAGE, *supra* note 7, at 10.

> states, and for the safety of the general government, must be amongst those powers, which not having been granted to congress, nor denied to the states, are declared by the 11th and 12th articles of the amendments to the constitution to be reserved to the states respectively, and therefore the alien act is an encroachment on those rights, and must be unconstitutional . . . Because it is an interference with, and an encroachment on, the reserved rights of the individual states, (see the 11th and 12th articles of the amendments).[91]

Page spoke interchangeably about reserved state rights and reserved state powers. Both are protected by the combined effect of the Ninth and Tenth Amendments. In fact, Page argued that the Ninth Amendment actually enhanced the federalist effect of the Tenth.

In another part of his essay, Page addressed the Address of the Virginia Minority that defended the acts as falling within the implied powers of Congress. The minority address pointed out that under the earlier Articles of Confederation, the states retained all powers not "expressly" delegated to the federal government. The Tenth Amendment, however, omitted the term "expressly" and, thus, implied a broader range of federal authority under the new Constitution. Page rejected this reading of the Tenth Amendment and argued that the combination of the Ninth and Tenth Amendments expressed the same limited reading of federal power as that declared by Article II of the Articles of Confederation:

> For how could it be supposed when the 2d article of the confederation declared, that "each state retains its sovereignty, freedom, and independence, and every power, jurisdiction and right, which is not by this Confederation expressly delegated to the U. States, in congress assembled," and the design of appointing a convention and the authority given by the different confederated states to that convention went no farther than to "render the then Federal Constitution adequate to the exigencies of government and the preservation of the union," (neither of which could require farther powers in government than are expressly granted) that although the convention omitted the insertion of a familiar article, whether as unnecessary in their opinion, or, through design; (such as seems now avowed) as the amendment was made, and as these words

91. *Id.* at 13–14.

> preceded it in the 11th article, "the enumeration, in the Constitution, of CERTAIN RIGHTS, shall not be construed to deny or disparage others retained by the people."
>
> I say, considering these things, how could it be possible to suppose, that these two amendments taken together, were not sufficient to justify every citizen in saying, 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, as fully and completely; as if the word expressly had been inserted? The best *Federalists*, as they were called, told you repeatedly, that there was no occasion for such an amendment, nor could there be, as long as a candid and republican construction should be put upon the Constitution. Indeed, candor should lead us to suppose, that the convention thought that the insertion of the 2d article of that confederation, in the constitution, was unnecessary, as they could not suppose that each state did not retain, and intend to retain its sovereignty, freedom and independence, and every power jurisdiction and right which they had not expressly delegated to the United States in Congress Assembled, or granted to the United States in their *new constitution*. And candor, and a respect for the majority of congress which recommended the amendments ought to induce us to think, that they also were of the same opinion, and therefore that they would not have recommended the addition of the 11th and 12th articles to the constitution, had they not been called upon by some states for such amendments. . . .[92]

Page insisted (as had others) that the combination of the Ninth and Tenth Amendments established a rule of construction whereby Congress would have only "expressly delegated powers." By this, Page meant that federal power was to be strictly construed to include only those implied powers that were "absolutely necessary" (Wortman) or that were a matter of "insurmountable implication" (Justice James Iredell). This directly refuted the claim in the minority address (and in Chief Justice Marshall's later opinion in *McCulloch v. Maryland*[93]) that the omission of the term "expressly" suggested that the framers intended delegated power to be broadly or "liberally" construed.

Although one might expect a states' right proponent like Page to insist that the Constitution embraced the principle of "expressly" delegated powers,

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92. *Id.* at 28–29.

93. *See* McCulloch v. Maryland, 17 U.S. 316, 406 (1819).

despite the omission of the term in the Tenth Amendment, in fact, throughout the ratification debates and for years afterward, *Federalists* made the same assertion. In the New York ratifying convention, Alexander Hamilton declared that "whatever is not expressly given to the federal head, is reserved to the members."[94] In the South Carolina debates, Federalist Charles Pinckney insisted that "no powers could be executed or assumed [by the federal government], but such as were expressly delegated."[95] In a speech delivered to the House of Representatives while the Bill of Rights remained pending in the states, James Madison reminded the assembly that the proponents of the Constitution had assured the states that "the general government could not exceed the expressly delegated powers."[96] Writing shortly after the adoption of the Bill of Rights, Madison again declared that "[w]hen the people have formed a Constitution, they retain those rights which they have not expressly delegated."[97] Finally, in one of the most famous decisions of the Supreme Court's first decade, Justice Samuel Chase declared that "the several State Legislatures retain all the powers of legislation, delegated to them by the State Constitutions; which are not EXPRESSLY taken away by the Constitution of the United States."[98] These are just a few examples that can easily be found in the historical record. There are many others. They arise in every major period of American constitutional law right up to the modern Supreme Court.[99] Page thus was not making a new or especially controversial claim. The idea that federal power was to be narrowly construed to include only *expressly enumerated* (and thus narrowly construed) responsibilities informed the original Constitution as well as the Ninth and Tenth Amendments. It was

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94. Debates in the Convention of the State of New York (June 28, 1788), *in* 5 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 20, at 117 (remarks of Alexander Hamilton). Hamilton would take a far broader view of federal power *following* the adoption of the Constitution. *See, e.g.*, Alexander Hamilton, Opinion on the Constitutionality of the Bank, *in* 8 PAPERS OF ALEXANDER HAMILTON, *supra* note 20, at 63.

95. Charles Pinckney, Speech Before the South Carolina House of Representatives (Jan. 16, 1788), *reported in* PA. PACKET & DAILY ADVERTISER, Feb. 21, 1788, at 2, *and reprinted in* 2 THE FOUNDERS' CONSTITUTION 8 (Philip B. Kurland and Ralph Lerner eds., 1987).

96. FED. GAZETTE, Feb. 12, 1791,at 2.

97. 4 ANNALS OF CONG. 934 (1794).

98. Calder v. Bull, 3 U.S. (3 Dall.) 386, 387 (1798).

99. *See* Griswold v. Connecticut, 381 U.S. 479, 490 n.5 (1963) (Goldberg, J. concurring) ("The Tenth Amendment similarly made clear that the States and the people retained all those powers not expressly delegated to the Federal Government."). For a discussion of the original meaning of the term "expressly delegated power" and its historical uses, *see* Lash, *The Original Meaning of an Omission*, *supra* note 78.

the Federalist Party's rejection of these constraints on delegated power, Page and others claimed, that led to the Alien and Sedition Acts.

For years, historians have believed that the Ninth Amendment played little, if any, role in the debates over the Alien and Sedition Acts. The evidence presented in this chapter should put that claim to rest. Newspapers, legislative debates, and political pamphlets all contained arguments that relied on the Ninth Amendment as a constraint on the interpretation of federal power. Particularly significant is the testimony of Page, a fellow member of Congress who helped frame and submit the Bill of Rights, including the Ninth Amendment.

St. George Tucker's 1803 Essays on American Constitutional Law

St. George Tucker's essays on American constitutional law were published in the appendixes of his 1803 annotated edition of Blackstone's Commentaries. Based on lectures that Tucker delivered while teaching at William and Mary during the 1790s, Tucker's essays were easily the most influential scholarly work on the American Constitution in the early decades of the republic and they remained influential long afterward. Because Tucker espoused the so-called compact theory of the Constitution (the idea that the Constitution arose from an act of the people in the several states, as opposed to an act of a single unified American citizenry), his ideas were attacked by Joseph Story in his 1833 *Commentaries on the Constitution*. Today, scholars generally place Tucker as representing the same postadoption theory of states' rights as John C. Calhoun and proslavery nullifiers.[100] This is deeply misleading. Tucker wrote long before the nullification debates and the rise of proslavery states' rights theory. Tucker, in fact, was an early advocate of the abolition of slavery.[101] Nor were his ideas about the Ninth Amendment and the limited construction of federal power something new when he published his treatise in 1803. They reflected, in systematized form, the same understanding of the

100. *See, e.g.,* Earl M. Maltz, *Majority, Concurrence, and Dissent:* Prigg v. Pennsylvania *and the Structure of Supreme Court Decisionmaking,* 31 Rutgers L.J. 345, 358 (2000).

101. *See* St. George Tucker, A Dissertation on Slavery: With a Proposal for the Gradual Abolition of It, in the State of Virginia (1796), *reprinted in* View of the Constitution of the United States with Selected Writings 402, 408–09 (Clyde N. Wilson ed., 1999).

Ninth Amendment as had been declared by James Madison before the ratification of the Bill of Rights and by innumerable other writers during the first decade of the Constitution.

Far from limiting the Ninth Amendment to the protection of individual rights, Tucker believed the retained rights of the people included the people's fundamental collective right to alter or abolish their form of government whenever they see fit:

> It must be owned that Mr. Locke, and other theoretical writers, have held, that "there remains still inherent in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them: for, when such trust is abused, it is thereby forfeited, and devolves to those who gave it."[102]

In a footnote following his quotation of Locke, Tucker noted that "[t]his principle is expressly recognized in our government, Amendments to the C. U.S. Art. 11, 12."[103] As we are now well aware, the reference is to the Ninth and Tenth Amendments.

In this passage, Tucker linked the Ninth Amendment to the people's retained collective right to revolution. Tucker spoke of powers devolving to the people on a state-by-state basis (thus the pairing with the Tenth Amendment). As did Madison and other founders, Tucker understood 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.[104] In this case, the people's retained collective right to revolution includes the right to recall a delegation of power when the government abuses its trust. Moreover, the reference to the Tenth Amendment exemplifies Tucker's view that the "people" exist as independent sovereigns in the several states.

St. George Tucker shared the Republicans' view that federalism was a critical aspect of liberty,[105] and in his influential essays on the Constitution he combined the Ninth and Tenth Amendments to create a single rule of strict

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102. 2 Tucker's Blackstone, *supra* note 72, at 162 (internal citation omitted).

103. *Id.* at 162 n.25.

104. *See, e.g.*, Debates in the Convention of the State of Pennsylvania (Oct. 28, 1787), in 2 Elliot's Debates, *supra* note 73, at 415, 436 (remarks of James Wilson) ("A bill of rights annexed to a constitution is an enumeration of the powers reserved.").

105. *See* Saul Cornell, The Other Founders: Antifederalism and the Dissenting Tradition in America, 1788–1828, at 265 (1999).

construction of federal power. According to Tucker, state governments "retain every power, jurisdiction and right not delegated to the United States, by the constitution, nor prohibited by it to the states."[106] Under the principles of the Ninth and Tenth Amendments "the powers delegated to the federal government, are, in all cases, to receive the most strict construction that the instrument will bear, where the rights of a state or of the people, either collectively, or individually, may be drawn in question."[107]

According to Tucker, under the Ninth Amendment, federal power should be strictly construed "wherever the right of personal liberty" is in dispute.[108] This interpretation of the Ninth was firmly grounded in the ideas of federalism and state autonomy. According to Tucker, the Ninth and Tenth Amendments prevented the federal government from interfering with or adding to the individual's prior obligations to the state:

> As [a federal compact] it is to be construed strictly, in all cases where the antecedent rights of a state may be drawn in question [citing the Tenth Amendment]; as a social compact it ought likewise to receive the same strict construction, wherever the right of personal liberty, of personal security, or of private property may become the subject of dispute; because every person whose liberty or property was thereby rendered subject to the new government, was antecedently a member of a civil society to whose regulations he had submitted himself, and under whose authority and protection he still remains, in all cases not expressly submitted to the new government [citing the Ninth and Tenth Amendments]. The few particular cases in which he submits himself to the new authority, therefore, ought not to be extended beyond the terms of the compact, as it might endanger his obedience to that state to whose laws he still continues to owe obedience; or may subject him to a double loss, or inconvenience for the same cause.[109]

This passage pulls together the strand of retained-sovereignty theory that informed the debates over the Constitution, the call for a bill of rights, the reaction to *Chisholm v. Georgia*, and John Page's insistence that the Ninth and

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106. 1 Tucker's Blackstone, *supra* note 72, app. note D at 141.

107. *Id.* at 154.

108. *Id.* at 151.

109. *Id.*

Tenth Amendments together establish the rule of "expressly delegated power." The source of authority begins with the people of the states, who preexisted the federal Constitution. These people of the several states were presumed to have delegated broad authority to their state governments to accomplish the varied purposes of local government. *Some* of these powers were withdrawn from the states and transferred to the federal government when the state convention ratified the Constitution. Whether one viewed the Constitution as a compact between the people in the several *states* or a compact between individual people of the *United States*, the result was the same because of the preexisting delegations of sovereign authority to the state governments.

This rule of strict construction presumed the continued existence of the people in the states as independent sovereigns. Should this sovereignty be abandoned or erased, so would the rule (and rationale) for strict construction. This explains the dramatic and almost universal rejection of the Supreme Court's ruling in *Chisholm*. But where *Chisholm* involved only the potential threat of future expansion of federal power to the detriment of individual and collective liberty, the Sedition Act was a concrete and "palpable" example of federal abandonment of the rule of strict construction with direct effects on the liberty of the individual. The purging of the Federalist Party from the political branches of government was understood for decades afterward to have restored the proper balance between federal and state power—a balance men like James Madison believed was essential to the survival of the Union and the flourishing of the American people.

But although the nationalist reading of federal power had been ousted from the political branches, there remained a third branch whose members were not so easily removed from office. John Marshall had soldiered under General George Washington at Valley Forge, fought for ratification of the Constitution alongside James Madison as a fellow Federalist, and served as secretary of state under Washington's vice president and successor in office, John Adams. In the waning days of a lame-duck administration, President Adams tapped Marshall to replace the retiring chief justice of the Supreme Court, Oliver Ellsworth. Nationalism thus gained an advocate on the Supreme Court at the same time that Thomas Jefferson and James Madison brought the principles of federalism to the presidency. John Marshall would go on to author some of the most, if not *the* most, famous opinions in the history of the U.S. Supreme Court.

Not a single one would mention the Ninth Amendment.

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SEVEN

The Ninth Amendment and the Marshall Court

AS THOMAS A. EMMET ROSE FROM HIS TABLE to address the justices of the Supreme Court, he had every reason to be optimistic about his case and his career. Described by Supreme Court justice Joseph Story as the "favorite counselor of New York," the former New York State attorney general was representing the interests of Aaron Ogden, a steamboat operator who ran a ferry line from New York City to Elizabeth Point, New Jersey. Ogden had received his license from Robert Fulton and Robert R. Livingston and thus enjoyed the famous steamboat inventors' state-granted monopoly to operate his ferry out of the waters of New York Harbor. There was money to be made in the emerging steamboat industry, and Thomas Emmet had made a career out of successfully fending off challenges to Livingston's monopoly and its licensees before the courts of New York. He had no reason to think that he would be any less successful before the Supreme Court of the United States—indeed, he had good reason to think that recent events significantly strengthened his client's chances of success.

The case, *Gibbons v. Ogden*, involved an effort by one Thomas Gibbons to horn in on the lucrative ferry run between New York and New Jersey. Although Gibbons had a federal coasting license allowing him the general right to ply the waters off the nation's coast, he had no license to operate a ferry out of New York Harbor, and his attempt to do so violated the monopoly granted to Ogden under state law. Ogden obtained an injunction against Gibbons from the New York courts, and Gibbons had appealed his cause to the U.S. Supreme Court. Gibbons's primary claim was that regulating interstate ferry transportation was a matter exclusively in the hands of the federal government under the commerce clause of Article I of the U.S. Constitution. Gibbons's fallback position was that his federal coasting license granted him the right to run a ferry out of any navigable state water connected to the coast of the United States.

Despite the fact that Gibbons had some of the most famous attorneys in the United States arguing his case, Thomas Emmet had reason to think that

Gibbons's position was exceedingly weak. To begin with, Emmet came before the Supreme Court having won the issue below with a supporting opinion written by the eminent jurist Chancellor James Kent.[1] Gibbons had made some noise before the New York court about his rights under the federal coasting license, but the claim was preposterous. Such licenses conferred no rights; they simply indicated that a tax had been paid and granted permission to navigate within the territorial waters of the United States.[2] Nothing about the license prevented a state from regulating the use of its own waterways—a fact the Supreme Court itself would recognize in a later case.[3] Gibbons's position about the *exclusive* power of the federal Congress to regulate interstate ferry runs was an even greater stretch. True, Congress had the power to regulate interstate commerce, but this grant of power by its terms said nothing about a state's *concurrent* right to regulate commerce within its jurisdiction. Theoretically, Congress might pass some kind of national "Interstate Ferry Act," but to date they had left such regulation in the hands of local governments.

Even better from Emmet's point of view was the fact that some of the most influential members of the current Supreme Court had adopted the view that states should be presumed to retain concurrent authority over traditionally local affairs, even when the Constitution grants the federal government a degree of power over the same subject. For example, the federal government has the power of taxation—but so do the states, so long as they exercise this power in manner that does not violate federal law. In a recent case, Supreme Court justice Joseph Story had written that the concurrent powers of the states must be protected whenever possible according "to the letter and spirit" of the Ninth Amendment. Not only had Chief Justice John Marshall joined Story's opinion, but the Senate had just confirmed a new Supreme Court justice who had earlier embraced the idea of presumed concurrent state power, and he had done so in a case involving the power of state governments to regulate the *ferryboat industry*. Newly appointed associate justice Smith Thompson was well acquainted with maritime law, having served as secretary of the navy.

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1. Livingston v. Van Ingen, 9 Johns. 507, 576 (N.Y. Sup. 1812) (Kent, C.J.) (upholding the state granted monopoly).

2. *See* Gibbons v. Ogden, 17 Johns. 488 (N.Y. Sup. 1820) (Platt, J.) (rejecting the argument that the federal coasting license constrained the New York monopoly).

3. *See* Willson v. Black-Bird Creek Marsh Co., 27 U.S. 245 (1829) (Marshall, C.J.) (upholding state regulation of a local dam across navigable waters despite a claim based on a federal coasting license).

And Justice Thompson would be *especially* familiar with New York's regulation of its waterways, having recently served as chief justice of the New York Supreme Court. In that capacity, Judge Thompson had listened favorably to attorney Thomas Emmet's argument that the Ninth Amendment protected the state's right to grant a ferryboat monopoly, and Judge Thompson had upheld the legality of Livingston's monopoly.[4] Thompson having now been appointed to the Supreme Court of the United States, Thomas Emmet could look forward to seeing a familiar face on the bench and likely receiving at least three (including the most influential) votes in favor of the concurrent powers of the states over local matters like ferryboat regulations.

But when Emmet rose to address the members of the Supreme Court, the seat of Justice Smith Thompson was empty. While traveling to take his seat on the Court, Thompson had received the news of his daughter's untimely death, and the new justice had altered his plans in order to attend her funeral. Having missed the oral arguments in *Gibbons*, Justice Thompson declined participate in the case. Instead, Chief Justice John Marshall led a unanimous remnant Court in ruling against Emmet's client and striking down the New York monopoly. In an opinion that ignored Emmet's Ninth Amendment argument (and Justice Story's recent invocation of that clause), Marshall ruled that federal power had no limits other than those expressly enumerated in the Constitution—the reverse proposition of the Ninth Amendment.[5] It was the most expansive statement of federal power to issue from the Marshall Court, indeed from *any* decision of the Supreme Court to this day. The result must have shattered Thomas Emmet. He died soon afterward, his heart giving out in the middle of arguing a case.

Thus far our story has been about the missing pieces of history where the Ninth Amendment was drafted, discussed, and applied. This chapter continues to recover that history, but it ends in a discussion of the one place where there is no history of the Ninth Amendment to be found—the judicial opinions of Chief Justice John Marshall.

There is little need to belabor the point about the original understanding of the Ninth Amendment. If the substantial record in the previous chapters is not enough, there is plenty more to be found in the early decades of the

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4. *Livingston*, 9 Johns. at 566 (Thompson, J.) (concurring with Chief Justice Kent in upholding the state granted monopoly).

5. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

Constitution, all of it involving a federalist reading of the amendment, and all of it occurring long before the skewing of constitutional debate as the country came apart over the issue of slavery. In the next chapter, I discuss the use of the Ninth Amendment in the years preceding the Civil War and the potential impact of the Reconstruction Amendments, particularly the Fourteenth Amendment. Discussion of the Ninth in that chapter goes not to the original understanding of the amendment but to the likely understanding of those privileges or immunities of U.S. citizens that became protected against state abridgement in 1868 by way of the Fourteenth Amendment. However "federalist" the original Bill of Rights, the nature of our Constitution substantially changed with the adoption of the Reconstruction Amendments. The task in the next chapter is to determine how to reconcile the principles informing the original Constitution with the new more libertarian principles of the Thirteenth, Fourteenth, and Fifteenth Amendments.

Before we reach that point, however, there is one final act in the early history of the Ninth Amendment to discuss. The early decades of the 1800s would witness the first discussion of the Ninth Amendment in a Supreme Court opinion. Justice Story's opinion in *Houston v. Moore*, however, would be the high-water mark for the Ninth Amendment. The vision of national power articulated by Chief Justice John Marshall in cases like *McCulloch v. Maryland* and *Gibbons v. Ogden* left no room for the rule of strict construction. Thus, although Marshall managed to give a limited reading to the Tenth Amendment, he avoided the Ninth Amendment altogether. Marshall's nationalist vision and his silence regarding the Ninth have both contributed to the modern amnesia regarding the original understanding of the retained rights of the people.

It should be clear by this point that there was not a single uniform interpretation of federal power at the time of the founding. The historical record strongly suggests that the most widely shared view of federal power was a limited one that expected a narrow construction of delegated authority, with most matters reserved to the control of the people of the states as a matter of right. There were, however, deeply nationalist visions of the Constitution that from the beginning competed with the Madisonian federalist view of delegated power. The common complaint by historians when it comes to legal history is that legal historians often fail to acknowledge crosscurrents and nuance in the historical record. I freely acknowledge such crosscurrents when it comes to competing visions of national power at play at the time of the founding, though, again, I do not think that the record is equally divided between federalist and nationalist readings of delegated power.

But however varied the approaches to national power, I do not concede the existence of "crosscurrents and nuance" when it comes to the basic federalist reading of the Ninth Amendment. Different people used the Ninth Amendment in different ways. Some read the amendment as significantly restricting federal power; others insisted that the amendment placed few if any constraints on federal power. But these are differences of degree, not kind. *Every* court and commentator who took a position on the Ninth Amendment in the initial decades of the Constitution, whether Federalist or Anti-Federalist or Democratic-Republican, nationalist or states' rightist, drafter or ratifier—*all* described the Ninth as echoing the same federalist principles as the Tenth.

From the second half of this chapter until the end of the book, the issue to be discussed is not the original meaning of the Ninth Amendment. The issue becomes what *happened* to the original meaning of the Ninth Amendment.

The Ninth Amendment and the Federalist Nature of Unenumerated Rights

As discussed previously, neither the text nor the history of the Ninth Amendment excludes any category of rights from falling within the meaning of the "rights retained by the people." Whether an individual natural right or a collective political right, *any* right not delegated into the hands of the federal government remained under the sovereign authority of the people in the states. Scholars have been right, then, to insist that the Ninth Amendment as originally understood protected individual natural rights. Where scholars have been mistaken is in assuming that because natural rights are presumed immune from the action of any government, federal or state, the rights of the Ninth Amendment must (at least theoretically) limit the powers of state as well as federal governments. No court or commentator adopted such an interpretation of the Ninth Amendment for more than a century after the adoption of the Bill of Rights. The historical record we have reviewed explains why: retained rights might be individual in nature in terms of their application against the federal government, but they were *federalist* in nature in terms of being left to the control of the people in the states.

This dual nature can be clearly seen in one of the most famous "individual natural rights" cases in the history of the Supreme Court, the 1798 case of

Calder v. Bull.[6] *Calder* involved an act by the Connecticut legislature granting a new trial in a probate case. The plaintiffs alleged that this act violated the ex post facto clause of the federal Constitution.[7] The U.S. Supreme Court heard the appeal under section 25 of the Judiciary Act, which granted the Court authority to review certain cases arising in state court and involving questions of federal law. After recounting the facts, Justice Samuel Chase began his opinion with a sentence generally omitted from scholarly accounts of the case:

> It appears to me a self-evident proposition, that the several state legislatures retain all the powers of legislation, delegated to them by the state constitutions; which are not EXPRESSLY taken away by the constitution of the United States. The establishing courts of justice, the appointment of judges, and the making [of] regulations for the administration of justice within each state, according to its laws, on all subjects not entrusted to the federal government, appears to me to be the peculiar and exclusive province and duty of the State Legislatures. All the powers delegated by the people of the United States to the federal government are defined, and NO CONSTRUCTIVE powers can be exercised by it.[8]

Although Justice Chase did not expressly mention the Tenth Amendment, present-day scholars would have no difficulty seeing in Chase's opening statement a paraphrase of the Tenth, despite his rewording of the clause. But Chase has done much more. His opening statement declares the principles of the Ninth *and* Tenth Amendments. Not only did he graft the term "retained" onto the general principle of reserved state power, but he followed that declaration with a principle forbidding the constructive enlargement of enumerated federal power.

Justice Chase's opinion is often cited as an early example of natural-rights jurisprudence and is included in general discussions of the meaning of the Ninth Amendment.[9] In the early decades of the nineteenth century, however, Chase's opinion was understood as seriously limiting the power of the

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6. 3 U.S. (3 Dall.) 386 (1798).

7. *Id.* at 387.

8. *Id.*

9. *E.g.*, Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty 126 (2004); Paul Brest et al., Processes of Constitutional Decisionmaking 111 (4th ed. 2000); Calvin R. Massey, Silent Rights: The Ninth Amendment and the Constitution's Unenumerated Rights 49, 158–59 (1995); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. Chi. L. Rev. 1127, 1166–73 (1987).

federal government to interfere with the states.[10] The fact that this aspect of the opinion has gone unnoticed for so long is probably due to the common assumption that a belief in natural rights is incompatible with a strong position on state autonomy. Having disabused ourselves of this presumption, we are now in a position to appreciate the full meaning of Justice Chase's opinion.

After declaring the fundamental principle of delegated power and the rule that such power is not to be enlarged by construction, Justice Chase next addressed whether the state law violated the ex post facto clause. In an extended rumination on an issue "not necessary now to be determined"—an issue regarding whether a state legislature can revise a decision of one of its state courts[11]—Justice Chase announced:

> I cannot subscribe to the omnipotence of a state legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the constitution, or fundamental law, of the State. . . . There are acts which the federal, or state, legislature cannot do, without exceeding their authority. There are certain vital principles in our free republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof of the government was established. An act of the legislature (for I cannot call it a law), contrary to

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10. In his 1826 *Commentaries on American Law*, Chancellor James Kent criticized Chase's states' rights reading of the Constitution. According to Kent:

> Judge Chase, in the case of *Calder v. Bull*, declared that the state legislatures retained all the powers of legislation which were not expressly taken away by the Constitution of the United States; and he held, that no constructive powers could be exercised by the federal government. Subsequent judges have not expressed themselves quite so strongly in favor of state rights, and in restriction of the powers of the national government.

1 James Kent, Commentaries on American Law *388–89 (Oliver Wendell Holmes, Jr., ed., Fred B. Rothman & Co. 1989) (12th ed. 1873). In *United States v. New Bedford Bridge*, 27 F. Cas. 91, 100 (C.C.D. Mass. 1847) (No. 15,867), the court cited *Calder* alongside states' rights opinions such as Justice Story's in *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820), Justice Daniels's in *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842), and Justice Thompson's dissenting opinion in *New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837). *See also* People *ex rel.* Attorney Gen. v. Naglee, 1 Cal. 232, 235 (1850) (citing *Calder* alongside *Houston*).

11. *Calder*, 3 U.S. (3 Dall.) at 387.

> the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.[12]

In this passage, Justice Chase repeated the broadly held view that certain fundamental principles of law limited the legitimate authority of the state. Chase did not, however, presume that the federal courts were in any position to define such rights for the people of a given state (much less all states). Chase merely insisted that the assumed existence of fundamental principles should raise a presumption that the state legislature did not intend to violate such principles:

> A law that punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys or impairs the lawful private contracts of citizens; a law that makes a man a Judge in his own cause; or a law that takes property from A. and gives it to B. It is against all reason and justice, for a people to entrust a legislature with such powers; and therefore, it cannot be *presumed* that they have done it.[13]

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

In his concurring opinion, Justice Iredell addressed the situation in which Chase's presumption is overcome and it appears that a law does in fact transgress the Court's understanding of natural rights. In such a case, argued Iredell, a court would have no authority to invalidate the law.[14] "The Court,"

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12. *Id.* at 387–88.

13. *Id.* at 388 (emphasis added).

14. *Id.* at 398–99 (Iredell, J., concurring).

explained Justice Iredell,

> cannot pronounce [a law] to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.[15]

According to Iredell, either the act fell within the retained authority of the state or it did not—whether it transgressed the principles of natural law was a matter for the people of the state to determine for themselves.[16] Both Chase's and Iredell's opinions fit within the Madisonian vision of the Ninth and Tenth Amendments as retaining such rights to the people of the several states to deal with as they see fit. Iredell's opinion also tracks his earlier dissent in *Chisholm v. Georgia* regarding the retained sovereign authority of the states.

Another case commonly cited in support of natural-rights readings of the Ninth Amendment is the 1810 case of *Fletcher v. Peck*.[17] *Fletcher* involved the Georgia legislature's corrupt sale of land to speculators.[18] A subsequent legislature invalidated the sale, and the original purchasers sued in federal court claiming a violation of the contract clause of Article I, Section 9 of the U.S. Constitution.[19] Had the case come to the Supreme Court on appeal from the state supreme court, then under section 25 of the Judiciary Act, the Court would have been limited to consideration of federal questions.[20] This was a

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15. *Id.* at 399.

16. According to Iredell:

> There are then but two lights, in which the subject can be viewed: 1st. If the Legislature pursue the authority delegated to them, their acts are valid. 2nd. If they transgress the boundaries of that authority, their acts are invalid. In the former case, they exercise the discretion vested in them by the people, to whom alone they are responsible for the faithful discharge of their trust: but in the latter case, they violate a fundamental law, which must be our guide, whenever we are called upon as judges to determine the validity of a legislative act.

Id.

17. 10 U.S. (6 Cranch) 87 (1810).

18. *Id.* at 87–89.

19. *Id.* at 87–92.

20. According to section 25 of the Judiciary Act of 1789:

> [A] final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty

diversity case, however, arising in federal court, so the Supreme Court remained free to consider issues of both state and federal law.[21] Accordingly, counsel raised arguments relating to both contract law and "first principles of natural justice."[22]

Marshall's opinion addresses the legislature's rescission of the prior sale, first under general rules of contract law, itself a matter of state law, and then under the restrictions of the contract clause of the U.S. Constitution. Although Marshall began his analysis of contract law by citing "certain great principles of justice,"[23] such language disappeared when he turned to the construction of the contract clause.[24] The most express declaration of natural law in *Fletcher* came in Justice William Johnson's concurrence: "I do not hesitate to

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> or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity, or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error.

Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–86.

21. For a discussion of *Fletcher* and the jurisdictional issues in these cases, *see* G. Edward White, 3-4 History of the Supreme Court of the United States: The Marshall Court and Cultural Change, 1815–35, at 597–612 (1988).

22. *Id.* at 604.

23. 1 Memoirs of John Quincy Adams 547 (Charles Francis Adams ed., Phila., J.B. Lippincott 1874) (remarks of John Marshall, Mar. 11, 1809).

24. Compare Marshall's discussion of state law, *Fletcher*, 10 U.S. (6 Cranch) at 135–36 ("It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power"), with his discussion of the federal Constitution, *id.* at 136 ("Does the case now under consideration come within this prohibitory sections of the constitution? In considering this very interesting question, we immediately ask ourselves what is a contract?"). In another case, *United States v. Fisher*, 6 U.S. (2 Cranch) 358 (1805), Marshall appears to invoke natural law in his construction of the Bankruptcy Code. *Id.* at 389–90 ("Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects."). At the outset of his opinion, however, Marshall laid out his principles of statutory construction, including "where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain; in which case it must be obeyed." *Id.* at 386. Rather than a statement of natural rights binding the government, at most this is a plain-statement rule. *But see* Sherry, *supra* note 9, at 1170 (linking this opinion to a natural rights jurisprudence of the Supreme Court).

declare that a state does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things: a principle which will impose laws even on the deity."[25] But Johnson explicitly distinguished his belief in natural law from the commands of the Constitution,[26] and he warned that the rights enumerated against the states in the Constitution should *not* be so broadly construed as to interfere with the retained right of the state majorities to exercise the power of eminent domain.[27] Johnson's opinion is a perfect example of how a states' rights protective rule of constitutional interpretation could coexist with a strong embrace of natural rights. Although neither Marshall nor Johnson cited the Ninth Amendment, both opinions fit comfortably with the federalist (meaning the theory of limited national government, not the political party) account of the Ninth envisioned by James Madison and the ratifying conventions.

All the so-called natural-rights Supreme Court cases follow this general principle: natural rights exist, but their enforcement is a matter of state, not federal, law. Supreme Court justice Joseph Story seems to have adhered to the same view. While riding circuit in New Hampshire only two years after joining the Supreme Court, Justice Story decided *Society for the Propagation of the Gospel v. Wheeler*.[28] One of the issues was whether a state law allowing tenants to recover the value of improvements was void because of its retroactive effect. The claim was that the law was

> in contravention of the 2d, 3d, 12th, 14th and 20th articles of the bill of rights, in the constitution of New Hampshire; and of the 10th section of the first Article, and the 9th article of the amendments, of the constitution

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25. *Fletcher*, 10 U.S. (6 Cranch) at 143 (Johnson, J., concurring).

26. *Id.* at 144 ("I have thrown out these ideas that I may have it distinctly understood that my opinion on this point is not founded on the provision in the constitution of the United States, relative to laws impairing the obligation of contracts.").

27. *Id.* at 145 ("[W]here to draw the line, or how to define or limit the words, 'obligation of contracts,' will be found a subject of extreme difficulty. To give it the general effect of a restriction of the state powers in favour of private rights, is certainly going very far beyond the obvious and necessary import of the words, and would operate to restrict the states in the exercise of that right which every community must exercise, of possessing itself of the property of the individual, when necessary for public uses; a right which a magnanimous and just government will never exercise without amply indemnifying the individual, and which perhaps amounts to nothing more than a power to oblige him to sell and convey, when the public necessities require it.").

28. 22 F. Cas. 756 (C.C.D.N.H. 1814) (No. 13,156).

> of the United States; and is also repugnant to natural justice; and is therefore void.[29]

Justice Story quickly dismissed the constitutional claim:

> In respect also to the constitution of the United States, the statute in question cannot be considered as void. The only article which bears on the subject, is that which declares, that no state shall pass "any ex post facto law, or law impairing the obligation of contracts." There is no pretence of any contract being impaired between the parties before the court. The compensation is for a tort, in respect to which the legislature have created and not destroyed an obligation. Nor is this an ex post facto law within this clause of the constitution, for it has been solemnly adjudged, that it applies only to laws, which render an act punishable in a manner, in which it was not punishable, when it was committed. Calder v. Bull, 3 Dall. [3 U.S.] 386; Fletcher v. Peck, 6 Cranch [10 U.S.] 87. The clause does not touch civil rights or civil remedies. The remaining question then is, whether the act is contrary to the constitution of New Hampshire.[30]

Justice Story ignored the Ninth Amendment claim, despite the alleged violation of natural rights. The supposedly "natural rights" cases *Calder* and *Fletcher* were discussed as relevant to interpreting the ex post facto and contract clause claims, *not* the Ninth Amendment claim. Story did consider principles of "natural justice," but only after he concluded his discussion of the federal Constitution and moved on to the issue of state law.[31] On that issue, Story apparently believed that the Ninth Amendment was irrelevant. This is precisely what we would expect under the Madisonian reading of the Ninth Amendment. Federal courts might consider issues of natural law in a diversity case involving issues of state law, but only as a presumptive rule of interpretation and always subject to the express will of the sovereign people of the state.

Given the federalist history of the Ninth Amendment and the general consensus that individual natural rights were matters of state law, it is not

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29. *Id.* at 766.

30. *Id.* at 767.

31. *Id.* at 768.

surprising that early-nineteenth-century cases discussing the Ninth Amendment as a source of unenumerated federal rights are extremely rare.[32] There appear to have been less than a handful of attempts by litigants to raise such claims prior to the Civil War.[33]All of these attempts were rejected by the courts. Use of the Ninth Amendment as a federalist guarantor of limited federal power, on the other hand, was common and can be found at all levels of state and federal courts. The federalist reading of the Ninth in the first half of the nineteenth century culminated in the first U.S. Supreme Court case to include a discussion of the Ninth Amendment, *Houston v. Moore*.

The Federalist Ninth Amendment in Early-Nineteenth-Century Courts

In the last chapter, the majority of Ninth Amendment discussion took place in the context of public debate. Political reliance on the Ninth Amendment continued in the early nineteenth century, but with the addition of judicial discussion and application of the Ninth. Beginning with the first state court discussion of the Ninth Amendment—by a ratifier of the Constitution—judicial interpretation of the Ninth Amendment was uniformly federalist, with the Ninth generally paired with the Tenth Amendment.

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32. I have found no clear evidence that any party even made such a claim before a state court during this period. One possible exception is *In re Graduates*, 11 Abb. Pr. 301, 322 n.4 (N.Y. 1860), but the reference to the Ninth is obscure and made in passing.

33. *See* United States v. Robins, 27 F. Cas. 825 (D.C. S.C. 1799) (court ignoring counsel's attempt to argue extradition violated Ninth and Tenth Amendment-based right to trial by jury); Holmes v. Jennison, 23 39 U.S. (14 Pet.) 540 (1840) (court ignoring counsel and former Vermont Governor C.P. Van Ness's argument that *Barron v. Baltimore* ought to be reversed and the Bill of Rights, including the Ninth Amendment, be read as applying to the states); Roosevelt v. Meyer, 68 U.S. (1 Wall.) 512 (1863) (court ignoring petitioner's claim that the Fifth, Ninth and Tenth Amendments protected a creditor's right to be paid in gold or silver). One other possible unenumerated-rights reference may be found in Justice Henry Baldwin's circuit court opinion in *Magill v. Brown*, 16 F. Cas. 408 (C. C.E.D. Pa. 1833) (No. 8,952). In the midst of his forty-four page opinion, Justice Baldwin briefly referred to the "personal rights . . . protected by the 2d and 3d clauses of section 9, art. 1, of the constitution, and the 9th amendment." *Id.* at 428. This is not inconsistent with the federalist reading of the Ninth and seems to track St. George Tucker's reading of the Ninth. For example, Baldwin linked the Ninth to restrictions on the federal government in Article I, Section 9, but *not* to the restrictions on the states in Article I, Section 10.

John Overton and the First State Court Case

Judge John Overton was a member of the second North Carolina ratifying convention.[34] Although the first North Carolina convention neither accepted nor rejected the Constitution, the second convention voted in favor of ratification in 1789.[35] Overton went on to join the Tennessee bench and preside over a case that contains the earliest known state judicial references to the Ninth Amendment. The background issue involved whether a state property judgment was binding on a portion of land falling within Indian territory. Judge Overton held that it was, in part because of the retained sovereignty of the states as protected under the Ninth and Tenth Amendments.

According to Judge Overton, the Constitution "abridged the sovereign rights of each State . . . [n]o further than the States have expressly, and not by equitable construction, delegated authority to the United States."[36] Overton based his construction on "the law of nature applied to nations." Following Emmerich de Vattel, Judge Overton maintained that "nations as well as individuals are tenacious of the rights of self-preservation, of which, as applied to sovereign States, the right of soil or eminent domain is one. Constitutions, treaties, or laws, in derogation of these rights are to be construed strictly." Here Overton cited Vattel and St. George Tucker ("two of the most eminent writers on jurisprudence") as well as the Ninth and Tenth Amendments.[37]

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34. After serving as a delegate to the second convention, Overton was later elected to the Superior Court of Tennessee, the precursor to the Tennessee Supreme Court. Theodore Brown, Jr., *John Overton, 1766–1833*, *in* TENNESSEE ENCYCLOPEDIA OF HISTORY AND CULTURE (2002), http://tennesseeencyclopedia.net/imagegallery.php?EntryID=O023.

35. North Carolina's initial ratification convention debated the Constitution, drafted a "Declaration of Rights" and "Amendments," and voted "neither to ratify nor reject the Constitution." Resolution of the North Carolina Convention (Aug. 1, 1788), *in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 243, 249, 251 (Jonathan Elliot ed., Wash., D.C., 1836). Over a year later, North Carolina ratified the Constitution. Resolution of the North Carolina Convention (Nov. 21, 1789), *in* 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786–1870, at 290 (Wash., D.C., Dep't of State 1894) [hereinafter DOCUMENTARY HISTORY OF THE CONSTITUTION].

36. Glasgow's Lessee v. Smith, 1 Tenn. (1 Overt.) 144, *14 (1805) (Westlaw pagination).

37. *Id.* at 166 n.1. The footnote in full reads: "See Vat. B. 2 c, 17, §§ 305, 308; Amendment to Con. U. S. arts 11, 12; 1 T. Bl. app. to part 1, 307, 308; Ib. 412; Vat. B. 1, c. 1, § 10; 2 Dall. 384; 1 T. Bl. app. to part 1, 269; 4 Johns. 163."

The Continued Debates Regarding the Bank of the United States

Although Madison failed to persuade a majority to reject the Bank of the United States in 1791, his arguments continued to resonate over the next two decades. In 1811, during the congressional debate over renewing the bank charter, opponents agreed with Madison that the latitude of construction pressed by the bank's proponents exceeded congressional power. As Representative William Burwell pointed out to the assembly, the subject of the bank had been "more thoroughly examined in 1791, and more ably elucidated than any other since the adoption of the Government. The celebrated speech of Mr. Madison, to which I ascribe my conviction, has been recently presented to us in the newspapers, and gentlemen must be familiar with it."[38] Representative William T. Barry echoed Burwell's praise of Madison's "perspicuous and luminous argument that has been so justly celebrated as defining and marking out the proper limits of power assigned to the General Government."[39] These men obviously would be aware of how Madison relied on the Ninth and Tenth Amendments. Others expressly relied on the Ninth Amendment alone. According to Representative Richard Johnson (a future vice president):

> The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people"; which amendment refers to the prohibitions to be found in the ninth section of the first article, and others of the same kind . . . [listing examples]. And more especially the tenth amendment . . . [quoting the Tenth]. The parts of the Constitution recited prove the position taken, that the Constitution is a grant of specified powers; that we can exercise no power not expressly delegated to us. . . .[40]

Likewise, Representative William Crawford argued:

> Congress cannot therefore usurp this power over the States, so explicitly and expressly reserved, without a flagrant violation of this (not an interpolation as it has been jesuitically styled, but) integral part of the Constitution. This opinion is confirmed by article ninth, amendments to

38. 22 Annals of Cong. 584 (1811) (statement of Rep. William Burwell).

39. *Id.* at 696 (statement of Rep. William T. Barry).

40. *Id.* at 720–21 (statement of Rep. Richard Johnson).

> the Constitution, which declares, that the enumeration in the Constitution of certain rights shall not be construed to deny, or disparage, others retained by the people. But the people have retained the right to establish banks—for all banks not delegated to the [federal government[41]], or prohibited to the States, are reserved to the States respectively, or to the people. . . . [The power to incorporate a bank] is of too imperious a nature to be sought for by implication, inclusion, or as an incidental means to carry any other power into effect. . . . If it had ever been parted with, it was all-important that it should have been parted with expressly.[42]

The same Ninth Amendment–based arguments were raised in the Senate. Senator William Giles, for example, recounted the concerns that led to the adoption of a constitution that reserved all unenumerated powers to the states:

> From this short history of the origin of the Constitution, and the causes which produced it, it evidently appears, that the General or Federal Government is in its nature and character a Government of enumerated powers, taken from previously existing State governments, enumerated and conferred on it, reserving all unenumerated powers to the State governments, or to the people in their individual capacities. But if any doubts had existed on this subject, two amendments to the Constitution, growing out of some jealousies lest a contrary interpretation should be given to the Constitution, have been adopted, which ought to put this question to rest forever. The 9th and 10th articles of amendment to the Constitution are as follows: . . . [quoting both the Ninth and Tenth]. Now, sir, can language be more explicit than this, in declaring that this charter contains enumerated powers, and that all not enumerated are reserved to the States or to the people?[43]

The bank's proponents disagreed that the charter violated the Ninth Amendment, but they accepted the federalist nature of the amendment.[44]

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41. The text at this point refers to "the people"—a transcription mistake, as Crawford seems clearly to be referring to the federal government. Otherwise, the quote makes no sense.

42. 22 Annals of Cong. 751, 753 (1811) (statement of Rep. William Crawford). Note the use of Madison's argument in his original speech against the bank. *See supra* chapter 3, notes 62–81 and accompanying text.

43. 22 Annals of Cong. 182–83 (1811) (statement of Sen. William Giles).

44. For example, Senator John Taylor argued that Congress had not rigorously applied the Ninth Amendment in the past and that if one took the obvious meaning of the Ninth

Indeed, Federalists never questioned the state-protective reading of the Ninth and occasionally adopted it themselves. For example, in 1817, Federalist Party member and state supreme court judge William Tilghman embraced the same federalist reading of the Ninth Amendment:

> Antecedent to the adoption of the Federal constitution, the power of the several states was supreme and unlimited. It follows, therefore, that all power, not transferred to the *United States*, remains in the states and the people, according to their several constitutions. This would have been the sound construction of the constitution, without amendment. But the jealousy of those, who feared that the federal government would absorb all the power of the states, caused it to be expressly recognized in the 11th and 12th articles of amendment.[45]

Retaining the Concurrent Power of the States

A critical issue in the early republic was determining the nature of federal power. Deeming federal power to be exclusive would preclude state authority over any matter within the potential reach of the federal government. For example, federal authority to regulate interstate commerce had the potential to deny states the authority to regulate *any* matter touching commercial affairs. Because it was a hotly contested issue during the ratification debates, Alexander

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Amendment to its logical conclusion, Congress could not operate:

> The Gentleman from Virginia (Mr. Giles) has called attention of the Senate to the 9th article of the amendments to the Constitution . . . [quoting the amendment]. . . . I know not how Mr. Adams found the States so much asleep to their rights when he tempted their citizens to become usurers, and this too in denial and disparagement of State powers actually exercised. If the present vigilance had then been exerted, I should suppose he was very lucky that he was not as much harassed as were some of the victims of the sedition law. Carry this doctrine of rigid construction in respect to this instance of collision of State and United State authorities to the extent contended for by the opposers of the bill—enforce to the fullest extent, according to its obvious meaning, the amendment last quoted, and we shall be surrounded with powers that we dare not use.

Id. at 301–02 (statement of Sen. John Taylor).

45. Farmers' & Mechs' Bank v. Smith, 3 Serg. & Rawle 63, 68 (Pa. 1817). Chief justice of the Pennsylvania State Supreme Court (1806–1827), William Tilghman was a Federalist midnight justice who lost his seat with the repeal of the Judiciary Act.

Hamilton in the *Federalist Papers* sought to placate Anti-Federalist concerns by limiting exclusive federal authority to "three cases":

> The principles established in a former paper teach us that the states will retain all *pre-existing* authorities which may not be exclusively delegated to the federal head; and that this exclusive delegation can only exist in one of three cases: where an exclusive authority is, in express terms, granted to the Union; or where a particular authority is granted to the Union and the exercise of a like authority is prohibited to the States; or where an authority is granted to the Union with which a similar authority in the States would be utterly incompatible.[46]

Under Hamilton's approach, much depends on the third case and how one arrives at the conclusion that state power is "utterly incompatible" with federal authority. Those advocating the maximum degree of state autonomy argued for strict construction of federal power in cases involving matters traditionally under state control. In 1803, for example, St. George Tucker wrote that state governments "retain every power, jurisdiction and right not delegated to the United States, by the constitution, nor prohibited by it to the states."[47] Drawing on Emmerich de Vattel's theory of the law of nations, Tucker wrote that states as sovereign entities were presumed to retain all powers not expressly delegated away.[48] This principle had been enshrined in the Ninth and Tenth Amendments, which together required that "the powers delegated to the federal government are, in all cases, to receive the most strict construction that the instrument will bear, where the rights of a state or of the people, either collectively, or individually, may be drawn in question."[49]

In the early 1800s, political and judicial debate echoed Tucker's view that the Ninth and Tenth Amendments called for a narrow construction of federal power. In 1807, a petition was sent to Congress on behalf of "sundry citizens of the United States" asking that Congress allow the state courts

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46. The Federalist No. 82, at 492 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

47. 1 Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and the Commonwealth of Virginia app. note D (View of the Constitution of the United States) at 141 (St. George Tucker ed., Phila., William Young Birch & Abraham Small 1803) (reprint Lawbook Exchange, 1996) [hereinafter Tucker's Blackstone].

48. See *id.* at 151.

49. *Id.* at 154.

concurrent jurisdiction over diversity cases despite the preferences of the plaintiff.[50] The petitioners' argument was grounded on the Ninth and Tenth Amendments, which, to the petitioners, preserved wherever possible the concurrent powers of the states.[51] In 1808, Senator James Lloyd cited the Ninth and Tenth Amendments as limiting federal regulation of commerce.[52] In the murder trial of Cyrus Dean, the Supreme Court of Vermont rejected a claim that an alien freeholder could not serve as a grand juror because of exclusive federal authority over immigrants. According to the court, the Ninth and Tenth Amendments established the state's retained concurrent right to determine the rights of alien freeholders within the state.[53]

Judge John Grimke and *State v. Antonio*

In 1816, South Carolina courts were faced with the question whether states have the authority to prosecute persons passing counterfeit federal coins.[54] Although the Constitution expressly empowers the federal government to punish counterfeiters,[55] it was not clear whether this express enumeration should be interpreted to prohibit the states from punishing persons *passing* counterfeit coins. It was possible to construe the general grant of power to Congress as preempting any state law on the subject of counterfeiting.

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50. 1 American State Papers: Miscellaneous 480 (Walter Lowrie & Walter S. Franklin eds., Wash., D.C., Gales & Seaton 1834).

51. *Id.*

52. 19 Annals of Cong. 251 (1809) (statement of Sen. James Lloyd).

53. *See* The Trial of Cyrus B. Dean, for the Murder of Jonathan Ormsby and Asa Marsh, Before the Supreme Court of Judicature of the State of Vermont, at Their Special Sessions, Begun and Holden at Burlington, Chittenden County, on the 23rd of August, A.D. 1808. Revised and Corrected from the Minutes of the Judges 47 (Burlington, Vt., Samuel Mills 1808), *available at* The Making of Modern Law: Trials 1600–1926, No. Q4200252612 (Thomson Gale). The court stated:

> We learn from the eleventh and twelfth articles of the first amendment to the Constitution of the United States . . . [quoting the Ninth and Tenth Amendments]. If then, Congress have power to intermeddle with the soil within a State's jurisdiction—to say who should, or rather who should not hold or possess it, this power must have been expressly delegated to the government of the United States.

Id.

54. State v. Antonio, 3 S.C.L. (1 Brev.) 562 (1816).

55. U.S. Const. art. I, § 8, cl. 6 ("[Congress shall have power] [t]o provide for the Punishment of counterfeiting the Securities and current Coin of the United States.").

Writing for the South Carolina Supreme Court, Judge John Grimke, a ratifier of the federal Constitution, rejected this argument and concluded that this power was a right retained by the states under the Ninth and Tenth Amendments:

> [I]t does not appear that the power of punishing persons for passing counterfeit coin, knowing it to be counterfeit, was either expressly given to the Congress of the United States, or divested out of the individual States. Now the 9th section of the amendments to the constitution, as agreed to by the several States, and which has now become a component part of the constitution, declares, that the enumeration in the constitution of certain rights, shall not be construed to deny or disparage others retained by the people; and in the 10th section of the same, it is further provided, that the powers not delegated to the United States by the constitution, nor prohibited by it to the State, are reserved to the States, respectively, or to the people. When we examine the powers conceded by the individual states, we find no enumeration of this power given to Congress, and when we review the powers denied to the individual States, we discover no mention whatever of their being divested of this power. The individual States were in possession of this power before the ratification of the constitution of the United States; and if there is no express declaration in that instrument, which deprives them of it, they must still retain it, unless they should be divested thereof by construction or implication.[56]

By this point in the book, Judge Grimke's statement probably seems commonplace. It is worth pausing for a moment, however, to recall just how radically different this statement is when compared with modern assumptions about the Ninth and Tenth Amendments. We are repeatedly instructed that these two amendments have nothing to do with one another; that the Ninth is about *rights*, whereas the Tenth is about *powers*; that the Ninth is about *individuals*, whereas the Tenth is about *states*; that the people of the Ninth are the undifferentiated people of the *nation*, whereas the people of the Tenth are the people of the separate *states*. Each of these modern dichotomies is rejected by the short passage above. As had everyone else since the adoption of the Bill of Rights, Judge Grimke (who served as the equivalent of

56. *Antonio*, 3 S.C.L. (1 Brev.) at 567–68.

the chief justice of the South Carolina Supreme Court) rejected any such dichotomy between the two amendments. The analysis of Judge Grimke, a southern slaveholder, might be dismissed by some as reflecting proslavery constitutional construction as opposed to the original meaning of the Ninth and Tenth Amendments. What we now know, however, is that Grimke was expressing a view of the amendments that follows an unbroken line of interpretation stretching back to the man who helped framed the original text.

We will have occasion to revisit Judge Grimke's opinion in the closing pages of this book. For now, it is enough to know that his views were commonplace among his contemporaries[57] and echoed the earliest interpretations of the Ninth Amendment.

The New York Steamboat Monopoly

New York's decision to grant Robert R. Livingston and Robert Fulton a monopoly on ferryboat traffic between ports in New Jersey and Manhattan Island triggered a series of lawsuits that culminated with the Supreme Court's invalidation of the monopoly in *Gibbons v. Ogden*.[58] In 1811, an anonymous author published an extended defense of the monopoly, arguing, among other things, that the states retained the right to grant monopolies under the Ninth and Tenth Amendments:

> It is hardly necessary to add that the 12th amendment, can have no other influence on this question than to strengthen this position. This amendment was made, not to give additional powers to the Federal Government,

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57. In *State v. Brearly*, 5 N.J.L. 639, 643 (1819), counsel for the state argued that jurisdiction to issue writs of habeas corpus against the U.S. military was a power retained by the states under the Ninth and Tenth Amendments. Though Judge Samuel L. Southard concluded that some matters are within the exclusive jurisdiction of the federal courts, he further explained:

> There are other questions, where the state and federal courts both have jurisdiction. They are such as existed and were the subjects of state cognizance and judicial notice before the formation of the general government, and are given to the *United States*, but altogether without words of exclusion used in application to the state. They are possessed by the federal courts because expressly given; they are retained by the states upon the impregnable ground that they have never been surrendered.

Id. at 644; *see also* Henry Bickel Co. v. Wright's Adm'x, 202 S.W. 672, 674 (Ky. 1918) ("[T]he ninth and tenth amendments reserve to the states all powers not expressly delegated.").

58. 22 U.S. (9 Wheat.) 1 (1824).

> not one of them tending to this object, but to guard the States against a constructive extension of those powers. If then certain powers were by a fair construction equally within the jurisdiction of Congress and the States respectively, such powers could not by force of this restrictive amendment, be taken from the States and vested in Congress, particularly when the preceding article of the amendment, contains an express provision against this constructive assumption of power. 11th Art. "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people"; thus the enumeration of the right of arming the militia, and maintaining a navy shall not disparage the right that the States have to arm the militia, or to keep a navy in time of war.[59]

The author read the Ninth Amendment as guarding against constructive extensions of federal power in matters involving the concurrent rights and powers of the states. As we shall see, Supreme Court justice Joseph Story adopted this Ninth Amendment–based defense of concurrent state power in a case concerning, coincidentally enough, concurrent state powers over matters involving the militia.

When the matter ultimately appeared before the New York courts in *Livingston v. Van Ingen*,[60] critics of the monopoly claimed that granting such monopolies was an exclusive power of the federal government under its enumerated powers to "promote the progress of science and useful arts" and to regulate interstate commerce.[61] Livingston's counsel, Thomas Emmet,[62] responded that the federal government had only such power as was expressly granted and that all other powers were reserved to the states under the Ninth

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59. The Right of a State to Grant Exclusive Privileges, in Roads, Bridges, Canals, Navigable Waters, &c. Vindicated by a Candid Examination of the Grant from the State of New-York to, and Contract with Robert R. Livingston and Robert Fulton, for the Exclusive Navigation of Vessels, by Steam or Fire, for a Limited Time, on the Waters of Said State, and Within the Jurisdiction Thereof 18 (N.Y., E. Conrad 1811), *microformed on* Early American Imprints, Series II, No. 23819 (Readex, NewsBank, Inc).

60. 9 Johns. 507, 508 (N.Y. Sup. Ct. 1812).

61. *Id.* at 515.

62. Thomas Emmet argued a number of important cases in state and federal court, including the U.S. Supreme Court, between 1815 and 1824. *See* 3–4 White, *supra* note 21, at 204–14. The culmination of his legal career was his argument before the Supreme Court in *Gibbons v. Ogden*. *Id.* at 210–11.

and Tenth Amendments.[63] The highest court of New York, under the leadership of Chancellor James Kent, upheld the monopoly.[64] In a concurring opinion, Judge Smith Thompson, later a Supreme Court justice, stressed the retained rights and powers of the states in language that echoes both the Ninth and Tenth Amendments:

> It is an undeniable rule of construction, applicable to the constitution of the United States, that all powers and rights of sovereignty, possessed and enjoyed by the several states, as independent governments, before the adoption of the constitution, and which are not either expressly, or by necessary implication, delegated to the general government, are retained by the states.[65]

Houston v. Moore: The First Supreme Court Discussion of the Ninth Amendment

In his 1820 book *Construction Construed, and Constitutions Vindicated*, John Taylor castigated the nationalist policies of the federal government and declared:

> The eleventh [Ninth] amendment prohibits a *construction* by which the rights retained by the people shall *be denied or disparaged*; and the twelfth [Tenth Amendment] "reserves *to the states respectively or to the people* the powers not delegated to *the United States*, nor prohibited *to the states*."

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63. According to Emmet:

> In the year 1789, certain amendments to the constitution were proposed; and of the articles adopted, the ninth and tenth were, "that the enumeration in the constitution of certain rights, shall not be construed to deny or disparage others retained by the people." 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."
>
> The convention of this state adopted the constitution with the explanation given by General Hamilton, who was a member, that no powers were conferred on congress but such as were explicitly given by the constitution.

Livingston, 9 Johns. at 550–51.

64. *Id.* at 590.

65. *Id.* at 565.

> The precision of these expressions is happily contrived to defeat a construction, by which the origin of the union, or the sovereignty of the states, could be rendered at all doubtful.[66]

Taylor was an ardent states' rights advocate, and his thoughts on the Ninth Amendment perhaps should be taken with a grain of salt given the amount of time that had passed since the original ratification of the Ninth Amendment.[67] The same year Taylor published his book, however, the nationalist Justice Story embraced the very same view of the Ninth Amendment.

Joseph Story's opinion in *Houston v. Moore* contains the earliest known discussion of the Ninth Amendment by a Supreme Court justice. Although written in dissent, Justice Story's analysis of the concurrent powers of the states was influential for the next one hundred years. As we shall see, it was cited by later Supreme Court justices and many state and federal courts as they continued to struggle with the line between state and federal power. As recently as 2008, in the Second Amendment case *District of Columbia v. Heller*, both the majority *and* dissent quoted Justice Story's dissent in *Houston*.[68] However, neither these recent opinions nor many earlier citations to *Houston* discussed (much less recognized) Story's use of the Ninth Amendment in that case.

It is not hard to understand why Story's reference to the Ninth has been missed. Justice Story referred to the Ninth as the "eleventh amendment."[69] As we now know, this was not a mistake—it was simply a conventional way of numbering the provisions in the Bill of Rights in the early decades of the Constitution. James Madison also referred to the Ninth as the "eleventh" in his letters and in his speech on the Bank of the United States.[70] In 1803,

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66. JOHN TAYLOR, CONSTRUCTION CONSTRUED, AND CONSTITUTIONS VINDICATED 46 (Leonard W. Levy ed., Da Capo Press 1970) (1820). Thomas Jefferson called Taylor's book "the most logical retraction of our governments to the original and true principles of the constitution creating them, which has appeared since the adoption of that instrument." Letter from Thomas Jefferson to Spencer Roane (June 27, 1821), *in* 10 THE WRITINGS OF THOMAS JEFFERSON 188, 189 (Paul Leicester Ford ed., N.Y., G.P. Putnam's Sons 1899).

67. *See* Andrew C. Lenner, *John Taylor and the Origins of American Federalism*, 17 J. EARLY REPUBLIC 399 (1997).

68. *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2807 (2008); *id.* at 2841 (Stevens, J., dissenting); *See also,* Tafflin v. Levitt, 493 U.S. 455, 458–59 (1990).

69. Houston v. Moore, 18 U.S. (5 Wheat.) 1, 49 (1820) (Story, J., dissenting).

70. *See, e.g.*, Letter from James Madison to George Washington (Dec. 5, 1789), *in* 5 DOCUMENTARY HISTORY OF THE CONSTITUTION, *supra* note 35, at 221; James Madison,

St. George Tucker published his treatise on the American Constitution, in which he referred to the Ninth and Tenth Amendments as "Articles 11 and 12."[71] John Taylor referred to the Ninth and Tenth Amendments as the "eleventh and twelfth" in *Construction Construed, and Constitutions Vindicated*.[72] As late as 1833, the Supreme Court referred to the Seventh Amendment as the "ninth"—its position on the original list.[73] Over time, the convention changed and "articles three through twelve" became known as the Bill of Rights and were renumbered one through ten. This change in convention, however, has had the effect of obscuring Justice Story's important discussion of the Ninth Amendment in *Houston*. Rescued from obscurity,[74] Story's opinion is now revealed as the Supreme Court's first and most relied-upon discussion of the Ninth Amendment as an independent principle of constitutional law.

Speech in Congress Opposing the National Bank (Feb. 2, 1791) [hereinafter Madison's Bank Speech], *in* JAMES MADISON: WRITINGS 480, 489 (Jack N. Rakove ed., 1999).

71. *See* 1 TUCKER'S BLACKSTONE, *supra* note 47, app. note D at 151, 154.

72. TAYLOR, *supra* note 66, at 46. According to Taylor:

> The eleventh amendment prohibits a construction by which the rights retained by the people shall be denied or disparaged; and the twelfth reserves to the state respectively or to the people the powers not delegated to the United States, not prohibited to the states. The precision of these expressions is happily contrived to defeat a construction, by which the origin of the union, or the sovereignty of the states, could be rendered at all doubtful.

Id. (emphasis omitted).

73. *See* Livingston v. Moore, 32 U.S. (7 Pet.) 469, 551 (1833) (referring to the current Seventh Amendment as the "ninth Article of the amendments of the constitution of the United States"); *see also Ex parte* Burford, 7 U.S. (3 Cranch) 448, 451 (1806) (referring to the Fourth Amendment as the "6th article of the amendments to the constitution").

74. *Houston v. Moore* actually has been hiding in plain sight. In addition to being cited on the issue of concurrent state power, *Houston* has long been a part of discussions regarding militias and the Second Amendment. *E.g.*, Michael A. Bellesiles, *The Second Amendment in Action*, 76 CHI.-KENT L. REV. 61, 99 n.319 (2000); J. Norman Heath, *Exposing the Second Amendment: Federal Preemption of State Militia Legislation*, 79 U. DET. MERCY L. REV. 39, 39–40 (2001); David B. Kopel, *The Supreme Court's Thirty-five Other Gun Cases: What the Supreme Court Has Said About the Second Amendment*, 18 ST. LOUIS U. PUB. L. REV. 99, 183 (1999) (calling Story's citation of the "fifth" amendment a "typo" but not mentioning his citation of the "eleventh"). Other language by Story in *Houston* regarding the Court's lack of power to expand the Constitution has also been cited in discussions of the power of the Supreme Court. *See, e.g.*, Raoul Berger, *New Theories of "Interpretation": The Activist Flight from the Constitution*, 47 OHIO ST. L.J. 1, 9 (1986) ("Understandably, Justice Story emphasized, 'we are not at liberty to add one jot of power to the national government beyond what the people have granted by the constitution.'").

The Opinion of Joseph Story

Houston involved a state prosecution for failure to perform federal militia duty.[75] Pennsylvania law provided that "every non-commissioned officer and private, who shall have neglected or refused to serve when called into actual service" would be court-martialed by the state and punished according to the federal militia law of 1795.[76] In 1814, President Madison instructed the governor of Pennsylvania to supply militiamen for the war against Great Britain. Houston, a private enrolled in the Pennsylvania militia, refused to join up with his detachment and was prosecuted and fined according to state law.[77] Houston's defense was that Pennsylvania law in this instance was "contrary to the constitution of the United States," particularly Article I, Section 8, Clauses 15 and 16 of the Constitution, which grant Congress authority over the militia.[78] According to Houston, federal power over the militia was "exclusive of state authority," and thus the states had no concurrent power to create courts-martial and impose penalties for violating federal militia law, even when Congress had failed to create its own courts-martial.[79]

In response, the state argued that concurrent state power should be assumed on the grounds of state sovereignty. Citing the New York court's decision in *Livingston v. Van Ingen*, Houston's lawyer declared:

> The necessity of a concurrent jurisdiction in certain cases results from the peculiar division of the powers of sovereignty in our government; and the principle, that all authorities of which the states are not expressly devested in favour of the Union, or the exercise of which, by the states, would be repugnant to those granted to the Union, are reserved to the

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75. 18 U.S. (5 Wheat.) at 49 (Story, J., dissenting). For an excellent discussion of *Houston*'s underlying facts from a non–Ninth Amendment point of view, *see* David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 B.Y.U. L. Rev. 1359, 1379–84.

76. *Houston*, 18 U.S. (5 Wheat.) at 58 (Story, J., dissenting).

77. *Id.* at 2 (syllabus).

78. *Id.* at 47 (Story, J., dissenting). Clause 15 allows Congress "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." U.S. Const. art. I, § 8, cl. 15. Clause 16 allows Congress "[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." U.S. Const. art. I, § 8, cl. 16.

79. *Houston*, 18 U.S. (5 Wheat.) at 4 (syllabus).

> states, is not only a theoretical consequence of that division, but is clearly admitted by the whole tenor of the constitution.[80]

Writing for a splintered majority, Justice Bushrod Washington ruled that Congress had not provided federal courts with exclusive jurisdiction in these kinds of matters and upheld Houston's conviction.[81] Justice Story dissented on the ground that federal militia law applicable to this case contemplated a federal—not a state—court-martial.[82] Story's dissent was joined by at least one other justice—most likely Chief Justice Marshall.[83]

In his opinion, Story conceded the importance of preserving the concurrent powers of the states, and he began his opinion by stating the importance of the case to issues of state sovereignty:

> Questions of this nature are always of great importance and delicacy. They involve interests of so much magnitude, and of such deep and permanent public concern, that they cannot but be approached with uncommon anxiety. The sovereignty of a state in the exercise of its legislation is not to be impaired, unless it be clear that it has transcended its legitimate authority; nor ought any power to be sought, much less to be adjudged, in favour of the United States, unless it be clearly within the reach of its constitutional charter.[84]

Story then noted that a constitutional grant of power does not necessarily deny states concurrent authority over a given subject. His reasoning here deserves to be presented in full:

> The constitution containing a grant of powers in many instances similar to those already existing in the state governments, and some of these

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80. *Id.* at 8.

81. *Id.* at 28 (majority opinion). In his opinion, Justice William Johnson found no reason for the case to have been heard by the Court; the state prosecution was ancillary to federal law—not in conflict with it—and the United States had not complained. *Id.* at 33 (Johnson, J., concurring). Johnson did not believe that Houston was subject to federal law at all prior to his reaching the "place of rendezvous." *Id.* at 36.

82. *Id.* at 68–69 (Story, J., dissenting).

83. *Id.* at 76. ("In this opinion I have the concurrence of one of my brethren."). An early compendium of the opinions of Chief Justice John Marshall included Justice Story's opinion in *Houston*, since the great chief justice apparently joined Justice Story's dissent. *See* THE WRITINGS OF JOHN MARSHALL, LATE CHIEF JUSTICE OF THE UNITED STATES, UPON THE FEDERAL CONSTITUTION 560–97 (Boston, James Munroe & Co., 1839).

84. *Houston*, 18 U.S. (4 Wheat.) at 48 (Story, J., dissenting).

being of vital importance also to state authority and state legislation, it is not to be admitted that a mere grant of such powers in affirmative terms to Congress, does, *per se*, transfer an exclusive sovereignty on such subjects to the latter. On the contrary, a reasonable interpretation of that instrument necessarily leads to the conclusion that the powers so granted are never exclusive of similar powers existing in the states, unless where the constitution has expressly, in terms, given an exclusive power to Congress, or the exercise of a like power is prohibited to the states, or there is a direct repugnancy or incompatibility in the exercise of it by the states.[85] The example of the first class is to be found in the *exclusive* legislation delegated to Congress over places purchased by the consent of the legislature of the state in which the same shall be, for forts, arsenals, dock-yards, &c.; of the second class, the prohibition of a state to coin money or emit bills of credit; of the third class, as this court have already held, the power to establish an uniform rule of naturalization, and the delegation of admiralty and maritime jurisdiction. In all other cases not falling within the classes already mentioned, it seems unquestionable that the states retain concurrent authority with Congress, *not only upon the letter and spirit of the eleventh amendment of the constitutio*n, but upon the soundest principles of general reasoning. There is this reserve, however, that in cases of concurrent authority, where the laws of the states and of the Union are in direct and manifest collision on the same subject, those of the Union being "the supreme law of the land," are of paramount authority, and the state laws, so far, and so far only, as such incompatibility exists, must necessarily yield.

Such are the general principles by which my judgment is guided in every investigation on constitutional points. I do not know that they have ever been seriously doubted. They commend themselves by their intrinsic equity, and have been amply justified by the opinions of the great men under whose guidance the constitution was framed, as well as by the practice of the government of the Union. To desert them would be to deliver ourselves over to endless doubts and difficulties; and probably to hazard the existence of the constitution itself.[86]

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85. To this extent, Story appears to track Hamilton's argument in the *Federalist* No. 82. *See supra* note 46 and accompanying text.

86. *Houston*, 18 U.S. (4 Wheat.) at 48–50 (Story, J., dissenting) (second and third emphasis added) (footnotes omitted).

The context of the discussion initially makes Story's reference to the "eleventh amendment" puzzling. The Eleventh Amendment restricts the jurisdiction of federal courts to hear claims by individuals against states.[87] In this passage, however, Story is not discussing federal court jurisdiction, but the proper construction of federal legislative power. This, as we have seen, raises issues under the Ninth, but not the Eleventh, Amendment. The reference makes sense, however, if Story is understood to be using the early convention of referring to provisions in the Bill of Rights according to their position on the originally proposed list of amendments.[88] Read this way, the passage not only makes sense, but it becomes a textbook case for how to apply the Ninth Amendment's rule of construction.

One of the original purposes of the Ninth Amendment was to prevent the Bill of Rights from being construed to suggest that congressional power

87. U.S. Const. amend. XI.

88. Additional evidence that Story was deploying the early convention comes later in his opinion when he refers to the Second Amendment as the "Fifth." *See Houston*, 18 U.S. (4 Wheat.) at 52–53 (Story, J., dissenting) ("The fifth amendment to the constitution, declaring that 'a well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed,' may not, perhaps, be thought to have any important bearing on this point."). This reference clearly indicates that Story was using some different method of numbering the amendments, but this particular passage raises a mystery of its own. If Story were using the early convention, he would have referred to the Second Amendment as the fourth. The fact that he calls it the fifth raises the possibility of transcription error. In fact, some commentators have referred to Story's "Fifth Amendment" reference in this case as a "typo." *See* Kopel, *supra* note 74, at 183 (calling Story's citation to the "fifth" amendment a "typo," but not mentioning Story's reference to the "eleventh"). But if the "fifth" was a transcription error, this calls into question whether his "eleventh amendment" reference also was in error. This, however, is not likely. The reference to the "fifth" makes no sense unless this was a case of transposing an intended reference to the fourth (now our Second Amendment) into a reference to the "fifth." The terms "fourth" and "fifth" are closely enough related to explain the error. Story's references to the eleventh amendment, however, need no such explanation. It makes perfect sense in the context of the discussion (other courts also believed that issues of concurrent state power raised Ninth Amendment issues), and it fits with the common convention described in the text. In fact, viewing his references to the eleventh under the convention helps explain the mistaken reference to the "fifth." Additional support for the view that his reference to the "fifth," but not his reference to the "eleventh," was a mistake is seen in the way this passage was treated in later court decisions. Story's reference to the eleventh amendment is *quoted* in briefs to the Supreme Court, and by Supreme Court justices themselves in later cases, without correction or any indication that the reference is mistaken. For example, lawyers before the Court in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 130–31 (1824)—when Justice Story was still on the bench—quoted Story's reference to the eleventh amendment, Story rejected their claim in that case, but neither he nor the litigants indicated that the reference was mistaken in any way. The reporter's reference to the "fifth" in *Houston*, on the other hand, is never quoted again by any litigant or any court—state or federal.

extended to all matters *except* those expressly restricted.[89] As Joseph Story would later write in his *Commentaries on the Constitution*:

> [The Ninth Amendment] was manifestly introduced to prevent any perverse, or ingenious misapplication of the well known maxim, that an affirmation in particular cases implies a negation in all others; and *é converso*, that a negation in particular cases implies an affirmation in all others. The maxim, rightly understood, is perfectly sound and safe; but it has often been strangely forced from its natural meaning into the support of the most dangerous political heresies. The amendment was undoubtedly suggested by the reasoning of the Federalist on the subject of a general bill of rights.[90]

In *Houston*, the defendant was attempting just such a "political heresy." One of Houston's arguments was that the sole power of the states to regulate in matters involving the militia was contained in the "reservation" clause of Article I, Section 8 of the Constitution.[91] That clause, after granting Congress power to organize and discipline the militia, reserved to the states "the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."[92] According to Houston, this reservation implied that all power not expressly reserved to the states was

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89. In his speech introducing draft amendments to the House of Representatives, Madison addressed concerns regarding the addition of a bill of rights:

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

James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), *in* James Madison: Writings, *supra* note 70, at 437, 448–49. The "last clause of the fourth resolution" referred to by Madison was an early draft of the Ninth Amendment.

90. 3 Joseph Story, Commentaries on the Constitution of the United States, at 751–52 (Fred B. Rothman & Co. 1991) (1833).

91. *Houston*, 18 U.S. (4 Wheat.) at 4–6.

92. U.S. Const. art. I, § 8, cl. 16.

exclusively in the hands of Congress.[93] Story rejected this argument, applying the rule of construction he believed declared by the Ninth Amendment:

> It is almost too plain for argument, that the power here given to Congress over the militia, is of a limited nature, and confined to the objects specified in these clauses; and that in all other respects, and for all other purposes, the militia are subject to the control and government of the State authorities. Nor can the reservation to the States of the appointment of the officers and authority of the training the militia according to the discipline prescribed by Congress, be justly considered as weakening this conclusion. That reservation constitutes an exception merely from the power given to Congress "to provide for organizing, arming, and disciplining the militia"; and is a limitation upon the authority, which would otherwise have developed upon it as to the appointment of officers. *But the exception from a given power cannot, upon any fair reasoning, be considered as an enumeration of all the powers which belong to the States over the militia.*[94] *What those powers are must depend upon their own constitutions; and what is not taken away by the Constitution of the United States, must be considered as retained by the States or the people.* The exception then ascertains only that Congress have not, and that the States have, the power to appoint the officers of the militia, and to train them according to the discipline prescribed by Congress. Nor does it seem necessary to contend, that the power "to provide for organizing, arming, and disciplining the militia," is exclusively vested in Congress. It is merely an affirmative power, and if not in its own nature incompatible with the existence of a like power in the States, it may well leave a concurrent power in the latter.[95]

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93. *Houston*, 18 U.S. (4 Wheat.) at 4 (stating that Houston argued that "the constitutional power of Congress over the militia, is *exclusive* of State authority").

94. At this point in the online Westlaw transcription of the case there is an error: "What those powers are must other. Nor has Harvard College any surer title than constitutions;." The text quoted above is taken from the *United States Reports* and contains no noticeable errors.

95. *Houston*, 18 U.S. (4 Wheat.) at 51–52 (Story, J., dissenting). Note that in this passage Story links the principles expressed by the Ninth and Tenth Amendments. The Ninth limits the construction of federal power (in this case as not exclusive), whereas the Tenth reserves all nondelegated power to the states.

This previously unnoticed text, marred by a transcription error in the online Westlaw version,[96] deserves a place alongside Madison's speech on the Bank of the United States in terms of the historical understanding of the Ninth Amendment. Having announced that determining the scope of exclusive federal power must be guided by the letter and spirit of the Ninth Amendment, Story applied the rule of construction he described in his *Commentaries* as mandated by the Ninth. That rule forbids construing a reservation of rights to suggest that all other rights are surrendered. In this case, the enumeration of certain rights—the state's right to appoint officers—must not be construed to deny or disparage other rights retained by the states, here, the right to create courts-martial absent any federal legislation to the contrary. It was only because Justice Story believed Congress *had* enacted a statute which granted federal courts exclusive jurisdiction over courts martial that he dissented from the Majority's judgment in favor of the state's exercise of its otherwise concurrent authority to regulate its militia.[97]

Joseph Story's opinion in *Houston* describes the Ninth Amendment as limiting the interpreted scope of federal power in order to preserve state regulatory authority. This echoes James Madison's description of the Ninth as "guarding against a latitude of interpretation" of federal power to the injury of the people's retained rights.[98] Federal power is thus prevented from intruding into matters retained by the people, who remain free to delegate that power to their state government as they see fit.[99] Madison nominated Story to the Supreme Court. Thus, when Story noted that his "general principles . . . have been amply justified by the opinions of the great men under whose guidance the constitution was framed," one cannot help but think of Story's patron.[100]

We know that courts throughout the nineteenth century echoed Story's federalist reading of the Ninth Amendment, generally pairing it with

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96. *See supra* note 94.

97. *Houston*, 18 U.S. (4 Wheat.), at 72.

98. Madison's Bank Speech, *supra* note 70, at 489.

99. *See* 3 Joseph Story, Commentaries on the Constitution, *supra* note 90 at 752 ("Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities, if invested by their constitutions of government respectively in them; and if not so invested, it is retained BY THE PEOPLE, as a part of their residuary sovereignty.").

100. *Houston*, 18 U.S. (4 Wheat.) at 50 (Story, J., dissenting).

the Tenth.[101] In *Houston*, however, Story cited the Ninth Amendment *alone* as the constitutional basis for his rule of construction limiting the scope of federal authority. The issue in *Houston* was the degree to which the enumerated powers of the federal government displaced the power of the states to establish courts-martial. This was an issue not of individual rights but of competing (or concurrent) powers.

The fact that Story believed the "letter and spirit" of the Ninth Amendment applied in such a situation indicates that Story, like Madison, viewed the retained rights of the Ninth Amendment through a federalist lens. The Ninth limited the extension of enumerated federal powers into areas of local concern retained by the people as a matter of right. To Story, constraining federal power (as opposed to guarding particular rights) was the central purpose of the Ninth.[102] Most strikingly, and uniquely among constitutional-treatise writers, the chapter on the Ninth Amendment in Story's *Commentaries* is titled "Non-Enumerated *Powers*."[103] The title aptly describes

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101. Many examples are cited in the beginning of this chapter. There are many others. For example, in the 1835 Tennessee case State v. Foreman, 16 Tenn. (8 Yer.) 543 (1835), the State of Georgia passed an act giving state courts jurisdiction over certain crimes committed within the Cherokee Nation. In an attempt to escape prosecution, the defendant argued that federal treaties with the Cherokee denied state courts jurisdiction to hear such cases, even when the crimes were committed within the state's borders. The state responded that if this were the correct reading of the federal treaties, those treaties would be void under the Ninth and Tenth Amendments:

> The states, by empowering the executive, with the advice and consent of the senate, to make treaties, did not surrender into their hands a power which could annihilate the states; for if by a treaty with the Indians, or any other nation, the treaty-making power can deprive the states of one attribute of sovereignty (not expressly surrendered), it can deprive them of all; and if jurisdiction, in express terms, were guaranteed to the Indians, and the right taken from the states, by the treaty, it would be void, because the exercise of this branch of jurisdiction is not one of the enumerated powers parted with by the states, but is, in fact, reserved to them by the 9th and 10th amendments to the Constitution. A treaty the subject-matter of which violates the Constitution, or surrenders to other powers the individual and reserved rights of the states, is a nullity.

Argument of George S. Yerger, *Foreman*, 16 Tenn. (8 Yer.) at 560–61. The State of Georgia thus believed that states had both "reserved powers and rights" under the Ninth and Tenth Amendments. The state court concluded that the treaty allowed state court jurisdiction without discussing the Ninth or Tenth Amendments. *Foreman*, at 334–37.

102. In his *Commentaries*, Story recounted the debates over adding a bill of rights and the Federalists' warning that doing so "might even be dangerous, as by containing exceptions from powers not granted it might give rise to implications of constructive power." 1 STORY, *supra* note 90, at 277.

103. 3 *id.* at 751 (emphasis added). The chapter heading for Story's discussion of the Tenth Amendment is "Powers Not Delegated." *Id.* at 753. The same chapter headings are used

his use of the Ninth in *Houston*, whether viewed as denying the federal government unenumerated exclusive powers to discipline the militia, or as preserving the unenumerated concurrent power of the states to do the same. As we shall see, Story may have come to regret his opinion in *Houston*, especially as it appeared to conflict with the Marshall Court's broad interpretations of federal power. Nevertheless, Story never disavowed or modified in any way his original analysis of the Ninth Amendment in *Houston v. Moore*.

The Fate of *Houston v. Moore*

Gibbons v. Ogden

Four years after *Houston* was decided, lawyers before the Supreme Court quoted significant portions of Story's opinion in one of the most important cases regarding federal power in the nineteenth century, *Gibbons v. Ogden*.[104] *Gibbons* involved yet another dispute over New York's grant of a steam navigation monopoly to Robert Fulton and Robert Livingston. The New York courts having previously upheld the monopoly in cases such as *Livingston v. Van Ingen*,[105] the monopoly now was challenged on the ground that it interfered with Congress's exclusive power to regulate interstate commerce.[106] The case, according to G. Edward White, has been "acknowledged as the high point of advocacy on the Marshall Court."[107] Thomas A. Emmet[108] represented Fulton and Livingston and their assignee Aaron Ogden. In his lengthy argument before the Court, Emmet claimed that states retained concurrent power to regulate commerce and cited St. George Tucker's Ninth- and Tenth Amendment–based rule of construction, Justice Thompson's opinion (written when he was a judge on the New York Supreme Court) in *Livingston v.*

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in the one-volume abridged version of the *Commentaries* that Story prepared almost at the same time as the three-volume work. STORY, *supra* note 90, at 711, 713.

104. 22 U.S. (9 Wheat.) 1, 130–31 (1824).

105. 9 Johns. 507, 561 (N.Y. Sup. Ct. 1812).

106. *Gibbons*, 22 U.S. (9 Wheat.) at 17.

107. WHITE, 3-4 HISTORY OF THE SUPREME COURT, *supra* note 21, at 211.

108. Emmet's name is misspelled in the *United States Reports*. *See Gibbons*, 22 U.S. (9 Wheat.) at 79.

Van Ingen,[109] and Justice Story's opinion in *Houston v. Moore*.[110] According to Emmet, concurrent state power to regulate commerce must give way only in cases involving a direct conflict between state and federal regulation.[111] On this point, Emmet quoted that portion of Justice Story's opinion in *Houston* that refers to the "11th amendment."[112] There is no indication that Emmet believed that Story's reference to the eleventh was in error,[113] and there was no attempt by Emmet to link the passage to his discussion of the Tenth Amendment several pages earlier in his brief.[114] As in *Houston*, this is a free-standing Ninth Amendment argument in favor of a limited reading of federal power. Nor is it surprising that Emmet picked up on Story's Ninth Amendment argument—Emmet had made the same argument himself before the New York courts *prior* to Story's opinion in *Houston*, relying then on Tucker's

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109. *Id.* at 86. Thompson was appointed to the Supreme Court in 1823. Because of his daughter's death, Thompson did not join the Court until February 10, 1824, the day after the arguments in *Gibbons* had concluded. *See* Norman R. Williams, Gibbons, 79 N.Y.U. L. Rev. 1398, 1429–30 (2004); *see also* 1 Charles Warren, The Supreme Court in United States History 607 (1929); David P. Currie, *The Constitution in the Supreme Court: State and Congressional Powers, 1801–1835*, 49 U. Chi. L. Rev. 887, 944 n.399 (1982).

110. *Gibbons*, 22 U.S. (9 Wheat.) at 86.

111. *Id.* at 130–31. Despite his loss in *Gibbons*, Emmet made a similar argument in the subsequent New York case *North River Steamboat Co. v. Livingston*:

> What then is this trade which congress can regulate? It is that carried on from within the geographical limits of one state to within those of another. It has no relation to the trade or contracts between individuals. How can congress regulate the trade and intercourse between man and man, even though they should reside in different states or countries? Its regulations can only act on commerce as a mass, carried on between two states or nations. This trade thus defined together with foreign trade, is all that it belongs to congress to regulate; the rest remains to the states, under the domination of internal trade, and which it is not therefore necessary to define. It includes all that is not taken by the constitution out of the general mass of commerce. It belongs to the states individually, not because the constitution has given it to them—for that instrument gives nothing whatsoever to the states—but because it appertains to sovereign power, and has not been delegated to congress; and the grants of power which are made to congress, so far as they may interfere with the rights of states, are to receive the strictest construction.

Hopk. Ch. 149, 190-91 (N.Y. Ch. 1824) (citing 1 Tucker's Blackstone, *supra* note 47, app. note D at 154).

112. *Gibbons*, 22 U.S. (9 Wheat.) at 130–31.

113. Emmet could have, for example, paraphrased the passage without quoting it. Actually, the reporter changed "eleventh" to "11th," an abbreviation that suggests a degree of comfort with Story's reference. After all, he could have distanced himself from a "mistake" by making no alterations in the quote.

114. *Gibbons*, 22 U.S. (9 Wheat.) at 87.

Ninth- and Tenth Amendment–based rule of construction.[115] Nor was Emmet's reading idiosyncratic. His co-counsel Thomas Oakley also referred to Story's "eleventh amendment" passage in *Houston*.[116] Although his argument in *Gibbons* regarding the Tenth Amendment has been recognized, scholars have completely missed Emmet's reliance on the Ninth.[117]

In striking down the state monopoly, Chief Justice John Marshall did not directly address either the Ninth or the Tenth Amendment. Instead, he rejected Ogden's argument that Congress lacked the power to grant Gibbons a coasting license and ruled that the state monopoly was in direct conflict with the federal license and thus invalid under the supremacy clause.[118] Rather than grapple with Emmet's Ninth Amendment argument, or his colleague's opinion in *Houston*, Marshall simply denied that there was *any* provision in the Constitution that restricted the interpretation of enumerated power:

> This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said, that these powers ought to be construed strictly.[119] But why ought they to be so construed? Is there one sentence in the constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants, expressly, the means for carrying all others into execution, Congress is authorized "to make all laws which shall be necessary and proper" for the purpose. But this limitation on the means which may be used, is not extended to the powers which are conferred; nor is there one sentence in the constitution,

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115. *See supra* note 60 and accompanying text.

116. *Gibbons*, 22 U.S. (9 Wheat.) at 41 n.5.

117. *See, e.g.*, Currie, *supra* note 109, at 944 n.396. I have not discovered any scholarly reference to Emmet's Ninth Amendment argument or to his quotation of Story's opinion in *Houston*.

118. *Gibbons*, 22 U.S. (9 Wheat.) at 240. Justice Story was on the Court at the time of *Gibbons*, but wrote no opinion. Even if Story still held the views he announced in *Houston*, he would have agreed with the result in *Gibbons*; Story believed that the federal commerce power was exclusive. *See* David P. Currie, *The Constitution in the Supreme Court: Contracts and Commerce, 1836–1864*, 1983 DUKE L.J. 471, 476; *see also* Susan Pace Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurst's Study of Corporations*, 49 AM. U. L. REV. 81, 94 n.53 (1999).

119. This is probably a reference to St. George Tucker's argument regarding "strict construction."

> which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule.[120]

In his earlier opinion in *McCulloch v. Maryland*,[121] Marshall similarly ignored the Ninth Amendment, despite its key role in James Madison's well-known (and often reprinted) argument against the bank.[122] In *Gibbons*, Marshall once again ignored the Ninth, despite Emmet's reference to the Ninth and Justice Story's opinion in *Houston*. Indeed, Marshall ignored *Houston*, despite the fact that the case was referred to nine separate times during oral arguments—more than any other case. Instead, Marshall announced that Congress's power to regulate commerce is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."[123] What was implicit in *McCulloch* was now express in *Gibbons*: the powers of the federal government were to be construed as having no limits beyond those expressly "prescribed in the constitution." The conflict between Marshall's rule of construction and the language and purpose of the Ninth Amendment is striking. Despite the Ninth's declaration that enumerated restrictions on power are not to be read as exhaustive, Marshall read them in just such a manner. In fact, during his entire tenure on the Supreme Court, Marshall never once referred to the Ninth Amendment, despite repeated references to it by bench and bar as a rule prohibiting expansive readings of federal power.

Thomas Emmet returned to New York a broken man. He had lost the most important case in his life in a decision that appeared to render valueless his client's contract with the State of New York. In one final attempt to protect the remnants of the original New York license, Emmet brought his client's

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120. *Gibbons*, 22 U.S. (9 Wheat.) at 187–88.

121. 17 U.S. (4 Wheat.) 316 (1819).

122. Others remained fully aware of Madison's argument and its importance to the bank debate. When St. George Tucker learned of the decision in *McCulloch*, he added a note discussing the case in his draft for a new edition of his Blackstone's Commentaries and specifically referred the reader to Madison's speech opposing the Bank of the United States. *See* St. George Tucker, Notes for a Revised Version of 1 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, Appendix, Note D ("View of the Constitution of the United States"), at 140, 287 (St. George Tucker ed., Philadelphia, William Young Birch & Abraham Small 1803). The notes for the unpublished revised edition are located in the Tucker-Coleman Papers, Special Collections Research Center, Swem Library, College of William and Mary.

123. *Gibbons*, 22 U.S. (9 Wheat.) at 196.

case yet again before the New York courts, only two months after the Supreme Court's decision in *Gibbons*.[124] Calling for a narrow interpretation of the Court's recent holding, Emmet's anger at the Supreme Court was palpable:

> I have no hesitation in saying, that if the liberties of this country are to be long preserved, it must be done by upholding the rights of the states, and with the utmost respect I say it, if some of the principles laid down by the chief Justice in the case of Gibbons v. Ogden, are not overruled within twenty years, the constitution will before then have verged towards a form of government, which many good men dread, and which assuredly the people never chose.
>
> There is a pretty general impression, that the decisions of that court on constitutional law, tend to such a result. It is the avowed opinion of Mr. Jefferson, and of many who now labor to check it. If that impression be correct, the consequences are much to be lamented; for such a course pursued by that court, (the value and importance of which ought to be estimated most highly) may well aid in its own destruction, and possibly in that of the fabric of the government.[125]

Once again citing Tucker's discussion of the Ninth and Tenth Amendments, Emmet refused to accept Marshall's assertion that the only limits on the exercise of congressional power were those expressly listed in the Constitution. Congress had but certain enumerated powers and "the rest remains to the states, under the denomination of internal trade, and which it is not therefore necessary to define." Echoing Madison, Tucker, and a long line of state and federal commentators, Emmet insisted that "the grants of power which are made to congress, so far as they may interfere with the rights of states, are to receive the strictest construction."[126]

Chancellor Kent apparently agreed with Emmet that Marshall and the Supreme Court had deeply erred in *Gibbons*, and he went out of his way to narrow the scope of that opinion.[127] It was impossible, however, to so narrow *Gibbons* as

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124. North River Steamboat Co. v. Livingston, Hopk. Ch. 149 (1824).

125. *Id.* at 189–90.

126. *Id.* at 191 (citing "1 Tucker's Blackstone, App. D. p. 154.").

127. *See North River Steamboat Co.*, [vol.] Hopk. Ch. at 199 (reading *Gibbons* as not addressing the issue of regulating commerce within the boundaries of a state, and not affecting the state license to any degree beyond the specific facts of that case).

to rule in favor of Emmet and his client. Utterly defeated, Thomas Emmet died only months later—in open court, in the middle of an argument.[128]

New York v. Miln

Although John Marshall declined to address either *Houston v. Moore* or the Ninth Amendment, other justices were not so reticent. When serving on New York's highest court, future Supreme Court justice Smith Thompson had given a sympathetic ear to Thomas Emmet's Ninth Amendment arguments in *Livingston v. Van Ingen*.[129] In *New York v. Miln*,[130] Justice Thompson adopted those arguments as his own. *Miln* involved a New York statute that required ship captains to furnish local authorities with a list of all passengers being brought into the state. The Supreme Court upheld the state law,[131] with Justice Story dissenting on the grounds that this was a regulation of commerce belonging exclusively to the federal government.[132] In his concurrence, Justice Thompson disagreed with Story's view of state power in the case and quoted Story's own words in *Houston* in support of concurrent state power to regulate commerce:

> [Concurrent state power] is fully recognised by the whole court, in the case of Houston v. Moore. . . . Mr. Justice Story, who also dissented from the result of the judgment, is still more full and explicit on this point. The constitution, says he, containing a grant of powers, in many instances similar to those already existing in the state governments; and some of these being of vital importance also to state authority and state legislation, it is not to be admitted, that a mere grant of such powers, in affirmative terms, to congress, does, *per se*, transfer an exclusive sovereignty on such subjects to the latter. On the contrary, a reasonable interpretation of that instrument necessarily leads to the conclusion that the powers so granted are never exclusive of similar powers existing in the states; unless [here he cited exceptions]. . . . In all other cases, not falling within the classes already mentioned, it seems unquestionable that the states retain

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128. Samuel L. Mitchell, A Discourse on the Life and Character of Thomas Addis Emmet: Pronounced, by Request, in the New-York City Hall, on the First Day of March, 1828 (N.Y., E. Conrad 1828).

129. 9 Johns. 507 (N.Y. Sup. Ct. 1812); *see supra* note 60 and accompanying text.

130. 36 U.S. (11 Pet.) 102 (1837).

131. *Id.* at 143.

132. *Id.* at 161 (Story, J., dissenting).

> concurrent authority with congress; not only upon the letter and spirit of the eleventh amendment of the constitution, but upon the soundest principle of reasoning.[133]

In his earlier *Van Ingen* opinion, the then New York judge Smith Thompson cited the Tenth Amendment in support of his view of concurrent state power.[134] In *Miln*, however, Justice Thompson said nothing about the Tenth Amendment, despite its role in the opinions of other justices.[135] Instead, Justice Thompson was content to let Story's construction of the Ninth Amendment suffice as textual grounding for the proper rule of interpretation.[136]

Prigg v. Pennsylvania

Other justices, as well as high-ranking executive officials, also embraced Story's reading of the Ninth Amendment in *Houston*. In *Prigg v. Pennsylvania*, the Supreme Court struck down Pennsylvania's "personal liberty" law of 1826 on the grounds that it interfered with the enforcement of the federal Fugitive Slave Act and the Constitution's fugitive slave clause.[137] In defense of the law, Pennsylvania's attorney general, Ovid F. Johnson, argued that federal law should not be read to displace all state regulation on the subject of fugitive slaves. In support of his argument, Johnson quoted Story's opinion in *Houston*:

> Supposing the power to pass laws on the subject of fugitive slaves to be concurrent, the learned counsel on the other side contended that it had been exercised by Congress; that the whole ground of legislation was provided for; that the right of the states was thereby superseded, and that

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133. *Id.* at 150–51 (Thompson, J., concurring).

134. *See supra* note 65 and accompanying text.

135. Both Justice Philip Pendleton Barbour's opinion for the Court and Justice Henry Baldwin's individual opinion, taken from his *Constitutional Views*, reference the Tenth Amendment. *See Miln*, 36 U.S. (11 Pet.) at 132; Henry Baldwin, A General View of the Origin and Nature of the Constitution and Government of the United States 181–97 (photo. reprint Lawbook Exchange 2000) (1837).

136. In his dissent, Story did not disavow his earlier opinion in *Houston*, but argued that *Gibbons* established the exclusive power of Congress to regulate matters affecting interstate commerce. *Miln*, 36 U.S. (11 Pet.) at 154–56 (Story, J., dissenting).

137. 41 U.S. (16 Pet.) 539, 612 (1842) ("The [fugitive slave clause] manifestly contemplates the existence of a positive unqualified right on the part of the owner of the slave, which no state law or regulation can in any way qualify, regulate, control, or restrain.").

> the act of Assembly of Pennsylvania was absolutely void. To all these positions, he would answer, in addition to what had already been advanced, that Congress had not covered the whole ground; . . . .
>
> He could not, on this branch of the case fortify his argument with stronger reason or authority than by quoting the words of Mr. Justice Story, in the case of *Houston v. Moore*. On this basis, he did not fear to let it rest. "The constitution, containing a grant of powers in many instances similar to those already existing in the state governments, and some of these being of vital importance also to state authority and state legislation, it is not to be admitted that a mere grant of such powers in affirmative terms to Congress, does, per se, transfer an exclusive sovereignty on such subjects to the latter. On the contrary, a reasonable interpretation of that instrument necessarily leads to the conclusion that the powers so granted are never exclusive of similar powers existing in the states, unless where the Constitution has expressly in terms given an exclusive power to Congress, or the exercise of a like power is prohibited to the states, or there is a direct repugnancy or incompatibility in the exercise of it by the states." And also, "In all other cases not falling within the classes already mentioned, it seems unquestionable, that the states retain concurrent authority with Congress, not only on the letter and spirit of the eleventh amendment of the Constitution, but upon the soundest principles of general reasoning."[138]

In his opinion striking down the Pennsylvania law, Justice Story did not dispute the attorney general's reading of *Houston*. Instead, Story argued that the power to regulate on the subject of fugitive slaves was exclusively federal in nature. Here, Story referred not to his own opinion in *Houston* but to Chief Justice Marshall's formulation in *Sturges v. Crowninshield* that "[w]herever the terms in which a power is granted to Congress, or the nature of the power require, that it should be exercised exclusively by Congress, the subject is as completely taken from the state legislatures, as if they had been forbidden to act."[139]

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138. *Id.* at 600–01. Johnson later cited the Tenth Amendment in support of the Pennsylvania law. *See id.* at 602 ("These cases are clearly left to the guardianship of the states themselves. The tenth article of the amendments to the constitution assures this right; and self-respect, if not self-protection, demands its exercise.").

139. *Id.* at 622 (quoting Sturges v. Crowinshield, 17 U.S. (4 Wheat.) 122, 193 (1819)).

Although Story did not repute (or even acknowledge) his earlier approach in *Houston*, his reasoning seemed to weaken *Houston*'s presumption of concurrent state power. In a separate opinion, Justice Peter Daniel noted the departure. Although he concurred in the judgment, Daniel nevertheless felt "constrained to dissent from some of the principles and reasonings which that majority in passing to our common conclusions, have believed themselves called on to affirm."[140] Arguing that states had concurrent power to regulate on the subject of fugitive slaves, Justice Daniel quoted Story's passage in *Houston v. Moore*, including Story's statement regarding the "eleventh amendment."[141]

Smith v. Turner

Justice Daniel would find another occasion to quote Story's *Houston* dissent in *Smith v. Turner*,[142] one of the so-called *Passenger Cases*.[143] In *Smith*, the Supreme Court struck down a state tax on incoming sea passengers,[144] drawing a dissent from Justice Daniel. Daniel began his analysis of the Constitution by announcing two principles: first, under the Tenth Amendment, Congress has only delegated power, and second, those powers are subject to a limiting rule of construction.[145] Rejecting statements in an earlier case by Justice

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140. *Id.* at 650 (Daniel, J., concurring).

141. *Id.* at 654. Daniel misquoted Story, but not in a manner that undermines the point. Daniel stated: "In all other cases not falling within the classes already mentioned, it seems unquestionable that the states retain concurrent authority with Congress, not only under the eleventh amendment of the Constitution, but upon the soundest principles of general reasoning." *Id.* Daniel dropped Story's language regarding the "letter and spirit." *See supra* text accompanying note 86. This strengthens the argument that Story's reference was not considered some kind of typographical error, for Daniel did not simply quote Story's opinion but paraphrased it—repeating the reference to the Ninth Amendment.

142. 48 U.S. (7 How.) 283, 498 (1849) (Daniel, J., dissenting).

143. The other case was *Norris v. City of Boston*. See *id.* at 283.

144. *Smith*, 48 U.S. (7 How.) at 409.

145. *Id.* at 496 (Daniel, J., dissenting). According to Daniel:

> 1st. Then, Congress have no powers save those which are expressly delegated by the Constitution and such as are necessary to the exercise of powers expressly delegated.
>
> 2d. The necessary auxiliary powers vested by art. 1, sec. 8, of the Constitution cannot be correctly interpreted as conferring powers which, in their own nature, are original, independent substantive powers; they must be incident to original substantive grants,

Henry Baldwin that federal power over commerce was exclusive,[146] Daniel invoked Justice Story's opinion in *Houston*:

> In opposition to the opinion of Mr. Justice Baldwin, I will place the sounder and more orthodox views of Mr. Justice Story upon this claim to exclusive power in Congress, as expressed in the case of Houston v. Moore with so much clearness and force as to warrant their insertion here, and which must strongly commend them to every constitutional lawyer. The remarks of Justice Story are these:—"Questions of this nature are always of great importance and delicacy. . . ."[147]

Daniel proceeded to quote this entire section of Story's opinion, including Story's reference to the "eleventh amendment."[148] Justice Daniel then remarked, "Here, indeed, is a commentary on the Constitution worthy of universal acceptation."[149] No one in the majority responded to Daniel's point regarding the "clearness and force" of Story's opinion in *Houston*; nor did they dispute Story's interpretation of the Ninth Amendment.[150] Instead, Justice Robert C. Grier simply defended his decision to invalidate the state law against criticism that he had engaged in a latitudinarian interpretation of federal power.[151]

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ancillary in their nature and objects, and controlled by and limited to the original grants themselves.

Id. (citations omitted). Justice Daniel's second point seems related to James Madison's argument in his speech on the Bank of the United States. According to Madison, unenumerated "necessary and proper" powers (ancillary powers) should not include "great and important powers," which required their own specific enumeration. *See* JAMES MADISON: WRITINGS, *supra* note 70, at 480, 482.

146. *Smith*, 48 U.S. at 498 (Daniel, J., dissenting) (referring to Groves v. Slaughter, 40 U.S. (15 Pet.) 449, 511 (1841)).

147. *Id.* (quoting Houston v. Moore, 18 U.S. (5 Wheat.) 1, 48 (1820) (Story, J., dissenting)).

148. This time, Daniel's quotation is correct.

149. *Smith*, 48 U.S. at 499 (Daniel, J., dissenting).

150. Story's tenure on the Court ended with his death in 1845.

151. *Smith*, 48 U.S. at 459 (Grier, J., concurring). According to Grier:

> The Constitution of the United States, and the powers confided by it to the general government, to be exercised for the benefit of all the States, ought not to be nullified or evaded by astute verbal criticism, without regard to the grand aim and object of the instrument, and the principles on which it is based. A constitution must necessarily be an instrument which enumerates, rather than defines, the powers granted

Given that *Houston* included the Supreme Court's first discussion of the Ninth Amendment—penned by no less a justice than Joseph Story—and that it was quoted in its entirety by later litigants and Supreme Court justices,[152] it seems surprising that this interpretation of the Ninth Amendment has gone so long unnoticed. In fact, Story's approach to concurrent state powers has remained influential throughout the history of the Supreme Court. Numerous state and federal courts have cited it in cases struggling to define the line between state and federal power, and the Supreme Court itself continues to cite *Houston* favorably in cases involving questions of concurrent state power.[153] Over time, however, *Houston*'s connection to the Ninth Amendment has been forgotten. Ironically, the sad fate of Story's opinion in *Houston v. Moore* may have been welcomed by Story himself.

The Silence of Justice Story

When Joseph Story published his *Commentaries on the Constitution* in 1833, he dedicated the work "to the Honorable John Marshall," whose "expositions of constitutional law enjoy a rare and extraordinary authority. They constitute a monument of fame far beyond the ordinary memorials of political and military glory."[154] Like other constitutional treatises written in the 1820s and

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by it. *While we are not advocates for a latitudinous construction*, yet "we know of no rule for construing the extent of such powers other than is given by the language of the instrument which confers them, taken in connection with the purpose for which they are conferred."

Id. (emphasis added).

152. Story's reference to the eleventh amendment was cited in other courts as well. *See* Commonwealth v. Nickerson, 128 N.E. 273, 276 (Mass. 1920); Crow v. State, 14 Mo. 237, 326–27 (1851) (Napton, J., dissenting; *In re* Booth, 3 Wis. 1, 75–76 (1854) (Crawford, J., dissenting). In his dissent in *Crow*, Judge William B. Napton prefaced his quotation of Story's eleventh amendment by noting:

> The general rule on this subject has been aptly and forcibly expressed by Judge Story, in Houston v. Moore and as that distinguished jurist has not been supposed to have any disposition to enlarge the powers of the States at the expense of any just right of the federal government, I prefer to adopt his views, expressed in his own language, as the basis of further investigation.

Crow, 14 Mo. at 326–27 (citation omitted).

153. *See* Tafflin v. Levitt, 493 U.S. 455, 458–59 (1990) (citing Justice Washington's opinion in *Houston v. Moore*).

154. 1 Story, *supra* note 90, at iii.

early 1830s, Story's *Commentaries* were more nationalist in their interpretation of federal power than were earlier works such as those of St. George Tucker.[155] Story, in fact, spent considerable time in his *Commentaries* refuting Tucker's strict-construction approach to the Constitution. Expressly adopting Marshall's interpretation of federal power in *McCulloch v. Maryland* and *Gibbons v. Ogden*, Story ignored both his own reading of the Ninth in *Houston v. Moore* and Tucker's reliance on the Ninth as establishing a rule of strict construction. Instead, Story presented the Ninth as no more than a redundant echo of the Tenth.

In his *View of the Constitution of the United States*, Tucker had read the Ninth and Tenth Amendments as together creating a rule of strict interpretation regarding federal power.[156] When Story cited the "eleventh amendment" as a federalist rule of construction in *Houston*, he did so in a legal context in which both bench and bar would have been familiar with Tucker's similar federalist construction of the "eleventh amendment."[157] Tucker's reading was not controversial, and, as the last section showed, it was warmly embraced by states' rights advocates in the years that followed. But Tucker's strict construction of federal power was directly at odds with the broad interpretation of federal power pressed by John Marshall in cases like *McCulloch v. Maryland* and especially *Gibbons v. Ogden*. In *Gibbons*, despite the Ninth Amendment argument raised by Thomas Emmet, Marshall declared, "[N]or is there one sentence in the constitution" that calls for a strict construction of federal power.[158]

Perhaps because Story's use of the Ninth in *Houston* conflicted with Marshall's absolute statement in *Gibbons*, it fell into disfavor among those supporting Marshall's nationalist reading of the Constitution. Treatise writers William Rawle and James Kent published their respective works on American constitutional law after the Supreme Court issued its opinion in *Gibbons*. Both writers acknowledged Story's earlier opinion in *Houston*, but both omitted his reference to the Ninth Amendment. For example, in his *View of the Constitution*, William Rawle paraphrased Story's language in

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155. *See* WHITE, 3-4 HISTORY OF THE SUPREME COURT, *supra* note 21, at 86–95.

156. 1 TUCKER'S BLACKSTONE, *supra* note 47, app. note D at 151.

157. According to Saul Cornell, Tucker's *Blackstone* was "an instant publishing success" and "became the definitive American edition of Blackstone until midcentury." SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788–1828, at 263 (1999).

158. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 187–88 (1824).

Houston in his discussion of the concurrent jurisdiction of state courts,[159] but he omitted Story's specific reference to the "eleventh amendment."[160] Similarly, in his 1826 *Commentaries on American Law*, James Kent cited Story's opinion in *Houston* and described it as having "defined with precision the boundary line between the concurrent and residuary powers of the states, and the exclusive powers of the Union."[161] Kent then closely paraphrased Story's actual opinion in *Houston*, but omitted Story's reference to the Ninth.[162] James Kent and Joseph Story had begun corresponding with one another in 1819,[163] and Story later praised this particular section of Kent's *Commentaries* (which,

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159. William Rawle, A View of the Constitution of the United States of America 205 (photo. reprint The Lawbook Exchange 2003) (2d ed. 1829).

160. Using language that tracks Story's language in *Houston* almost verbatim, Rawle wrote:

> The Constitution containing a grant of powers in many instances similar to those already existing in the state governments, and some of these being of vital importance to state authority and state legislatures, a mere grant of such powers, in affirmative terms to congress, does not *per se* transfer an exclusive sovereignty on such subjects to the latter.
>
> On the contrary, the powers so granted would not be exclusive of similar powers existing in the states, unless the Constitution had expressly given an exclusive power to congress, or the exercise of a like power were prohibited to the states, or there was a direct repugnancy or incompatibility in the exercise of it by the states. . . .
>
> In all other cases not falling within these classes the states retain concurrent authority. [Here, Rawle omitted Story's reference to the eleventh amendment.]
>
> There is this reserve, however, that in cases of concurrent authority where the laws of the states and of the United States are in direct and manifest collision on the same subject, those of the United States being the supreme law of the land are of paramount authority, and the state laws so far, and so far only, as such incompatibility exists must necessarily yield [citing *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 48 (Story, J., dissenting)].

Id. In addition to omitting Story's reference to the Ninth Amendment, Rawle also omitted the Ninth and Tenth Amendments from his description of constitutional restrictions on the federal government. *Id.* at 135. The omission of the Ninth Amendment from this list is significant because Rawle believed that the restrictions of the first eight amendments also bound the states. *See id.* at 135–36. Rawle apparently read both the Ninth and Tenth Amendments in a federalist light. Although Rawle's work is known for its defense of secession, Rawle shared Marshall's nationalist approach to federal power. For example, Rawle indirectly criticized Tucker's strict construction of federal power, *see id.* at 31 ("A strict construction, adhering to the letter, without pursuing the sense of the composition, could only proceed from a needless jealousy, or rancorous enmity."), and he expressly praised Marshall's opinion in *Gibbons*, *id.* at 82.

161. 1 Kent, *supra* note 10, at *390.

162. *Id.* ("In all other cases, the states retain concurrent authority with Congress [Kent omitted Story's reference to the eleventh amendment], except where the laws of the states and of the Union are in direct and manifest collision on the same subject").

163. White, 3–4 History of the Supreme Court, *supra* note 21, at 105.

in turn, praised Story).[164] Whatever the reasons for Kent's failure to include Story's reference to the Ninth, it would not have gone unnoticed by Story. Most likely, Story approved of the omission because he himself ultimately abandoned the idea that the Ninth Amendment played any role in restricting the interpretation of federal power.

Story's 1833 *Commentaries on the Constitution* presented the rulings of the Marshall Court as the proper guides to interpreting the Constitution. In addition to refuting states' rights theories such as those advanced by James Madison and Thomas Jefferson in their Virginia and Kentucky Resolutions,[165] Story spent considerable time refuting Tucker's "strict construction" theory of federal power. In 1803, Tucker had written that the Constitution "is to be construed strictly, in all cases where the antecedent rights of a state may be drawn in question; as a social compact it ought likewise to receive the same strict construction."[166] In support of his approach, Tucker cited the writings of Emmerich de Vattel, and the Ninth and Tenth Amendments.[167] In his *Commentaries*, Story quoted this section of Tucker's work and strongly criticized Tucker's reliance on Vattel and the Tenth Amendment, [168] but said nothing about Tucker's reliance on the Ninth Amendment. Instead, Story treated Tucker's Ninth Amendment argument as if it were based on *nothing at all*.[169]

Story presented Marshall's formulation of federal power in *McCulloch* and *Gibbons* as an alternative to Tucker's strict construction approach. First,

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164. 1 STORY, *supra* note 90, at 424 n.1 (asserting, after citing *Gibbons*, that "Mr. Chancellor Kent has given this whole subject of exclusive and concurrent power a thorough examination; and the result will be found most ably stated in his learned Commentaries, Lecture 18").

165. *See, e.g.*, *id.* at 287 n.1, 289 n.1.

166. 1 TUCKER'S BLACKSTONE, *supra* note 47, app. note D at 151 (citation omitted).

167. *Id.*

168. 1 STORY, *supra* note 90, at 393.

169. *See id.* at 396. Story wrote:

> When it is said, that the constitution of the United States should be construed strictly, viewed as a social compact, whenever it touches the rights of property, or of personal security, or liberty, the rule is equally applicable to the state constitutions in the like cases. The principle, upon which this interpretation rests, *if it has any foundation*, must be, that the people ought not to be presumed to yield up their rights of property or liberty, beyond what is the clear sense of the language and the objects of the constitution.

Id. (emphasis added).

Story provided an extended quotation from *Gibbons*, including Marshall's assertion that there is not a single sentence in the Constitution that suggests a limited reading of federal power.[170] Story then adopted Marshall's reverse Ninth Amendment argument in *McCulloch*, which construed the enumeration of rights in Article I, Section 10 to suggest an otherwise broad degree of federal power.[171] Having established the proper interpretive approach to federal power, Story next addressed the concurrent powers of the states. In *Houston*, Story suggested that a limited reading of federal exclusive power was supported by the letter and spirit of the "eleventh amendment." In his *Commentaries*, Story paraphrased his *Houston* opinion, but, as had Rawle and Kent, he omitted his earlier reference to the Ninth Amendment.[172] Story did not modify or correct the prior reference; he simply did not repeat it, despite numerous citations to the very page in *Houston* that includes the discussion of the Ninth.

Having committed himself to Marshall's view that there is no text suggesting a limited reading of federal power, Story embarked on an extended discussion of the variety of ways state power must give way to federal authority. In essence, Story argued that states retain only those powers that are left over after a proper interpretation of federal power.[173] Like Marshall's interpretation in *McCulloch* and *Gibbons*, Story's interpretation of federal power was unfettered by any restrictive rule of construction, much less by the Ninth Amendment. Instead, Story suggested that the retained concurrent powers of the states are entirely dependent on a reasonable interpretation of delegated federal power. This is a restatement of the Tenth Amendment, and in fact, Story asserted that his rules "are confirmed by the positive injunctions of the tenth amendment."[174] The critical issue, of course, was determining

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170. *Id.* at 401–02.

171. *Id.* at 413–15.

172. *Id.* at 421–22.

173. *Id.* at 431–33.

174. *Id.* at 433. In his section on the Tenth Amendment, Story cited, among other cases, *Houston v. Moore* and the page in that case containing the "eleventh amendment" passage. The citation is out of place; it has nothing to do with the specific proposition discussed in the text (involving the decision not to add the word "expressly" to the Tenth Amendment). Its inclusion remains obscure. One could argue that this citation raises the possibility that the *Houston* reference to the "eleventh amendment" was a mistaken reference to the Tenth. I believe this is unlikely, however, for a number of reasons. First, the citation itself makes no sense, even in terms of the Tenth Amendment discussion to which it is linked. It does not support the assertion made in the text. Second, Story cited

what constituted a reasonable interpretation of federal power—a subject James Madison and St. George Tucker believed was addressed by the *Ninth* Amendment. Not only did Story avoid addressing Tucker's use of the Ninth Amendment in support of the rule of strict construction, but Story remained silent regarding his own use of the Ninth as a rule of construction in *Houston*.

Despite these omissions, remnants of Story's earlier federalist reading of the Ninth can be found in his *Commentaries*. Story placed his discussion of the Ninth Amendment in volume 3, in a chapter entitled "Non-Enumerated Powers."[175] When one considers the common present-day description of the Ninth Amendment as guarding unenumerated *rights*,[176] Story's title is startling. At the very least, it shows that Story agreed with Madison that preserving retained rights amounts to the same thing as constraining federal power. In fact, Story's heading makes no sense unless powers and rights are two sides of the same coin: constraining one preserves the other. It also explodes the myth that the founding generation believed that the Tenth dealt with governmental power whereas the Ninth dealt with individual rights.[177] If nothing else, Story's heading seems to put to rest that erroneous categorical assumption. Given Story's nationalist approach to federal power, his description of the Ninth takes on even greater significance as, in effect, an admission against interest. Story shared John Marshall's broad interpretation of congressional power, and he had no incentive to describe any clause in the Constitution as limiting federal authority if the issue was in doubt. If anything, one would expect a nationalist like Story to try to minimize the impact of the Ninth Amendment on federal power, and in fact, it appears that this was Story's intent.

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this specific page in *Houston* repeatedly in his *Commentaries*. *See, e.g.*, *id.* at 424 n.2, 428 n.2. Despite these numerous citations, however, Story never once suggested that the page contained an error. Moreover, neither lawyers nor courts believed that the passage contained any errors, for they quoted it in briefs and judicial opinions. The fact that the passage was embraced by others and never corrected by Story suggests that it did not contain an obvious error. It did, however, contain an application of the Ninth Amendment that Story no longer advocated.

175. 3 *id.* at 751.

176. *See, e.g.*, THE COMPLETE BILL OF RIGHTS 627 (Neil H. Cogan ed., 1997) (chapter on Ninth Amendment entitled "Unenumerated Rights Clause").

177. This particular point seems well established by Madison's description of the Ninth Amendment in his speech on the Bank of the United States. Story's chapter heading for the Ninth simply makes the point as clear as is historically possible.

By titling his chapter "Non-Enumerated Powers," Story appears to limit the role of the Ninth to no more than that effected by the Tenth Amendment—federal power goes no further than that enumerated in the Constitution. This approach views the Ninth not as a restrictive rule of interpretation but as a mere restatement of the Tenth Amendment's principle of enumerated power. Further evidence that Story viewed the Ninth and Tenth Amendments as covering the same territory can be found in the index to his *Commentaries*. There, under the heading "Rights Reserved to the States and People," he referred the reader to his discussion of the Ninth *and* Tenth Amendments.[178] Under the heading "Reserved Powers and Rights of the People," Story referred the reader to the same amendments.[179] Clearly, Story believed that the Ninth and Tenth Amendments expressed related principles of limited federal authority. Story was unwilling, however, to follow his earlier approach in *Houston* and read the Ninth as constraining the interpreted scope of enumerated federal power.

The tension between his words in *Houston* and his later nationalist interpretation of the Constitution was noticed by his colleagues on the bench, who in cases like *Miln* and *Prigg* quoted Story's own words in *Houston* as a remonstrance against his nationalist vision of federal power. Still, in his judicial opinions, Story remained silent. He neither corrected nor modified his earlier view of the "eleventh amendment"; nor did he address Ninth Amendment–based readings of the Constitution such as those proposed by

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178. 3 Story, *supra* note 90, at 774.

179. *Id.* at 773. A similar collapsing of the Ninth and Tenth Amendments can be found in Peter Du Ponceau, A Brief View of the Constitution of the United States 44–45 (Phila., E.G. Dorsey 1834). Treating the Ninth as if it and the Tenth were a single clause, Du Ponceau remarked:

> The enumeration in the constitution of certain rights, is not to be construed to deny or disparage others retained by the people; and 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. This article differs from a similar one in the confederation in this, that the word *expressly* is here left out, which leaves room for implied powers, without the admission of which the constitution could not be carried into effect.

Id. Like Story, Du Ponceau treated the Ninth as no more than a declaration of the enumerated-powers theory of federal power. Also like Story, and as is generally found in the treatises of the late 1820s and 1830s, Du Ponceau minimized the impact of both the Ninth and Tenth Amendments on federal power. As did all treatise writers of antebellum America, however, Du Ponceau assumed that the Ninth was linked to the Tenth as a statement regarding the limited powers of the federal government.

St. George Tucker. Like Marshall, Story chose to ignore the Ninth Amendment rather than debate its meaning.

Although later courts continued to cite Story's opinion in *Houston*, they often echoed his *Commentaries* and omitted his language regarding the "eleventh amendment."[180] As the convention for referring to the Bill of Rights changed, Story's reference to the eleventh amendment became ever more obscure. In time, Story's opinion in *Houston* came to be associated with principles underlying the Tenth Amendment.[181] For example, in the 1843 Michigan case *Harlan v. People*,[182] Judge Alpheus Felch wrote his own version of Story's opinion, replacing the "eleventh amendment" with the Tenth. After citing Story's opinion in *Houston*, Judge Felch wrote:

> And it is affirmed, by the same authorities, that a mere grant of power in affirmative terms, does not, *per se*, transfer an exclusive sovereignty on such subjects to the Union. In all cases not falling within either of the classes already mentioned, the states retain either the sole power, or a power which they may exercise concurrently with congress. This results not only from the general principles on which the Union is founded, but is within the letter of the tenth article of the amendments to the constitution, 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."[183]

This passage was taken straight from Story's opinion; Felch simply changed "letter and spirit of the eleventh amendment" to "the letter of the tenth."[184] Felch either believed that Story made a mistake, or he agreed with Story's later position that the issue was best considered through the lens of the Tenth Amendment. In either event, Story's reference to "the eleventh"

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180. *E.g.*, United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 548 n.30 (1944); Helm v. First Nat'l Bank of Huntington, 43 Ind. 167, 169 (1873); Norfolk & W.R. Co. v. Commonwealth, 24 S.E. 837, 838 (Va. 1896).

181. *See* Keller v. United States, 213 U.S. 138, 145 (1909) (quoting a different passage from Story's opinion in *Houston v. Moore* and associating his reasoning with the Tenth Amendment). For a discussion of how the Tenth Amendment came to overshadow the Ninth as a rule of construction, *see* Kurt T. Lash, Madison's Celebrated Report of 1800: The Transformation of the Tenth Amendment, 74 Geo. Wash. L. Rev. 165 (2006).

182. 1 Doug. 207 (Mich. 1843).

183. *Id.* at 211.

184. Compare *id. with* Houston v. Moore, 18 U.S. (5 Wheat.) 1, 49 (1820) (Story, J., dissenting).

and its significance to the early understanding of the Ninth Amendment was erased.

The Significance of *Houston v. Moore*

Although long forgotten as an opinion dealing with the Ninth Amendment, Justice Story's opinion in *Houston v. Moore* is significant for a number of reasons. Judges and scholars seeking the original meaning of the Ninth Amendment have often turned to the views of James Madison and Joseph Story.[185] Until now, however, the views of these founding-era figures remained critically incomplete. Although his *Commentaries* linked the Ninth to the Tenth Amendment as a statement of principle, *Houston v. Moore* suggests Justice Story's original views on how the Ninth Amendment should actually be applied. Written within the lifetime of those who drafted and ratified the clause, Story's opinion illuminates the general understanding of the Ninth Amendment in the period immediately following its adoption. Story's reading of the Ninth was not contradicted by any other justice, and his specific analysis of the Ninth Amendment was quoted by Supreme Court justices and the finest lawyers in the United States. Moreover, no other account of the Ninth Amendment was proposed by any justice on the Court at the time or for the next 150 years—which strongly suggests that Story's opinion presented the commonly accepted view of the Ninth as a federalism-based rule of construction, even if the application of that rule was sporadic. Indeed, Story's and Marshall's later reluctance to even acknowledge the Ninth makes sense if the amendment was widely regarded as a rule supporting state autonomy. Finally, because Story's opinion in *Houston* adopted the Madisonian reading of the Ninth Amendment—a reading itself based on proposals from

185. *E.g.*, Griswold v. Connecticut, 381 U.S. 479, 489–90 (1965) (Goldberg, J., concurring). Scholarly references to Madison and Story in works discussing the Ninth Amendment are ubiquitous. For only a few such examples, *see* LEONARD LEVY, ORIGINS OF THE BILL OF RIGHTS 244, 246–60 (1999) (discussing Story and Madison); MASSEY, *supra* note 9, at 146–47, 168 nn.172–73 (discussing Madison and Story); THOMAS B. MCAFFEE, INHERENT RIGHTS, THE WRITTEN CONSTITUTION, AND POPULAR SOVEREIGNTY: THE FOUNDERS' UNDERSTANDING 79 (2000) (discussing Madison); Randy E. Barnett, *Introduction: James Madison's Ninth Amendment*, *in* 1 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 1 (Randy E. Barnett ed., 1989) (discussing Madison); Knowlton H. Kelsey, *The Ninth Amendment of the Federal Constitution*, *in* 1 RIGHTS RETAINED BY THE PEOPLE, *supra*, at 102–03 (discussing Story).

the state conventions—*Houston v. Moore* establishes a link between the state conventions, Madison's interpretation of the Ninth Amendment, and the common understanding of the Ninth in the period following its adoption. This Madisonian approach viewed the Ninth as limiting the construction of delegated federal power in the service of preserving the policy-making authority of the people in the states.

Houston v. Moore also illustrates how the Ninth Amendment could be closely related to the Tenth and yet still retain an independent role in constitutional interpretation. *Houston* did not examine whether enumerated federal power existed. The issue was whether concededly delegated federal power should be construed in a manner that denied or disparaged the retained concurrent rights of the states. Answering this question required a rule of interpretation, and it is the Ninth, not the Tenth, that expressly provides such a rule.

The ultimate fate of *Houston v. Moore*, however, raises an intriguing possibility. Scholars have often dismissed historical references to the Ninth Amendment because they believed that such references really were about the Tenth.[186] Judge Felch's rewriting of Story's *Houston* analysis in *Harlan v. People* suggests that the opposite may be true: past cases that refer to the Tenth Amendment may sometimes really be discussing a rule of construction primarily grounded in the original understanding of the Ninth.

As I explain in the next chapters of this book, later courts did not share the Marshall Court's reluctance to cite and rely on the Ninth Amendment. Marshallian nationalism was soon replaced by a decidedly states' rights interpretation of the Constitution. Marshall's approach to the Ninth and Tenth Amendments would return, however, in the constitutional upheaval known as the New Deal.[187]

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186. *See, e.g.*, Bennett B. Patterson, The Forgotten Ninth Amendment: A Call for Legislative and Judicial Recognition of Rights Under Social Conditions of Today 32 (1955).

187. *See* discussion *infra* chapter 9.

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EIGHT

Slavery and the Impact of the Fourteenth Amendment

AT THE CLOSE OF SENATOR JUDAH P. BENJAMIN'S SPEECH TO FULL SENATE, the Senate gallery erupted in cheering and applause. When the din showed no signs of dying down, Benjamin's political opponents demanded that the gallery be cleared. Even as the boisterous crowd was being removed, it was obvious that no further work would be accomplished that day; the Speaker gaveled the assembly to adjourn. The speech that caused the commotion was soon published as a pamphlet and distributed throughout the United States.[1]

The first practicing Jewish senator in U.S. history, Judah Benjamin delivered his speech on the proper construction of the Constitution on New Year's Eve 1860 in the midst of a national crisis over slavery and state secession. Tying together Vattel's law of nations,the original understanding of the ratifiers, James Madison's celebrated *Report of 1800*, and the constitutional principles of St. George Tucker, Benjamin instructed the assembly on the strict construction of federal power and the retained powers and rights of the several states. The Constitution, admonished Benjamin, was not to be construed as creating "a General Government over all the people, but . . . a Government of States, which delegated powers to the General Government." This principle was confirmed by "[t]he language of the ninth and tenth amendments to the Constitution." These amendments, which Benjamin quoted, were "susceptible of no other construction."[2]

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1. *See* CONG. GLOBE, 36th Cong., 2d. Sess. 212–17 (1860) (statement of Sen. Judah P. Benjamin). The speech was printed in pamphlet form by Washington printer Lemuel Towers (a copy is available in the Brock Collection, Huntington Research Library). For an account of the speech, *see* PIERCE BUTLER, JUDAH P. BENJAMIN (1907); ELI N. EVANS, JUDAH P. BENJAMIN: THE JEWISH CONFEDERATE 109 (1988). The speech was widely reported in the press. *See, e.g.*, Secession Speech by Senator Benjamin of Louisiana, NEW YORK TIMES, Jan. 1, 1861, at 1; The News, NEW YORK HERALD, Jan. 1, 1861, at 4, page 4, available in Archive of Americana, America's Historical Newspapers (Readex, Newsbank, Inc.); Legislative, THE SUN, Jan. 1, 1861, at 4, available in Archive of Americana, America's Historical Newspapers (Readex, Newsbank, Inc.); Speech of Senator J. P. Benjamin, THE CONSTITUTION (Wash. D.C.), Jan. 9, 1861, at 1-2, available in Archive of Americana, America's Historical Newspapers (Readex, Newsbank, Inc.).

2. CONG. GLOBE, 36th Cong., 2d. Sess. 214 (1860) (statement of Sen. Judah P. Benjamin).

As political entities that retained their sovereign existence even after the adoption of the Constitution, states retained the right to determine for themselves whether the federal government had irreparably violated the original compact. Two days before Benjamin's speech, the people of South Carolina, meeting in convention, had made exactly that determination and had seceded from the Union. Now, in one of his last speeches before the Senate, Judah P. Benjamin defended the right of South Carolina to secede (and the right of any other state to do the same). Not long afterward, Benjamin resigned his seat and joined the Confederacy. Once offered a position on the U.S. Supreme Court,[3] Benjamin became the Confederacy's first attorney general and, later, secretary of war.[4]

The Confederacy produced its own Constitution, which, in many ways mirrored its federal predecessor. There were, of course, differences—the overt protection of slavery being the most obvious.[5] Other differences were more subtle. Judah Benjamin read the Ninth and Tenth Amendments as protecting the retained rights and powers of the people in the states, but the very idea of independent sovereign "peoples" had been rejected by some of the most important decisions of the Marshall Court. One of the major issues behind the nullification crisis and the incipient Civil War was whether, in fact, sovereignty was solely national in character or remained split between the national government and sovereign people in the states. The seceding states voted with their feet on this matter and made their interpretation of sovereignty explicit in their version of the Ninth and Tenth Amendments:

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

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3. President Millard Fillmore offered Benjamin a seat on the Court in 1852. *See* EVANS, *supra* note 1, at 83.

4. *See id.* at 115.

5. The original federal Constitution nowhere explicitly mentioned slavery, but it contained numerous provisions protecting the institution, including the three-fifths clause of Article I and clauses protecting the importation of "persons" in Articles I and V. The Confederate Constitution was not so reticent about naming and protecting what it referred to as "the right of property in negro slaves." *See, e.g.*, C.S.A. CONST. art. I, § 9, cl. 4 (1861), *reprinted in* 3 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS: NATIONAL DOCUMENTS, 1826–1900, (Donald J. Musch & William F. Swindler eds., 1985).

> The powers not delegated to the Confederate States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people thereof.[6]

This was not a rejection of the federal Ninth and Tenth Amendments. It was an effort to clarify what many believed was their original meaning—a meaning thrown into doubt by the rulings of the Marshall Court. Like their predecessors, the Confederate Ninth and Tenth Amendments were added "for greater caution." Albeit ruefully, abolitionists seemed to share the Confederacy's reading of the Ninth Amendment; although they cited almost every rights-bearing provision in the Constitution (and beyond) in support of abolition, they found no use for the Ninth Amendment. Neither did the drafters of the Fourteenth Amendment. When it came time to list the privileges and immunities of the *national* people of the United States, John Bingham, the drafter of Section 1 of the Fourteenth Amendment, listed the rights contained in the first eight amendments to the Constitution. Conspicuously missing from Bingham's list were the Ninth and Tenth Amendments. In 1868, the Ninth remained a statement of local autonomy. The question now was the degree to which that statement would survive, if indeed it would survive, Reconstruction.

The previous chapter marked the end of our discussion of the original meaning of the Ninth Amendment. Despite the Marshall Court's silence regarding the Ninth Amendment, the historical record reveals a federalist interpretation of the Ninth that stretches from the speeches of James Madison to the opinion of Justice Joseph Story in *Houston v. Moore*.[7] This traditional understanding of the amendment was well established long before slavery and radical Calhounian rhetoric skewed political debate. The Ninth Amendment had been closely associated with the Tenth from the beginning—indeed, even before the two amendments had been officially ratified. It is because of the broadly accepted federalist nature of the Ninth that both clauses were persona non grata to the Marshall Court.

The Ninth Amendment, of course, did not exist in a political vacuum. Politics were ever present in the amendment's use in public debate. But the fact that Federalists and Republicans alike found opportunity to call on the

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6. C.S.A. Const. art. VI, § 5 (1861), *reprinted in* 3 Sources and Documents of United States Constitutions, *supra* note 5.

7. 18 U.S. (5 Wheat.) 1 (1820).

protection of the Ninth Amendment simply illustrates the nature of the clause. Like all constitutional limitations on governmental power, the Ninth Amendment was a tool available to anyone with a personal or political motivation for limiting the reach of the national government. Whether the Ninth Amendment was wielded in good faith or not, what is most significant for our purposes is a historical record that reflects unanimity in how judges, lawyers, and politicians viewed the amendment. Here, I want to stress the fact of *unanimity*: during the early decades of the Constitution, no counternarrative existed which challenged the federalist nature of the Ninth Amendment. One simply cannot find a single court or commentator arguing that the Ninth Amendment had anything to say about state protection (or abridgment) of individual rights. Despite the many modern attempts to make such an argument, such a reading was not within the range of plausible understandings during the early decades of the Constitution (and long afterward).

But the Constitution is not static. Putting aside contemporary theories of a living or evolving Constitution, it is simply a historical fact that the Constitution has been significantly amended since its first adoption in 1788. The adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments introduced new individual rights against state action. Matters once retained by the people in the states now became issues of national concern and subject to judicial enforcement by the federal courts and statutory regulation by the national legislature. This new birth of national freedom raises a host of difficult questions regarding the post–Civil War Bill of Rights in general and the Ninth Amendment in particular.

Legal historians have long argued about whether the Bill of Rights, which originally placed restrictions only on the federal government, somehow was applied or "incorporated" against the states through the adoption of the Fourteenth Amendment in 1868. For example, although the original First Amendment prohibited federal establishments of religion, states remained free after 1791 to establish religion if they wished to do so. The Fourteenth Amendment, however, declares that "no state shall make or enforce any law abridging a privilege or immunity of citizens of the United States." It is possible that, as of 1868, freedom from religious establishments was considered a privilege or immunity of U.S. citizens. If so, then the privileges or immunities clause of the Fourteenth Amendment arguably "incorporates" the restrictions of the original establishment clause and makes it applicable against both federal *and* state governments.

There are a variety of views regarding whether the Fourteenth was originally understood to have incorporated the Bill of Rights against the states.

Various members of the Supreme Court have adopted different positions at different times and so, by default, have engaged in a kind of "selective" incorporation whereby individual provisions in the Bill of Rights have been interpreted to be aspects of "due process" protected against state action by the Fourteenth Amendment. Through this process, the Supreme Court has incorporated most of the first eight amendments to the Constitution. The Ninth Amendment, however, has *not* been incorporated into the Fourteenth. The evidence recounted in this chapter suggests that the Court has been right, at least as a historical matter, to reject the Ninth Amendment as a proper candidate for incorporation.

If the Court has been correct, however, there remains the difficult issue of having to *reconcile* the federalist Ninth Amendment with the libertarian Fourteenth. To what degree have the original protections of the Ninth been transformed by the adoption of the Fourteenth Amendment? If not incorporated, then has the original federalist principle of Ninth Amendment been effectively erased through the adoption of the Civil War Amendments? Answering these questions requires looking not only at the debates surrounding the adoption of the Fourteenth Amendment but also at the public understanding of the Ninth Amendment both prior to the Civil War and in the later period of Reconstruction.

Slavery and the Ninth Amendment

> *I shall support the Amendts. proposed to the Constitution that any exception to the powers of Congress shall not be so construed as to give it any powers not expressly given, & the enumeration of certain rights shall not be so construed as to deny others retained by the people—& the powers not delegated by this Constn. nor prohibited by it to the States, are reserved to the States respectively; if these amendts. are adopted, they will go a great way in preventing Congress from interfering with our negroes after 20 years or prohibiting the importation of them. Otherwise, they may even within the 20 years by a strained construction of some power embarrass us very much.*
>
> William L. Smith to Edward Rutledge, August 10, 1789.[8]

8. Letter from William L. Smith to Edward Rutledge (Aug. 10, 1789), *in* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 273, 273 (Helen E. Veit et al. eds., 1991).

As a rule of construction preserving the autonomy of the states, the Ninth Amendment was caught up in the struggle over slavery from its very beginning. As the above quotation illustrates, politicians in the First Congress were aware that preserving the retained rights of the people could have the effect of preserving the rights of state majorities to maintain the institution of slavery. As the public debate over slavery intensified in the first half of the nineteenth century, it was inevitable that the Ninth Amendment would become part of the dispute.

Radical states' rights theorists refused to accept the nationalist rulings of the Marshall Court. Decision such as *Martin v. Hunter's Lessee*[9] were resisted by some state courts as violating the balance established by the Ninth and Tenth Amendments. In *Stunt v. The Ohio*,[10] for example, future chief justice of the Ohio Supreme Court T. W. Bartley relied on the Ninth and Tenth Amendments in rejecting the authority of the Supreme Court to review state court opinions. Bartley began by reiterating the rule of strict construction: "[E]very written instrument conferring limited and expressly defined powers must be strictly construed." This rule of strict construction was "authoritatively required by the ninth or tenth additional amendatory articles of the constitution." Repeating the same argument Madison made in his speech against the Bank of the United States, Judge Bartley declared that "[w]ithout this express requirement of a strict construction, the constitution would not have been adopted by the states."[11]

In 1856, having been elevated to chief justice of the Ohio Supreme Court, Bartley repeated his view of the Ninth Amendment and argued that the clause protected the right of the states to regulate slavery. In *Anderson v. Poindexter*, the Ohio Supreme Court ruled that slaves automatically became free once they set foot on the free soil of Ohio.[12] Concurring in the judgment, Chief Justice Bartley believed that the majority had been overly dismissive of states' rights:

> [H]aving declared that the powers enumerated in the constitution should not be construed to deny or disparage the rights retained by the

9. 14 U.S. (1 Wheat.) 304 (1816).

10. Stunt v. The Ohio, 3 Ohio Dec. Reprint 362, 1855 WL 3878 (Ohio Dist. Ct., 1855).

11. *Id.* at *4 (Westlaw pagination). Although Bartley's decision was reversed on appeal the next year, *see* The Ohio v. Stunt, 10 Ohio St. 582 (1856), Judge Bartley joined the Ohio Supreme Court as chief justice and issued the same opinion in dissent, *see* Piqua Bank v. Knoup, 6 Ohio St. 342, 347–48 (1856) (Bartley, C.J., dissenting).

12. 6 Ohio St. 622 (1856).

> people; and having guaranteed the sovereignty and independence of each state, subject only to the powers delegated to the confederacy, [the people of the several states] recognized the relation of master and servant, secured the return of fugitives from servitude.[13]

Although Bartley invoked the Ninth Amendment on behalf of states that allowed slavery,[14] state autonomy was a two-way street. In *Mitchell v. Wells*, the Supreme Court of Mississippi ruled that a former slave who had been freed in Ohio had no enforceable rights in Mississippi courts.[15] In his dissent, Judge Alexander Handy criticized the majority's refusal to recognize the rights of Ohio citizens and raised the Ninth and Tenth Amendments as establishing the reserved "rights and powers" of the people of the several states:

> The 9th and 10th amendments to the Constitution of the United States reserve to the people of the several States the rights and powers not enumerated in that instrument, and delegated to the confederacy, nor prohibited to the States; and the right of an inhabitant or subject of any State, not enumerated, remains as a sovereign power reserved to the State, and to be exercised by those entitled to her protection according to the principles applicable to the relations of independent nations.[16]

This was not the only attempt to use the Ninth Amendment in support of abolition. As we saw in the last chapter, in *Prigg v. Pennsylvania*, the Pennsylvania attorney general, Ovid F. Johnson, argued that federal law should not be read to displace all state regulation on the subject of fugitive slaves, in that case Pennsylvania's law freeing any slave who touched the state's "free soil." In support of his argument, Johnson quoted Justice Joseph Story's opinion in *Houston v. Moore* regarding the letter and spirit of

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13. *Id.* at 686 (Bartley, C.J., concurring).

14. Bartley concurred with the result, but objected to the breadth of the majority decision on the grounds that it needlessly intruded upon the retained rights of states that allowed slavery. To Bartley, slaves did not become free simply by "touching the soil" of Ohio, but only if domiciled within the state and thus subject to its laws. In this case, however, Poindexter was domiciled in Ohio during the relevant period. *See id.* at 720.

15. 37 Miss. 235, 264 (1859).

16. *Id.* at 283–84 (Handy, J., dissenting).

the Ninth Amendment.[17] Justice Story ignored Ovid's argument (and his own opinion in *Houston v. Moore*), drawing a rebuke from his fellow justice Peter Daniel. Arguing that states had concurrent power to regulate on the subject of fugitive slaves, Daniel quoted Story's passage in *Houston v. Moore*, including Story's statement regarding the "eleventh amendment."[18]

Protecting state autonomy, however, inevitably led to the legal entrenchment of slavery. In *Willis v. Jolliffee*, a certain E. W. took one of his slaves, Amy, and her seven children to Ohio with the intention of setting them free.[19] His will dictated that his estate was to be executed in trust for Amy and her children.[20] Tragically, E. W. died the moment he arrived with Amy and her children at the wharf in Cincinnati.[21] Not having yet been freed, Amy remained a slave under South Carolina law, and, according to the trial court, Amy could not inherit E. W.'s estate.[22] The opinion cited a number of constitutional provisions, including the Ninth and Tenth Amendments, in support of its conclusion that the Constitution anticipated state recognition of slavery as a "property" right.[23]

Supreme Court justice John Campbell took a similar view in his concurring opinion in *Dred Scott v. Sandford*.[24] In *Dred Scott*, the Supreme Court struck down the Missouri Compromise on the ground that Congress had no authority to ban slavery from the territories. One of the issues in the case was the scope of power delegated by the provision permitting Congress "to dispose of and to make all needful rules and regulations respecting the territory or other property belonging to the United States."[25] The government argued that "all" meant all and that it "include[d] all subjects of legislation

17. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 600–01 (1842).

18. *Id.* at 654 (Daniel, J., concurring).

19. Willis v. Jolliffee, 32 S.C. Eq. (11 Rich. Eq.) 447, 450–51 (1860). In the case, respondent's name is spelled "Jolliffe." *Id.* at 447.

20. *Id.* at 448.

21. *Id.* at 450.

22. *Id.* at 491.

23. *Id.* at 477. The decision was reversed on appeal without a discussion of either the Ninth or the Tenth Amendment. *Id.* at 517.

24. 60 U.S. (19 How.) 393, 493 (1856) (Campbell, J., concurring).

25. *Id.* at 509.

in the territory."[26] Campbell's response was that such a construction of congressional power would destroy the concept of limited enumerated powers expressed by the Ninth and Tenth Amendments. According to Campbell:

> The people were assured by their most trusted statesmen "that the jurisdiction of the Federal Government is limited to certain enumerated objects, which concern all members of the republic," and "that the local or municipal authorities form distinct portions of supremacy, no more subject within their respective spheres to the general authority, than the general authority is subject to them within its own sphere." Still, this did not content them. Under the lead of Hancock and Samuel Adams, of Patrick Henry and George Mason, they demanded an explicit declaration that no more power was to be exercised than they had delegated. And the ninth and tenth amendments to the Constitution were designed to include the reserved rights of the States, and the people, within all the sanctions of that instrument, and to bind the authorities, State and Federal, by the judicial oath it prescribes, to their recognition and observance. Is it probable, therefore, that the supreme and irresponsible power, which is now claimed for Congress over boundless territories, the use of which cannot fail to react upon the political system of the States, to its subversion, was ever within the contemplation of the statesmen who conducted the counsels of the people in the formation of this Constitution?[27]

Reconstruction and the Ninth Amendment

The struggle over slavery and a bloody Civil War gave rise to a new understanding of freedom in the United States, one that dramatically altered the original balance of power between the federal government and the states. Whereas the original Bill of Rights applied only to the federal government, the Fourteenth Amendment introduced significant new restrictions on the states and bound

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26. *Id.* at 510.

27. *Id.* at 511. Although Chief Justice Taney's lead opinion in *Dred Scott* discussed the constitutional protection of unenumerated property rights under the due process clause of the Fifth Amendment, Taney did not cite the Ninth Amendment in support of these unenumerated rights. *Id.* at 450 (majority opinion). Only Justice Campbell raised the Ninth Amendment, and did so only in regard to the scope of enumerated federal powers.

them to respect the "privileges or immunities" of citizens of the United States.[28] Although the Supreme Court has interpreted the due process clause to incorporate most of the provisions in the Bill of Rights,[29] present-day constitutional historians suggest that the privileges or immunities clause is more likely to have been the intended vehicle of incorporation.[30]

If, in fact, the framers of the Fourteenth Amendment intended to incorporate the Bill of Rights, this signaled a changed understanding of the nature of the Bill of Rights itself.[31] The original Bill of Rights operated as a limitation on federal power. The Fourteenth Amendment, on the other hand, not only protected rights against state action, but it also granted federal power to enforce those rights. Incorporating a right from the original Bill of Rights into the Fourteenth Amendment thus would signal a transformation of public understanding whereby words once associated with states' rights were now viewed as declarations of individual freedom.

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28. *See* U.S. CONST. amend. XIV, § 1.

29. *See infra* chapter 9, notes 168-83 and accompanying text (discussing the Ninth Amendment and the doctrine of incorporation).

30. *E.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 181–214 (1998); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 2 (1986). Earlier scholarship had generally been skeptical regarding any intent to incorporate the Bill of Rights. *E.g.*, Raoul Berger, *Incorporation of the Bill of Rights: Akhil Amar's Wishing Well*, 62 U. CIN. L. REV. 1 (1993); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, (1949); Lino A. Graglia, "*Interpreting the Constitution*": *Posner on Bork*, 44 STAN. L. REV. 1019, 1033–34 (1992). My own work tends to support the conclusions of Curtis and Amar. *See, e.g.*, Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085 (1995) [hereinafter Lash, *Establishment Clause*]; Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106 (1994) [hereinafter Lash, *Free Exercise Clause*]. This chapter, however, focuses on the issue of whether the Ninth Amendment was understood in a manner that made it as likely to be considered a "privilege or immunity" of U.S. citizens as the rights listed in the first eight amendments.

    A separate issue involves whether the privileges or immunities clause was understood to protect unenumerated individual rights. A good argument can be made that it was intended to do so. *See* AMAR, *supra*, at 280; Kurt T. Lash, *Two Movements of a Constitutional Symphony: Akhil Reed Amar's The Bill of Rights*, 33 U. RICH. L. REV. 485, 492 (1999) (book review) [hereinafter Lash, *Two Movements*]. If so, then an originalist interpretation of the Constitution must reconcile the Ninth and Fourteenth Amendments and determine the degree to which the Fourteenth altered the original protections of the Ninth. I address such issues at the close of this chapter.

31. Professor Amar suggests that the Bill of Rights underwent a process of "refined incorporation" through which some, but not all, of the liberties in the original Bill of Rights were absorbed into the Fourteenth, thereby changing their focus from protecting federalism to safeguarding individual liberty. *See* AMAR, *supra* note 30, at 215–30.

Recently, a number of constitutional scholars have argued that just such transformations in public understanding occurred in regard to a number of liberties listed in the Bill of Rights. Michael Kent Curtis, for example, has traced the growing calls for freedom of speech against state action that were triggered by widespread suppression of abolitionist speech.[32] Akhil Reed Amar has examined how drafters of the Fourteenth Amendment believed, contrary to Supreme Court precedent, that the liberties listed in the first eight amendments should be protected against abridgment by the states as a matter of natural right.[33] In my own work, I have argued that by Reconstruction, certain principles of religious liberty had come to be understood as privileges or immunities.[34]

It is possible that the Ninth Amendment similarly evolved during the antebellum period. Even if originally understood as limiting federal power in the service of state autonomy, by 1868 the common understanding of the Ninth could have changed. If the rule of construction of the Ninth Amendment was understood as a personal-rights guarantee at the time of the adoption of the Fourteenth Amendment, then the new understanding of the clause is as capable of being incorporated against the states as is freedom of speech or any other personal freedom listed in the Bill of Rights. In fact, at least two members of the Reconstruction Congress apparently read the Ninth in this manner.[35]

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32. Michael Kent Curtis, Free Speech, "The People's Darling Privilege": Struggles for Freedom of Expression in American History 194–215 (2000).

33. *See* Amar, *supra* note 30, at 181–87.

34. Lash, *Establishment Clause*, *supra* note 30, at 1151–52; Lash, *Free Exercise Clause*, *supra* note 30, at 1146–49.

35. In an 1866 speech, Senator James Nye noted:

> In the enumeration of natural and personal rights to be protected, the framers of the Constitution apparently specified everything they could think of—"life," "liberty," "property," "freedom of speech," "freedom of the press," "freedom in the exercise of religion," "security of person," &c.; and then, lest something essential in the specifications should have been overlooked, it was provided in the ninth amendment that "the enumeration in the Constitution of certain rights should not be construed to deny or disparage other rights not enumerated." This amendment completed the document. It left no personal or natural right to be invaded or impaired by construction. All these rights are established by the fundamental law.

Cong. Globe, 39th Cong., 1st Sess. 1072 (1866) (statement of Sen. James Nye). John Yoo quotes this passage and concludes that "[t]his statement shows that the Reconstruction Congress adopted the antebellum interpretation of the Ninth Amendment among the states as a guarantee of minority civil rights, not of majoritarian political ones." John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 Emory L.J. 967, 1026 (1993). It is certainly

Some Ninth Amendment scholars have made an argument along these lines. Professor John Yoo, for example, concedes the original federalist understanding of the Ninth Amendment, but points out that between the founding and the Civil War, a number of states adopted provisions in their state constitutions that mirror the language of the federal Ninth Amendment. To Professor Yoo, these state constitutional provisions suggest a new understanding of the language and meaning of the Ninth Amendment.[36]

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true that James Nye read the Ninth as referring to rights capable of being applied against the states. Nye also read the necessary and proper clause as a grant of federal power to pass legislation enforcing these rights against state abridgment. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1072 (1866) (statement of Sen. James Nye) ("Congress has no power to invade [the rights of the Ninth Amendment]; but it has the power "to make all laws necessary and proper" to give them effective operation, and to restrain the respective States from infracting them."). As far as his reading of the necessary and proper clause is concerned, Nye clearly went beyond the general understanding of the Reconstruction Congress which viewed a constitutional amendment necessary to empower Congress to protect individual rights against state abridgment. Likewise, if Nye believed that the Ninth Amendment protected *only* individual rights (this is not clear from the statement above), then this too goes beyond what we know about contemporary views of the Ninth in 1868. As the chapter shows, the common antebellum understanding of the Ninth was as a federalism-based rule of construction. If Nye's views represented those of the Thirty-ninth Congress, then the framer of Section 1 of the Fourteenth Amendment, John Bingham, almost certainly would have included the Ninth on his list of privileges or immunities. He did not do so. This is not to deny that some members of the Reconstruction Congress viewed the Ninth as guarding individual rights. *See*, for example, the 1872 speech by Senator John Sherman referring to the Ninth as a source of unenumerated rights in support of congressional power to pass the 1875 Civil Rights Act. CONG. GLOBE, 42d Cong., 2d Sess. 843 (1872) (statement of Sen. John Sherman). But finding some interpretations along these lines is not surprising. Even in the antebellum period, some attempts were made to read the Ninth as a source of unenumerated individual rights. *See supra* Chapter 7 at note 33 and accompanying text. Alongside these sporadic attempts to read the Ninth in this manner, however, are far more numerous statements on (and applications of) the Ninth as a federalist rule of construction. In fact, other members of the Reconstruction Congress continued to follow the antebellum understanding of the Ninth and Tenth as twin guardians of state autonomy. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2467 (1866) (statement of Rep. Benjamin Boyer) (pointing to the Ninth and Tenth Amendments—during the debates about a constitutional amendment to deny voting rights for those who aided the Confederacy—as prohibiting the Federal government from "trampl[ing] upon" the southern States by disenfranchising the large majority of their voting population). In the antebellum period, the public may have come to read the first eight amendments as expressing individual (and not collective) rights, but there is little evidence that such a transformation of public opinion occurred in regard to the federalist nature of the Ninth and Tenth Amendments.

36. Yoo, *supra* note 35, at 1009; *see also* AMAR, *supra* note 30, at 280 (describing the adoption of "baby Ninth Amendments" by several states before 1867 and suggesting that "[w]hat began as a federalism clause intertwined with the Tenth Amendment soon took on a substantive life of its own, as a free-floating affirmation of unenumerated rights").

Although it is possible that the common understanding of the Ninth Amendment in 1868 rendered it an appropriate candidate for incorporation, the bulk of historical evidence makes it more likely that the Ninth Amendment, like the Tenth, continued to be broadly understood as a federalist guardian of state autonomy. To begin with, even those historians who support incorporation in general do not believe that the Tenth Amendment was incorporated by the Fourteenth Amendment.[37] Because it expressly protects states' rights, incorporating the Tenth against the states is logically impossible. But, as earlier chapters have shown, the Ninth Amendment was read *in pari materia* with the Tenth consistently throughout the antebellum period. From the controversy over the Bank of the United States to the struggle over exclusive federal power to Campbell's concurrence in *Dred Scott*, the Ninth and Tenth Amendments were understood as joint expressions of state autonomy. States' rights theorists like St. George Tucker and John Taylor had expressly linked the Ninth and Tenth Amendments as dual expressions of federalism.[38] William Rawle, in his *View of the Constitution*, listed and discussed the first eight amendments as the Constitution's "Declaration of Rights,"[39] which Rawle believed applied against both federal and state governments.[40] Neither the Ninth nor the Tenth, however, made Rawle's list of rights. In fact, by 1868, these two amendments were regularly distinguished from the rest of the Bill of Rights. The Confederate Constitution, for example, adopted the first eight amendments word for word, but placed the Ninth and Tenth in a separate section and reworded them to reflect the federalist understanding of both clauses.[41]

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37. *E.g.*, Amar, *supra* note 30, at 280.

38. John Taylor, Construction Construed, and Constitutions Vindicated 46 (Leonard W. Levy ed., Da Capo Press 1970) (1820); 1 Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and the Commonwealth of Virginia app. note D (View of the Constitution of the United States) at 307–08 (St. George Tucker ed., Phila., William Young Birch & Abraham Small (1803)).

39. William Rawle, A View of the Constitution of the United States of America 120 (photo. reprint The Lawbook Exchange 2003) (2d ed. 1829).

40. *See id.* ("A declaration of rights, therefore, properly finds a place in the general Constitution, where it equalizes all and binds all.").

41. C.S.A. Const. art. VI, § 5 (1861), *reprinted in* 3 Sources and Documents of United States Constitutions, *supra* note 5, at 125, 137. John Yoo believes that adding the language "of the several states" to the Ninth Amendment in the Confederate Constitution is indirect proof of an individual-rights reading of the federal Ninth Amendment. *See* Yoo, *supra* note 35, at 1008. However, as the last chapter showed, antebellum judges who had

The idea that neither the Ninth nor the Tenth Amendment contained principles that could be applied against the states was not limited to states' rights theorists. Abolitionists had long called for a reevaluation and a broadening of individual liberty,[42] but they ignored the Ninth Amendment as either a source of rights or textual support for additional individual rights.[43] If the Ninth had been considered even indirect support for individual rights against the states, then its omission from abolitionist arguments is inexplicable. Of all people in antebellum America, abolitionists had the greatest incentive to use every possible constitutional argument available in the cause against slavery. In fact, abolitionists relied on the Declaration of Independence, natural law, biblical exegesis, and common law, as well as a libertarian reading of most of the Bill of Rights;[44] they relied on almost everything except the Ninth Amendment.[45] Similarly, judicial decisions such as *Calder v. Bull*,[46] *Fletcher v. Peck*,[47] and *Terret v. Taylor*[48]—decisions that explored the existence of enforceable natural rights—never raised the Ninth Amendment as a potential source of unenumerated rights.[49] Instead, slave owners from the beginning saw the Ninth as protecting the states' right to maintain slavery.[50] Even the drafter of Section 1 of the Fourteenth Amendment, John Bingham, distinguished the Ninth and Tenth from the first

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addressed the Ninth Amendment read the clause as if it already contained this explanatory language.

42. *See* AMAR, *supra* note 30, at 161 ("Beginning in the 1830's, abolitionist lawyers developed increasingly elaborate theories of natural rights, individual liberty, and higher law. . . .").

43. *See* Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 CHI.-KENT L. REV. 131, 144 (1988) (noting that the Ninth Amendment was not cited as a restriction on state power by radical antislavery lawyers).

44. *See* AMAR, *supra* note 30, at 161, 239 (pointing out that abolitionists developed elaborate declaratory theories of natural rights, individual liberty, and higher law starting in the 1830s, and that federalism and majoritarianism were replaced by libertarianism as the "dominant, unifying theme of the First Amendment's freedoms" by the 1860s).

45. For examples of abolitionists citing only the first eight amendments, *see* WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848, at 267 (1977) (quoting Gerrit Smith).

46. 3. U.S. (3 Dall.) 386 (1798).

47. 10 U.S. (6 Cranch) 87 (1810).

48. 13 U.S. (9 Cranch) 43 (1815).

49. *See* Levinson, *supra* note 43, at 144.

50. *See* Letter from William L. Smith to Edward Rutledge (Aug. 10, 1789), *supra* note 8 (suggesting that if the Ninth and Tenth amendments were adopted, "they [would] go a great way in preventing Congress from interfering with our negroes after 20 years or prohibiting the importation of them").

eight amendments in regard to privileges or immunities protected by the Fourteenth Amendment.[51] Other members of the Thirty-ninth Congress also described the personal rights protected by the Fourteenth Amendment to be expressed in the first eight amendments.[52]

Instead, the Ninth and Tenth Amendments were cited in support of the right of the states to secede from the Union. On December 31, 1860, only a few days after South Carolina voted to secede, Louisiana senator and future Confederate secretary of war Judah P. Benjamin delivered a speech to the Senate in defense of South Carolina and the right of secession.[53] Benjamin began by reminding the assembly of the principle of popular sovereignty and the right of the people to amend or abolish their form of government. Just as one legislature can undo the acts of a previous assembly, "so can one convention of the people duly assembled, repeal the acts of a former convention."[54] Moving to the specific issue of secession, Senator Benjamin recounted the debates over the ratification of the Constitution[55] and pointed out that proponents of ratification in states like New York and Virginia had "failed until they proposed to accompany their ratifications with amendments that should prevent its meaning from being perverted, and prevent it from being falsely construed."[56]

The "false construction" to which Benjamin referred was one that consolidated the states into a single national government—an interpretation prevented by the adoption of the Ninth and Tenth Amendments:

> So, sir, we find that not alone in these two conventions, but by the common action of the States, there was an important addition made to the Constitution by which it was expressly provided that it should not be construed to be a

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51. CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866) (statement of Rep. John Bingham).

52. *See id.* at 2467 (statement of Rep. Benjamin Boyer); *id.* at 2765–66 (statement by Sen. Jacob Howard); *see also* AMAR, *supra* note 30, at 226 ("[B]oth Bingham and Howard seemed to redefine 'the Bill of Rights' as encompassing only the first eight rather than ten amendments. . . .").

53. CONG. GLOBE, 36th Cong., 2d Sess. 212 (1860) (statement of Sen. Judah P. Benjamin).

54. *Id.* at 212.

55. *Id.* at 214.

56. *Id.* Benjamin continued, "[A]nd in two of the states especially—the states of Virginia and New York, the ratification was preceded by a statement of what their opinion of its true meaning was, and a statement that, on that construction, and under that impression, they ratified it." *Id.*

> General Government over all the people, but that it was a Government of States, which delegated powers to the General Government. The language of the ninth and tenth amendments to the Constitution is susceptible of no other construction: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."[57]

To Benjamin, the right of secession "results from the nature of the compact itself; that it must necessarily be one of those reserved powers which was not abandoned [by the states]."[58] Although this right should be exercised only in cases involving an irreparable breach in the original compact, determining whether such a breach had occurred was up to the people of each state to decide for themselves. Here, Benjamin cited Thomas Jefferson and James Madison's Virginia and Kentucky Resolutions.[59] Noting that the resolutions were treated with contempt by the "northern states," Benjamin cited the defense provided by Madison in his *Report of 1800* as "the best considered, the most perfect, the most compact argument upon the constitutional rights of the States of this Union that has ever been delivered."[60] In his report, Madison himself had declared that "where resort can be had to no tribunal superior to the authority of the parties, the parties themselves must be the rightful judges in the last resort, whether the bargain made has been pursued or violated."[61]

Having cited the Ninth and Tenth Amendments and the speeches of James Madison, Benjamin concluded by echoing St. George Tucker's reliance on Emmerich de Vattel and *The Law of Nations*, in which Vattel explained that "several sovereign and independent states may unite themselves together by a perpetual confederacy without ceasing to be, each individually, a perfect state."[62] As independent sovereigns, the states had the retained right to withdraw from the Union if such was the desire of their people.

It is not my intent to defend Judah Benjamin's argument regarding the right of secession or his reading of Madison's *Report of 1800*. Benjamin's speech

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57. *Id.*

58. *Id.* at 215.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* (quoting book 1, chapter 1 of Vattel's *The Law of Nations*).

is important not as a justification for dismantling the Union, but for his use of the standard reading of the Ninth Amendment in support of the seceding states. As had others throughout the first half of the nineteenth century, Benjamin viewed the Ninth as having played a key role in the overall story of federalism in the new republic. This was not a new interpretation of the Ninth Amendment; it was the traditional view—and thus Benjamin believed that it would help place his defense of secession on firmer ground. In terms of whether the Ninth was viewed as a privilege or immunity of U.S. citizens, it is unlikely that the men who drafted the Fourteenth Amendment would have forgotten the most recent use of the Ninth Amendment by the departing members of the secessionist South.

In fact, right up until the adoption of the Fourteenth Amendment, the Ninth continued to be linked with the Tenth as one of the twin guardians of federalism. For example, in 1863, in the midst of a violent national struggle over fundamental rights, the Indiana Supreme Court cited the Ninth Amendment in an opinion rejecting a claim that the federal government had exclusive jurisdiction over navigable waters within a state:

> In the case at bar, it may, for the sake of the argument, be conceded, that Congress not only possesses the power, but the exclusive right, to regulate commerce among the several States, including the pilotage of vessels engaged in said commerce; and still the facts, so far as the record shows them, do not make a case falling strictly within the principle of the points thus conceded, because not involved. And why? The ninth amendment to the Constitution is as follows: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people," and tenth: "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."[63]

Even states whose constitutions were amended to add provisions mirroring the Ninth Amendment continued to read the federal Ninth in conjunction with the Tenth. In 1865, for example, the Supreme Court of Maryland declined to give an expansive reading to the federal Constitution's ban on ex post facto laws, on the grounds that "prohibitions on the states, are not to be

63. Barnaby v. State, 21 Ind. 450, 452 (1863).

enlarged by construction."[64] This interpretive rule was required according to the "spirit and object of the 9th and 10th Amendments."[65] Only a few years earlier, Maryland had added a provision to its Declaration of Rights that mirrored the federal Ninth Amendment.[66] Whatever interpretation the Maryland state court might have given its own version of the Ninth Amendment, it is clear that adding such a provision to the state constitution had no effect on the court's federalist understanding of the federal Ninth Amendment.

Judicial opinions throughout the 1860s continued to emphasize the links between the Ninth and Tenth Amendments. In the 1864 case *Philadelphia & Railroad Co. v. Morrison*, a federal court considered a challenge to Congress's power to issue notes as legal tender.[67] Although he withdrew from the case and left the judgment to circuit-riding Supreme Court justice Robert C. Grier,[68] Judge John Cadwalader published an opinion in which he stressed the federalism-based goal of the Ninth and Tenth Amendments:

> In determining the application of the incidental power of legislation, the ninth and tenth amendments of the constitution must be considered. The ninth provides that the enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people; the tenth provides that the powers not delegated by the constitution, to the United States, nor prohibited by it to the states, are reserved to the states respectively or to the people. These two amendments, whether their words are to be understood as restrictive or declaratory, preclude everything like attribution of implied residuary powers of sovereignty, or ulterior inherent rights of nationality, to the government of the

64. Anderson v. Baker, 23 Md. 531, 624 (1865). The case upheld the right of a state to alter its constitution to impose restrictions on the franchise (a test oath in this case) against a claim that this violated the ex post facto restriction in Article I, Section 10. *Id.* at 624–25.

65. *Id.*

66. "This enumeration of rights shall not be construed to impair or deny others retained by the people." MD. CONST., Decl. of Rights, art. 42 (1851). *But see* Yoo, *supra* note 35, at 1009 (arguing that Maryland's adoption of such a provision suggests a different reading of the federal Ninth).

67. 19 F. Cas. 487 (C.C.E.D. Pa. 1864) (No. 11,089). The issue would not be resolved until the *Legal Tender Cases*. *See infra* notes 106–123 and accompanying text.

68. Justice Grier avoided the issue of congressional power by ruling that the act authorizing the payment of particular debts in U.S. notes did not include the particular debt at issue. *Phila. & R.R.*, 19 F. Cas. at 492.

> United States. Therefore the constitution confers no legislative powers except those directly granted, and those which may be appropriate as incidental means of executing them. . . .
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> . . . .
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> . . . That the amendments were thus intended for security against usurpations of the national government only, and not against encroachments of the state governments, may be considered a truism. But recurrence to historical facts which explain constitutional truisms, cannot be too frequent, if they are in danger of being overlooked in calamitous times, or of being crowded out of memory by any succession of appalling events.[69]

Interpretation of the Ninth Amendment during Reconstruction tracks the same interpretation of the Ninth Amendment at the time of the founding. Although there is some evidence that during the 1860s the first eight amendments came to be understood as representing privileges or immunities of U.S. citizens, when it comes to the Ninth Amendment, this evidence almost completely disappears. Instead, it seems that both the Ninth and Tenth Amendments fell outside the public's general understanding of the personal freedoms expressed in the Fourteenth Amendment. Scholars continue to disagree about whether either the drafters or the ratifiers of the Fourteenth Amendment believed that the text incorporated any (or all) of the first eight amendments against the states. Whatever one's conclusions regarding the first eight amendments, however, the Ninth Amendment presents a different case. Not even John Bingham, the drafter of Section 1 and someone who held one of the most expansive interpretations of the privileges or immunities clause, believed that the Fourteenth Amendment embraced the protections of the Ninth. The full weight of the historical record thus makes the Ninth as implausible a candidate for incorporation as the Tenth.

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69. *Id.* at 489–91 (Cadwalader, J., non-judicial opinion on the case). Cadwalader cited *Livingston v. Van Ingen* for the proposition that the Ninth Amendment, as well as the rest of the Bill of Rights, does not apply against the states. This is a correct citation to *Livingston*'s holding that the "ninth article" or Seventh Amendment does not apply against the states. Contrary to some assertions, the New York court did not make a mistake in *Livingston*; nor did Cadwalader in citing it.

Reconciling the Ninth and Fourteenth Amendments

Although historians may be satisfied with studying a single period of our constitutional history, those who seek original meaning as a tool for informing contemporary application of the Constitution cannot be so limited. The normative force of original understanding as an interpretive method is most often grounded on the idea of popular sovereignty and the right of the people to establish fundamental law.[70] This very idea, however, carries with it the possibility that the people will change their minds at some future date and alter or amend their constitution in an effort to better secure their liberty. When this happens, those seeking to use original understanding as a guide to contemporary meaning must adjust their efforts to make room for the newly announced vox populi.

Complicating this effort is the fact that amendments come in different forms with different effects. Sometimes, the adoption of a new constitutional text represents a popular revolution that completely sweeps away a previous legal regime. This appears to have occurred with the displacement of the Articles of Confederation by the federal Constitution. In that case, the originalist effort may focus on a single moment of time and the people's contemporary understanding of a single newly enacted text. In other cases, however, new wine is poured into old wineskins. Sometimes the people modify only *part* of the original text, leaving some of, or even all, the original text in place (as occurred, for example, with the adoption of the Eleventh Amendment). When this occurs, the originalist effort involves *synthesizing* the original with the newly enacted text, which requires putting together, to the degree possible, the likely public understanding of how the new text was to work with the old.

The task of synthesis is made all the more complicated by the fact that, in enacting the new text, the people may have reimagined the meaning and import of the old text. For example, under the original Constitution, the establishment clause declared that Congress was to make no law respecting an establishment of religion. A strong historical case can be made that this not only prevented federal religious establishments but also forbade federal

70. For a discussion of the link between the normative theory of popular sovereignty and the search for original meaning, *see* KEITH WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999).

interference with state establishments, since this too would be a law "respecting an establishment of religion."[71] The clause was not meant to preserve individual freedom, in other words, but to preserve the right of state majorities to regulate religion as they saw fit, free from federal interference. Suppose, however, that "We the People" in 1868 believed that nonestablishment of religion was a privilege or immunity of U.S. citizens. Suppose also that these people of 1868 also believed that the original establishment clause was *not* about reserving power to the states, but instead announced a general principle of freedom that now ought to be applied against the state governments. In such a case, the people might well be wrong in terms of the original understanding of the establishment clause. This "error," however, would not impede their sovereign authority to make their imagined understanding of the constitutional text an enforceable right. Revolutions, after all, often involve the legal entrenchment of an imagined past.

All these possibilities complicate any effort to understand the full legal effect of the Fourteenth Amendment on the original meaning and scope of the Ninth. It may be that not only was the Ninth not incorporated in the Fourteenth, but it was in effect completely swept away by the adoption of the Reconstruction Amendments, to the point that *nothing* is left of the original clause (at least as an enforceable matter). The Ninth Amendment under this view would be no more enforceable than the fugitive slave clause of the original Constitution.[72] A second possibility is that the Ninth Amendment was reimagined in 1868 as a provision declaring the retained *individual rights* of the people. Although this would be a flawed account of the original meaning of the clause, it would have the effect of trimming the original Ninth down to a principle protecting only *individual* rights in a manner that could allow the clause's incorporation (as then understood in 1868) into the Fourteenth Amendment. Finally, even if the people continued to view the Ninth as a federalism provision, the Fourteenth Amendment may have been understood as altering *part* of the original Ninth Amendment, leaving the remainder fully enforceable *alongside* the Reconstruction Amendments.

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71. *See, e.g.*, Steven D. Smith, Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom (1999).

72. U.S. Const. art. IV, § 2, cl. 3, *superseded by* U.S. Const. amend. XIII ("No person held to service or labour in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on claim of the party to whom such service or labour may be due.").

Our analysis of the history surrounding the adoption of the Fourteenth Amendment seems to exclude the second possibility. The vast bulk of the historical record indicates that the Ninth Amendment was not generally "reimagined." In the years leading up to the adoption of the Fourteenth Amendment, the Ninth continued to be discussed and applied as a federalist provision, and it was ignored as a possible source of privileges or immunities by those most involved (and those with the most at stake) in the adoption of the Fourteenth. This leaves the first and last possibilities: either the Ninth was completely *erased* as an enforceable clause, or remnants of the original Ninth survived Reconstruction and must now be *reconciled or synthesized with* the Fourteenth Amendment. It is this last possibility that seems most supported by the historical record.

The Fourteenth Amendment and Unenumerated Rights

After establishing the national and state citizenship of all persons born in the United States, Section 1 of the Fourteenth Amendment declares that "[n]o State shall" abridge the privileges or immunities of U.S. citizens or deny any person the right to due process or equal protection under the law. This restriction on state power carves out a portion of rights previously retained by state majorities and places them beyond the reach of the political process. The current scholarly debate involves the content of these rights; for example, whether they include some of, or all, the rights contained in the first eight amendments, and whether they (also) include certain unenumerated rights such as the right to privacy or the common-law right to pursue a trade.[73] No scholar or judge has ever suggested that the Fourteenth Amendment incorporates the Ninth Amendment. From the earliest incorporation cases to modern doctrine, the Supreme Court has consistently limited the scope of the incorporation doctrine to the first eight amendments.[74] Our review of the historical record suggests that this traditional view is correct.

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73. *See* Lash, *Two Movements*, *supra* note 30.

74. *See* Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 Tex. L. Rev. 597, 673–74 (2005). In fact, courts originally cited the Ninth Amendment to support a rejection of the theory of total incorporation. *See id.* at 675.

In addition to potentially incorporating some of (or all) the provisions listed in the first eight amendments to the Constitution, it is also possible that the privileges or immunities clause was intended and understood to embrace certain unenumerated common-law rights. Legal scholars such as Akhil Amar,[75] Randy Barnett,[76] and others[77] argue that the privileges or immunities clause may have been understood to include much that modern unenumerated-rights advocates believe is protected under the Ninth Amendment. If so, then whatever the original meaning of the Ninth, these unenumerated personal rights might have been understood as being protected against state action under the Fourteenth Amendment.[78]

For example, in 1791 the common-law right to armed self-defense may have been one of the unenumerated retained rights protected against federal intrusion by the Ninth Amendment.[79] By 1868, this unenumerated common-law right may well have been considered a privilege or immunity of U.S. citizens. Determining which, if any, unenumerated rights were broadly understood as privileges or immunities in 1868 is a historical endeavor beyond the specific focus of this book. It is important to acknowledge, however, the theoretical possibility that some of the unenumerated individual rights retained by the people in 1788 became national rights protected against both state and federal abridgment in 1868.

But whatever the scope of personal rights protected under the privileges or immunities clause, the clause covers only a portion of the rights retained by the people under the original Ninth Amendment. As previously discussed, a great many of the rights retained by the people involved collective or majoritarian rights, in particular, the right to local self-government in all matters not delegated to the federal government. All these rights, to the extent that they were not erased or transformed by the Reconstruction

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75. AMAR, *supra* note 30, at 280.

76. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 66–68 (2004).

77. Trisha Olson, *The Natural Law Foundation of the Privileges or Immunities Clause of the Fourteenth Amendment*, 48 ARK. L. REV. 347, 421 (1995); Christopher J. Schmidt, *Revitalizing the Quiet Ninth Amendment: Determining Unenumerated Rights and Eliminating Substantive Due Process*, 32 U. BALT. L. REV. 169, 177–78 (2003).

78. *See* AMAR, *supra* note 30, at 281–82.

79. The Supreme Court has held that such a right was within the original understanding of the Second Amendment. *See* District of Columbia v. Heller, 128 S. Ct. 2783 (2008). Even if incorrect in regard to the Second Amendment, the same evidence might well establish a common-law right retained by the people.

Amendments, continue to be rights retained by the people of the several states. Put another way, unless the Reconstruction Amendments, including the Fourteenth, *completely erased* the collective and majoritarian rights of the people in the states, the set of rights protected under the Ninth is *not coextensive* with the set of rights protected by the privileges or immunities clause of the Fourteenth Amendment.

For example, let's assume that the set of retained rights under the original Ninth Amendment included the individual right to armed self-defense and the collective right of state majorities to determine educational policy free from federal control. Even if the right to armed self-defense was considered an individual right capable of being "incorporated" against the states in 1868, the right of local majorities to control education policy would no more be subject to incorporation than the states' rights provisions of the Tenth Amendment. The same would be true for *all* retained collective or majoritarian rights protected by the Ninth Amendment.[80] Whatever the scope of the Fourteenth Amendment, these remnant unenumerated rights remain under the protection of the Ninth to the extent that they have not been abrogated (or transformed) by the Fourteenth.

The continued existence of retained collective and majoritarian rights following Reconstruction carries implications for any interpretation of the Fourteenth. As a rule of construction, the Ninth Amendment prohibits the enumeration of any rights from being construed in a manner that denies or disparages the retained rights of the people. In 1791, this rule of construction applied not only to the enumerated Bill of Rights but also to the ex post facto and contract clauses of Article I, Section 9. As a matter of popular sovereignty, any rights added by the people through the adoption of the Fourteenth Amendment would trump any aspect of state autonomy originally protected under the Ninth and Tenth Amendments. However, there is no evidence that the Fourteenth Amendment either repealed or completely reconstructed the originally federalist Ninth and Tenth Amendments. The courts in the post–Civil War period therefore faced the task of reconciling the older restrictions of the Ninth and Tenth Amendments with the newly adopted rights contained in the Fourteenth.[81] This task required an act of

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80. As explained earlier, all retained rights are collective in the sense that they remain under the control of the collective people in the several states. These same people may then choose to allow political majorities to regulate the matter, or place the issue beyond the control of ordinary politics by placing it off-limits in the state constitution.

81. Bruce Ackerman refers to this as an act of "intergenerational synthesis." *See* 1 Bruce Ackerman, We the People: Foundations 113 (1991).

construction: the courts had to determine how broadly to construe both the older retained rights and the newly enacted rights and powers in the Fourteenth Amendment. Prior to 1868, the rule of strict construction would have counseled a limited reading of federal power to intrude upon matters retained by the people in the states. In the aftermath of the Civil War, courts had to decide if the same rule of strict construction applied to the Constitution of the re-United States of America.

The Fourteenth Amendment and the Rule of Strict Construction

The rule of construction discussed thus far is based on the idea that all federal power was originally delegated from independent sovereign states that remained sovereign entities even after the adoption of the Constitution. Clearly, the federal Constitution transferred a number of sovereign powers and rights to the federal government. The fact remained, however, that the ratifiers were promised that all nondelegated powers and rights were retained by the people in the states—"retained" being the operative word, for it signaled a preexistent collection of sovereign peoples and guaranteed that these people would retain their independent sovereign existence after ratification. As Madison put it, the Constitution was neither wholly federal nor wholly national.

This continued sovereign existence carried with it critical implications for the interpretation of delegated federal powers and rights. As Attorney General Edmund Randolph explained in the controversy over the Bank of the United States, constitutions generally should receive a more liberal interpretation than statutes, for "[t]he one comprises a summary of matter, for the detail of which numberless laws will be necessary; the other is the very detail."[82] The United States, however, comprised two kinds of governments,

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82. Edmund Randolph, The Constitutionality of the Bank Bill (Feb. 12, 1791) (Opinion of the Attorney General), *reprinted in* H. Jefferson Powell, The Constitution and the Attorneys General 3, 4 (1999). New York chancellor James Kent made the same point in *Livingston v. Van Ingen*. According to Chancellor Kent:

> When the people create a single, entire government, they grant at once all the rights of sovereignty. The powers granted are indefinite, and incapable of enumeration. Every thing is granted that is not expressly reserved in the constitutional charter, or necessarily retained as inherent in the people. But when a federal government is erected with only a portion of the sovereign power, the rule of construction is directly the reverse, and every power is reserved to the member that is not, either in express terms,

each with its own constitution. Under this kind of system, the presumption of liberal construction had to be modified: "[W]hen we compare the modes of construing a state and the federal constitution, we are admonished to be stricter with regard to the latter, because there is a greater danger of error in defining partial than general powers."[83]

Similarly, James Madison believed that latitudinarian constructions of federal power threatened to overwhelm the balance of power between the federal government and the states:

> It is of great importance as well as of indispensable obligation, that the constitutional boundary between them should be impartially maintained. Every deviation from it in practice detracts from the superiority of a Chartered over a traditional Govt. and mars the experiment which is to determine the interesting Problem whether the organization of the Political system of the U.S. establishes a just equilibrium; or tends to a preponderance of the National or the local powers.[84]

The evil of slavery and a catastrophic Civil War, however, threw into question the "just equilibrium" that obtained prior to 1868. The Thirteenth, Fourteenth, and Fifteenth Amendments each imposed significant new restrictions on the autonomy of the states. The question for the courts following the adoption of the Reconstruction Amendments was whether the character of the nation had changed so much as to remove the presumptions underlying the founding rule of construction. The answer to this question would determine the fate of the Ninth and Tenth Amendments.

The Continuing Remnant Sovereignty of the States

Even the most radical of Republicans conceded that the principles underlying the Tenth Amendment continued to operate in the aftermath of the

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> or by necessary implication, taken away from them, and vested exclusively in the federal head.
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> Livingston v. Van Ingen, 9 Johns. 507 (N.Y. Sup. Ct. 1812) (Kent, C.J.).

83. Randolph, *supra* note 82, at 5.

84. Letter from James Madison to Spencer Roane (May 6, 1821), *in* JAMES MADISON: WRITINGS 772, 773 (Jack N. Rakove ed., 1999).

Thirteenth and Fourteenth Amendments. For example, Samuel Shellabarger, an Ohio Republican and close associate of John Bingham, rejected claims that the proposed Fifteenth Amendment would in any way alter the powers reserved to the states under the Tenth Amendment. According to Shellabarger:

> The Constitution itself in express terms provides that:
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> "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."
>
> Hence it follows that the power of regulating elections not being prohibited to the States by the Constitution as it stands, resides now either with the states or with the people. If this is so, if the power to regulate elections of registrations resides with the States under the Constitution in its present form, then my proposition will not take it away. It simply provides that the right to vote shall be exercised by all male citizens of a certain age. Every power now residing with the States, under the Constitution, except so far as this amendment takes away their power, will remain with them still.[85]

Notice that Shellabarger not only insisted that the Tenth and its original principles remained in operation, but he also continued to read the phrase "or to the people" as referring to the people in the several states. His comments regarding the Tenth are not unusual; references to the restrictive principles of the Tenth Amendment can be found throughout the Reconstruction debates.

As we will see below, members of the Reconstruction Congress continued to cite both the Ninth and Tenth Amendments as dual guarantors of

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85. Cong. Globe, 40th Cong., 3d Sess. 727 (1869) (statement of Rep. Samuel Shellabarger). John Harrison describes Shellabarger as "a leading Republican legal theorist in the House." John Harrison, *State Sovereign Immunity and Congress's Enforcement Powers*, 2006 Sup. Ct. Rev. 353, 366. For a description of Shellabarger as a "principal radical theoretician," *see* William M. Wiecek, The Guarantee Clause of the U.S. Constitution 164 (1972). Shellabarger, of course, rejected the idea that the Reconstruction Amendments should be strictly construed. *See* Letter from Samuel Shellabarger to James M. Comly (Apr. 10, 1871) (on file with the Ohio Historical Society, James M. Comly papers). The relevant portions of this letter are quoted in Harold M. Hyman & William M. Wiecek, Equal Justice Under Law: Constitutional Development, 1835-1875, at 471 (1982).

state sovereignty.[86] The issue was not whether the Ninth and Tenth Amendments remained operative but the degree to which powers and rights once reserved to the states under these amendments were now transferred to the national government. As was the case at the time of the founding, this was a matter not only of textually delegated power but also of the proper method of interpreting the scope of delegated power.

Reconstruction and the Rule of Strict Construction

The rule of strict construction did not involve the narrow interpretation of constitutional texts for its own sake—the rule applied in order to preserve the retained sovereign powers and rights of the people. As sovereign entities, the people in the states were presumed to delegate away no more power than necessary to accomplish a particular purpose. There was a presumption against a claim of delegated power that could be overcome only by express language or necessary implication.

One of the earliest and clearest examples of the broad embrace of this rule occurred in the pre- and post-ratification debates regarding Article III and state suability. Critics of the proposed Article III claimed that the clause would be interpreted to the fullest extent possible, thus allowing individuals to sue nonconsenting states in federal court. Federalist defenders of the Constitution responded by insisting that states were presumptively immune from such suits and would continue to be so under the proposed Constitution. Because the text of Article III did not *require* such a broad reading of federal judicial power, it would be construed in a manner that excluded private suits against the states, thus preserving the retained sovereignty of the states. It was the failure of Federalist judges to apply this rule in the first years of the Constitution that led to the adoption of the Eleventh Amendment—an amendment that referred back to what had been understood as the proper construction of Article III.[87]

The issue of suing states and state officials emerged once again in the debates surrounding the adoption of the Reconstruction Amendments and

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86. *See* CONG. GLOBE, 41st Cong., 2d Sess. app. at 354 (1870) (remarks of Sen. William T. Hamilton) (quoting the Ninth and Tenth Amendments in support of a narrow reading of the federal power to enforce voting rights).

87. *See supra* chapter 5 for a more extensive discussion of the Eleventh Amendment.

the attempts of Congress to enact legislation holding state officials accountable for violating the rights of newly freed blacks in the South.[88] Judicial opinions and legal commentary in the years leading up to the Civil War continued to follow the rule of presumed state sovereign immunity. According to Joseph Story in his *Commentaries on the Constitution*,

> It is a known maxim, justified by the general sense and practice of mankind, and recognized in the law of nations, that it is inherent in the nature of sovereignty not to be amenable to the suit of any private person, without its own consent. This exemption is an attribute of sovereignty, belonging to every state in the Union.[89]

Case law right up to the Civil War followed the same rule.[90] As the Supreme Court of Georgia succinctly stated, "The State cannot be sued."[91]

In the Reconstruction Congress, the debates reflect a widespread assumption that state governments could not be sued without their consent. This view was widely held both during the debates over the Thirteenth, Fourteenth and Fifteenth Amendments and after those amendments had been ratified. No member of the various Congresses that produced the Reconstruction Amendments suggested that the amendments gave Congress the authority to authorize suits by individuals against the states. Instead, the various debates indicate a widespread belief that although individual state officials might be held accountable, states as such could not be sued without their consent. Republican senator John Pool of North Carolina, for example, explained (without contradiction) that Congress's powers under Section 2 of the Fifteenth Amendment allowed for legislation holding individual state officials accountable, but not states themselves; states could not be punished for a crime.[92] Other Republicans refused to go even *that* far, arguing that criminal liability for state officials would destroy local self-government.[93]

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88. For a general discussion of the issues and evidence cited in this section, *see* Harrison, *supra* note 85.

89. 3 Joseph Story, Commentaries on the Constitution of the United States 538 (1833) (footnotes omitted).

90. *See, e.g.*, O'Connor v. Pittsburgh, 18 Pa. 187, *3 (1851) ("[I]t is the prerogative of the sovereign to be exempt from coercion by action") (Westlaw pagination).

91. Walked v. Spullock, 23 Ga. 436, 438 (1857).

92. Cong. Globe, 41st Cong., 2d Sess. 3611 (1870) (remarks of Sen. John Pool).

93. *Id.* app. at 421–22 (remarks of Sen. Joseph Fowler).

Senator Oliver Morton of Indiana supported the 1871 Ku Klux Klan Act, which authorized suits against state officials and private individuals, in part because states themselves could not be indicted or punished as states. According to Morton, "There can be no legislation to enforce [Section 1 of the Fourteenth Amendment] as against a state."[94] John Bingham, the author of Section 1, agreed: "[T]he United States punishes men, not states, for a violation of its law."[95]

Interestingly, these debates did not involve suits by out-of-state residents—a subject expressly covered by the Eleventh Amendment—but rather suits by state residents aggrieved by their own state officials. By assuming states themselves could not be sued, the *Republican* members of the Reconstruction Congresses implicitly assumed the need to construe federal judicial power in a manner preserving the sovereign status of the states. They assumed, in other words, the preexisting and ongoing principle of strict construction. This does not mean that the Reconstruction Amendments did not accomplish a dramatic realignment of federal-state authority (perhaps more than the courts recognized at the time). It does mean, however, that whatever the understood scope of these amendments, there is no evidence that their framers or ratifiers understood them as having erased the status of the states as independent sovereignties or as having eliminated the need to take this status into account when construing delegated power and rights.[96]

In sum, it appears that the Reconstruction Congress assumed the continued, if trimmed, operation of the Tenth Amendment and the continued existence of the states as independent sovereign entities. If the Republican members of the Reconstruction Congress shared this view of the retained sovereignty of the states, then we can be sure that the Democratic members did as well. The same would be true of those who ratified the Reconstruction Amendments, for they did so against a backdrop of judicial opinions and

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94. Cong. Globe, 42d Cong., 1st Sess. app. at 251 (1871) (remarks of Sen. Oliver Morton). Senator Morton continued, "A criminal law cannot be made against a State. A State cannot be indicted or punished as such. The legislation which Congress is authorized to enact must operate, if at all, on individuals." *Id.*

95. *Id.* app. at 86.

96. In *Fitzpatrick v. Bitzer*, 527 U.S. 445 (1976), the Supreme Court ruled that Congress could authorize individual suits against the states under its enforcement powers in Section 5 of the Fourteenth Amendment. The *Fitzpatrick* Court did not engage in any historical analysis, nor have later cases that continue to follow *Fitzpatrick*. *See* Harrison, *supra* note 85 at 354.

legal commentary that assumed the continued remnant sovereignty of the states. Not even the most radical of the congressional Republicans claimed that the new amendments would alter this fundamental aspect of the federal Constitution.

The Reconstruction Supreme Court and Strict Construction

The same year the Fourteenth Amendment became part of the U.S. Constitution, the Supreme Court reaffirmed the federalism-based rule of strict construction. In *Lane County v. Oregon*,[97] Lincoln-appointed Republican Salmon P. Chase led a unanimous Court in upholding Oregon's right to require the payment of debts in gold or silver coin instead of federal notes (as required by federal law). Chase supported his ruling by recounting the "separate and independent existence" of the states in the federal system.[98]

> To them nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated to the national government are reserved. The general condition was well stated by Mr. Madison in the Federalist, thus: "The Federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and designated for different purposes."[99]

As Chief Justice Chase would write later that same term, "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."[100]

As a Lincoln Republican, Chase rejected the power of the states to secede from the Union.[101] But rejecting this claim of sovereignty did not lead the Reconstruction Supreme Court to reject the idea of remnant sovereignty and the continued independent existence of the states. In its earliest decisions following the adoption of the Thirteenth and Fourteenth Amendments, the

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97. 74 U.S. (7 Wall.) 71 (1868).

98. *Id.* at 76.

99. *Id.*

100. Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1868).

101. *Id.*

Supreme Court continued to follow Madison's rule of "expressly delegated power" and its attendant requirement that federal power be narrowly construed. For example, in the 1870 case *Collector v. Day*,[102] the Supreme Court narrowly construed Congress's delegated powers of taxation and struck down an attempt to tax the salary of state officials. According to Justice Samuel Nelson, the adoption of the Tenth Amendment established a rule of interpretation whereby "[t]he government of the United States . . . can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication."[103] This is, of course, precisely what James Madison, John Page, St. George Tucker, and others in the founding generation identified as the federal rule of strict construction, under which all federal power would be narrowly construed to preserve the retained sovereignty of the states. As the Court in *Day* concluded, the appointment of officers to administer their laws was "one of the sovereign powers vested in the States by their constitutions, which remained unaltered and unimpaired, and in respect to which the State is as independent of the general government as that government is independent of the States"—an independence that included independence from federal taxation.[104] Although Justice Joseph P. Bradley dissented, Nelson's opinion was joined by the rest of the Court, including Chief Justice Chase. That opinion would remain the rule until the time of the New Deal.[105]

The *Legal Tender Cases*[106]

A recurring controversy throughout the nineteenth century was whether the federal government had the power to issue paper money. Although states were forbidden to issue legal tender,[107] it was not clear whether issuing paper money was a power delegated to the federal government. In almost

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102. 78 U.S. (11 Wall.) 113 (1870).

103. *Id.* at 124.

104. *Id.* at 126.

105. *See* Helvering v. Gerhardt, 304 U.S. 405 (1938); Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466 (1939) (overruling *Day*).

106. The *Legal Tender Cases* comprised three separate cases: *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870), *Knox v. Lee*, 79 U.S. (12 Wall.) 457 (1871), and *Juilliard v. Greenman*, 110 U.S. 421 (1884).

107. *See* U.S. Const. art. I, § 10, cl. 1.

back-to-back opinions, the Supreme Court swung from invalidating to upholding federal power in this area.

In the first case to reach the Supreme Court, *Hepburn v. Griswold*,[108] Chief Justice Chase narrowly construed federal power and invalidated Congress's attempt to issue paper money.[109] Invoking the restrictive principle of the Tenth Amendment, Chase explained that the Tenth was intended "to restrain the limited government established under the Constitution from the exercise of powers not clearly delegated or derived by just inference from powers so delegated."[110] Stretching federal power to conduct war to include the power to issue legal tender, wrote Chase,

> carries the doctrine of implied powers very far beyond any extent hitherto given to it. It asserts that whatever in any degree promotes an end within the scope of a general power, whether, in the correct sense of the word, appropriate or not, may be done in the exercise of an implied power.[111]

As had James Madison, Chase rejected the idea that the Constitution leaves it to Congress to determine whether a particular action is sufficiently related to an enumerated end. According to Chase:

> [This] would convert the government, which the people ordained as a government of limited powers, into a government of unlimited powers. It would confuse the boundaries which separate the executive and judicial from the legislative authority. It would obliterate every criterion which this court . . . established for the determination of the question whether legislative acts are constitutional or unconstitutional.[112]

Over the next year, President Ulysses S. Grant had the opportunity to replace two justices on the Supreme Court. On the very day the Court handed down its opinion in *Hepburn*, Grant nominated William Strong and Joseph P. Bradley. As soon as both men were confirmed, they joined the justices who

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108. 75 U.S. (8 Wall.) 603 (1870).

109. *Id.* at 614.

110. *Id.*

111. *Id.* at 617.

112. *Id.* at 618.

had dissented in *Hepburn* in calling for further argument on the constitutionality of the Legal Tender Act.[113]

In *Knox v. Lee*,[114] a new majority of the Court led by the newly appointed justice William Strong reversed *Hepburn*. Relying on John Marshall's broad articulation of federal power in *McCulloch v. Maryland*, Justice Strong maintained that Congress had "the right to employ freely every means, not prohibited, necessary for its preservation, and for the fulfillment of its acknowledged duties."[115] Strong went even further than Marshall, however, and argued that Congress had powers beyond those expressly or even impliedly authorized by the text of the Constitution. "[I]t is not indispensable," argued Strong,

> to the existence of any power claimed for the Federal government that it can be found specified in the words of the Constitution, or clearly and directly traceable to some one of the specified powers. Its existence may be deduced fairly from more than one of the substantive powers expressly defined, or from them all combined.[116]

Strong supported this rejection of the principle of enumerated powers by pointing to the Bill of Rights:

> And, that important powers were understood by the people who adopted the Constitution to have been created by it, powers not enumerated, and not included incidentally in any one of those enumerated, is shown by the amendments. The first ten of these were suggested in the conventions of the States, and proposed at the first session of the first Congress, before any complaint was made of a disposition to assume doubtful powers. The preamble to the resolution submitting them for adoption recited that the "conventions of a number of the States had, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added." This was the origin of the amendments, and they are significant. They tend plainly to show that, in the judgment of those who

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113. *See* 6 Charles Fairman, The History of the United States Supreme Court: Reconstruction and Reunion, 1864–88, at 738 (1971).

114. 79 U.S. (12 Wall.) 457 (1871).

115. *Id.* at 533–34.

116. *Id.* at 534.

> adopted the Constitution, there were powers created by it, neither expressly specified nor deducible from any one specified power, or ancillary to it alone, but which grew out of the aggregate of powers conferred upon the government, or out of the sovereignty instituted. Most of these amendments are denials of power which had not been expressly granted, and which cannot be said to have been necessary and proper for carrying into execution any other powers. Such, for example, is the prohibition of any laws respecting the establishment of religion, prohibiting the free exercise thereof, or abridging the freedom of speech or of the press.[117]

The passage is a striking example of what the Federalists swore was not a proper construction of the Constitution and what the letter and spirit of the Ninth Amendment was designed and understood to prevent: the idea that the enumeration in the Constitution of certain rights implied the existence of otherwise unconstrained federal power.[118] John Marshall, of course, had made a similar argument in *McCulloch*[119] and *Gibbons*.[120] And, like Marshall in those cases, Justice Strong remained silent about the Ninth Amendment. Instead, by reversing the rule of construction represented by the Ninth, Strong articulated a principle irreconcilable with both the Ninth and the Tenth Amendments.

Some scholars have used the *Legal Tender Cases* to refute a federalist reading of the Ninth Amendment. Professor Calvin Massey, for example, has argued that if the Ninth were understood to prevent this kind of implied extension of federal power, someone surely would have raised Ninth

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117. *Id.* at 534–35.

118. *See also* Thomas B. McAfee, Inherent Rights, the Written Constitution, and Popular Sovereignty: The Founders' Understanding 170–72 (noting that the Ninth Amendment should prevent this kind of argument).

119. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (Marshall, C.J.) ("Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. *Why else were some of the limitations, found in the 9th section of the 1st article, introduced?* It is also, in some degree, warranted, by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is a constitution we are expounding.") (emphasis added).

120. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); *supra* chapter 7.

Amendment objections to Strong's opinion.[121] In fact, someone did. Justice Stephen Field insisted that Strong's approach violated the rule of construction demanded by the state ratification conventions and expressed by the Ninth Amendment. Justice Field's reference to the Ninth has gone unnoticed before now because Field referred to the section in Joseph Story's *Commentaries on the Constitution* that discusses the role of the Ninth Amendment. Although lawyers and courts at the time would have understood Justice Field's reference to section 1861 of Story's *Commentaries*, the significance of this reference has escaped present-day scholars.

In his opinion, Justice Field noted sardonically that Strong's approach does dispose of the issue regarding the scope of federal power "without difficulty, for it would end all controversy by changing our government from one of enumerated powers to one resting in the unrestrained will of Congress."[122] The response to such a proposition, however, "is found in the nature of the Constitution, as one of granted powers." Field took particular exception to Strong's attempt to use the enumeration of certain rights as support for a broad construction of delegated power. Here, Field turned to the history behind the adoption of the Bill of Rights:

> In the Convention which framed the Constitution, a proposition to appoint a committee to prepare a bill of rights was unanimously rejected, and it has been always understood that its rejection was upon the ground that such a bill would contain various exceptions to powers not granted, and on this very account would afford a pretext for asserting more than was granted. [Here Field cited, among other sources, "Story on the Constitution, §§ 1861, 1862, and note."] In the discussions before the people, when the adoption of the Constitution was pending, no objection was urged with greater effect than this absence of a bill of rights, and in one of the numbers of the Federalist, Mr. Hamilton endeavored to combat the objection. After stating several reasons why such a bill was not necessary, he said: "I go further and affirm that bills of rights, in the sense and to the extent they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted, and on this very account would

121. *E.g.*, Calvin R. Massey, Silent Rights: The Ninth Amendment and the Constitution's Unenumerated Rights 86 (1995).

122. The Legal Tender Cases, 79 U.S. (12 Wall.) 457, 664 (1870) (Field, J., dissenting).

> afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?". . . How truly did Hamilton say that had a bill of rights been inserted in the Constitution, it would have given a handle to the doctrine of constructive powers. We have this day an illustration in the opinion of the majority of the very claim of constructive power which he apprehended, and it is the first instance, I believe, in the history of this court, when the possession by Congress of such constructive power has been asserted.[123]

Justice Field's reference to "§§ 1861, 1862, and note" in Story's *Commentaries* refers to Story's description of the Ninth Amendment and its role in preventing the enumeration of certain constitutional rights from being construed to suggest otherwise unlimited federal power. Although Justice Strong relied on just such a construction, Justice Field reminded the reader that the advocates of the Constitution sought to prevent such an implied expansion of federal power and, as presented in Story's *Commentaries on the Constitution*, believed that they had done so through the adoption of the Ninth Amendment. The majority in *The Legal Tender Cases* did not dispute Field's (and Story's) federalist reading of the Ninth. They simply ignored it.

The *Slaughterhouse Cases:* Preserving the Rule of Construction

If the holding of *Hepburn* was short lived, so too was the broad rule of construction announced by Justice Strong in the *Legal Tender Cases*. Only two years later, in the *Slaughterhouse Cases*,[124] the Supreme Court returned to the rule of construction reflected in pre–Civil War discussions of the Ninth and Tenth Amendments.

Perhaps emboldened by the Court's broad reading of federal power in the *Legal Tender Cases*, the plaintiffs in *Slaughterhouse* declared that the Fourteenth Amendment had "obliterated" the "confederate features of the government" and had "consolidated the several 'integers' into a consistent whole."[125] The purpose of the Fourteenth, they argued, was "to establish

123. *Id.* at 665–66.

124. 83 U.S. (16 Wall.) 36 (1872).

125. *Id.* at 52–53.

through the whole jurisdiction of the United States ONE PEOPLE, and that every member of the empire shall understand and appreciate the fact that his privileges and immunities cannot be abridged by State authority."[126] It was "an act of Union, an act to determine the reciprocal relations of the millions of population within the bounds of the United States—the numerous State governments and the entire United States administered by a common government."[127]

Justice Samuel Miller, however, rejected the idea that the Fourteenth Amendment had consolidated the several states into a single common government in which all privileges and immunities were controlled at the national level.[128] According to Justice Miller, the Reconstruction Amendments' core purpose was to establish the freedom of former slaves, and the amendments' scope should be interpreted with that in mind.[129] If the Court were to adopt the plaintiffs' position, then under Section 5 of the Fourteenth Amendment, Congress would also be permitted to "pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects."[130] This would "fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character."[131] According to Justice Miller, the Court should not interpret any constitutional provision in a manner that "radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people . . . in the absence of language which expresses such a purpose too clearly to admit of doubt."[132]

Justice Miller's rule for interpreting the Constitution echoes the antebellum theory of federal-state relations—a theory originally expressed in the

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126. *Id.* at 53.

127. *Id.*

128. *Id.* at 78.

129. *Id.* at 71–72.

130. *Id.* at 78.

131. *Id.*

132. *Id.* Justice Miller concluded: "We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them." *Id.*

Ninth and Tenth Amendments. But the United States had just endured the Civil War—a war in which the claims of state autonomy were decidedly rejected by the victors. According to the plaintiffs in *Slaughterhouse*, however appropriate a state-protective rule of construction might have been *prior* to the Civil War, we were now a wholly national people and the Reconstruction Amendments should be construed accordingly. Justice Miller recognized the force of this argument, but nevertheless maintained that the Reconstruction Amendments had not completely erased the constitutional principle of federalism:

> The adoption of the first eleven amendments to the Constitution so soon after the original instrument was accepted shows a prevailing sense of danger at that time from the Federal power. And it cannot be denied that such a jealousy continued to exist with many patriotic men until the breaking out of the late civil war. It was then discovered that the true danger to the perpetuity of the Union was in the capacity of the State organizations to combine and concentrate all the powers of the State, and of contiguous States, for a determined resistance to the General Government.
>
> Unquestionably this has given great force to the argument, and added largely to the number of those who believe in the necessity of a strong National government. But, however pervading this sentiment, and however it may have contributed to the adoption of the amendments we have been considering, we do not see in those amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the State with powers for domestic and local government, including the regulation of civil rights—the rights of person and of property—was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States, and to confer additional power on that of the Nation.[133]

Justice Miller believed that federalism had survived the Civil War, and, echoing James Madison,[134] he insisted that it was the Court's duty to preserve

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133. *Id.* at 82.

134. Letter from James Madison to Spencer Roane (May 6, 1821), *supra* note 84, at 773 (discussing the need to maintain a "just equilibrium" between federal and state power).

a balance between state and federal power through the application of a rule of construction that limited the interpretation of delegated federal authority. In this case, it meant limiting the interpreted scope of the Reconstruction Amendments. The *Slaughterhouse Cases* are an example of the Supreme Court's refusal to construe enumerated rights so broadly as to transfer to the national government the power to control general matters of local self-government. In the absence of clear language requiring such a construction, Justice Miller believed that the Court must limit its interpretation of constitutional rights as well as unenumerated powers. Although Miller did not expressly mention the Ninth Amendment, his reasoning clearly adopted the pre–Civil War understanding of the Ninth Amendment's rule of construction, as later courts would recognize.[135]

Justice Miller's opinion in the *Slaughterhouse Cases* has been criticized in contemporary scholarship for failing to identify and enforce the intended meaning of the privileges or immunities clause, reducing that provision instead to a redundant statement of preexisting national rights.[136] In fact, there is significant evidence that the privileges or immunities clause was intended to embrace, at the very least, the freedoms listed in the first eight amendments to the Constitution and perhaps fundamental common-law rights as well.[137]

But Miller's attempt to synthesize the founding-era amendments with those of Reconstruction deserves to be taken seriously.[138] Federalism was not merely an idea animating the founding era, to be shrugged off with the adoption of the Reconstruction Amendments. Federalism was textually enshrined in the Constitution through the adoption of the Ninth and Tenth Amendments (and, Justice Miller appears to suggest, through the adoption of the Eleventh Amendment as well). Absent an express repeal of these constitutional provisions, it was the Court's duty to synthesize the document as a whole, preserving what remained of the past while giving meaning to the people's new articulation of fundamental law. Justice Miller may have given short shrift to the desires of the framers of the Fourteenth Amendment, but his effort to

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135. *E.g.*, United States v. Moore, 129 F. 630, 632, 635 (C.C.N.D. Ala 1904) (interpreting the Ninth and Tenth Amendments as requiring an express abrogation of state sovereign authority, and citing the Court's decision in *Slaughterhouse* in support of this rule of construction).

136. *E.g.*, Lawrence H. Tribe, American Constitutional Law 1303–11 (3d ed. 2000).

137. *See generally* Lash, *Two Movements*, *supra* note 30, at 485.

138. *See* 1 Ackerman, *supra* note 81, at 113.

reconcile the founding and Reconstruction was an endeavor—however flawed—to interpret the document as a whole.

After *Slaughterhouse*, the Supreme Court remained solidly in the camp of James Madison and not Justice William Strong (or John Marshall for that matter) for the remainder of the nineteenth century and well into the twentieth. Had the Supreme Court continued to follow Justice Strong's reasoning in the *Legal Tender Cases*, the Ninth and Tenth Amendments most likely would have withered on the vine. Instead, because the Court embraced the same rule of construction advocated by James Madison and the state conventions, the next several decades proved quite hospitable to the rule of construction[139] and the twin guardians of federalism.[140]

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139. *See* Hans v. Louisiana, 134 U.S. 1 (1890).

140. *See, e.g.*, The Civil Rights Cases, 109 U.S. 3, 14–15 (1883) (linking a limiting rule of construction to the Tenth Amendment).

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The Fall of the Original Ninth Amendment and the Rise of New Deal Constitutionalism

The last two items in the Bill of Rights are of tremendous importance. They are sentinels against over-centralization of government, monuments to the wisdom of the constitutional framers who realized that for the stable preservation of our form of government, it is essential that local governmental functions be locally performed. . . . Many signs today seem to indicate that the wisdom of the philosophy which guided the framing of these amendments is being forgotten.

Senator Pat McCarran, Commencement address at Georgetown University, September 12, 1943[1]

AFTER MORE THAN A CENTURY of robust application as federalist guardians of local self-government, the Ninth and Tenth Amendments met the same fate in the struggle over federal power during the Great Depression. The infamous *Lochner* Court continued the tradition of narrowly construing federal power and struck down major portions of Franklin Delano Roosevelt's New Deal. The political backlash included Roosevelt's Court-packing plan and congressional proposals to reduce the power of the Supreme Court. When a single justice changed his vote (the "switch in time that saved nine"), a new Supreme Court majority engaged in a rapid expansion of national power, resurrecting the earlier opinions of Chief Justice John Marshall. Within a short time, the Tenth Amendment had been reduced to a mere "truism," and the federalist Ninth Amendment joined the Tenth in constitutional exile as an abandoned limit on congressional power. The last stand of the historical reading of the Ninth Amendment took place during the Court's early struggle to define

1. Pat McCarran, Our American Constitutional Commonwealth—Is It Passing?, Address at the Commencement Exercises of Georgetown University (Sept. 12, 1943), *in* 89 CONG. REC. app. at A3820 (1943).

which liberties guaranteed by the Bill of Rights had been "incorporated" against the states under the Fourteenth Amendment. In *Bute v. Illinois*, the Supreme Court resisted incorporating all the criminal procedural rights from the Bill of Rights against the states on the ground that doing so would unduly interfere with the right to local self-government protected by the Ninth and Tenth Amendments.[2] Within a few short years, however, the Court rejected the reasoning of *Bute*, and the last remnant of the historic Ninth Amendment disappeared from view.

The first half of this chapter includes a fairly exhaustive account of the use of the Ninth Amendment in state and federal courts prior to the New Deal. There is nothing new here in terms of theory: one finds the same analysis of the Ninth Amendment already developed in prior chapters repeated over and over again in state and federal courts throughout the Progressive era. There is a purpose, however, to including this history. One of the most durable myths about the Ninth Amendment is that it attracted little attention prior to the modern Supreme Court's discovery of the Ninth in *Griswold v. Connecticut*. The first half of this chapter should put that myth permanently to rest. The second half of this chapter helps explain how the myth arose in the first place.

Congressional Power, Individual Rights, and the Ninth Amendment, 1868–1930

The General Structure of Ninth Amendment Claims in the Progressive Era

Having survived Reconstruction, both the Ninth and Tenth Amendments flourished in the period prior to the New Deal. Cited repeatedly by state and federal judges, the Ninth Amendment continued to be paired with the Tenth as an expression of limited federal power and retained local autonomy.[3]

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2. 333 U.S. 640 (1948).

3. For example, in *United States v. Ferger*, 256 F. 388 (S.D. Ohio 1918), the court declared:

> The principle that our federal government is one of enumerated powers is universally admitted. The powers possessed by the national government are only such as have been delegated to it. The states have all powers but such as they have surrendered, which is but stating what the Constitution declares in article 9: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others

Challenges based on the Ninth and Tenth Amendments were brought against federal regulation of prostitution,[4] drugs,[5] unfair trade practices,[6] and bribery.[7] Some plaintiffs went so far as to claim that the Ninth and Tenth Amendments invalidated the ratification of national Prohibition under the Eighteenth Amendment.[8] Although courts generally held in favor of federal power, no court disputed the reading of the Ninth and Tenth Amendments as mutual declarations of limited federal power and retained state autonomy.[9]

More successfully, states relied on the Ninth and Tenth Amendments in their efforts to limit federal preemption of state law[10] and to narrow the

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retained by the people." And in article 10: "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." The states have not surrendered, and therefore retain, their power to enact laws to prevent and punish such acts as these defendants are charged with, and have not delegated to the Congress the power to pass laws to prevent and punish acts, however immoral, which have no relation whatever to the subjects-matter included within any of the powers delegated. "In the American constitutional system, the power to establish the ordinary regulations of police has been left with the individual states, and cannot be assumed by the national government," says Judge Cooley.

Id. at 390–91 (citations omitted).

4. Hoke v. United States, 227 U.S. 308, 319–20 (1913).
5. United States v. Charter, 227 F. 331, 332 (N.D. Ohio 1915).
6. T.C. Hurst & Son v. FTC, 268 F. 874, 875–86 (E.D. Va. 1920).
7. Dropps v. United States, 34 F.2d 15 (8th Cir. 1929).
8. *See, e.g.*, United States v. Sprague, 44 F.2d 967, 984 (D.N.J. 1930); United States v. Panos, 45 F.2d 888, 890 (N.D. Ill. 1930) (describing such arguments as "absurd").
9. *See, e.g.*, State v. C.C. Taft Co., 167 N.W. 467, 468 (Iowa 1918) (involving an argument by the state that the Ninth and Tenth Amendments reserve to the states the right to regulate goods not traveling in interstate commerce); McCabe's Adm'x v. Maysville & B.S.R. Co., 124 S.W. 892, 893 (Ky. Ct. App. 1910) (involving a claim that a federal removal statute violated the Ninth and Tenth Amendment, which the court rejected without discussing the amendments); Dickson v. United States, 125 Mass. 311 (1878) (rejecting a claim that the Ninth and Tenth Amendments required a strict construction of federal power to the extent that the federal government could not take land granted to it in a will, but not disputing the general principle).
10. *See, e.g.*, *In re* Estate of Hansen, 155 Misc. 712 (N.Y. Sup. Ct. 1935) (concluding that federal treaties should be construed in conformance with the Ninth and Tenth Amendments to preserve state authority to appoint legal representatives for the minor children of foreign nationals). According to the court:

    When the State of New York concurred in creating the power "to make Treaties" (U. S. Const. art. II, § 2), it ceded to the President, acting with the advice and consent of two-thirds of the Senate, only so much of its presumably unbounded sovereignty as was thought necessary for the welfare of the Union in respect of interstate and international matters; and under the Ninth and Tenth Amendments, as the recipient of that

construction of enumerated restrictions placed upon the states in Article I, Section 10. For example, Iowa courts concluded that the contract clauses of both the federal Constitution and its state constitution should be construed narrowly in light of the Ninth and Tenth Amendments' preservation of the state police power to respond to economic emergencies. In *Des Moines Joint Stock Land Bank v. Nordholm*, the plaintiffs challenged an Iowa law extending the time for redeeming foreclosed-upon property as a violation of, among other things, the federal contracts clause and its state analogue.[11] According to the Iowa Supreme Court:

> Regardless of the declaration in the Constitution of the United States that the state shall pass no law impairing the obligation of contracts, there nevertheless is reserved to the states their police power and the power to sustain their sovereignty and government and their existence as states. Such police power "is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals.". . . What power, then, is reserved under the contract clause of the state Constitution? The Ninth Amendment to the Constitution of the United States provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." And Amendment 10 to the Constitution of the United States continues with the following reservation: "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." Section 25, article 1, of the state Constitution declares: "This enumeration of rights shall not be construed to impair or deny others, retained by the people."[12]

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treaty-making power took in the right of another, the delegated power is deemed not to extend any further than the general terms of that grant fairly imply in view of the object to be thereby attained.

Id. at 713.

11. 253 N.W. 701 (Iowa 1934).

12. *Id.* at 705–10 (citations omitted). Interestingly, it appears that the Iowa court believed that the Ninth and Tenth Amendments suggested a limited reading of rights provisions in both the federal and state constitutions.

Other courts echoed this "limited interpretation of enumerated rights against the states" reading of the Ninth Amendment. In *Oregon Railroad & Navigation Co. v. Campbell*, Oregon's railroad rate regulations were challenged as an unconstitutional interference with interstate commerce and as violations of equal protection and due process of law.[13] Federal district court judge Charles E. Wolverton dismissed the equal protection and due process claims, concluding that the rates were reasonable.[14] Determining whether the enumerated commerce power precluded state rate regulation required a return to first principles. According to Wolverton, the Ninth and Tenth Amendments together

> indicated, as strongly as could be, that the Constitution of the United States is but a delegation of powers. . . . The whole lawmaking power out of this repository of power is committed to the several state Legislatures, except such as has been delegated to the federal government or is withheld by express or implied reservation in the state Constitutions.[15]

Questions involving the balance of power between the states and the federal government in regulating railroads occurred repeatedly during this period. Determining the scope of the federal commerce power in this area, in particular whether federal statutes preempted state authority, often triggered an analysis of the Ninth and Tenth Amendments. In *People v. Long Island Railroad*, the New York courts issued an injunction preventing the

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13. 173 F. 957 (C.C.D. Or. 1909).

14. *Id.* at 991.

15. *Id.* at 978–79. The court concluded that, under the Ninth and Tenth Amendments, the state retained the power to set rates for intrastate commerce. *Id.* at 979. Similarly, in *Shealy v. Southern Railway Co.*, 120 S.E. 561, 563 (S.C. 1924), the South Carolina Supreme Court held that federal transportation laws did not preempt the ability of the state to require railroads to erect "passenger sheds" at stops serving both in-state and out-of-state passengers. In his concurrence, Judge Memminger wrote:

> Also we should bear in mind the general rule of construction, that where an act permits of two constructions, one of which will lead to constitutional difficulties, and the other will render the act valid, the court should adopt the latter.
>
> Article 9 of the Amendments of the United States Constitution provides that the renunciation [sic] in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people. And article 10 of the Amendments provides that the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states.

Id. at 568.

railroad from raising its rates for intrastate travel beyond rates authorized by state law.[16] The railroad argued that its rates were authorized by the federal Interstate Commerce Commission and that any state regulation to the contrary was preempted by federal law.[17] According to Judge Benedict, however, allowing federal regulation of intrastate travel would unconstitutionally intrude upon powers reserved to the states under the Ninth and Tenth Amendments. Quoting both provisions, Benedict declared that

> [u]nder this Constitution, the powers of government over all the states were vested in the general or federal government, and at the same time the powers of government over each state, in so far as they were not delegated either expressly or by necessary implication to the federal government were reserved to the states themselves.[18]

If the federal government could regulate such matters of local concern, Benedict inquired, "what becomes of state sovereignty?"[19]

The Rule of Construction and Defining the Retained Rights of the People

In his speech discussing the origins and meaning of the Ninth Amendment, James Madison referred to the states' presumptively retained rights to regulate agriculture, manufacture, and commerce.[20] As the industrial age exponentially increased the nature and scope of the national economy, the Court conceded that these presumptively local activities occasionally raised legitimate federal concerns but, once again, limited construction of

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16. 185 N.Y.S. 594, 611 (N.Y. Spec. Term 1920). The case was reversed by the state appellate court because the lower court lacked jurisdiction. People v. Long Island R.R., 186 N.Y.S. 589 (N.Y. App. Div. 1921). The court's reversal was announced orally "[w]ithout passing on the merits of any question presented." *Id.*

17. *Long Island R.R.*, 185 N.Y.S. at 599.

18. *Id.* at 609.

19. *Id.* at 610.

20. *See* James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791) [hereinafter Madison's Bank Speech], *in* JAMES MADISON: WRITINGS 480, 485 (Jack N. Rakove ed., 1999).

federal power to activities that directly or substantially affected interstate commerce.[21]

In *Hammer v. Dagenhart*, for example, the Court invalidated the Keating-Owen Child Labor Act, which barred from interstate commerce goods made by children.[22] Writing for the Court, Justice William Day noted that delegated federal power "was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution."[23] Justice Day then quoted Marshall's opinion in *Trustees of Dartmouth College v. Woodward*, which forbade construing the Constitution in a manner that would "restrain the states in the regulation of their civil institutions, adopted for internal government."[24] Marshall's opinion, Day argued, established that

> the maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the Nation by the Federal Constitution.
>
> In interpreting the Constitution, it must never be forgotten that the Nation is made up of States to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved. . . . To sustain this statute would not be, in our judgment, a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction an invasion by the federal power of the control of a matter purely local in its

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21. *See, e.g.*, Houston, E. & W. Tex. Ry. v. United States, 234 U.S. 342, 355 (1914) (allowing Congress to regulate "in all matters having such a close and substantial relation to interstate commerce that it is necessary or appropriate to exercise the control for the effective government of that commerce"); Champion v. Ames, 188 U.S. 321, 360 (1903) (permitting congressional limits on private contracts "which directly and substantially" impact interstate commerce"); United States v. E.C. Knight Co., 156 U.S. 1, 33 (1895) (allowing regulation of activity that "affects, not incidentally, but directly, the people of all the States").

22. 247 U.S. 251, 276 (1918).

23. *Id.* at 274. The Court cited, among other sources, "Cooley's Constitutional Limitations (7th Ed.) p. 11." *Id.*

24. *Id.* at 274–75 (quoting Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 629 (1819)) (citations omitted).

> character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the States.[25]

Although Justice Day's opinion in *Hammer* focused on the Tenth Amendment, other courts cited *Dartmouth College* and *Hammer* as expressing principles embraced by the Ninth as well as the Tenth Amendment. In *George v. Bailey*, for example, a federal court considered whether Congress could enact essentially the same law that was invalidated in *Hammer*, this time justified as an exercise of Congress's enumerated power to tax.[26] The court began its analysis of the Child Labor Tax by repeating the interpretive rules of both *Hammer* and *Dartmouth College*.[27] Rejecting the government's argument that the court should defer to Congress's power to tax and spend, district judge James E. Boyd pointed to the Ninth and Tenth Amendments:

> The position taken by the counsel for the defendant does not appeal to the court here as being based upon sound reason or intelligent construction. The Tenth Amendment to the Constitution reads as follows [quoting the Tenth]. From time to time the courts have been called on to construe the meaning of this amendment, and almost without exception it has been held that the powers of the national government are limited to those delegated. This construction is fortified by the Ninth Amendment, which reads as follows [quoting the Ninth]. This amendment must be construed to mean that, in framing the Constitution, the sovereign people of the several states ceded to the general government certain designated powers, leaving all other rights and powers, such as are necessary to maintain our dual system of government, to the states respectively and to the people.[28]

To a judge following the traditional understanding of limited federal power, allowing the federal government to regulate any matter simply

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25. *Id.* at 275–76.

26. 274 F. 639, 640–41 (W.D.N.C. 1921).

27. *Id.* at 640–41 (citations omitted).

28. *Id.* at 644. Although the Supreme Court reversed the decision in *Bailey* on standing grounds, *see* Bailey v. George, 259 U.S. 16, 19–20 (1922), it later invalidated the Child Labor Tax at issue in *Bailey* on the grounds that the tax exceeded federal power under *Hammer v. Dagenhart*. *See* Child Labor Tax Case, 259 U.S. 20, 44 (1922).

affecting commerce seemed to destroy the concept of enumerated powers and alter the character of our constitutional government.[29] The original purpose of the Ninth Amendment was to prevent expansive interpretations of federal power that disparaged the people's retained right to manage certain affairs free from federal interference. For all the criticism nineteenth-century courts have received for failing to recognize the true nature of commerce, the critics have failed to recognize the textual and historical mandate that drove them to maintain a distinction between national and local matters.

Ninth Amendment scholars often dismiss nineteenth-century tandem references to the Ninth and Tenth Amendments as irrelevant to understanding the history of the Ninth, under the assumption that such references are really about the *Tenth* Amendment.[30] If one assumes that the Tenth is about limited power and the Ninth is about individual rights, this assumption is understandable. As a matter of original understanding and constitutional text, however, it is the Ninth Amendment that most clearly calls for a narrow construction of enumerated powers.[31] Thus, to the extent that these cases call for a limited construction of enumerated federal powers, even if both amendments are cited, the declared rule of construction fits the text and original history of the Ninth more than the Tenth Amendment.

Distinguishing the Ninth from the First Eight mendments

Following a pattern that began before the Civil War and continued during the Reconstruction debates, courts continued to distinguish the Ninth and Tenth Amendments from the rest of the Bill of Rights.[32] In *Brown v. Walker*,

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29. *See* Madison's Bank Speech, *supra* note 20, at 485.

30. *See, e.g.*, Bennett B. Patterson, The Forgotten Ninth Amendment: A Call for Legislative and Judicial Recognition of Rights Under Social Conditions of Today 32 (1955) (noting that a number of cases briefly mention both the Ninth and Tenth Amendments but actually only involve the Tenth).

31. The fact that the Tenth does not by its terms control the construction of federal power was occasionally pointed out by the Supreme Court itself. *See* Missouri v. Holland, 252 U.S. 416, 433–34 (1920) ("The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment.").

32. For example, in his *Treatise on the Limitations of Police Power in the United States,* Christopher G. Tiedeman wrote:

> The principle constitutional limitations, which are designed to protect private rights against the arbitrary exercise of governmental power, and which therefore operate to

Justice Henry Brown wrote that "the object of the first eight amendments to the constitution was to incorporate into the fundamental law of the land certain principles of natural justice which had become permanently fixed in the jurisprudence of the mother country."[33] When the Supreme Court first began to construe the due process clause of the Fourteenth Amendment to include certain freedoms listed in the Bill of Rights, the discussion generally, and sometimes expressly, involved only the first eight amendments.[34] On a number of occasions, the Supreme Court expressly described the Bill of Rights as including only the first eight amendments.[35] In *Palko v. Connecticut,* for example, Justice Benjamin Cardozo characterized arguments in favor of total incorporation of the Bill of Rights as applying only to the first eight amendments.[36] This distinction between the first eight amendments

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> limit and restrain the exercise of police power, are the following:—[Amendments 1–8, 14, and 15]. . . . Here are given only the provisions of the Federal constitution, but they either control the action of the States, as well as of the United States, or similar provisions have been incorporated into the bills of rights of the different state constitutions, so that the foregoing may be considered to be the chief limitations in the United States upon legislative interference with natural rights.
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> Christopher G. Tiedeman, A Treatise on the Limitations of Police Power in the United States 13–15 (St. Louis, F.H. Thomas Law Book Co. 1886).

33. 161 U.S. 591, 600 (1895); *see also* Maxwell v. Dow, 176 U.S. 581, 607–08 (1900) (Harlan, J. dissenting) (referring to the first ten amendments as the Bill of Rights, but quoting only the first eight amendments, which he characterized as "privileges and immunities enumerated in these amendments belong[ing] to every citizen of the United States"); Holden v. Hardy, 169 U.S. 366, 382 (1898) ("[T]he first eight amendments to the Constitution were obligatory only upon congress.").

34. For example, in the Supreme Court case *Eilenbecker v. District Court*, 134 U.S. 31 (1890), Justice Samuel Miller noted:

> The first three of these assignments of error, as we have stated them, being the first and second and fourth of the assignments as numbered in the brief of the plaintiffs in error, are disposed of at once by the principle often decided by this court, that the *first eight articles of the amendments* to the Constitution have reference to powers exercised by the government of the United States, and not to those of the states.
>
> *Id.* at 34 (emphasis added); *see also* Ohio *ex rel.* Lloyd v. Dollison, 194 U.S. 445, 447 (1904) (quoting the above statement from *Eilenbecker*).

35. *See, e.g.*, Bolln v. Nebraska, 176 U.S. 83, 87 (1900) ("The argument of the plaintiff in error in this connection is that, by these acts, the people of Nebraska adopted the Constitution of the United States, and thereby the first eight amendments containing the bill of rights became incorporated in the constitution of the State.").

36. 302 U.S. 319, 323 (1937). According to Justice Benjamin Cardozo:

> We have said that in appellant's view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments I to VIII) if done by the federal

and the Ninth and Tenth echoes the same distinction made by Fourteenth Amendment framers such as John Bingham.[37] The distinction would become even more apparent in opinions citing the Ninth and Tenth Amendments in support of arguments opposing the full incorporation of the first eight amendments.[38]

The Ninth Amendment and Individual Rights

Between the Civil War and the New Deal, a few cases discussed the Ninth Amendment as a source of unenumerated individual rights.[39] In *Roman Catholic Archbishop v. Baker*, the Oregon Supreme Court invalidated a local ordinance prohibiting the building of a school in a residential district.[40] The Oregon court declared that the "right to own property is an inherent right"[41] and suggested that this was one of the other rights referred to in the Ninth Amendment.[42] *Baker*, however, was the exception. Just as before the

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government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule.

Id.; *see also* HORACE EDGAR FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 94 (1908) (concluding that "Congress, the House and the Senate, had the following objects and motives in view for submitting the first section of the Fourteenth Amendment to the States for ratification: 1. To make the Bill of Rights (the first eight amendments) binding upon, or applicable to, the States.").

37. *See supra* chapter 8, note 51 and accompanying text.

38. *See infra* notes 168-84 and accompanying text; *see also* Felix Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746, 746 (1965) (limiting his discussion to cases involving the first eight amendments).

39. I have found five state cases involving attempts to read the Ninth Amendment as a source of independent rights—compared with no state cases in the antebellum period. In federal court during this same period, there was only one such claim, compared with two such claims in federal court during the antebellum period. The state cases might suggest a growing sense of the Ninth as a plausible source of individual rights at the state level. As this section points out, however, every court but one that considered the matter dismissed the Ninth Amendment claim.

40. 15 P.2d 391, 393, 396 (Or. 1932).

41. *Id.* at 395.

42. According to the court:

> It may be assumed that the adoption of the first ten amendments of the Constitution of the United States, commonly called the Bill of Rights, specifically mentions only such rights as to which there might have been a doubt, and so that the people should not be misled, at the same time there was adopted, as a part of the Constitution,

Civil War, courts generally dismissed arguments that the Ninth Amendment was a source of unenumerated rights.[43]

More frequently, courts relied on the Ninth in decisions *limiting* the construction of enumerated federal rights. In *United States v. Moore*, for example, a federal district court dismissed a federal indictment for conspiring to interfere with a citizen's right to establish a miners' union, on the grounds that the indictment exceeded federal power.[44] The federal government claimed that it had the power to prohibit such conspiracies as part of its power to protect privileges or immunities under Section 5 of the Fourteenth Amendment.[45] The federal district court rejected this reading of the Fourteenth Amendment on the grounds that, as declared in the Ninth

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> Amendment 9, which says: "The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Id.

43. *See* King v. State, 71 S.E. 1093 (Ga. 1911) (rejecting a Ninth Amendment individual rights claim in a prosecution for usury); Cont'l Life Ins. & Inv. Co. v. Hattabaugh, 121 P. 81 (Idaho 1912) (ignoring a Ninth Amendment claim); Fithian v. Centanni, 106 So. 321 (La. 1925) (ignoring a Ninth Amendment claim); State *ex rel.* Labauve v. Michel, 46 So. 430 (La. 1908) (rejecting a claim that the Ninth Amendment establishes a right to change votes in a state primary); *see also* Clay v. City of Eustis, 7 F.2d 141 (S.D. Fla. 1925). According to the court in *Eustis*:

> Section 24 of the Bill of Rights of the state Constitution and Amendment 9 of the federal Constitution, which provides that the enumeration of certain rights shall not be construed to deny others retained by the people, and the complainant's claim that the right to have a voice in local self-government and to be represented in taxation is one of these rights reserved, and which has been violated by the two sections of the special act. This position is not tenable under the decisions of the courts.

Id. at 142–43. In *McLendon v. State*, 60 So. 392 (Ala. 1912), the court ruled that a state law providing a tax exemption for ex-Confederate soldiers violated the equal protection clause of the Fourteenth Amendment. Dissenting from the the majority's conclusionthat the tax exemption did not violate the state constitution, Judge Mayfield appears to have adopted an unenumerated-rights reading of the Ninth Amendment:

> Article 9 of the federal Constitution reads as follows: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The equal right, with other citizens, to practice a noble and worthy profession, or to pursue an honorable, lawful, and remunerative avocation, is certainly one of the citizen's inalienable rights, as much so as those of life, liberty, or property, which are specially enumerated.

Id. at 397 (Mayfield, J., dissenting). Finally, in 1932, a judge of the Territory of Hawaii appeared to seriously consider the Ninth as a source of unenumerated rights, but ultimately declined to recognize an "inalienable" right of estranged fathers to the custody of their children. *See In re* Guardianship of Thompson, 32 Haw. 479, 485–86 (1932).

44. 129 F. 630, 634–36 (C.C.N.D. Ala. 1904).

45. *Id.* at 635.

and Tenth Amendments, states retain the exclusive power to protect individuals from private violence. According to Judge Thomas Goode Jones:

> The last two of the ten amendments thus proposed provided that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people," and 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." It is quite apparent, therefore, that the protection of certain rights of the citizen of a state, although he is by recent amendments made a citizen of the United States and of the state in which he resides, depends wholly upon laws of the state, and that as to a great number of matters he must still look to the states to protect him in the enjoyment of life, liberty, property, and the pursuit of happiness.[46]

In Judge Jones's view, the Ninth and Tenth Amendments counseled a limited reading of congressional power under the Fourteenth Amendment. Whatever effect the Fourteenth Amendment had on state power, when it came to private conspiracies, "recent amendments to the Constitution have made no change in the power or duty of the general government."[47]

United States v. Moore ultimately became a seminal case for judicial recognition of the fundamental right to interstate travel.[48] The case also stands as

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46. *Id.* at 632. Judge Jones continued:

> The Constitution of the United States, as we repeat, left the power and duty to protect life, liberty, property, the pursuit of happiness, freedom of speech, the press, and religious liberty, and the right to order persons and things within their borders, for the protection of the health, lives, limbs, morals, and peace of citizens, save as the original power of the states over them might be disturbed or destroyed by the specific grants of power to the general government, where the Constitution found them—in the exclusive keeping and power of the state—and denied the general government any responsibility for or power over them. Rights like these do not arise from the Constitution of the United States, and are in no wise dependent upon it. Provisions of the Constitution which refer to rights like these are merely in recognition of rights which existed before the government of the United States was formed, in abdication of power in the general government to interfere with or invade them, and in some instances intended as a breakwater against their invasion by state power.

Id. at 634–35.

47. *Id.* at 635 (citing and misquoting United States v. Cruikshank, 92 U.S. 542, 553–54 (1875)).

48. *See* United States v. Guest, 383 U.S. 745, 759 (1966) (citing *Moore* as one of the first cases recognizing the constitutional right of interstate travel).

an example of how courts during the Progressive era increasingly deployed the Ninth and Tenth Amendments in cases involving the construction of asserted federal rights against state action. Although there are examples of this prior to 1868,[49] the adoption of the Fourteenth Amendment significantly expanded the catalog of constitutional rights that were protected against state action. Just as the Ninth and Tenth Amendments previously expressed a rule for construing the scope of enumerated powers, they now also guided the courts in interpreting the scope of enumerated rights. In *State v. Gibson*, for example, the Indiana Supreme Court upheld a state antimiscegenation law against a challenge under the Fourteenth Amendment and the Civil Rights Act of 1866.[50] The court noted that the founders intended that powers not delegated to the federal government be retained by the states and that the Ninth and Tenth Amendments were adopted expressly for this purpose:

> The powers conferred on the general government are of a general and national character, and none of them authorize or permit any interference with, or control over, the local and internal affairs of the state. The general government is one of limited and enumerated powers, and it can exercise no power that is not expressly, or by implication, granted. The people being the inherent possessors of all governmental authority, it necessarily and logically resulted that all powers not granted to the general government, or prohibited to the state governments, were retained by the states and the people, but the great, wise, and illustrious men who framed our matchless form of government were so jealous of the right of local self-government that they were unwilling to leave the question of the reserved powers to implication and construction. Hence, within two years after the adoption of the federal constitution, twelve amendments thereto were submitted by Congress to the states for ratification, which were ratified. The ninth and tenth amendments read as follows [quoting the amendments in full].[51]

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49. *See* Anderson v. Baker, 23 Md. 531 (1865) (using the Ninth and Tenth Amendments in a case limiting the construction of Article I, Section 10).

50. 36 Ind. 389, 405 (1871).

51. *Id.* at 396–97.

States now used the Ninth and Tenth Amendments to maintain racial segregation, just as southern states had previously used both amendments to maintain local control of slavery.[52]

As a textual matter, the Ninth's rule of construction applies to any provision in the Constitution that can be expanded into areas retained by the people as aspects of local self-government. For example, in *State ex rel. Mullen v. Howell*, the Washington state legislature adopted a joint resolution ratifying the proposed Eighteenth Amendment and submitted the issue to state referendum, which voted in support of ratification.[53] The use of a referendum for ratifying a proposed constitutional amendment was challenged as violating the ratification structure set out in Article V of the Constitution.[54] Writing for the Washington Supreme Court, Chief Justice Stephen J. Chadwick rejected the argument. According to Chadwick, although Article V speaks of ratifications by state *legislatures*, this provision in the federal Constitution could not be read so broadly as to interfere with the people's right to referendum—a right reserved to the states under the Ninth and Tenth Amendments:

> [T]he tenth amendment to the Constitution, [which states] that "the powers not delegated to the United States . . . are reserved to the states respectively, or to the people," . . . is a declaration that the people of the several states may function their legislative power in their own way, especially so when the Ninth Amendment, "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people," is regarded—for the right to legislate directly or by repre-

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52. *See* Bd. of Educ. v. Tinnon, 26 Kan. 1 (1881). In *Tinnon*, the plaintiffs claimed that a decision by a local school board to segregate public schools violated the Fourteenth Amendment. In defense, the city argued that the rule of construction represented by the Ninth and Tenth Amendments should limit the court's reading of the Fourteenth:

> And viewing the apparent scope of the first section of the fourteenth amendment, it is singular that any necessity existed for the adoption of the fifteenth amendment, as the unlearned can scarcely conceive a broader and more comprehensive statement of equal rights. But the jealousy of the people as against the possible encroachment of federal power, had given birth to the ninth and tenth amendments, and to such salutary rule of construction by the judiciary, that the adoption of the fifteenth amendment was vitally necessary to remedy the evil still then existing; and in this amendment, for the first time the term "color" appears in the federal constitution.

Id. at 12.

53. 181 P. 920, 921 (Wash. 1919).

54. *Id.* at 922.

> sentative bodies is a right assuredly retained, and, being retained, may be exercised in the form and manner provided by the people of a state. . . .[55]

Other courts echoed this collective-political-rights reading of the Ninth and Tenth Amendments. In *Hawke v. Smith*,[56] the Ohio Supreme Court was faced with the same issue presented in *Howell*. According to the per curiam opinion, Article V's use of the term "legislature" includes situations in which the people of the state act in a "legislative capacity," and public referenda are such instances.[57] In his concurrence, Justice R. M. Wanamaker noted that "each state was presumed to deal with its own domestic affairs—that is, state affairs—in the manner best calculated to promote the safety and happiness of the people of that state, according to the judgment of the people of that state."[58] Responding to the contention that this would "elevate the state above the nation,"[59] Wanamaker replied:

> It must be remembered that we had state Constitutions before we had a national Constitution, and that only by acting as states, through representatives and delegates, was the national Constitution adopted, first by the convention, and second by the states, and then it would not have been adopted by the states but for the overwhelming assurance that as soon as Congress would meet there should be proposed and adopted, at the earliest practicable moment, a Bill of Rights safeguarding the rights of the states and the people. In this behalf it is significant to note articles 9 and 10 [quoting both the Ninth and Tenth Amendments]. . . .
>
> It must be remembered that in the early history of the nation, especially at the time of the making of the national Constitution, the doctrine of states' rights was in the ascendancy—that is, the states were exceedingly jealous of their rights and powers as states and were loath to surrender them—and therefore the imperative demand for the reservation of all powers not delegated by the Constitution. Surely one of the most important and significant of all those powers reserved was the right of each state to determine for itself its own political machinery and its own domestic policies, and it can

55. *Id.* at 925–26.

56. 126 N.E. 400 (Ohio 1919).

57. *Id.* at 402.

58. *Id.* at 403 (Wanamaker, J., concurring).

59. *Id.*

> scarcely be claimed that it is within the power of any court to nullify or in any wise alter the political machinery of a state, especially that which the state has designed and designated as its lawmaking machinery.[60]

To Justice Wanamaker, the founders adopted the Ninth and Tenth Amendments in order to reserve the "right of each state to determine for itself its own political machinery and its own domestic policies."[61] A retained right, it was not to be disparaged by an overly restrictive reading of Article V.

The idea that the Ninth and Tenth Amendments preserved the retained right of local self-government echoed throughout the cases decided between Reconstruction and the New Deal. The rule of construction preserving this right sometimes was deployed on its own, sometimes in association with the Tenth Amendment, and sometimes in conjunction with both the Ninth and Tenth Amendments. In a legal culture in which state autonomy was presumed, perhaps it was not necessary to link the rule to the specific textual mandate of the Ninth Amendment. The time would come, however, when that legal culture would change.

The New Deal Transformation of the Ninth Amendment

The New Deal and the Ninth Amendment Prior to 1937

> *The only controversy that is here is between the humble citizen who asserts his right to carry on his little business in a purely local commodity and in a purely local fashion, without being arrested and punished for a mythical, indirect effect upon interstate commerce.*
>
> *United States v. Lieto*[62]

Following President Franklin Delano Roosevelt's election in 1932, state and federal courts were obliged to struggle with the constitutionality of the New Deal. Because the issue often involved construing the scope of federal power, the Ninth Amendment was often called into play. In 1935, for example, a New

60. *Id.*

61. *Id.*

62. 6 F. Supp. 32, 36 (N.D. Tex. 1934).

York court struck down provisions in the National Industrial Recovery Act ("NIRA") because it violated the nondelegation doctrine.[63] Concurring in the opinion, Judge Leon Rhodes declared that the act exceeded federal power as constructed under the Ninth and Tenth Amendments. Quoting both, Rhodes explained:

> The several states were separate and independent sovereignties at the time of the adoption of the Federal Constitution, and thus they remain, except in so far as certain powers have been delegated to the United States by that Constitution. No state may lawfully be deprived of such reserved powers except in the manner specified in such Constitution. In no other way may the sovereignty of any state be impaired, except by surrender from within or usurpation from without.[64]

With a single exception,[65] federal court opinions discussing the Ninth Amendment in the period from 1930 to 1936 focused on the constitutionality of the New Deal. In *Amazon Petroleum Corp. v. Railroad Commission*,[66] the plaintiff alleged that the NIRA exceeded federal power under the Tenth Amendment, violated "natural and inherent rights contrary to the Ninth Amendment to the national Constitution," and contravened nondelegation principles and various aspects of the Fourth, Fifth, and Eighth Amendments.[67] It is unclear whether the plaintiff's Ninth Amendment claim involved the right to local self-government or instead referred to unenumerated individual rights. To the federal district judge, however, the rights at issue were those of the states. According to Judge Randolph Bryant, the secretary of the interior had exceeded his power "to the prejudice of the rights of the state over matters of purely local concern."[68] Bryant continued, "In interpreting the Constitution it must never be forgotten that the nation is made up of states to which are entrusted the powers of local government. And to them and to

63. Darweger v. Staats, 278 N.Y.S. 87, 89 (N.Y. App. Div. 1935).

64. *Id.* at 92 (Rhodes, J., concurring).

65. *See In re* Guardianship of Thompson, 32 Haw. 479 (1932).

66. 5 F. Supp. 639 (E.D. Tex. 1934).

67. *Id.* at 644.

68. *Id.* at 649–50.

the people the powers not expressly delegated to the national government are reserved."[69]

In *Hart Coal Corp. v. Sparks*, a federal district court invalidated wage and hours regulations issued by the National Recovery Administration under the NIRA.[70] According to Judge Charles I. Dawson, the Ninth and Tenth Amendments expressed principles that limited the construction of federal power:

> In considering this question, we must never forget that the national government is one of delegated powers, and that Congress possesses only such legislative powers as are expressly or by implication conferred upon it by the people in the Constitution. Even though the Ninth and Tenth Amendments to the Constitution had never been adopted, it would be difficult, in the light of the history of the Constitution, of its source, and of the objects sought to be accomplished by it, to reach any other conclusion than that there is reserved to the states or to the people all the powers and rights not expressly or impliedly conferred upon the national government. But the Ninth Amendment [quoting the text] and the Tenth Amendment [also quoted] put this matter beyond all question. Therefore Congress does not have all legislative power. It possesses only such legislative power as has been expressly or impliedly conferred upon it.[71]

References to the right to local self-government occur in a number of opinions in the years leading up to the New Deal. For example, in *United States v. Lieto*, the district court dismissed a prosecution for violations of maximum-hour and minimum-wage provisions under the Code of Fair

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69. *Id.* at 645. The Supreme Court would ultimately agree that the act violated the Constitution, but under the nondelegation doctrine, not the Ninth or Tenth Amendment. Panama Ref. Co. v. Ryan, 293 U.S. 388, 392 (1935).

70. 7 F. Supp. 16, 28 (W.D. Ky. 1934).

71. *Id.* at 21. The case would be reversed on appeal to the Sixth Circuit on grounds of standing, with no discussion of, or disagreement with, the district court's analysis of the Ninth and Tenth Amendments. Sparks v. Hart Coal Corp., 74 F.2d 697 (6th Cir. 1934); *see also* Koch v. Zuieback, 194 F. Supp. 651, 656 (S.D. Cal. 1961) ("The Ninth and Tenth Amendments, pertaining, respectively, to enumerated powers and powers reserved to the states, contain no provisions relevant to the case at bar, and could not conceivably be construed to authorize a suit for damages against an individual or federal official."); United States v. Gearhart, 7 F. Supp. 712, 716 (D. Colo. 1934) (dismissing a prosecution under the NIRA for selling coal below a minimum price set by the federal government, and relying in part on the Ninth and Tenth Amendments).

Competition issued pursuant to the NIRA.[72] The defendant claimed that the prosecution violated the Fifth, Ninth, and Tenth Amendments. Without expressly mentioning any of these amendments, Judge William Hawley Atwell focused on the individual's right to operate a local business free from federal interference: "The only controversy that is here is between the humble citizen who asserts his right to carry on his little business in a purely local commodity and in a purely local fashion, without being arrested and punished for a mythical, indirect effect upon interstate commerce."[73]

As they had from the beginning, courts preserved this right to local self-government through the application of a rule of construction generally, and sometimes expressly, associated with the Ninth Amendment. In *Acme, Inc. v. Besson*, the federal district court in New Jersey invalidated the wage and hour provisions promulgated under the NIRA.[74] In coming to his conclusion, Judge Guy Laverne Fake interpreted "commerce" to exclude local manufacturing.[75] His conclusion was based in part on Supreme Court precedent and in part on the interpretive rules of the Ninth Amendment:

> There is still another source to which we may refer in sustaining the foregoing definition, and that is the well-known historic fact that the people of the original states were extremely reluctant in granting powers to the federal government and expressly laid down a rule of constitutional construction in the Ninth Amendment, wherein our forefathers said: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." And then, further, in the Tenth Amendment, we find this express limitation upon the federal government: "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." In view of the foregoing, we have labored in vain to conclude that it was the intent of the Constitution to pass to the Congress regulatory authority over those local, intimate, and close relationships of persons and property which arise in the processes of

72. 6 F. Supp. 32, 36 (N.D. Tex. 1934).

73. *Id.* at 36.

74. 10 F. Supp. 1, 6–7 (D.N.J. 1935).

75. *Id.* at 6.

> manufacture, even though they may, in the broader sense, affect interstate commerce.[76]

Again, the rule represented by the Ninth preserves the principle declared by the Tenth. Reserving nondelegated power to the people of the several states seems an empty promise if federal power can be so broadly interpreted as to swallow the primary concerns of local government.

As they had done for more than a century, judges during the early years of the New Deal cited the Ninth's rule of construction to preserve the principle of limited enumerated federal powers. In *United States v. Neuendorf*, an Iowa district court invalidated an attempt to regulate purely intrastate commerce under the Agricultural Adjustment Act.[77] In coming to its conclusion, the court cited both the Ninth and Tenth Amendments[78] and concluded that allowing the federal government to regulate purely intrastate commerce would "emasculate the intent of the Tenth Amendment to retain in and for the states all powers not delegated to the national government."[79] To the

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76. *Id.*

77. 8 F. Supp. 403, 406–07 (S.D. Iowa 1934).

78. According to the court:

> The government of the United States is one of limited powers. The Tenth Amendment to the Constitution expressly so declares: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." And Amendment 9 provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Id. at 405.

79. *Id.* at 406. As Judge Watkins expressed it in the 1935 case *Duke Power Co. v. Greenwood County*, 10 F. Supp. 854 (D.C.S.C. 1935):

> That the legislation in question does not come within the powers of Congress under the commerce clause seems too well settled to require argument. If there could have existed any doubt under the Constitution as originally adopted, that was effectually removed by the subsequent and almost immediate adoption of the first ten amendments, each in turn being a restriction upon federal power, and each *specifically prohibiting the enactment of laws regarding matters affecting individual rights and local self-government, . . .* the Ninth Amendment, declaring that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people," and the Tenth Amendment, especially reserving to the states, respectively, or to the people, all powers not delegated—and, I may add, not specifically delegated—to the United States by the Constitution, nor prohibited by it to the states.

Id. at 866 (emphasis added). In *Duke Power*, the court invalidated, as beyond Congress's commerce powers, an attempt by the Public Works Administration to finance public

court, the rule of construction prevented overbroad constructions of federal power, in order to protect rights or powers reserved to the states under the Tenth—in particular, the right to local self-government.

Most of the cases I have discussed in the preceding section involve state and lower federal courts. Their understanding of the Ninth Amendment, however, tracked that of the U.S. Supreme Court—even as the Court began to reconsider its commitment to a limited construction of federal power. In the 1936 case *Ashwander v. Tennessee Valley Authority*, the Supreme Court upheld congressional authority to sell electricity generated by the Wilson Dam.[80] According to Chief Justice Charles Evans Hughes, Congress had express authority under Article IV, Section 3 to dispose of property acquired by the United States, including electrical energy.[81] The chief justice then addressed the Ninth and Tenth Amendment claims:

> To the extent that the power of disposition is thus expressly conferred, it is manifest that the Tenth Amendment is not applicable. And the Ninth Amendment (which petitioners also invoke) in insuring the maintenance of the rights retained by the people, does not withdraw the rights which are expressly granted to the Federal Government. The question is as to the scope of the grant and whether there are inherent limitations which render invalid the disposition of property with which we are now concerned.[82]

According to Hughes, the Tenth Amendment claim failed once it was established that Congress was exercising an enumerated power. A *separate* inquiry was then required for the Ninth Amendment claim, which Hughes described as involving the scope of the enumerated power and whether there were inherent limitations on that power that would prevent the sale of electricity to a local market. This reading of the Ninth Amendment distinguishes it from the Tenth and echoes the description of the Ninth provided by James Madison a century and a half before the New Deal. The interpreted scope of

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works projects under the NIRA. *Id.* at 868. The decision ultimately was vacated and remanded for a new trial by the Supreme Court on grounds of mootness. Duke Power Co. v. Greenwood County, 299 U.S. 259 (1936).

80. 297 U.S. 288, 338 (1936).

81. *Id.* at 330.

82. *Id.* at 330–31.

federal power cannot extend up to the enumerated restrictions in the Bill of Rights. Federal power is limited in itself and must not be construed to deny or disparage the retained rights of the people. The *Ashwander* Court assumed that the rights retained by the people under the Ninth Amendment involve the collective right to local regulation of electricity, but contrasted that regulatory right with the regulatory rights of the federal government. Hughes's opinion in *Ashwander* presents one of the clearest examples of Ninth Amendment rights being read to refer to the collective rights of local self-government.

The New Deal and the Tenth Amendment Prior to 1937

By the time of the New Deal, a substantial body of judicial precedent limited congressional power to regulate local commercial activities.[83] But proponents of progressive legislation began to make claims of federal authority beyond those expressly enumerated in the Constitution. According to this alternate view, it was the federal government's duty to promote the general welfare—a duty that included broad authority to respond to the economic emergency of the Great Depression. This was not so much an interpretation of an enumerated power, an issue that would raise Ninth Amendment concerns. Rather, this was an assertion of inherent federal power to act in times of emergency, which raised issues under the Tenth.

In *A.L.A. Schechter Poultry Corp. v. United States*, the government argued that its authority to regulate local labor conditions under the Live Poultry Code "must be viewed in the light of the grave national crisis with which Congress was confronted."[84] Writing for the Court, Chief Justice Hughes rejected this claim of unenumerated "emergency powers" as conflicting with the Tenth Amendment:

> Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend

83. *See generally* notes 20–29 and accompanying text.

84. 295 U.S. 495, 528 (1935).

> the imposed limits because they believe that more or different power is necessary. Such assertions of extra-constitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment—"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."[85]

Having concluded that the unenumerated-power claim violated the Tenth Amendment, Hughes proceeded to consider whether any enumerated federal power gave Congress the authority to regulate purely intrastate commerce. At this point, Hughes did not rely on the Tenth Amendment, but instead deployed a rule of constitutional interpretation that mandated the preservation of state regulatory autonomy:

> In determining how far the federal government may go in controlling intrastate transactions upon the ground that they "affect" interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. . . . If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government. . . .
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> . . . [T]he distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise, as we have said, there would be virtually no limit to the federal power, and for all practical purposes we should have a completely centralized government. We must consider the provisions here in question in the light of this distinction.[86]

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85. *Id.* at 528–29. Hughes was not completely consistent on this point. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 442–44 (1934) (arguing that the Constitution should be interpreted in light of public need); *see also* Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 FORDHAM L. REV. 459 (2001) (discussing Hughes's interpretation of the Constitution in *Blaisdell*).

86. *Schechter*, 295 U.S. at 546–48; *see also* Madison's Bank Speech, *supra* note 20, at 486 (referring to the "delicate doctrine of implication").

Wholly apart from the declaration of the Tenth Amendment, the Court insisted that an additional rule of construction was necessary to ensure the distinction between state and federal responsibilities. In *Carter v. Carter Coal Co*., the government similarly argued in favor of an unenumerated power to regulate for the common good.[87] Once again, the Court rejected that argument on the basis of the Tenth Amendment.[88] When the Court turned to the interpretation of the commerce clause, however, it did not apply the Tenth Amendment, but instead the rule of construction from *Schechter*:

> [T]he [*Schechter*] opinion, . . . after calling attention to the fact that if the commerce clause could be construed to reach transactions having an indirect effect upon interstate commerce the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government, we said: "Indeed, on such a theory, even the development of the state's commercial facilities would be subject to federal control."[89]

Although this left control of certain local matters to the states, the purpose was not to protect the rights of states, but to preserve the separation of power between state and federal governments. State regulatory autonomy was a matter of constitutional principle and not one the states were empowered to barter away.[90]

Finally, in *United States v. Butler*, the Supreme Court interpreted the taxing and spending clause to authorize only nonregulatory programs

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87. 298 U.S. 238 (1936).

88. *Id*. at 293–94.

89. *Id*. at 309.

90. According to the Court:

> The determination of the Framers Convention and the ratifying conventions to preserve complete and unimpaired state self-government in all matters not committed to the general government is one of the plainest facts which emerge from the history of their deliberations. And adherence to that determination is incumbent equally upon the federal government and the states. State powers can neither be appropriated on the one hand nor abdicated on the other.

Id. at 295. One can hear echoes of James Madison's veto of the latitudinarian internal improvements bill: "the assent of the states . . . cannot confer the power." James Madison, Veto Message to Congress (Mar. 3, 1817), *in* JAMES MADISON: WRITINGS, *supra* note 20, at 718, 720.

furthering the general welfare.[91] Attempts to convert this authority into an unlimited power to *regulate* for the general welfare violated the Tenth Amendment:

> The [Agricultural Adjustment Act] invades the reserved rights of the states. . . . From the accepted doctrine that the United States is a government of delegated powers, it follows that those not expressly granted, or reasonably to be implied from such as are conferred, are reserved to the states or to the people. To forestall any suggestion to the contrary, the Tenth Amendment was adopted. The same proposition, otherwise stated, is that powers not granted are prohibited. None to regulate agricultural production is given, and therefore legislation by Congress for that purpose is forbidden.[92]

Any attempt to go beyond enumerated powers, even in an emergency, triggered the protections of the Tenth Amendment. When interpreting the scope of an enumerated power, the Court followed what it believed was an interpretive imperative: drawing a line between federal and state autonomy was *required*, both by the term "interstate commerce" and by the Tenth Amendment's reservation of the power to regulate *intra*state commerce to the states.[93] Although, unlike lower federal courts, the Supreme Court did not

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91. 297 U.S. 1, 64–66 (1936).

92. *Id.* at 68.

93. Courts continued to follow this approach even as the Supreme Court was dismantling *Lochner*'s legacy. *See* State v. Packard-Bamberger & Co., 2 A.2d 599 (N.J.D.C. 1938). In *Packard-Bamberger*, the New Jersey court limited Supreme Court precedents, such as *Nebbia v. New York*, 291 U.S. 502 (1934), to apply only to statutes temporarily regulating prices and struck down a state price-control statute as violating the common-law property right to set one's own price, citing the Ninth Amendment in support of its decision. *Id.* at 602–03. This limited reading of *Nebbia* was rejected by the Supreme Court a few years later in *Olsen v. Nebraska ex rel. Western Reference Bond Ass'n*, 313 U.S. 236 (1941). More frequently, claims were made that the expansion of federal power violated the Ninth and Tenth Amendments' principle of limited enumerated power—claims that initially received sympathetic treatment by the courts. In *Duke Power Co. v. Greenwood County*, 19 F. Supp. 932, 945 (D.C.S.C. 1937), plaintiffs challenged the building of a power plant financed by a federal loan under the NIRA, in part because it "amounted in substance to an invasion of the powers reserved to the states and to the people under the Ninth and Tenth Amendments to the Federal Constitution." According to the court:

> It is our view that it would be a violation of the Tenth Amendment to accomplish federal regulation of the local intrastate transactions to a substantial degree and thus displace state regulation even if this result was brought about through a loan and grant agreement resulting in the building and operation of a municipally owned and

directly address the Ninth Amendment,[94] it implicitly acknowledged that preserving the principles of the Tenth required an additional rule of construction. When the New Deal Court abandoned that rule, the Court also abandoned the Ninth and Tenth Amendments as substantive limits on federal power.

The Rule Abandoned

In the constitutional upheaval known as the New Deal revolution of 1937,[95] the doctrinal underpinnings that had informed judicial understanding of the Ninth and Tenth Amendments for a century and a half were swept away. A few months after his 1936 landslide election to a second term of office, President Roosevelt announced his "Court-packing plan."[96] Whether in response to this threat to the Court's independence or simply because of a change of mind, Justice Owen J. Roberts did an abrupt about-face and voted to uphold laws he had previously opposed as beyond federal power.[97] His "switch in time" signaled the beginning of the New Deal revolution.[98] In a rapid succession of cases, the Supreme Court altered its interpretation of liberty of contract,[99] rejected the authority of federal courts to construe state

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federally aided power plant. . . . There must be some limit to this power of expenditure. Without enumerating them all, the most important limitation on this power immediately suggests itself to us. The general welfare power may not be exercised to disturb the balance between the states and the federal government which exists under our constitutional system.

Id. at 950–52.

94. *See, e.g.*, George v. Bailey, 274 F. 639, 644 (W.D.N.C. 1921).

95. *See* 2 Bruce A. Ackerman, We the People: Transformations 257 (1998); Lash, *supra* note 85, at 461.

96. Franklin D. Roosevelt, Radio Address on Reorganizing the Federal Judiciary (Mar. 9, 1937), *in* S. Rep. No. 75-711, app. D at 41 (1937).

97. *Compare* Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936), *with* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), *and* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

98. For a magisterial look at the New Deal and its constitutional implications, see 1 & 2 Ackerman, *supra* note 95. The restructuring of constitutional doctrine that occurred around the time of the New Deal has spawned an enormous body of scholarly writing. *See generally* Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 Yale L.J. 153 (2002).

99. United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

common law,[100] abandoned nondelegation doctrine,[101] and began to construct a new framework for protecting the individual rights listed in the first eight amendments.[102] The last two provisions of the Bill of Rights were abandoned.[103] For the next thirty years, not a single successful invocation of either the Ninth or the Tenth Amendment would be brought in any federal court.

Rejecting the Individual Right to Local Self-Government

Following the Supreme Court's decision in *Butler*, which prohibited coercive exercises of the federal power to tax and spend,[104] a number of claims were brought challenging New Deal legislation as coercive and (thus) in violation of the Ninth and Tenth Amendments. As of 1936, these claims were dismissed

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100. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

101. United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); Yakus v. United States, 321 U.S. 414 (1944).

102. *Carolene Prods. Co*., 304 U.S. at 152–53 n.4.

103. Harbingers of a new approach to the Ninth Amendment and the rule of construction first arose in lower federal courts in 1936. In *Precision Castings Co. v. Boland*, 13 F. Supp. 877 (W.D.N.Y. 1936), a Roosevelt appointee, Judge Harlan Rippy, rejected a facial challenge to the National Labor Relations Act. The case involved Fourth, Fifth, and Seventh Amendment challenges by plaintiffs targeted for investigation by the National Labor Relations Board ("NLRB"). *Id.* at 879–80. The plaintiffs also raised claims under "the Ninth and Tenth Amendments, in that Congress has attempted to legislate with reference to powers expressly reserved to the states." *Id.* at 880. Rejecting the constitutional claims, Judge Rippy noted that the NLRB had a statutory duty to establish a connection between the unfair labor practices and interference with interstate commerce. It was premature to conclude that the NLRB would fail to do so, and the court had a duty to resolve all constitutional doubts in favor of the government. *Id.* at 881–82. Missing from the Court's analysis was the Supreme Court's decision in *Schechter*, which *presumed* that Congress's commerce powers did not authorize regulation of local labor conditions. Also missing was any mention of the Ninth or Tenth Amendment. *See also* S. Buchsbaum & Co. v. Beman, 14 F. Supp. 444 (N.D. Ill. 1936). In *Buchsbaum*, a federal district court rejected a claim that the enforcement of the National Labor Relations Act was an unconstitutional regulation of local labor conditions under the Fifth, Ninth, and Tenth Amendments. According to district court judge James Herbert Wilkerson, although it may be possible to interpret the act as exceeding congressional power, "[e]very possible presumption is in favor of the validity of the statute, and this continues until the contrary is shown beyond a rational doubt." *Id.* at 447. Once again, there was no discussion of *Schechter* or the Ninth or Tenth Amendment as a limit on the construction of federal power.

104. *See supra* notes 91–93 and accompanying text.

without discussion of either amendment.[105] By the spring of 1937, however, it was clear that the Supreme Court had abandoned its earlier limited interpretation of federal power. In *NLRB v. Jones & Laughlin Steel Corp.*, Justice Roberts switched sides in the dispute over the constitutionality of the New Deal and voted to uphold the National Labor Relations Act and its protection of the right to local collective bargaining.[106] Prior cases had held that local commercial activities generally had no more than an indirect effect on interstate commerce.[107] In *Jones & Laughlin*, however, the Court abandoned that distinction, even while claiming to remain faithful to the idea that the interpretation of enumerated federal powers must preserve the distinction between national and local control.[108]

One month after *Jones & Laughlin*, the Supreme Court upheld the Social Security Act against a challenge that, among other things, the act coerced "the States in contravention of the Tenth Amendment or of restrictions implicit in our federal form of government."[109] Although Ninth Amendment claims were raised in the lower court,[110] Justice Benjamin Cardozo's opinion

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105. *See* Steward Mach. Co. v. Davis, 89 F.2d 207, 210 (5th Cir. 1937) (upholding provisions of the Social Security Act and noting that although unemployment relief is primarily a state matter, the federal treasury is also involved and that reasonable protection of the treasury is "part of the general welfare in a constitutional sense"); Reconstruction Fin. Corp. v. Cent. Republic Trust Co., 17 F. Supp. 263, 290 (N.D. Ill. 1936) (asserting that the creation of the Reconstruction Finance Corporation fell within Congress's enumerated powers and that the assertion that its creation violated the Ninth and Tenth Amendments "place[d] restrictions on the power of the national government which are not sustained by either reason or authority").

106. 301 U.S. 1, 30 (1937).

107. *See* Hammer v. Dagenhart, 247 U.S. 251, 277 (1918) (Holmes, J. dissenting).

108. According to the Court:

> Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. The question is necessarily one of degree.

Jones & Laughlin, 301 U.S. at 37 (citations omitted).

109. *Steward Mach. Co.*, 301 U.S. at 548.

110. *See* Charles C. Steward Mach. Co. v. Davis, 89 F.2d 207, 208 (5th Cir. 1937).

in *Steward Machine Co. v. Davis* did not mention the Ninth.[111] Instead, Justice Cardozo rejected the claim that the act coerced the states in violation of the Tenth Amendment, in part because the state had not objected to the act.[112] Cardozo thus abandoned the reasoning in *Carter Coal*—and that of James Madison—that the people have a right to decide certain matters at a local level and that this right was not the state's to give away.[113] Not only did Cardozo implicitly reject the right of local self-government, but he also suggested that federal legislation in this case was justified, in part because the states had failed to respond to a national emergency.[114]

Other New Deal decisions expressly rejected a local self-government reading of the Ninth and Tenth Amendments. In *Tennessee Electric Power Co. v. Tennessee Valley Authority*, private power companies sued to invalidate a federally financed dam project that resulted in the creation of several hydroelectric plants.[115] They claimed that the federal government's sale of electricity in a local market violated the Ninth and Tenth Amendments because it would "result in federal regulation of the internal affairs of the states, and will deprive the people of the states of their guaranteed liberty to earn a livelihood and to acquire and use property subject only to state regulation."[116] Writing for the Court, Justice Owen Roberts concluded that

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111. Cardozo may have obliquely referenced the Ninth Amendment claim when he characterized the plaintiff's claim as involving "restrictions implicit in our federal form of government." *Steward Mach. Co*., 301 U.S. at 585. This characterization echoes the *Ashwander* Court's description of the Ninth Amendment as placing inherent limitations in our federal form of government. *See* Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 338 (1936); *supra* note 82 and accompanying text.

112. *Steward Mach. Co*., 301 U.S. at 596.

113. *See* James Madison, Veto Message to Congress (Mar. 3, 1817), *supra* note 90, at 720 (stating that the consent of the states cannot confer power on the federal government).

114. According to the Court:

> The other [consequence of state failure to enact social security programs] was that in so far as there was failure by the states to contribute relief according to the measure of their capacity, a disproportionate burden, and a mountainous one, was laid upon the resources of the Government of the nation. . . . The Social Security Act is an attempt to find a method by which all these public agencies may work together to a common end. Every dollar of the new taxes will continue in all likelihood to be used and needed by the nation as long as states are unwilling, whether through timidity or for other motives, to do what can be done at home.

Steward Mach. Co., 301 U.S. at 588–89.

115. 306 U.S. 118, 119 (1939).

116. *Id*. at 136.

mere federal participation in a local electricity market was not an exercise of regulatory power and therefore could not constitute "federal regulation of purely local matters reserved to the states or the people by the Tenth Amendment."[117] More broadly, Justice Roberts declared that even if the government's actions did exceed federal authority under the Ninth and Tenth Amendments, individuals had no standing to raise claims involving the rights of the states:

> The sale of government property in competition with others is not a violation of the Tenth Amendment. As we have seen there is no objection to the Authority's operations by the states, and, if this were not so, the appellants, absent the states or their officers, have no standing in this suit to raise any question under the amendment. These considerations also answer the argument that the appellants have a cause of action for alleged infractions of the Ninth Amendment.[118]

To Justice Roberts, concluding that the plaintiffs lacked standing to raise Tenth Amendment claims necessarily resolved the issue of standing under the Ninth Amendment. Both amendments involved the rights of the states, not of individuals. Thus, neither amendment involved an enforceable individual right to limited federal power—even in cases in which the federal government had overstepped its authority.

But states would fare no better in cases in which standing *was* granted. To the New Deal Court, the Ninth and Tenth Amendments had no effect on the construction of federal power. In *United States v. Darby*, the Court declared that it would uphold federal regulation of purely intrastate commerce if Congress reasonably concluded that the activity in question affected interstate commerce.[119] In one of the most famous Supreme Court passages on the Tenth Amendment, Justice Harlan Fiske Stone declared:

> Our conclusion is unaffected by the Tenth Amendment, which provides: "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." The amendment states but a truism that all is retained which

117. *Id.* at 142.

118. *Id.* at 144.

119. 312 U.S. 100, 119 (1941).

> has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.
>
> From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end.[120]

Although Justice Stone downplayed pre-1937 cases that suggested a very different interpretation of federal power, his description of the Tenth Amendment is a plausible interpretation of the text. The words of the Tenth Amendment do not expressly limit the construction of enumerated federal powers;[121] they merely announce that all nondelegated powers are reserved to the states. It requires a second rule of construction, either derived as a matter of implication from the idea of nondelegated sovereign powers and rights or, as Madison believed, expressly announced by the Ninth Amendment, to justify a narrow construction of delegated power. Without such a limiting rule of construction, even though expanding interpretations of federal power do not expressly violate the Tenth, the clause represents an ever-diminishing set of reserved state powers. Justice Stone, however, did not address the Ninth Amendment or the vast number of cases citing it in support of a limiting rule of construction. Instead, he simply announced the restoration of John Marshall's original vision of federal power.[122]

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120. *Id.* at 123–24 (citations omitted).

121. Though one might derive a rule of strict construction by implication from the text's reference to the reserved sovereign powers of the people. *See* Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and "Expressly" Delegated Power*, 83 Notre Dame L. Rev. 1889 (2008).

122. *Id.* at 119. Bruce Ackerman refers to the New Deal Court's attempt to ground their expansion of federal power in the "original meaning" of the Constitution as the "myth of rediscovery." *See* 1 ACKERMAN, *supra* note 95, at 43.

Raising John Marshall

By the time the Supreme Court decided *Wickard v. Filburn* in 1941,[123] not even the Tenth Amendment warranted discussion. Instead, Justice Robert Jackson followed the lead of *Darby* and assumed the correctness of Chief Justice Marshall's interpretation of federal power, noting without any sense of irony that Marshall had "described the Federal commerce power with a breadth never yet exceeded."[124] Conceding that a number of cases since Marshall's time had limited the scope of federal power, Jackson pointed to more modern cases that had acknowledged the economic effects of local activities:

> The Court's recognition of the relevance of the economic effects in the application of the Commerce Clause, exemplified by this statement, has made the mechanical application of legal formulas no longer feasible. Once an economic measure of the reach of the power granted to Congress in the Commerce Clause is accepted, questions of federal power cannot be decided simply by finding the activity in question to be "production" nor can consideration of its economic effects be foreclosed by calling them "indirect."[125]

The Court having accepted economic effects as the measure of federal power, the fact that the regulated activity was local was irrelevant. Implicit in Jackson's approach was the assumption that there is no independent constitutional norm limiting federal power in cases involving an activity that has the requisite economic effects. This was Marshall's approach, and Jackson quoted his statement in *Gibbons*: "The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution."[126]

According to Justice Jackson, federal power extends to all activities except those with enumerated limitations prescribed in the Constitution. In effect, the only rights retained by the people are those expressly enumerated in the

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123. 317 U.S. 111 (1942).

124. *Id.* at 120.

125. *Id.* at 123–24.

126. *Id.* at 124.

Constitution—precisely the result Madison and other founders believed they had prevented by adopting the Ninth Amendment. Following the lead of John Marshall in *McCulloch* and *Gibbons*, the Court accomplished this not by reinterpreting the Ninth Amendment but by ignoring it.

Amendments without a Rule of Construction: *United Federal Workers of America (CIO) v. Mitchell*

Despite the dramatic reconfiguring of federal power, courts throughout this period continued to read both the Ninth and Tenth Amendments as federalism-based constraints on the scope of federal power.[127] For example, in

127. In 1939, the Supreme Court of Michigan used the Ninth and Tenth Amendments to distinguish the enumerated powers of the federal government from the general police powers of the state. *In re* Brewster St. Hous. Site in Detroit, 289 N.W. 493 (Mich. 1939). According to the court:

> Although it seems clear that all legislative powers not delegated through the Constitution to the congress of the United States are reserved to the people, by reason of the peculiar character of the government created by the Constitution it was thought wise to establish and declare definite rules for the construction of that instrument, (1) "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people" (Art. 9); and (2) "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" (Art. 10). The legislative power of the several States stands upon a different footing. . . . There is a broad distinction, therefore, between the rules which govern in construing the Constitution of the United States and the Constitution of the State.

Id. at 500; *see also* Lovett v. United States, 66 F. Supp. 142, 149 (Ct. Cl. 1945) (Jones, J., concurring) ("The national government is one of delegated powers in all its branches. [According to the Ninth and Tenth Amendments,] [a]ll powers not delegated remain with the states or with the people."); *In re* Idaho Fed'n of Labor, 272 P.2d 707, 713–14 (Idaho 1954) (Taylor, J., dissenting) (contrasting the state "Ninth Amendment" with the federal Ninth and Tenth, and distinguishing the roles of a federal and state constitution); Manning v. Davis, 201 P.2d 113, 115 (Kan. 1948) ("It is well settled that under our theory of government all governmental power is vested in the people. Normally, our Federal Constitution is looked upon as a grant of power, though it contains some limitations upon the powers of the states. But it specifically provides: [quoting the Ninth and Tenth Amendments]."); United States v. W. Va. Power Co., 39 F. Supp. 540, 543–44 (S.D.W. Va. 1941) (discussing plaintiff's Fifth, Ninth, and Tenth Amendment claims against the taking of property for building a dam, and deciding on Fifth Amendment grounds); Aponaug Mfg. Co. v. Fly, 17 F. Supp. 944, 945 (S.D. Miss. 1937) (discussing the plaintiff's argument that the Social Security tax violates, among other provisions, the Fifth, Ninth, and Tenth Amendments, and dismissing on other grounds); Harrington v. Indus. Comm'n of Utah, 88 P.2d 548, 554 (Utah 1939) (balancing Congress's interstate commerce power against the Ninth and Tenth Amendments in upholding a state worker's compensation statute).

Woods v. Cloyd W. Miller Co., the Supreme Court upheld the Housing and Rent Act of 1947 under Congress's war powers.[128] The Supreme Court acknowledged, however, that an overly broad reading of federal war powers, even if kept within the limits of the rest of the Bill of Rights, might nevertheless threaten the Ninth and Tenth Amendments:

> We recognize the force of the argument that the effects of war under modern conditions may be felt in the economy for years and years, and that if the war power can be used in days of peace to treat all the wounds which war inflicts on our society, it may not only swallow up all other powers of Congress but largely obliterate the Ninth and the Tenth Amendments as well. There are no such implications in today's decision.[129]

The Court did not say that such a reading would obliterate the Bill of Rights. In fact, after disposing of the Ninth and Tenth Amendment argument, the Court went on to independently analyze whether the act violated the substantive protections of the Fifth Amendment.[130] The implication was that exercising war powers in times of peace theoretically threatened the principle of limited enumerated powers, with the Ninth and Tenth Amendments read as particular guardians of that principle. The concern, however, was merely theoretical.[131] Without a rule of interpretation limiting the actual

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128. 333 U.S. 138, 141 (1948).

129. *Id.* at 143–44.

130. *Id.* at 145 (analyzing an equal protection claim under the federal due process clause).

131. One of the few cases applying the Ninth and Tenth Amendments with bite in this period involved the lower-court opinion of what ultimately would become a major separation-of-powers decision by the Supreme Court. In *Youngstown Sheet & Tube Co. v. Sawyer*, federal district court judge David Andrew Pine struck down, on the basis of principles of enumerated powers as declared by the Ninth and Tenth Amendments, Truman's executive order seizing the steel mills. 103 F. Supp. 569, 573 (D.D.C. 1952). According to Judge Pine:

> This contention requires a discussion of basic fundamental principles of constitutional government, which I have always understood are immutable, absent a change in the framework of the Constitution itself in the manner provided therein. The Government of the United States was created by the ratification of the Constitution. It derives its authority wholly from the powers granted to it by the Constitution, which is the only source of power authorizing action by any branch of Government. It is a government of limited, enumerated, and delegated powers. The office of President of the United States is a branch of the Government, namely, that branch where the executive power is vested, and his powers are limited along with the powers of the two other great branches or departments of Government, namely, the legislative and the judicial. [citing the Ninth and Tenth Amendments]

construction of federal power, the expansion of federal power remained without constitutional restraint beyond specific restrictions such as those contained in the first eight amendments.[132]

Prior to the New Deal, the Ninth and Tenth Amendments generally were read in conjunction with a rule of construction limiting the interpretation of federal power. This rule ensured that enumerated powers were interpreted in light of the people's retained right to local self-government. Areas such as local commercial activity were presumptively a matter reserved to the states, and the construction of federal power was limited accordingly. After the New Deal, particularly after decisions such as *Darby* and *Wickard*, determining the scope of federal power was decoupled from any consideration of the retained rights of the states. Once a court established a reasonable link between a legislative act and an enumerated power, Ninth and Tenth Amendment claims necessarily failed.

This toothless reading of the Ninth and Tenth Amendments was already implicit in lower federal court decisions,[133] and the Supreme Court expressly adopted it in *United Public Workers of America (CIO) v. Mitchell*.[134] In *Mitchell*, a group of federal employees challenged provisions of the Hatch Act that prohibited government workers from engaging in certain political activities. In addition to First and Fifth Amendment claims, the employees claimed that the act was a "deprivation of the fundamental right of the people of the United States to engage in political activity, reserved to the people of the

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Id. The Supreme Court affirmed without mentioning the Ninth or Tenth Amendments, but Justice Hugo Black's majority opinion did track the reasoning of Judge Pine. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) ("It is clear that if the President had authority to issue the order he did, it must be found in some provision of the Constitution.").

132. *See* EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 63–65 (1957) (speaking of the Ninth and Tenth in 1957 as mere truisms).

133. As the Third Circuit put it in the 1943 case *Commonwealth & Southern Corp. v. Securities and Exchange Commission*, 134 F.2d 747 (3d. Cir. 1943), "In view of our conclusion that the order here complained of is within the commerce power[,] Commonwealth's contention that the order violates the Fifth, Ninth and Tenth amendments *necessarily* fails." *Id.* at 753 (emphasis added). The scope of federal power is determined independently of the Ninth and Tenth Amendments and, once found, negates any Ninth or Tenth Amendment claim. *See also* United States v. City of Chester, 144 F.2d 415, 419 (3d Cir. 1944) (noting the plaintiffs' Ninth and Tenth Amendment claims, but upholding federal action as falling within Congress's war powers, without any further mention of the Ninth or Tenth Amendment).

134. 330 U.S. 75 (1947).

United States by the Ninth and Tenth Amendments."[135] Writing for the Court, Justice Stanley Reed ruled that the Ninth and Tenth Amendment claims required no analysis of an independent right, but involved only questions of enumerated federal power:

> The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people. Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail.[136]

In some ways, Justice Reed's approach tracks that of James Madison. Once an enumerated power is found, there can no longer be a claim under either the Ninth or the Tenth Amendment. What is missing from his account, however, is the role of the Ninth Amendment in determining whether the federal government had in fact been granted a particular power. Absent the application of such a rule of construction, the only limits to federal power were those rights or restrictions enumerated in the Constitution. Reed thus echoed John Marshall's rejection of any independent restrictive rule of construction.

Ninth Amendment scholars have criticized Justice Reed's treatment of the Ninth Amendment in *Mitchell*. Calvin Massey, for example, argues that Reed's opinion rendered the Ninth "a mere declaration of a constitutional truism, devoid of any independent content, effectively rendered its substance nugatory and assigned to its framers an historically untenable intention to engage in a purely moot exercise."[137] Massey is correct, but his statement is ironic. Reed's opinion does the same thing to the Tenth Amendment, without

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135. *Id.* at 83 n.12.

136. *Id.* at 95–96. The Court went on to uphold the act, triggering a dissent by Justice Black, who believed the plaintiff's First and Fifth Amendment rights had been violated. *Id.* at 105, 109 (Black, J., dissenting). Black made no mention of either the Ninth or the Tenth Amendment.

137. Calvin R. Massey, Silent Rights: The Ninth Amendment and the Constitution's Unenumerated Rights 91 (1995).

triggering any objection from Massey or any other Ninth Amendment critic of *Mitchell*.[138]

What these criticisms miss, however, is a clue embedded in *Mitchell* regarding the traditional meaning of the Ninth Amendment. Although denounced for pairing the Ninth Amendment with the Tenth and confusing them both, Reed's opinion in fact represents a modern example of a very old tradition that read both clauses as twin guardians of the people's retained rights. Justice Reed simply adopted a post–New Deal reading of the Tenth Amendment. This itself is a clue that his reading of the Ninth Amendment may *also* have been a creature of the New Deal revolution.[139] It is an example of the diminished reading of both the Ninth and Tenth Amendments that occurred in the constitutional upheaval of 1937.

The Ninth Amendment as a "Truism"

Mitchell's reduction of the Ninth Amendment to a mere truism became the rule in later cases. In *United States v. Painters Local Union No. 481*,[140] a federal district court rejected a "boilerplate" claim that included Ninth and Tenth Amendment claims, noting:

> [T]he contention that the Act violates the Ninth and Tenth Amendments in that it invades rights reserved to the States is left wholly without substance if, as I have held above, the grant of powers to the Union under the Constitution includes either expressly or by implication the power which the Congress has exercised in this enactment. As was said in [*Mitchell*]: "When objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of

138. *See also* Randy E. Barnett, *Introduction: James Madison's Ninth Amendment*, *in* 1 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 1, 6–7 (Randy E. Barnett ed., 1989) (criticizing Justice Reed's opinion for adopting the "erroneous" rights-powers conception of the Ninth Amendment).

139. *But see* Thomas B. McAffee, *A Critical Guide to the Ninth Amendment*, 69 TEMP. L. REV. 61, 64 n.14 (1996) (characterizing *Mitchell* as presenting the "traditional understanding" of the Ninth Amendment).

140. 79 F. Supp. 516 (D. Conn. 1948).

> invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail."[141]

Following the same approach in *Roth v. United States*, the Supreme Court dismissed First, Ninth, and Tenth Amendment claims that Congress had no power to ban obscene materials from the U.S. mail.[142] Having concluded that obscene materials were not protected under the First Amendment, the Court explained that the issue became one of federal power to regulate the mail. Concluding that such power existed was enough to do away with the Ninth and Tenth Amendment claims without further discussion.[143]

A final example of the *Mitchell* reading of the Ninth Amendment occurred only one year before *Griswold v. Connecticut*. In *Heart of Atlanta Motel, Inc. v. United States*, the Supreme Court upheld the federal Civil Rights Act of 1964, which banned private discrimination in places of public accommodation.[144] The act had been challenged as exceeding Congress's power under the commerce clause and as a violation of the Fifth and Thirteenth

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141. *Id.* at 527; *see also* City of Detroit v. Div. 26 of Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees of Am., 51 N.W.2d 228, 233 (Mich. 1952) (citing *Mitchell* in rejecting a boilerplate Ninth and Tenth Amendment human-rights claim).

142. 354 U.S. 476, 479–94 (1957).

143. *Id.* at 492–93. According to Justice William Brennan:

> Roth's argument that the federal obscenity statute unconstitutionally encroaches upon the powers reserved by the Ninth and Tenth Amendments to the States and to the people to punish speech and press where offensive to decency and morality is hinged upon his contention that obscenity is expression not excepted from the sweep of the provision of the First Amendment that "*Congress* shall make *no law* . . . abridging the freedom of speech, or of the press. . . ." (Emphasis added.) That argument falls in light of our holding that obscenity is not expression protected by the First Amendment. We therefore hold that the federal obscenity statute punishing the use of the mails for obscene material is a proper exercise of the postal power delegated to Congress by Art I, § 8, cl. 7. In [*Mitchell*] this Court said: ". . . The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people. Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail. . . ."

> *Id.* (alteration in original) (footnotes omitted); *see also* Sunshine Book Co. v. Summerfield, 249 F.2d 114, 117–18 (D.C. Cir. 1957) (following the Supreme Court's decision in *Roth*, and upholding the federal power to ban obscene material from the mails against a Ninth and Tenth challenge).

144. 379 U.S. 241, 261–62 (1964).

Amendments[145]—there was no claim regarding the Ninth or Tenth Amendments. The Supreme Court upheld the act as a reasonable regulation of commerce, citing, among other cases, *Gibbons*, *Darby*, and *Jones & Laughlin*.[146] In his concurrence, Justice Hugo Black quoted Marshall in *Gibbons*:

> At least since [*Gibbons*], decided in 1824 in an opinion by Chief Justice John Marshall, it has been uniformly accepted that the power of Congress to regulate commerce among the States is plenary, "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."[147]

In a companion case handed down the same day, *Katzenbach v. McClung*,[148] the Court dismissed a similar challenge to the Civil Rights Act, only this time the claim included alleged violations of the Ninth and Tenth Amendments.[149] According to Justice Tom Clark, the decision in *Heart of Atlanta* "disposes of the challenges that the appellees base on the Fifth, Ninth, Tenth, and Thirteenth Amendments."[150] *Heart of Atlanta*, as mentioned, did not contain any Ninth or Tenth Amendment claims.[151] If the Court believed that the Ninth Amendment protected individual rights, its dismissal seems, at the very least, unexplained. On the other hand, under the *Mitchell* reading of the Ninth and Tenth Amendments, *Katzenbach*'s dismissal makes perfect sense. Under *Mitchell*, once power is conceded, any claim under the Ninth and Tenth Amendments automatically disappears. In *Heart of Atlanta*, the Court had established the federal commerce power and thus answered any Ninth or Tenth Amendment claim raised in *Katzenbach*. The very brevity of the analysis in *Katzenbach* suggests the potency of the *Mitchell* rule.

As the scope of the New Deal became clear, lower courts acquiesced to the Supreme Court's rulings but objected to the Court's abandonment of

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145. *Id.* at 243–44.

146. *Id.* at 254–57.

147. *Id.* at 271 (Black, J., concurring).

148. 379 U.S. 294 (1964).

149. *Id.* at 298 n.1.

150. *Id.*

151. *Heart of Atlanta* did, on the other hand, involve Fifth and Thirteenth Amendment claims. 379 U.S. at 244.

limited federal power. In *Henry Broderick, Inc. v. Riley*, the Washington Supreme Court dismissed a challenge to administrative decision making under the Unemployment Compensation Act.[152] In his concurrence, Justice William Millard conceded that recent precedents controlled the outcome, but nevertheless quoted the "following apt challenging statements"[153] from a recent speech by Senator Pat McCarran lamenting the waning influence of the Ninth and Tenth Amendments:

> The last two items in the Bill of Rights are of tremendous importance. They are sentinels against overcentralization of government, monuments to the wisdom of the constitutional framers who realized that for the stable preservation of our form of government, it is essential that local governmental functions be locally performed. The ninth amendment to the Constitution provides that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The tenth amendment to the Constitution provides 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." Many signs today seem to indicate that the wisdom of the philosophy which guided the framing of these amendments is being forgotten.[154]

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152. 157 P.2d 954, 963 (Wash. 1945).

153. *Id.* at 964 (Millard, J., concurring).

154. *Id.* at 966 (*supra* note 1). McCarran also served as chief justice of the Nevada Supreme Court. McCarran's lament was echoed by other courts. *See* Walker v. Gilman, 171 P.2d 797 (Wash. 1946). *Walker* involved a challenge to damages awarded under the federal Price Control Act. Despite misgivings about the constitutionality of the law, the Washington court wrote that it was compelled to bow to the judgment of the U.S. Supreme Court that the act was constitutional. *Id.* at 806. In his dissent, Justice George B. Simpson quoted "the decision of the superior court of Yakima county in the case of Kenyon v. Blackburn, written by Honorable N. K. Buck, judge of the superior court of Yakima county." *Id.* at 808. In that opinion, Judge Buck declared that judges do not take an oath to follow the decision of other courts. *Id.* Judge Buck then cited the reservation of powers in the Ninth and Tenth Amendments:

> > It should be kept in mind that the first thing that the people did after adopting their fundamental law was to insist upon making certain restrictions upon the power of Congress so clear that no man could misunderstand. They intended that all general power should remain with the people, and to that end adopted Articles IX and X of the Amendments.
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> > Article X has been quoted above. That language is so clear that no layman can misunderstand it; but sometimes, by judicial interpretation, the inclusion of certain

Absent the interpretive restraint of a rule of construction, just as the state conventions feared at the time of the founding, federal power expanded to the edge of specific restrictions.[155] As Justice Potter Stewart later would write, expanding upon a quote from *Darby*, "The Ninth Amendment, like its companion the Tenth, . . . 'states but a truism.'"[156]

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powers or duties is construed to exclude all others. In order to avoid any such possible curtailment of the rights of the people, the framers and adopters of the amendments provided further in Article IX of those amendments: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

Id. at 809; *see also* Looper v. Ga. S. & Fla. Ry., 99 S.E.2d 101 (Ga. 1957). In *Looper*, the Supreme Court of Georgia, in a unanimous opinion, strongly remonstrated against recent U.S. Supreme Court rulings upholding forced payment of union dues by non-union members. *Id.* at 103. Arguing that these decisions conflicted with the principles of the Ninth and Tenth Amendments, the Georgia court limited the reach of the Supreme Court's decisions and ruled that forced contributions to the ideological activities of the union violated the First and Fifth Amendments:

> Anyone familiar with the experiences of the thirteen original colonies under the dictatorial powers of the King as expressed in the Declaration of Independence, the reluctance of the States to surrender or delegate any powers to a general government as evidenced by the Articles of Confederation, and the demonstrated need for more powers in the area where jurisdiction was given the general government, will have no difficulty in clearly understanding the meaning of the Constitution when it defines those powers and by the Ninth and Tenth Amendment removes all doubt but that powers not expressly conferred were retained by the States. . . . But claiming authority under [the commerce clause] the Congress, with the sanction of the Supreme Court, has projected the jurisdiction of the general government into every precinct of the States and assumed Federal jurisdiction over countless matters, including the right to work, which are remotely, if at all, related to interstate commerce. By this unilateral determination of its own powers the general government has at the same time and in the same manner deprived its creators, the States, of powers they thought and now believe they retained. But State courts, irrespective of contrary opinions held by their own judges which by law are required to have had experience as practicing attorneys before they can become judges of the law, must obey and accept the decisions of the Supreme Court of the United States pertaining to interstate commerce.

Id. at 104.

155. It is no surprise that the Court's broadest development of the dormant commerce clause occurred at the same time as it abandoned the Ninth and Tenth Amendments as substantive guardians of the concurrent powers of the states. *E.g.*, S.C. State Highway Dep't v. Barnwell Bros., Inc. 303 U.S. 177 (1938); *see also* Paul G. Kauper, *State Regulation of Interstate Motor Carriers*, 31 MICH. L. REV. 920, 925 (1933).

156. Griswold v. Connecticut, 381 U.S. 479, 529 (1965) (Stewart, J., dissenting).

The Last Days of the Historical Ninth Amendment

The Post–New Deal Ninth Amendment and Individual Rights

The New Deal revolution left unchanged the traditional rejection of the Ninth Amendment as a source of independent personal rights.[157] Although there does appear to have been a marked increase in Ninth Amendment individual-rights claims in the period between 1937 and 1965, most of these

157. *See* Gernatt v. Huiet, 16 S.E.2d 587, 588 (Ga. 1941) (rejecting the application of the Ninth Amendment against the state with a citation, perhaps in error, to *Lessee of Livingston v. Moore*, 32 U.S. (7 Pet.) 469 (1833)); Twin Falls County v. Hulbert, 156 P.2d 319, 322 (Idaho 1945) (noting the plaintiff's argument that application of the federal Price Control Act "is unconstitutional as an invasion of state sovereignty [and] violative of the 9th and 10th Federal Amendments of the Federal Constitution," but deciding the case on other grounds); Kape v. Home Bank & Trust Co., 18 N.E.2d 170, 171 (Ill. 1938) (rejecting the plaintiff's attempt to make the Ninth and Tenth Amendment argument in favor of limited construction of bankruptcy law); State *ex rel.* O'Riordan v. State Dep't of Corrections, 209 N.E.2d 267 (Ind. App. 1965) (rejecting an individual-rights claim because of a lack of jurisdiction); Williams v. City of Wichita, 374 P.2d 578 (Kan. 1962) (upholding state water regulation against claimed violations of the Ninth and Fourteenth Amendments); Johnson v. Bd. of Comm'rs, 75 P.2d 849, 857 (Kan. 1938) (rejecting, without discussion, an attempt to use the Ninth as a source of individual rights against liquor regulation); People *ex rel.* Hamportzoon Choolokian v. Mission of the Immaculate Virgin, 90 N.E.2d 486 (N.Y. 1949) (rejecting claims based of First, Fifth, Eighth, Ninth and Fourteenth Amendments in support of challenge to state child custody ruling); Allen v. S. Ry., 107 S.E.2d 125, 134 (N.C. 1959) (rejecting a Ninth Amendment claim against the forced payment of union dues); *In re* Templeton, 159 A.2d 725, 730 (Pa. 1960) (ignoring the dissent's argument that people have the inherent right to collectively protect themselves from violence); Kirschke v. City of Houston, 330 S.W.2d 629, 634 (Tex. Ct. App. 1960) (rejecting an individual-rights argument against a takings claim); *see also* Royal Standard Ins. Co. v. McNamara, 344 F.2d 240, 242 (8th Cir. 1965) (rejecting Ninth and Tenth Amendment individual-rights claims regarding an insurer that opposed a military directive establishing insurance requirements for vehicles on a military base); Ryan v. Tennessee, 257 F.2d 63, 64 (6th Cir. 1958) (rejecting an obscure Ninth Amendment claim); Whelchel v. McDonald, 176 F.2d 260, 261 (5th Cir. 1949) (rejecting a Ninth Amendment challenge to the makeup of a military tribunal); Zemel v. Rusk, 228 F. Supp. 65, 66 (D. Conn. 1964) (rejecting a Ninth and Tenth individual-rights claim); Kirk v. State Bd. of Ed., 236 F. Supp. 1020, 1021 (E.D. Pa. 1964) (rejecting a Ninth Amendment individual-rights claim); Suggs v. Bhd. of Locomotive Firemen and Engineermen, 219 F. Supp. 770 (M.D. Ga. 1960); United States v. Int'l Union United Auto. Aircraft & Agr. Implement Workers of Am., 138 F. Supp. 53, 55 (E.D. Mich. 1956) (raising a Ninth Amendment claim, but deciding the case on other grounds); *Ex parte* Orr, 110 F. Supp. 153 (E.D.S.C. 1952); *Ex parte* Sentner, 94 F. Supp. 77 (E.D. Mo. 1950); Joint Anti-Fascist Refugee Comm. v. Clark, 177 F.2d 79, 82 (D.C. Cir. 1949); United States v. Foster, 80 F. Supp. 479, 483 (S.D.N.Y. 1948); *Ex parte* Kurth, 28 F. Supp. 258, 263 (S.D. Cal. 1939) (rejecting the attempt to use the Ninth Amendment to establish an international right of asylum).

claims cited the Ninth and Tenth Amendments alongside a number of other constitutional claims in a boilerplate fashion.[158] In general, these claims

158. *See* Singer v. United States, 380 U.S. 24, 26 (1965) (rejecting the claim that the Fifth, Sixth, Ninth, and Tenth Amendments are violated by placing conditions on the ability to waive the right to a trial by jury, with no discussion of the Ninth Amendment); United States v. Congress of Indus. Orgs., 355 U.S. 106, 109 (1948) (involving First, Ninth, and Tenth Amendment claims, decided on statutory grounds); United States v. Painters Local Union No. 481, 172 F.2d 854, 856 (2d Cir. 1949) (raising Ninth and Tenth Amendment claims, but deciding on statutory grounds); United States v. Gates, 176 F.2d 78, 79 (2d Cir. 1949) (raising Ninth and Tenth Amendment claims, but deciding on other grounds); Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948) (rejecting First, Fifth, Ninth and Tenth Amendments claims against regulations of the National Labor Relations Board); United States *ex rel.* Birch v. Fay, 190 F. Supp. 105, 106 (S.D.N.Y. 1961) (rejecting an individual-rights claim and treating it as "in essence" a Fourteenth Amendment due process claim); Nukk v. Shaughnessy, 125 F. Supp. 498, 502 (S.D.N.Y. 1954) (rejecting an individual-rights claim based on the Ninth and Tenth); United States v. Candela, 131 F. Supp. 249, 250 (S.D.N.Y. 1954) (rejecting an individual-rights claim based on the Ninth and Tenth); United States v. Fujimoto, 102 F. Supp. 890, 898 (D. Haw. 1952) (rejecting claims based on the First, Fifth, Sixth, Ninth, and Tenth Amendments); United States v. Constr. & Gen. Laborers Local Union, 101 F. Supp. 869, 870 (W.D. Mo. 1951) (raising, but not addressing, the Ninth and Tenth); Int'l Ass'n of Machinists v. Street, 108 S.E.2d 796, 804 (Ga. 1959) (rejecting claims based on the First, Fifth, Ninth, and Tenth Amendments); Int'l Ass'n of Machinists v. Sandsberry, 277 S.W.2d 776, 780 (Tex. Ct. App. 1954) (dismissing First, Fifth, Ninth, and Tenth Amendment challenges against a federally authorized strike by the union on grounds that there is no state action).

A number of these "boilerplate" claims were made in the context of challenges to anti-Communist-era regulations. *See, e.g.*, Slagle v. Ohio, 366 U.S. 259, 261–62 n.4, 264 (1961) (rejecting boilerplate First, Ninth, and Tenth Amendment claims regarding the refusal to answer Communist questions, but granting the claim on other grounds); Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 745 n.3 (1961) (involving First, Fifth, Ninth, and Tenth Amendment claims against the expenditure of union dues for political activity); Hartman v. United States, 290 F.2d 460, 462, 470 (9th Cir. 1961) (rejecting boilerplate First, Ninth, and Tenth Amendment claims regarding the refusal to answer Communist questions); Wilkinson v. United States, 272 F.2d 783, 787 (5th Cir. 1960) (same); Barenblatt v. United States, 252 F.2d 129, 134–36 (D.C. Cir. 1958) (same); Briehl v. Dulles, 248 F.2d 561, 566 (D.C. Cir. 1957) (rejecting boilerplate Ninth and Tenth Amendment claims regarding the refusal to grant a passport because of the failure to respond to allegations of Communist association); United States v. Kamin, 136 F. Supp. 791, 793, 804 (D. Mass. 1956) (involving the refusal to answer questions regarding Communist associations and a Ninth Amendment claim, with the case decided on other grounds); United States v. Stein, 140 F. Supp. 761, 767, 769 (S.D.N.Y. 1956) (rejecting individual-rights and state-power challenges to the federal Smith Act); Nat'l Mar. Union of Am. v. Herzog, 78 F. Supp. 146, 163–77 (D.D.C. 1948) (upholding against First, Fifth, and Ninth Amendment challenges to a provision in the Labor-Management Relations Act denying to a labor union the privilege of being recognized as an exclusive bargaining agent unless the union's officers have filed affidavits denying membership in or affiliation with the Communist Party); Sheiner v. State, 82 So.2d 657, 667–68 (Fla. 1955) (rejecting a claim that disbarment for refusing to answer whether he was member of the Communist Party violates due process after the attorney invoked his rights under the "first, fourth, fifth, sixth, eighth, ninth and tenth amendments to the constitution of the United States

appear to have cited the Ninth and Tenth Amendments as general limitations on federal power.[159] In any event, prior to the 1960s, all but one of these claims failed.[160] Not only did courts reject Ninth Amendment individual-rights claims, but they also cited the Ninth Amendment in support of decisions limiting an expanded interpretation of enumerated individual federal rights.[161]

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of America"); Thompson v. Wallin, 93 N.Y.S.2d 274, 285 (N.Y. Sup. 1950) (ignoring Ninth and Tenth Amendment challenges, but ruling in favor of teachers fired for being members of the Communist Party); *In re* Patterson, 302 P.2d 227, 228, 235 (Or. 1956) (denying the application of admission to the bar of a person who was a member of the Communist Party and who had refused to answer questions before a House committee on the grounds that answering such questions violated the "First, Fourth, Fifth, Ninth and Tenth Amendments of the Constitution of the United States"); Browning v. Slenderella Sys., 341 P.2d 859, 868 (Wash. 1959) (Mallery, J., dissenting) (arguing that the Ninth Amendment suggests an individual right to exclude people from private business accommodations on the basis of race); State v. James, 221 P.2d 482, 488–501 (Wash. 1950) (rejecting a Ninth Amendment defense for appellee's refusal to answer whether he was a member of the Communist Party before a state legislative committee).

159. Some scholars at the time experimented with the idea that both the Ninth and Tenth Amendments protected unenumerated personal rights. *See* Norman Redlich, Are There "Certain Rights . . . Retained By the People?", 37 N.Y.U. L. Rev. 787, 808 (1962) (noting "the strong historical argument that [the Ninth and Tenth Amendments] were intended to apply in a situation where the asserted right appears to the Court as fundamental to a free society but is, nevertheless, not specified in the Bill of Rights").

160. In *Colorado Anti-Discrimination Commission v. Case*, 380 P.2d 34 (Colo. 1963), the court upheld the state's Fair Housing Act and cited the federal Ninth Amendment for the proposition that there are inherent rights beyond those listed in the Constitution. The court noted that "[a] proper construction of this single sentence [of the Ninth Amendment] entitles that provision to far greater consideration in the definition of and the protection afforded to 'inherent rights' than has heretofore been recognized." *Id.* at 40.

161. *See, e.g.*, State v. Sprague, 200 A.2d 206, 209 (N.H. 1964) (rejecting a Ninth Amendment property-right claim against the application of a state law forbidding racial discrimination in public accommodations, and instead citing the Ninth in support of state police powers). In *State ex rel. Hawkins v. Board of Control*, 93 So.2d 354 (Fla. 1957), the Florida Supreme Court observed:

> In what appears to be a progressive disappearance of State sovereignty, it is interesting to read certain decisions (among others) which the United States Supreme Court has handed down in recent months. . . . It is a "consummation devoutly to be wished" that the concept of "states' rights" will not come to be of interest only to writers and students of history.

Id. at 357. In his concurrence, Chief Justice Glenn Terrell mocked the U.S. Supreme Court's recent equal protection decisions and wrote sympathetically of state resistance to integration:

> [States resisting integration] contend that since the Supreme Court has tortured the Constitution, particularly the welfare clause, the interstate commerce clause, the Ninth and Tenth Amendments, the provisions relating to separation of state and

The Last Stand of the Historical Ninth Amendment: *Bute v. Illinois* and the Doctrine of Incorporation

The *Lochner* Court had interpreted the due process clause of the Fourteenth Amendment to include some of the liberties listed in the Bill of Rights, such as freedom of speech,[162] freedom of the press,[163] and the right to counsel,[164] but resisted the wholesale absorption of the Bill of Rights into the Fourteenth Amendment.[165] The New Deal Court not only abandoned the nontextual *Lochnerian* liberty of contract,[166] but for a brief time it considered abandoning *Lochnerian* textual rights such as freedom of speech as well.[167] For some years following the New Deal, courts cited the Ninth and Tenth Amendments in support of their continued resistance to total incorporation. In *Payne v. Smith*, for example, the Washington Supreme Court refused to incorporate the Fifth Amendment's right to indictment by grand jury for infamous crimes.[168] The court invoked the Ninth and Tenth Amendments' preservation of local rule regarding state court procedures:

> This clause in the Fourteenth Amendment leaves room for much of the freedom which, under the Constitution of the United States and in accordance with its purposes, was originally reserved to the states for their exercise of their own police powers and for their control over the procedure to be followed in criminal trials in their respective courts.

> federal powers, and the powers not specifically granted to the Federal government being reserved to states, they have a right to torture the court's decision. Whatever substance there may be to this contention, it is certain that forced integration is not the answer to the question.

Id. at 360–61 (Terrell, C.J., concurring).

162. Gitlow v. New York, 268 U.S. 652 (1925).

163. Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931).

164. Powell v. Alabama, 287 U.S. 45 (1932).

165. Palko v. Connecticut, 302 U.S. 319 (1937).

166. United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

167. *See* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 594 (1940) (upholding compelled flag salutes in public schools), *rev'd*, W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). For a general discussion of the New Deal Court and the doctrine of incorporation, *see* Lash, *supra* note 85.

168. 192 P.2d 964, 966 (Wash. 1948).

> . . . The compromise between state rights and those of a central government was fully considered in securing the ratification of the Constitution in 1787 and 1788. It was emphasized in the "Bill of Rights," ratified in 1791. In the ten Amendments constituting such Bill, additional restrictions were placed upon the Federal Government and particularly upon procedure in the federal courts. None were placed upon the states. On the contrary, the reserved powers of the states and of the people were emphasized in the Ninth and Tenth Amendments. The Constitution . . . sought to keep the control over individual rights close to the people through their states.[169]

The Washington Supreme Court's resistance in *Payne* to the expansion of the incorporation doctrine, on the basis of the Ninth and Tenth Amendments, was no anomaly. The court was simply echoing the views of the Supreme Court of the United States. In *Bute v. Illinois*, the Supreme Court considered whether allowing a defendant in a noncapital criminal prosecution to represent himself without inquiring into whether he desired or could afford an attorney violated his rights under the Fourteenth Amendment.[170] Because the Sixth Amendment required such inquiry in federal court, the issue was whether this rule was incorporated against the states. In a 5 to 4 decision, Justice Harold Burton rejected the claim and provided an extended analysis of the Ninth and Tenth Amendments and their roles in interpreting the scope of the Fourteenth Amendment's due process clause.[171] Because of the depth of his analysis, and because this case has not been discussed in any previous book on the Ninth Amendment,[172] Justice Burton is quoted at length:

> One of the major contributions to the science of government that was made by the Constitution of the United States was its division of powers between the states and the Federal Government. The compromise between state rights and those of a central government was fully considered

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169. *Id.* at 967.

170. 333 U.S. 640, 644 (1948).

171. *Id.* at 650–53.

172. Despite its being among the most extended discussions of the Ninth and Tenth Amendments by the Supreme Court, I have found only a single cite to *Bute* in a discussion of the Ninth Amendment—an offhand mention in a footnote in a student note. *See* Stephen Hampton, Note, *Sleeping Giant: The Ninth Amendment and Criminal Law*, 20 SW. U. L.REV. 349, 349 n.3 (1991).

in securing the ratification of the Constitution in 1787 and 1788. It was emphasized in the "Bill of Rights," ratified in 1791. In the ten Amendments constituting such Bill, additional restrictions were placed upon the Federal Government and particularly upon procedure in the federal courts. None were placed upon the states. On the contrary, the reserved powers of the states and of the people were emphasized in the Ninth and Tenth Amendments. The Constitution was conceived in large part in the spirit of the Declaration of Independence which declared that to secure such "unalienable Rights" as those of "Life, Liberty and the pursuit of Happiness. . . . Governments are instituted among Men, deriving their just powers from the consent of the governed. . . ." It sought to keep the control over individual rights close to the people through their states. While there have been modifications made by the States, the Congress, and the courts in some of the relations between the Federal Government and the people, there has been no change that has taken from the states their underlying control over their local police powers and state court procedures. They retained this control from the beginning and, in some states, local control of these matters long antedated the Constitution. The states and the people still are the repositories of the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States. . . ." The underlying control over the procedure in any state court, dealing with distinctly local offenses such as those here involved, consequently remains in the state. The differing needs and customs of the respective states and even of the respective communities within each state emphasize the principle that familiarity with, and complete understanding of, local characteristics, customs and standards are foundation stones of successful self-government. Local processes of law are an essential part of any government conducted by the people. No national authority, however benevolent, that governs over 130,000,000 people in 48 states, can be as closely in touch with those who are governed as can the local authorities in the several states and their subdivisions. The principle of "Home Rule" was an axiom among the authors of the Constitution. After all, the vital test of self-government is not so much its satisfactoriness weighed in the scales of outsiders as it is its satisfactoriness weighed in the scales of "the governed." While, under the Constitution of the United States, the Federal Government, as well as each state government, is at bottom a government by the people, nevertheless, the federal sphere of government has been largely limited to certain delegated powers. The burden of establishing a delegation of power to the

> United States or the prohibition of power to the states is upon those making the claim. This point of view is material in the instant cases in interpreting the limitation which the Fourteenth Amendment places upon the processes of law that may be practiced by the several states, including Illinois. In our opinion this limitation is descriptive of a broad regulatory power over each state and not of a major transfer by the states to the United States of the primary and pre-existing power of the states over court procedures in state criminal cases.[173]

Justice Burton linked the Ninth and Tenth Amendments with both the division of powers between the states and the federal government, and the need to keep control over individual rights close to the people through their state governments. Together, the Ninth and Tenth preserved the retained rights and powers of the states and of the people. One of those retained rights was the right to "Home Rule," or, as earlier courts had phrased it, the right of a state "to determine for itself its own political machinery and its own domestic policies."[174] Preserving that right required a rule of construction. The Court in *Bute* applied such a rule, noting that the principles underlying the Ninth and Tenth Amendment are "material in the instant cases in *interpreting* the limitation which the Fourteenth Amendment places upon the processes of law that may be practiced by the several states."[175]

Even if the Supreme Court in a post–New Deal world no longer deployed the Ninth and Tenth as substantive restrictions on Congress, under *Bute* these amendments continued to have a role in guiding the Court's construction of enumerated individual rights.[176] This, then, was the final synthesis of the founding, Reconstruction, and the New Deal: although no longer expressing substantive limits on the enumerated powers of Congress, the Ninth and Tenth Amendments nevertheless limited the Court's own expansion of the Fourteenth Amendment. Or, as the Ninth Amendment might put it: the enumeration in this Constitution of certain rights, *like those in the Fourteenth Amendment*, shall not be construed to deny or disparage other rights retained

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173. *Bute*, 333 U.S. at 650–53 (alteration in original) (citations omitted).

174. Hawke v. Smith, 126 N.E. 400, 403 (Ohio 1919).

175. 333 U.S. at 653 (emphasis added).

176. Limiting the impact of Supreme Court interference with the political process, state or federal, was a theme running through much of the Supreme Court's New Deal–revolution jurisprudence. *See* Lash, *supra* note 85, at 462–64.

by the people, such as the general right to local control of criminal procedure. As the Supreme Court gradually incorporated almost all of the Bill of Rights, including the criminal-procedure provisions,[177] this last remnant of the historical reading of the Ninth Amendment faded from view.

Writing in the midst of the Warren Court's incorporation of criminal-procedure rights, a judge on the Ohio Court of Common Pleas wrote:

> I believe that a majority of the justices of the Supreme Court of the United States have, in recent years, erred grievously in finding, after more than a century and a half, that their present concepts of the provisions of the Bill of Rights of the Constitution of the United States, in nearly every conceivable detail, are applicable to the States. . . . To me it seems that our history irrefutably establishes the fact that our forefathers clearly understood that the States were to chiefly control our daily affairs and that the national government was to be one of delegated powers—not omnipotence. The grand design was to preclude a tyrannical national government—not to create completely impotent State governments. . . . Yet time and again, in recent years, I perceive a majority of our Supreme Court justices to have found some pretext for invalidating state action, in the face of overwhelming proof of criminal acts, by ignoring the 9th and 10th Amendments.[178]

More than just ignored, the Ninth Amendment and its history had been lost.

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177. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963) (incorporating the right to counsel contained in the Sixth Amendment); Mapp v. Ohio, 367 U.S. 643 (1961) (incorporating the Fourth Amendment).

178. State v. Puckett, 201 N.E.2d 86, 89 (Ohio Ct. Com. Pl. 1964).

TEN

Death and Transfiguration

How the Ninth Amendment Got Filed in the Wrong Place

AT THE UNIVERSITY OF CHICAGO, in a separate wing off the main section of the Joseph Regenstein Library, one can research rare books and manuscripts at the Special Collections Research Center. Among the varied documents deposited at the center, you will find the papers of the late Chicago law professor Philip B. Kurland, an internationally renowned constitutional theorist and coeditor with Ralph Lerner of the five-volume set of historical materials titled *The Founders' Constitution*.[1] Published in the Constitution's bicentennial year of 1987, this expansive collection of historical documents relating to the adoption and early understanding of the Constitution is widely used today by legal historians and constitutional scholars.[2]

Among Professor Kurland's papers are boxes that contain materials relating to the Founders' Constitution Project. One box, number 86, contains a folder with two significant pieces of historical evidence relating to the Ninth Amendment that Professor Kurland appears to have prepared for publication in the collection. One is an excerpt from Chancellor James Kent's *Commentaries on American Law*. The extended passage involves a discussion of the concurrent powers of the state and federal governments and includes an analysis of Story's opinion in *Houston v. Moore* and the New York case *Livingston v. Van Ingen*—both, as we have seen, key cases in the history of the Ninth Amendment. Placed with Kent's *Commentaries*, however, is an even more important document: Judge John Grimke's full opinion in *State v. Antonio*. As I discussed in chapter 7, Grimke's opinion explained how the Ninth Amendment worked alongside the Tenth in preserving the retained rights and powers of

1. THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987).

2. References to *The Founders' Constitution* are ubiquitous in constitutional legal scholarship. The success of the collection was predicted as soon as it was published. In his 1987 review, historian Harold M. Hyman declared that the five-volume set was "an absolute necessity for all serious 'law and history' specialists." Harold M. Hyman, *The Founders' Constitution*, 5 LAW & HIST. REV. 581 (1987) (book review).

the people in the states, with both calling for a limited construction of federal power. Written by a ratifier of the Constitution, the opinion tracked Madison's description of the Ninth in his speech against the Bank of the United States, and did so in the context of an actual legal opinion by a major jurist of the founding generation. Of all the vast materials collected for *The Founders' Constitution*, Grimke's opinion seems to have been the only postadoption discussion of the Ninth Amendment by an actual ratifier that Kurland was able to locate.

Grimke's opinion in *State v. Antonio*, unfortunately, was not included in the published five-volume set. Professor Kurland apparently believed that Grimke's opinion was important enough to at least prepare for publication (the opinion is copied and pasted to separate pieces of paper). In the end, however, Kurland and Lerner decided not to include the text of the opinion and simply added a brief citation to the case in a "see also" list of sources at the end of the final section on the Bill of Rights. Still, Kurland must have thought the opinion was important enough to keep in storage, and you can find it should you choose to visit the center at the Regenstein Library. However, you won't find Judge Grimke's opinion or the above-mentioned section of Kent's *Commentaries* if you look in the set of historical materials Professor Kurland preserved in the section marked "Amendment IX." Instead, you'll find them in box number 86, in a folder marked "Not Used, Amendment X."

Bennett Patterson's Book

> *After a careful search we have not been able to find any other decisions by the courts of the United States, either state or federal, which directly discuss the applicability of the Ninth Amendment. The decisions of our courts to this date throw very little light upon its meaning*
>
> Bennett Patterson, *The Forgotten Ninth Amendment*[3]

Although Bennett Patterson's 1955 book *The Forgotten Ninth Amendment* was not the first twentieth-century work to focus on the Ninth,[4] it has been the

3. Bennett B. Patterson, The Forgotten Ninth Amendment: A Call for Legislative and Judicial Recognition of Rights Under Social Conditions of Today 33 (1955).

4. The first appears to have been an article by Knowlton H. Kelsey in which Kelsey argued that the Ninth Amendment supported judicial enforcement of *Lochnerian* property rights. *See* Knowlton H. Kelsey, *The Ninth Amendment to the Federal Constitution,* 11 Ind. L.J. 309, 313 (1936).

most influential. Containing a rather curious introduction by the retired dean of Harvard Law School Roscoe Pound,[5] Patterson's book was cited by courts even prior to *Griswold v. Connecticut*[6] and has been cited by almost every significant work on the Ninth Amendment since 1965.[7]

In his account of the history of the Ninth Amendment, Patterson focused on Madison's original version of the Ninth Amendment, which Patterson believed reflected an original intent to require states as well as the federal government to protect unenumerated rights.[8] Beyond this rather

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5. Pound's introduction comes close to contradicting everything that follows. Against Bennett's vision of broad judicial enforcement of unenumerated rights, Pound noted that

> the states have the attributes and powers of sovereignty so far as they have not been committed to the federal government by the Constitution. So far as inherent rights are not committed to the federal government, defining and securing them is left to the states or to be taken over by the people of the United States by constitutional amendment.

Roscoe Pound, *Introduction* to PATTERSON, *supra* note 3, at iii, vi.

6. *See* Colo. Anti-Discrimination Comm'n v. Case, 380 P.2d 34, 40 (Colo. 1962) (upholding the state's Fair Housing Act and citing the federal Ninth Amendment and Patterson's book for the proposition that there are inherent rights beyond those listed in the Constitution). *But see* Terry v. City of Toledo, 194 N.E.2d 877, 881–83 (Ohio Ct. App. 1963) (noting the Colorado court's decision in *Case* and its citation of Patterson's book, but, in canvassing similar claims against housing acts around the country, concluding that "the cases are in complete confusion").

7. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 234 n.43 (2004) [hereinafter BARNETT, RESTORING THE LOST CONSTITUTION]; PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 113 (4th ed. 2000); EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 63 n.10, 64 n.11 (1957); Randy E. Barnett, *Introduction: James Madison's Ninth Amendment* [hereinafter Barnett, *James Madison's Ninth Amendment*], *in* 1 THE RIGHTS RETAINED BY THE PEOPLE 1, 2 n.5 (Randy E. Barnett ed., 1989); Raoul Berger, *The Ninth Amendment, as Perceived by Randy Barnett*, 88 Nw. U. L. Rev. 1508, 1516 n.58 (1994); Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 223 n.6 (1983); James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 51 n.300 (1995); Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 908 n.3 (1993); Robert M. Hardaway et al., *The Right to Die and the Ninth Amendment: Compassion and Dying after* Glucksberg *and* Vacco, 7 GEO. MASON L. REV. 313, 348 n.314 (1999); JoEllen Lind, *Liberty, Community, and the Ninth Amendment*, 54 OHIO ST. L.J. 1259, 1269 n.9 (1993); Thomas B. McAffee, *The Constitution as Based on the Consent of the Governed—Or, Should We Have an Unwritten Constitution?*, 80 OR. L. REV. 1245, 1267 n.101 (2001); Simeon C.R. McIntosh, *On Reading the Ninth Amendment: A Reply to Raoul Berger*, 28 HOW. L.J. 913, 933 n.66 (1985); Lawrence E. Mitchell, *The Ninth Amendment and the "Jurisprudence of Original Intent,"* 74 GEO. L.J. 1719, 1720 n.7 (1986); Michael J. Perry, Brown, Bolling *& Originalism: Why Ackerman and Posner (Among Others) Are Wrong*, 20 S. ILL. U. L.J. 53, 73 n.85 (1995); Norman Redlich, *Are There "Certain Rights . . . Retained by the People"?*, 37 N.Y.U. L. REV. 787, 805 n.7 (1962).

8. PATTERSON, *supra* note 3, at 15.

idiosyncratic argument, Patterson spent little time exploring the Ninth's original history. Among other aspects of the historical record missing from his account are the precursors from the state conventions, Madison's letter about the meaning of the final draft of the Ninth Amendment, the debates in the Virginia assembly, and Madison's discussion of the Ninth in his speech opposing the Bank of the United States. As far as judicial construction was concerned, Patterson believed that "[t]here has been no direct judicial construction of the Ninth Amendment by the Supreme Court of the United States of America" and that the "very few cases in the inferior courts" that discussed the Ninth, like their counterparts in the Supreme Court, "throw very little light upon [the Ninth Amendment's] meaning."[9] In passing, Patterson mentioned that a number of pre–New Deal cases mentioned the Ninth Amendment, but that none of these were of any assistance, because they apparently involved the construction of federal power and not the protection of individual rights. According to Patterson, they "do not actually discuss the Ninth Amendment, but actually discuss the *Tenth* Amendment."[10] In this way, Patterson was able to sweep away over a century of case law that presented a very different understanding of the Ninth Amendment from the one he presented in his book.

Given that so many other scholars have also missed major portions of the Ninth Amendment's history, it would be unfair to criticize Patterson's book for its historical shortcomings. *The Forgotten Ninth Amendment* was, after all, the first book to focus on the Ninth Amendment, and, despite its shortcomings, it has been quite influential. Since its publication, scholars and judges of every political stripe have accepted Patterson's picture of an amendment lying dormant and forgotten prior to the twentieth century.[11] Justice Arthur

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9. *Id.* at 33.

10. *Id.* at 32.

11. This is by far one of the most enduring myths about the Ninth Amendment. The following is only a partial list of influential scholarly works that have claimed that the Ninth Amendment remained dormant until it was rediscovered in the late twentieth century: Brest et al., *supra* note 7, at 113 ("The title of Bennett Patterson's 1995 book, The Forgotten Ninth Amendment, accurately captures the status of this provision of the Bill of Rights throughout most of our constitutional history."); Dumbauld, *supra* note 7, at 64 ("There is no occasion for amazement when the fact comes to light that apparently there has never been a case decided which turned upon the Ninth Amendment. It has been invoked by litigants only ten times and in each instance without success."); Calvin R. Massey, Silent Rights: The Ninth Amendment and the Constitution's Unenumerated Rights 9–10 (1995) ("Very little effort has been devoted to doctrinal

Goldberg himself cited Patterson's book in his *Griswold* concurrence.[12] To the extent that he relied on Patterson's research, Goldberg had every reason to believe that he was writing on a clean historical slate.

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argument for the simple reason that a majority of the Supreme Court has never relied upon the Ninth Amendment as the basis for any decision."); *id.* at 224 n.17 ("Only seven Supreme Court cases prior to *Griswold* dealt in any fashion with the Ninth Amendment."); PATTERSON, *supra* note 3, at 27 ("There has been no direct judicial construction of the Ninth Amendment by the Supreme Court of the United States of America. There are very few cases in the inferior courts in which any attempt has been made to use the Ninth Amendment as the basis for the assertion of a right."); Eric M. Axler, *The Power of the Preamble and the Ninth Amendment: The Restoration of the People's Unenumerated Rights*, 24 SETON HALL LEGIS. J. 431, 442 (2000) ("While the Amendment began as an important condition to the states' ratification of the Constitution, it subsequently went unnoticed by the Supreme Court for 174 years."); Randy E. Barnett, *Foreword*, 1 THE RIGHTS RETAINED BY THE PEOPLE, *supra* note 7 at vii, vii ("For all but the last quarter of a century the amendment lay dormant, rarely discussed and justifiably described as 'forgotten' in the one book devoted to it."); Raoul Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1, 1 (1980) ("Justice Goldberg rescued [the Ninth Amendment] from obscurity in his concurring opinion in *Griswold v. Connecticut*."); *id.* at n.3. ("Prior to *Griswold* . . . the court had few occasions to probe the meaning of the Ninth Amendment."); Caplan, *supra* note 7, at 223–24 ("After lying dormant for over a century and a half, the ninth amendment to the United States Constitution has emerged from obscurity to assume a place of increasing, if bemused, attention. . . . Ninth Amendment analysis has proceeded in three stages. In the first stage, which lasted until 1965, the amendment received only perfunctory treatment from courts and commentators."); *id.* at 224 n.5 ("During this first period there were only the most glancing judicial and scholarly references to the ninth amendment, with no explicit construction of the amendment by the Supreme Court in the seven cases that represent the sum total of the Court's pronouncements on the amendment prior to 1965."); Kelsey, *supra* note 4, at 319 ("There seems to be no case that decides the scope of the Ninth Amendment even in part. In decisions where it is mentioned, it is either grouped with the Tenth Amendment in decisions based upon or involving the latter, and hence concerning reservation or denial of power, or it is merely classified as one of the first ten which are held to be limitations on national and not on state power. No case has been found that uses the Ninth Amendment as the basis for the assertion or vindication of a Right."); Mark C. Niles, *Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights*, 48 UCLA L. REV. 85, 89 (2000) ("[N]o Supreme Court decision, and few federal appellate decisions, have relied on the Ninth Amendment for support."); Redlich, *supra* note 7, at 808 ("The Ninth Amendment has been mentioned in several cases but no decision has ever been based on it." (citing cases listed in PATTERSON, *supra* note 3, at 27–35)); Chase J. Sanders, *Ninth Life: An Interpretive Theory of the Ninth Amendment*, 69 IND. L.J. 759, 769 (1994) ("[U]ntil 1965, the Court mentioned the Ninth Amendment in fewer than ten cases. In all but one of these, the references were brief and passing."); Eugene M. Van Loan III, *Natural Rights and the Ninth Amendment*, 48 BYU L. REV. 1, 1 n.3 (1968) (citing only two pre-1900 cases, and concluding that "[i]n the few cases where anything more than a cursory reference to the ninth appeared, it was lumped with the tenth, as an innocuous rule of construction limiting the federal government to its delegated powers").

12. Griswold v. Connecticut, 381 U.S. 479, 490 n.6 (Goldberg, J., concurring).

Griswold v. Connecticut

By 1965, the Supreme Court had shed its *Bute*-era resistance to broad incorporation of the first eight amendments.[13] Thus, when the Court decided *Griswold*, it had already abandoned the last application of the Ninth Amendment as a rule calling for the limited construction of national power.[14] Still, even if the Ninth Amendment was no longer a substantive restriction on the Court's interpretation of enumerated federal powers and rights, there remained 150 years of jurisprudence linking the purpose of the Ninth with the principles of the Tenth. This link had been assumed by the Supreme Court itself only a year prior to *Griswold* in the Court's rejection of Ninth and Tenth Amendment claims in *Katzenbach v. McClung*.[15] In a decision that would trigger the modern debate over the Ninth Amendment, however, the Supreme Court assumed—indeed, *asserted*—that this jurisprudence did not exist.

The Penumbras of Justice William O. Douglas

The factual background of *Griswold* and the manner in which it reached the Supreme Court are worthy of another book.[16] Suffice to say, the case was less about invalidating a moldy Connecticut law banning the distribution of contraceptives to married couples (which was never enforced anyway) and more about getting the Supreme Court to embrace the unenumerated right to privacy. Justice William O. Douglas's majority opinion in *Griswold* has received no small degree of grief from legal scholars—including scholars who support the decision's embrace of a right to privacy. From merely "unpersuasive"[17] to

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13. *See supra* chapter 9, notes 170–178 and accompanying text for a discussion of *Bute v. Illinois*, 333 U.S. 640 (1948).

14. Between the time that Patterson published his book and 1965, when the Court decided *Griswold*, some courts noted the relevance of his work to the issue of judicial enforcement of unenumerated rights. *See, e.g.*, *supra* note 6.

15. *See supra* chapter 9, notes 154–157 and accompanying text.

16. Perhaps the most comprehensive discussion of the case and its background can be found in David J. Garrow, Liberty and Sexuality: The Right to Privacy and the Making of *Roe v. Wade* (updated ed. 1998).

17. Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 Chi.-Kent L. Rev. 131, 135–36 (1988) (arguing that Justice Douglas's "attempt to arrive at marital privacy through an exegesis of the Bill of Rights simply does not persuade").

"an amateur exercise in metaphysical poetry,"[18] Justice Douglas's evocation of penumbral emanations has long been the subject of polite criticism among friends and open ridicule by critics—a rather ironic outcome given that Douglas's penumbral approach was developed at the suggestion of his colleagues on the bench. Douglas's original draft opinion had focused on the First Amendment associational rights of married couples.[19] Although he spoke of association as a right within the penumbra of the First Amendment, his analysis was limited to that particular text. When Douglas circulated his original draft to his fellow justices on the Court, however, Justice William Brennan worried that the broad First Amendment analysis might be used in later cases to protect the associational rights of *Communists*.[20] Accordingly,

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18. Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1113 (2002) ("Justice Douglas's opinion for the Court reads more like an amateur exercise in metaphysical poetry than law. . . . Strikingly, though, his argument seems unpersuasive. The reason is simple: it looks like all the reasoning is being done by a patchwork of images and metaphors.").

19. According to Douglas's original draft:

> The association of husband and wife is not mentioned in the Constitution or in the Bill of Rights. Neither is any other kind of association. The right to educate a child in a school of the parents' choice—whether public or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain peripheral rights.

William O. Douglas, Draft *Griswold* Opinion, at 3 (on file with the Library of Congress, the Papers of William O. Douglas, box 1347, no. 496 (typed draft, riders, penciled draft)); *see also id.* at 5 ("Marriage does not fit precisely any of the categories of First Amendment rights. But it is a form of association as vital in the life of a man or woman as any other and perhaps more so. We would indeed have difficulty protecting the intimacies of one's relationship to NAACP and not the intimacies of one's marriage relation.").

20. According to the case notes prepared by Brennan's clerks that year:

> Justice Douglas showed an early draft of his opinion in *Griswold v. Connecticut*, 381 U.S. 479, to Justice Brennan, and asked for his suggestions. In that draft, Justice Douglas adopted a First Amendment approach, likening the husband-wife relationship to other forms of association already given First Amendment protection. Somewhat alarmed by this approach, Justice Brennan sent a note the following morning outlining the approach eventually adopted by the Court. It was possible to persuade Justice Douglas to abandon the First Amendment approach by showing that the "association" of married couples had little to do with advocacy—and that so broad-gauged an approach might lead to First Amendment protection for the Communist Party simply because it was a group, an approach Justice Douglas had rejected in the original Communist Party registration case. To save as much of the original approach as possible, it was suggested that the expansion of the First Amendment to include association be used as an analogy to justify a similar approach in the area of privacy. . . . [Brennan] did join Justice Goldberg's opinion, which elaborated the same basic ideas at somewhat greater length.

in a private note, Brennan urged Douglas to find some other way to reach the same result:

> It goes without saying, of course, that your rejection of any approach based on *Lochner v. New York* is absolutely right. And I agree that the association of husband and wife is not mentioned in the Bill of Rights, and that is the obstacle we must hurdle to effect a reversal in this case.
>
> But I hesitate to bring the husband-wife relationship within the right to association we have constructed in the First Amendment context. . . . If a suitable formulation can be worked out, I would prefer a theory based on privacy, which, as you point out, is the real interest vindicated here. . . .
>
> Instead of expanding the First Amendment right of association to include marriage, why not say that what has been done for the First Amendment can also be done for some of the other fundamental guarantees of the Bill of Rights? In other words, where fundamentals are concerned, the Bill of Rights guarantees are but expressions or examples of those rights, and do not preclude applications or extensions of those rights to situations unanticipated by the Framers. Whether, in doing for other guarantees what has been done for speech and assembly in the First Amendment, we proceed by an expansive interpretation of those guarantees or by application of the Ninth Amendment admonition that the enumeration of rights is not exhaustive, the result is the same. The guarantees of the Bill of Rights do not necessarily resist expansion to fill in the edges where the same fundamental interests are at stake.
>
> The Connecticut statute would, on this reasoning, run afoul of a right to privacy created out of the Fourth Amendment and the self-incrimination clause of the Fifth, together with the Third, in much the same way as the right to association has been created out of the First.[21]

Following Brennan's advice, Douglas abandoned his original "marital association" approach and drafted an opinion tracking Brennan's suggestion that he locate the right to privacy in an amalgam of several provisions in the Bill of Rights. Scholars have generally viewed Douglas's opinion as an

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William T. Finley, Jr., & S. Paul Posner (law clerks), Case Notes on Griswold (on file with the Library of Congress, the Papers of William J. Brennan, box II: 6).

21. Note from William Brennan to William O. Douglas (Apr. 24, 1965) (on file with the Library of Congress, the Papers of William O Douglas, box 1347, no. 496).

unpersuasive effort to avoid repeating the sin of *Lochner*.[22] As discussed earlier, Douglas did at least try to follow the reasoning of "footnote 4" in *United States v. Carolene Products Co.* and Justice Jackson's reasoning in *West Virginia Board of Education v. Barnette*, and ground the right to privacy in the text of the Constitution. But by moving to a general metaphor of penumbras emanating from the Bill of Rights in general (rather than just a penumbral reading of the First Amendment itself), Douglas lost touch with the text of the Constitution altogether—far more so than he would have had he followed his original instinct and focused on the associational aspect of the First Amendment. The result was an opinion that elicited "giggles" from the other Supreme Court clerks at the time[23] and knowing smiles from law students ever since.

Justice Arthur Goldberg's Opinion

Uneasy about Justice Douglas's approach, Chief Justice Earl Warren initially resisted joining his opinion and apparently discussed his doubts with Justice Arthur Goldberg.[24] Goldberg, who was eager to follow up on his Ninth Amendment query at oral argument, decided to use the unease over Douglas's opinion as an opportunity to draft an opinion focusing on the Ninth. He assigned the initial research and drafting to his law clerk (now a Supreme Court justice) Stephen Breyer.[25] Neither Breyer nor Justice Goldberg apparently found much in the way of Ninth Amendment case law. As Goldberg announced in the final draft of his concurrence, the "Court has had little occasion to interpret the Ninth Amendment."[26] Citing the work of

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22. *See, e.g.*, Jed Rubenfeld, *The Right to Privacy*, 102 HARV. L. REV. 737, 802 (1989) (suggesting that "what drove privacy into the penumbras . . . was a perceived need to differentiate the privacy doctrine from the language of substantive due process"). Rubenfeld continued, "[T]his insecurity on privacy's part . . . resulted in the very thing feared; by resorting to shadows, the right to privacy has simply invited critics to expose it—and to brand it, of course, with the scarlet letter of Lochnerism." *Id.*

23. *See* GARROW, *supra* note 16, at 249 (reporting his conversations with clerks James S. Campbell, Stephen Goldstein, and Lee A. Albert).

24. *Id.*

25. *Id.* at 250.

26. Griswold v. Connecticut, 381 U.S. 479, 490 (1965) (Goldberg, J., concurring).

Bennett Patterson,[27] who himself had found at least five Supreme Court cases mentioning the Ninth Amendment, Justice Goldberg declared that "[a]s far as I am aware, until today this Court has referred to the Ninth Amendment only in [three cases:] *United Public Workers v. Mitchell*, *Tennessee Electric Power Co. v. TVA*, and *Ashwander v. TVA*."[28] Not only did Justice Goldberg fail to mention the Court's reference to the Ninth Amendment only the year before in *Katzenbach v. McClung*,[29] or the substantial discussion of the Ninth and Tenth in *Bute v. Illinois*,[30] but he also failed to cite all the Supreme Court cases actually listed in Patterson's book.[31]

Expanding on Justice Douglas's brief citation to the Ninth Amendment in the majority opinion,[32] Justice Goldberg argued that the Ninth "lends strong support" to the idea that liberty protected against state action by the Fourteenth Amendment "is not restricted to rights specifically mentioned in the first eight amendments."[33] Building his historical case on the works of James Madison and Joseph Story,[34] Goldberg insisted that "[t]he Amendment is almost entirely the work of James Madison. It was introduced in Congress by him and passed the House and Senate with little or no debate and virtually no change in language."[35] Although Justice Goldberg was certainly right about Madison's key role in drafting the amendment, one is at a loss to explain his assertion that the passage of the Ninth Amendment involved "virtually no change in language"; *half* the amendment was erased by the select committee, a change from the original version dramatic enough to cause serious problems in the drive to ratify the Bill of Rights.[36]

By limiting his historical analysis to only the final version of the Ninth Amendment, Justice Goldberg could focus on the text's invocation of rights

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27. *Id.* at 490 n.6 (citations omitted).

28. *Id.*

29. *See* 379 U.S. 294, 298 n.1 (1964).

30. *See* 333 U.S. 640 (1948).

31. Goldberg did cite *Mitchell*, but, like Patterson, he did not cite the *Mitchell* Court's express construction of the Ninth and Tenth Amendments. *Griswold*, 381 U.S. at 490 n.6 (Goldberg, J., concurring).

32. *Id.* at 484 (majority opinion).

33. *Id.* at 493 (Goldberg, J., concurring).

34. *Id.* at 488–90.

35. *Id.* at 488.

36. *See supra* chapter 3, notes 24–59 and accompanying text.

without having to grapple with Madison's point that preserving the rights of the Ninth was inextricably tied to limiting the powers of the federal government. As did Patterson, Goldberg assumed that "rights" meant *individual* rights and that the Court's role was identifying and protecting certain unenumerated individual rights from governmental interference, including state governmental interference. By assuming that the retained rights of the Ninth were solely individual in nature, Goldberg was able to make a direct analogy between the unenumerated *individual* rights of the Ninth (which bound the federal government) and the undefined *individual* "liberties" of the Fourteenth (which bound the states). Accordingly, Goldberg concluded that limiting the scope of the Fourteenth Amendment to just those incorporated rights expressly mentioned in the Constitution would "ignore the Ninth Amendment and to give it no effect whatsoever."[37]

I should stress at this point that I believe this is an entirely reasonable reading of the Ninth Amendment *if* one assumes that retained rights are solely individual in nature and that "the people" of the Ninth Amendment are solely national in character. These are how the words are commonly understood today. Absent historical evidence to the contrary, Justice Goldberg had no reason to think that these words meant anything else (though it might have occurred to the justice to wonder why "the people" of the Tenth Amendment were understood in a very different manner). What is troubling about his opinion is not so much his failure to more fully engage the historical materials but his cavalier treatment of the Court's own precedents, as indicated by his failure to cite even those few Supreme Court cases discovered by Bennett Patterson. Justice Goldberg was engaged in a transformation of the Court's traditional understanding of the Ninth Amendment, one that would disengage the Ninth from the Tenth and take it in a direction directly opposite to every prior decision in state or federal court—his opinion might have acknowledged as much.

The Dissents

In dissent, Justice Potter Stewart reasserted the *Mitchell* doctrine and argued that the "Ninth Amendment, like its companion the Tenth . . . 'states but a truism that all is retained which has not been surrendered.'" It had

37. *Griswold*, 381 U.S. at 491 (Goldberg, J., concurring).

been "framed by James Madison and adopted by the States simply to make clear that the adoption of the Bill of Rights did not alter the plan that the *Federal* Government was to be a government of express and limited powers, and that all rights and powers not delegated to it were retained by the people and the individual States." Noting that the Court had never held any other view of the Ninth, Justice Stewart marveled that the Court had reversed the original meaning of the clause in a manner that "would have caused James Madison no little wonder."[38] Justice Stewart's view exemplified the post–New Deal reading of the Ninth Amendment: the Ninth and Tenth Amendment were unenforceable declarations of the general principle of federalism. This had been the Supreme Court's approach to both amendments since *United States v. Darby* was decided in 1941—a case that Justice Stewart quoted as referring to both amendments.[39]

In a separate dissent, Justice Hugo Black derided Goldberg's "recent discovery" of the Ninth Amendment.[40] Accusing the majority of returning to the discredited jurisprudence of the *Lochner* Court,[41] Justice Black argued that "every student of history knows" that the purpose of the Ninth Amendment was "to assure the people that the Constitution in all its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication."[42] Black then noted the irony of using the Ninth to interfere with the right to local self-government:

> [F]or a period of a century and a half no serious suggestion was ever made that the Ninth Amendment, enacted to protect state powers against federal invasion, could be used as a weapon of federal power to prevent state legislatures from passing laws they consider appropriate to govern local affairs.[43]

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38. *Id.* at 530 (Stewart, J., dissenting) (citations omitted).

39. *Id.* at 529.

40. *Id.* at 518 (Black, J., dissenting). Black had joined Douglas's dissent in *Bute v. Illinois*, 333 U.S. 640 (1948), probably on the grounds of his long-stated advocacy of total incorporation.

41. *Id.* at 522.

42. *Id.* at 520.

43. *Id.*

Justice Black's dissent has been the subject of rather severe scholarly criticism.[44] According to John Hart Ely, "Black's response to the Ninth Amendment was essentially to ignore it," and Ely accused Black of being inconsistent in his refusal to follow "original understanding" even if "[he] didn't like where it led."[45] In light of the evidence regarding the original meaning of the Ninth Amendment discussed in this book—an original meaning echoed by 150 years of jurisprudence—it seems that of all the opinions in *Griswold*, Justice Black's came the closest to the original meaning of the amendment. It is true that the Ninth Amendment was enacted to "protect state powers against federal invasion."[46] And the federalist structure of the Ninth was not modified by the Fourteenth Amendment, whose framers ignored the Ninth and Tenth Amendments and looked instead to the first eight amendments for examples of the privileges or immunities of U.S. citizens.

This does not mean that Goldberg and the majority in *Griswold* were necessarily wrong to discover and enforce a general right to privacy against state abridgment.[47] It only means that Justice Goldberg could not have chosen a less appropriate amendment to support a decision denying the people of Connecticut their right to decide the matter for themselves. It also means that Justice Black's instincts about the Ninth Amendment were correct.

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44. *See* Rodney J. Blackman, *Spinning, Squirreling, Shelling, Stiletting, and Other Stratagems of the Supremes*, 35 Ariz. L. Rev. 503, 513 (1993) ("[M]uch of Black's dissent appears to be soaked in acid and blood."); Fleming, *supra* note 7, at 52 ("Justice Black wrote that the Ninth Amendment was adopted not to protect 'unenumerated' rights but, 'as every student of history knows, to assure the people that the Constitution in all its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication.' The common rejoinder is that every student of history knows that the *Tenth* Amendment, not the *Ninth*, was adopted for that purpose." (quoting *Griswold*, 381 U.S. at 520 (Black, J., dissenting))); Christopher J. Schmidt, Revitalizing the Quiet Ninth Amendment: Determining Unenumerated Rights and Eliminating Substantive Due Process, 32 U. Balt. L. Rev. 169, 180 (2003) ("Justice Black refurbished, if not created, the textually inaccurate traditional approach to Ninth Amendment jurisprudence. . . . [He] ignored the text of the Ninth Amendment.").

45. John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 38 (1980).

46. *Griswold*, 381 U.S. at 520 (Black, J., dissenting).

47. It is possible that the privileges or immunities clause of the Fourteenth Amendment was understood to include certain common-law rights analogous to those liberties generally associated with the right to privacy. This depends, however, on one's interpretation of that *enumerated* right.

The Ninth Amendment and the Modern Supreme Court

Although the *Griswold* decision laid the groundwork for the Supreme Court's eventual invocation of the right to privacy in *Roe v. Wade*,[48] the modern Supreme Court has remained reluctant to rely on the Ninth Amendment as the source of any judicially enforceable unenumerated individual rights. For example, even though the lower court in *Roe v. Wade* expressly based its decision on the Ninth Amendment,[49] the Supreme Court demurred on the issue, instead stating rather cryptically:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[50]

In this passage, the Court appeared to keep the door open to grounding the right to privacy on the Ninth Amendment (at least in the alternative). In fact, this was to be the last time any Supreme Court majority suggested even the *possibility* that the Ninth Amendment might serve as a source of enforceable unenumerated individual rights.[51] Instead, various justices have used the Ninth Amendment in support of a broad reading of a separately *enumerated* right. For example, the three-judge plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey* contains the following statement regarding the proper interpretation of the Fourteenth Amendment: "Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of

48. 410 U.S. 113 (1973).

49. Roe v. Wade, 314 F. Supp. 1217, 1221 (D.C. Tex. 1970).

50. *Roe*, 410 U.S. at 153.

51. The Court would later quote this sentence from *Roe* in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 60 (1976), without adding to the basic analysis of *Roe v. Wade*. Although Chief Justice Berger, writing for a plurality in *Richmond Newspapers*, used the Ninth in support of his reading of the First Amendment, he nevertheless avoided any direct reliance on the Ninth itself. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 579 (1980) (plurality opinion).

the substantive sphere of liberty which the Fourteenth Amendment protects. See U.S. Const., Amdt. 9."[52]

It is hard to know what to make of this reference to the Ninth Amendment. The plurality apparently believed that the citation spoke for itself, for it said nothing else about *how* the Ninth supports a broad reading of the Fourteenth Amendment. The problem, however, is that the text of the Ninth Amendment says nothing at all about the proper interpretation of *enumerated* rights like the Fourteenth Amendment. As discussed in chapter 4, no matter how restrictive an interpretation one might give to an enumerated right, doing so neither denies nor disparages *other* unenumerated rights retained by the people. The plurality's citation to the Ninth Amendment in support of their reading of the Fourteenth is at best a non sequitur and at worst a misreading of the Ninth.

Despite the obscurity of the plurality's citation, it is fairly easy to identify the assumptions about the Ninth Amendment upon which it is based. Following the same line of reasoning as Bennett Patterson, the justices of the *Casey* plurality clearly read both the Ninth and Fourteenth Amendments as referring *solely* to individual rights. One can imagine that if pressed on the matter, the plurality would argue that the Ninth's reference to a broad category of undefined individual rights suggests a historical commitment to individual liberty broadly interpreted and that this same approach surely would have been shared by the framers of the Fourteenth Amendment, who *also* shared expansive views about individual liberty.

The plurality's reliance on the Ninth Amendment in support of a broad reading of a separately enumerated right is representative of *every* invocation of the Ninth Amendment by the modern Supreme Court; the Ninth is never relied on in its own right, but rather serves as rhetorical support for a broad interpretation of a *different* amendment. Not even the most forceful advocate of the unenumerated-individual-rights reading of the Ninth Amendment has ever called for the enforcement of the amendment itself. It is not hard to understand why. Relying directly on the Ninth as a source of *unenumerated* rights would mean staring into the void: identifying and enforcing rights not listed in the Constitution. Taken seriously, such a view requires departing from the text of the Constitution and fashioning a right ex nihilo—out of nothing (nothing, at least, that is in the text of the Constitution). One might say that the Supreme Court has done exactly that in its recognition of a variety of liberties not specifically mentioned in the text of the Constitution, such as

52. 505 U.S. 833, 848 (1992).

the right of parents to control the educational upbringing of their children and other unenumerated substantive due process rights. But this is not true, as is clear from the phrase "substantive due process." These are rights identified as part of the *textual* right to liberty protected by the due process clause(s). In these cases, although the textual right to liberty is simply interpreted at a high enough level of generality to include a broad range of subsidiary rights, it still remains an interpretation of an enumerated right. Although this might seem unduly formalistic, it is clear that the Supreme Court believes that the distinction is quite important: the Supreme Court has *never* broken from the text of the Constitution and enforced a right that, by the Court's own admission, fell outside the "sphere" of a particular enumerated right.

But by using the Ninth as rhetorical support for broad interpretations of enumerated rights, justices like those in the *Casey* plurality have been forced to embrace an unjustifiably *narrow* reading of the Ninth Amendment. The pairing of the Ninth and Fourteenth Amendments requires the paring down of the Ninth Amendment to the point that it protects *only* individual rights. As noted earlier, there is nothing in the text of the Ninth that suggests such a narrow rendering of the conceptually rich phrase "rights retained by the people." And there is much in the history behind the amendment that suggests that the rights of the Ninth Amendment embraced *everything* not meant to be impinged upon by unduly broad constructions of federal power, from the right of an individual to lie on his left side to the right of local majorities to determine local educational policy to the right of the collective people of a state to alter their state constitution.

This is the irony of the transfigured Ninth Amendment: although used in support of a broad conception of individual freedom, the clause has become a far smaller provision than that envisioned by its framers and has been rendered altogether unenforceable as an independent provision in the Bill of Rights.

Philip Kurland, *The Founders' Constitution*, and the Confirmation Hearings of the Judge Robert Bork

Mr. Bork: . . . I think the ninth amendment therefore may be a direct counterpart to the 10th amendment. The 10th amendment says, in effect, that if the powers are not delegated to the United States, it is reserved to the states or to the people. And I think the ninth amendment says that, like powers, the enumeration of rights shall not be construed to deny or

disparage rights retained by the people in their State Constitutions. That is the best I can do with it.
Senator DeConcini: Yes. You feel that it only applies to their State constitutional rights.
Mr. Bork: Senator, if anyone shows me historical evidence about what they meant, I would be delighted to do it. I just do not know.
Senator DeConcini: I do not have any historical evidence. What I want to ask you is purely hypothetical, Judge. Do you think it is unconstitutional, in your judgment, for the Supreme Court to consider a right that is not enumerated in the constitution—
Mr. Bork: Well, no.
Senator DeConcini: —to be found under Article IX?
Mr. Bork: I do not think you can use the Ninth Amendment unless you know something of what it means. For example, if you had an amendment that says "Congress shall make no" and then there is an inkblot and you cannot read the rest of it and that is the only copy you have, I do not think the court can make up what might be under the inkblot if you cannot read it.

Hearings before the Senate Judiciary Committee on the Supreme Court nomination of Robert H. Bork[53]

Even if not as a judicially enforceable right, the Ninth Amendment has nevertheless played an important role in matters involving the Supreme Court of the United States. According to Professor Sanford Levinson, Judge Robert Bork's nomination to the Supreme Court was defeated "largely because of his refusal to acknowledge the 'unenumerated' right to privacy."[54] The only textual justification for recognizing unenumerated rights, of course, is the Ninth Amendment, and it was Judge Bork's treatment of that amendment that became a particularly contentious issue during his nomination hearing before the Senate Judiciary Committee. Indeed, it was Anthony Kennedy's supposedly more "moderate" approach to the Ninth Amendment—one that viewed the clause as supporting a broad construction of constitutional terms like "liberty"—that helped pave his way to the Court as an acceptable alternative to Judge Bork.[55]

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53. *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 100th Cong. 249 (1987) [hereinafter *Bork Nomination Hearings*] (statement of Robert H. Bork).

54. Levinson, *supra* note 17, at 135.

55. *See* S. Comm. on the Judiciary, Nomination of Anthony M. Kennedy to be an

One of the most important critics of Bork's nomination to testify before the Senate Judiciary Committee was University of Chicago law professor Philip Kurland.[56] What made Kurland's testimony so devastating was his reputation as a staunch critic of the liberal Warren Court and his strict adherence, in his past work, to constitutional text and history.[57] Kurland informed the committee that he had changed his views regarding the Ninth Amendment and unenumerated rights while compiling historical materials for the five-volume set of historical documents titled *The Founders' Constitution*.[58] Kurland's research on the Ninth Amendment for the collection not only led him to a new understanding of the amendment, but it also compelled him to passionately denounce Judge Bork's nomination.[59] Kurland's Ninth

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Associate Justice of the United States Supreme Court, S. Exec. Rep. No. 100-113, at 20–21 (1988). This section of the report includes the following heading: "V. Judge Kennedy Has a Reasoned and Balanced Approach to the Ninth Amendment, One That is Fully Consistent With His Understanding of Liberty in the Due Process Clause." The report goes on to note Kennedy's testimony that the framers believed "that the first eight amendments were not an exhaustive catalogue of all human rights" and that "the Court is treating [the Ninth Amendment] as something of a *reserve clause*, to be held in the event that the phrase "liberty" and the other spacious phrases in the Constitution appear to be inadequate for the Court's decision." *Id.* at 20.

56. *See* Levinson, *supra* note 17, at 138; *see also* Linda Greenhouse, *Byrd Asks Panel to Forgo a Vote in Debate on Bork*, N.Y. Times, Sept. 29, 1987, front page ("Philip B. Kurland, a law professor at the University of Chicago, said Judge Bork's judicial philosophy failed to recognize that 'the preservation and advancement of individual liberty' was the 'principal objective' of the Constitution's framers. Professor Kurland said that Judge Bork's refusal to recognize rights not specified in the text of the Constitution was inconsistent with his stated adherence to the doctrine of 'original intent,' because the framers did not intend the Constitution to be so limited.").

57. For Kurland's criticism of the Warren Court, *see* Philip B. Kurland, *The Supreme Court, 1963 Term—Foreword: Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*, 78 Harv. L. Rev. 143 (1964).

58. The Founders' Constitution, *supra* note 1.

59. Professor Kurland's prepared statement for the Senate Judiciary Committee included the following passage regarding Judge Bork and the Ninth Amendment:

> [N]ot only does Judge Bork's judicial philosophy bode ill for past decisions in the Supreme Court, it also reveals an unwillingness to recognize that the principle objective of the framers of our Constitution 200 years ago was the preservation and advancement of individual liberty. Liberty was, indeed, the watchword of the national convention and of the state ratifying conventions as well.
>
> The Constitution did not create individual rights. The people brought them to the convention with them and left the convention with them, some enhanced by constitutional guarantees. The Bill of Rights, in guaranteeing some more, made sure that none was adversely affected.
>
> Judge Bork, however, would now limit the rights of the individual to those specifically stated in the document, thereby rejecting his claim to be a textualist by ignoring the Ninth Amendment which provides, and I quote, "the enumeration in the

Amendment–based opposition to Bork's nomination nicely dovetailed with the overall strategy of those seeking to derail Bork's nomination.[60] By focusing on the Ninth Amendment, opponents could paint the judge as a hypocrite for refusing to engage the Ninth Amendment while purporting to be devoted to the text of the Constitution and the original intentions of its framers.[61] After all, if even a conservative constitutionalist like Philip Kurland felt compelled to modify his stance on the Ninth Amendment and the right to privacy when confronted with the historical evidence, Bork's failure to do the same suggested pigheadedness at best and duplicity at worst.

> Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Bork Nomination Hearings, *supra* note 53, at 2833 (testimony of Prof. Philip B. Kurland). During the subsequent questions from members of the committee, Kurland explained how his views on the Ninth Amendment had been affected by his work on *The Founders' Constitution*:

> The Chairman (Senator Joseph Biden): Professor Kurland, is your view of the right of privacy the same as Judge Bork's, to the best of your knowledge, to the extent that one exists or does not exist within the Constitution?
>
> Mr. Kurland: It is not now, no. That is, I have come to realize this through the book that I just edited, which was the—it is called "The Founders' Constitution" and consists of all of the, or most of the writings and documents relating to the framing. I have come to a different realization of the breadth of the rights of Englishmen that was sought to be protected by the Constitution makers. So while I was prepared to argue as to whether the right of privacy should be included among those rights, my position now is that there is no doubt about the Court's capacity to create that right. Not to create it, but to affirm it.

Id. at 2860.

60. Professor Kurland was deeply involved with a group assisting Senator Joseph Biden in putting together a strategy to defeat Bork's nomination. Mark Gitenstein, Matters of Principle: An Insider's Account of America's Rejection of Robert Bork's Nomination to the Supreme Court 61 (1992). In late June 1987, when Justice Lewis Powell announced his resignation from the Supreme Court, Senator Biden immediately set up a conference call that included Kurland, Laurence Tribe, Ken Bass, and Floyd Abrams. *Id.* at 24. This became a working group of academics advising Biden throughout the hearings. *See* Edward Walsh, *For Committee Staff, Time to Get Ready for Bork; Confirmation Drama to Supplant Iran-Contra Hearings as Capitol Hill's Main Event*, Washington Post, Aug. 11, 1987, A13. This was not Kurland's first foray into the politics of judicial nominations—he had worked with Tribe the year before in opposing the appointment of Daniel Manion to the U.S. Circuit Court of Appeals. Gitenstein, Matters of Principle, *supra*, at 24.When interviewed on the television show *Meet the Press*, Kurland remarked, "The one thing we know is that the senate should not be asked to consent to the appointment of both Dr. Jekyll and Mr. Hyde." This quote would become the central theme in a *Time* magazine cover story that included two identical pictures of Judge Bork side by side—one upside down. *Id.* at 201.

61. *See* Levinson, *supra* note 17 at 138 (discussing the use of the Ninth Amendment by the "architects of the strategy which led to Bork's defeat").

What was the historical evidence regarding the Ninth Amendment uncovered by Professors Philip Kurland and Ralph Lerner in their editing of *The Founders' Constitution*? For the collection, Professors Kurland and Lerner had included what they viewed as the most significant historical documents relating to the adoption and early history of each provision in the Constitution. For most of the provisions in the Bill of Rights (volume 5 of the collection), this included debates in the state ratifying conventions, the amendments first suggested by the state conventions, Madison's original draft of the amendment, early constitutional treatises dealing with the amendment such as St. George Tucker's essays on American constitutional law, and early Supreme Court cases construing the amendment.[62]

In the section on the Ninth Amendment, however, *none of these* sources were included. Instead, Kurland and Lerner included (1) founding-era materials relating to the belief in natural individual rights; (2) one Anti-Federalist letter claiming that under the Constitution as originally proposed, the federal government would exercise power over all unenumerated rights; (3) Madison's explanation that this would be prevented by the Ninth Amendment; (4) Madison's final draft of the Ninth Amendment and a rejected attempt by Massachusetts Representative Elbridge Gerry to clarify the meaning of "deny or impair"; and (5) a paragraph written forty-two years later by Joseph Story. In total, the section on the Ninth Amendment in *The Founders' Constitution* takes up less than twelve pages.[63] In comparison, the documents relating to the religion clauses alone take up sixty-six pages.

Missing from the section on the Ninth Amendment are the early versions suggested by the state ratifying conventions,[64] Madison's original version of

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62. *See*, for example, the sources cited for the First Amendment in 5 THE FOUNDERS' CONSTITUTION, *supra* note 1, at 44.

63. In a law review article expanding on an essay written for the *Chicago Tribune* that was critical of Bork's position on the Ninth Amendment, Kurland cited nothing except a work by Judge Learned Hand. *See* Philip B. Kurland, *Bork: The Transformation of a Conservative Constitutionalist*, 9 CARDOZO L. REV. 127 (1987).

64. In the section on the Tenth Amendment, for example, Kurland and Lerner included North Carolina's proposed amendment reserving to the states all "power, jurisdiction, and right, which is not by this Constitution delegated to the Congress of the United States." 5 THE FOUNDERS' CONST., *supra* note 1, at 403 (Documents for Amendment X); *see also id.* at 89 (including an amendment from the Virginia ratifying convention relating to the First Amendment).

the Ninth,[65] Madison's letters regarding the meaning of the Ninth,[66] Madison's discussion of the Ninth Amendment in his speech on the Bank of the United States,[67] St. George Tucker's discussion of the Ninth Amendment,[68] and Justice Joseph Story's discussion of the Ninth Amendment in *Houston v. Moore*.[69] Finally, as I pointed out in the introduction to this chapter, Judge Grimke's opinion in *State v. Antonio*, which linked the Ninth and Tenth Amendments, was (apparently) considered but ultimately omitted and filed away in a folder containing documents for the Tenth Amendment.

All these omitted references involve sources well known to Kurland and Lerner—sources that they used throughout *The Founders' Constitution*, *except* in regard to the Ninth Amendment.[70] A major portion of Madison's speech against the Bank of the United States is included—but the included passage ends precisely at the point where Madison goes on to describe the history behind the passage of the Ninth and Tenth Amendments.[71] A passage from St. George Tucker is included which begins *immediately following* a passage describing the Ninth and Tenth Amendments as working together to establish the rule of strict construction[72] and stops *immediately before* another passage linking the Ninth and Tenth Amendments with the rule of

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65. In the section on the First Amendment, Kurland and Lerner included both the proposed amendments from the Virginia ratifying convention and Madison's original version of the First Amendment. *See id.* at 89 and 92.

66. For example in the section on the religion clauses, Kurland and Lerner included, among other materials, Madison's discussion of the First Amendment in his 1817 "Detached Memoranda." *See id.* at 103.

67. Kurland and Lerner included an extended excerpt of Madison's speech against the proposed bank bill in their section on the necessary and proper clause. *See* 3 THE FOUNDERS' CONSTITUTION, *supra* note 1, at 244. The excerpt stops just prior to Madison's discussion of how the Ninth and Tenth Amendments work to restrict the construction of delegated federal power. *Id.* at 245.

68. Passages from St. George Tucker's treatise on the Constitution are included throughout *The Founders' Constitution*—indeed, there are too many to cite. In the volume on the Bill of Rights alone, Tucker's work is quoted or cited in the sections on the First, Second, Third, Fourth, Fifth, Sixth, and Tenth Amendments. *See id.* at 96 (First Amendment, religion), 152 (First Amendment, speech and press), 212 (Second Amendment), 218 (Third Amendment), 301 (Fifth and Sixth Amendments, criminal process), 404 (Tenth Amendment).

69. *See, e.g.*, 3 *id.* at 188.

70. *See supra* notes 64–69.

71. *See id.* at 245.

72. *See* 4 *id.* at 277.

construction.[73] In the section on the Tenth Amendment, Kurland and Lerner cited a reference to the Tenth Amendment in St. George Tucker's discussion of Article I, Section 10, but *did not* include Tucker's specific discussion of the Tenth Amendment in his chapter on the Bill of Rights—a discussion linking the principles of the Tenth Amendment with those of the Ninth.[74] Grimke's opinion in *Antonio*, of course, makes the same point as Madison's speech and Tucker's *Commentaries* regarding the interlocking Ninth and Tenth Amendments—but it too was omitted. Kurland and Lerner considered all these sources to contain important, relevant information about the early understanding of the Constitution, and yet, when these same sources addressed the Ninth Amendment, that particular discussion was omitted.

There are different ways to explain these omissions. The least likely explanation is that Professors Kurland and Lerner simply *missed* all the references to the Ninth Amendment in the sources they otherwise used repeatedly throughout *The Founders' Constitution*. Not only would both men have been well acquainted with sources like Madison's speech and St. George Tucker's treatise on the Constitution, but we know that they had Grimke's opinion *in hand*. But just as unlikely is the idea that either of these men, each a giant in their field, was trying to "hide" relevant historical evidence. All this evidence was, and remains, easily available to any historian who wants to explore the documents.

The most likely explanation is that both men truly believed that none of this evidence reflected the *true* original meaning of the Ninth Amendment and therefore concluded that none of this evidence deserved to be included in the collection. Just as the assumptions of Bennett Patterson caused him to dismiss more than one hundred years of case law relating to the Ninth Amendment because the cases involved limitations on federal power, not the protection of individual rights, so Kurland and Lerner likely dismissed similar references to the Ninth Amendment by James Madison and St. George Tucker. Like Grimke's opinion in *State v. Antonio*, these references must have seemed related to the *Tenth* Amendment, not the Ninth.

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73. *Id.*; *see* 1 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 app. note D (View of the Constitution of the United States) at 154 & nn. * and Ŧ (St. George Tucker ed., Phila., William Young Birch & Abraham Small 1803).

74. *See* 5 The Founders' Constitution, *supra* note 1, at 404.

For his part, Professor Kurland was convinced that the Ninth Amendment protected *individual* natural rights.[75] Kurland therefore was being perfectly honest when he testified before the Senate Judiciary Committee that he believed it was *Judge Bork* who refused to confront the historical evidence regarding the Ninth Amendment.[76] Perfectly honest and tragically ironic.

Judge Bork's position was closer to the truth about the historical Ninth Amendment than he knew at the time, and his position was certainly more in keeping with someone confronted with a largely empty historical record. Bork's first instinct was to read the Ninth as a counterpart to the Tenth Amendment, an instinct largely vindicated by what we now know about the original understanding of both the Ninth and Tenth Amendments. His second instinct was to refuse to come to any definitive conclusion regarding the Ninth absent the emergence of an adequate historical record regarding the original meaning of the clause. This seems an altogether reasonable position for a self-proclaimed originalist faced with an almost nonexistent historical record—or, better, a historical record that had come to be filed in the wrong place. If the Ninth Amendment was not actually hidden under an inkblot, then it was certainly obscured by a misunderstanding regarding the historic nature of retained rights.

If, in fact, the history of the Ninth Amendment is missing because it was filed in the wrong place, then what would it mean to put the amendment in its proper place? Assuming that an accurate understanding of our constitutional history can assist us in our effort to understand and apply our Constitution *today*, how does restoring the lost history of the Ninth Amendment make any difference to this fundamental task of citizenship?

This is the subject of the final chapter.

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75. *See* Kurland, *supra* note 63.

76. *See Bork Nomination Hearings*, *supra* note 53, at 2844 (testimony of Prof. Philip B. Kurland) ("Judge Bork however would now limit the rights of the individual to those specifically stated in the document, thereby rejecting his claim to be a textualist by ignoring the Ninth Amendment").

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ELEVEN

Guarding the Retained Rights of the People

The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold.

Griswold v. Connecticut[1]

Contemporary Federalism and the Retained Rights of the People

I began this book by claiming that the Ninth Amendment had been the recipient of a rather remarkable run of bad luck. History seems to bear this out; the Ninth Amendment was born in confusion, given a later-abandoned title, excluded from the decisions of the Marshall Court, rejected by the New Deal Court, and turned on its head by the modern Supreme Court. Even worse, as a tool for enforcing federalist limitations on national power, the Ninth Amendment has been wielded by some of least savory individuals in the nation's history and in defense of some of the worst evils, in particular, slavery and racial segregation. That being the case, one might be tempted to attribute its fate to some kind of karmic retribution and conclude "good riddance to bad rubbish."

But perhaps one should resist the temptation. This is only part of the story of the Ninth Amendment. The original purpose of the Ninth was to guard against the tyrannical exercise of delegated federal power, and it was to that purpose that the Ninth Amendment was first wielded in the great constitutional debate over the Alien and Sedition Acts. The Ninth thus played a role in the revolution

1. 381 U.S. 479, 491 (1965) (Goldberg, J., concurring).

of 1800, which restored, and some might say definitively established, the sovereign right of the people to criticize their national government. The great voices of James Madison and Thomas Jefferson were heard in the language of the Virginia and Kentucky Resolutions—resolutions read on the protected floor of the state assemblies (representing one of the retained rights of the people in the states) in an act that exemplifies how federalism can safeguard freedom.

Nor have we moved so far as a country as to have abandoned the idea that local autonomy can play a role in the defense of collective and individual freedom. John Hart Ely once described the Ninth Amendment as "that old constitutional jester."[2] Perhaps he is right, for as much as we have been tricked into missing its history, we may also have been tricked into missing its current use. Even if their source has been forgotten, the principles enshrined by the Ninth Amendment continue to inform the Supreme Court's construction of the Constitution. The so-called federalism revival that occurred during the tenure of Chief Justice William H. Rehnquist involved the Supreme Court's application of principles that can be traced back to the original understanding of the Ninth Amendment. Consider, for example, the late Chief Justice Rehnquist's opinion in *United States v. Lopez*.[3] Reviving the tradition of limiting the expansion of the federal commerce power into areas traditionally under state control, Rehnquist wrote: "To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[4]

Compare Chief Justice Rehnquist's warning about "piling inference upon inference" with James Madison's warning about using a "chain" of "remote implications" to justify the expansive interpretation of federal power:

> If implications, thus remote and thus multiplied, can be linked together, a chain may be formed that will reach every object of legislation, every object within the whole compass of political economy. The latitude of interpretation required by the bill is condemned by the rule furnished by the constitution itself.[5]

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2. John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 33 (1980).

3. 514 U.S. 549 (1995).

4. *Id.* at 567.

5. James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791) [hereinafter Madison's Bank Speech], *in* James Madison: Writings 480, 486 (Jack N. Rakove ed., 1999).

The warnings are one and the same. The more the Supreme Court allows a remote connection to an implied federal responsibility to justify an exercise of national power, the greater the chance that the Court will have transformed the nature of federal power from one of limited enumerated responsibilities to one of general police power. In the modern federalism cases, the Court generally grounded its limited construction of federal power on the underlying principles of the Tenth Amendment. Madison believed that the principle inhered in the very *nature* of delegated federal power, with the Ninth and Tenth Amendments serving only to make this assumed principle an express part of the Constitution.

The federalism revival of the Rehnquist Court went beyond cases involving federal regulatory power. A significant strand of this new federalist jurisprudence involved the proper scope of the federal judicial power as well. In *Alden v. Maine*, the Supreme Court ruled that Congress's powers under Article I could not be construed so broadly as to allow Congress to subject nonconsenting states to private suits for damages in state courts.[6] Although *Alden* was generally read as an Eleventh Amendment case, Justice Kennedy's opinion was based on his reading of the retained rights of the states:

> [A]s the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and *which they retain today* (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.[7]

This concept of limiting the construction of federal power (in *Alden*, federal judicial power) in order to preserve the retained rights of the states echoes every Ninth Amendment case from Justice Story's opinion in *Houston v. Moore* to Justice Burton's opinion in *Bute v. Illinois*. All these opinions deployed a rule of construction in order to preserve the retained rights and powers of the states. Although a number of scholars have criticized the contemporary Court's federalism jurisprudence as unsupported by either

6. 527 U.S. 706, 712 (1999).

7. *Id.* at 712–14 (emphasis added).

text or history,[8] an appreciation of the original meaning and historical application of the Ninth Amendment raises the possibility that the Court's jurisprudence is grounded in both.

The federalism jurisprudence of the current Supreme Court is generally understood as based on the Tenth Amendment. This is reasonable given that the modern Court itself has linked its rule of construction to the Tenth.[9] But grounding the Ninth Amendment's express rule of construction in the implied principles of the Tenth weakens the doctrine both as a matter of textual meaning and historical understanding. Put simply, it implies that the Court's limited reading of federal power is more a result of judicial policy than an effort to preserve the retained rights of the people.[10]

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8. *See* Ashutosh Bhagwat, *Affirmative Action and Compelling Interests: Equal Protection Jurisprudence at the Crossroads*, 4 U. PA. J. CONST. L. 260, 261 (2002) (describing the Rehnquist Court's "nontextual federalism-jurisprudence" as an example of "judicial activism"); Peter M. Shane, *Federalism's "Old Deal": What's Right and Wrong with Conservative Judicial Activism*, 45 VILL. L. REV. 201, 209–10 (2000) (criticizing the federalism jurisprudence of the Rehnquist Court on textual and historical grounds); Larry D. Kramer, *No Surprise. It's an Activist Court*, N.Y. TIMES, Dec. 12, 2000, at A33 (arguing that "conservative judicial activism is the order of the day"); Cass R. Sunstein, *Tilting the Scales Rightward*, N.Y. TIMES, Apr. 26, 2001, at A23 ("[W]e are now in the midst of a remarkable period of right-wing judicial activism."). *See generally* STEPHEN E. GOTTLIEB, MORALITY IMPOSED: THE REHNQUIST COURT AND LIBERTY IN AMERICA, at xi (2000) (arguing that the Rehnquist Court represents a "major revolution" in American judicial thought); TINSLEY E. YARBROUGH, THE REHNQUIST COURT AND THE CONSTITUTION (2000) (chronicling the doctrinal trends of constitutional decision making at the Rehnquist Court); Herman Schwartz, *Introduction* to THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT 19 (Herman Schwartz ed., 2002) (calling the Rehnquist Court's federalism doctrine "an astonishing display of judicial activism not seen since the 1930's").

9. *See Alden*, 527 U.S. at 713–14 ("Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of national power."); *see also* United States v. Lopez, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring); United States v. Morrison, 529 U.S. 598, 648 (2000) (Souter, J., dissenting).

10. The fact that these cases are related to the Tenth Amendment, but are not actually based on its text, has been noted both by justices favoring and by justices opposing the modern Court's federalism jurisprudence. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 585 (1985) (O'Connor, J., dissenting) ("The *spirit* of the Tenth Amendment, of course, is that the States will retain their integrity in a system in which the laws of the United States are nevertheless supreme."); New York v. United States, 505 U.S. 144, 156–57 (1992) ("The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself. . . . Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States."); *Morrison*, 529 U.S. at 648 n.18 (2000) (Souter, J., dissenting) (pointing out that the majority's "special solicitude for 'areas of traditional state regulation'" was "founded not on the text of the Constitution but on what has been

Grounding federalism jurisprudence in the text and history of the Ninth Amendment, rather than the Tenth, would clarify much of what appears counterintuitive in protecting "state power" over "individual rights." When the Supreme Court invalidated the federal laws at issue in cases like *United States v. Lopez*,[11] *United States v. Morrison*,[12] and *City of Boerne v. Flores*,[13] it did so on the grounds that, in each case, the federal government had failed to provide a sufficient factual record to justify the use of federal power. The result in each case was to leave local majorities free to set their own policies on handgun possession, private violence against women, and zoning for historical preservation. This is the same approach the Supreme Court uses in cases involving a protected class or a fundamental individual right: absent sufficient proof that the government regulation was narrowly tailored to achieve a compelling interest, the regulation is struck down and the individual is left free to act—or not, as the case may be. The federalism cases of the Supreme Court thus appear to treat states as if they were a protected class, or local government as if it were exercising a fundamental right.

Viewing the federalist limits on national power through the lens of the Ninth Amendment clarifies why it is altogether proper to treat the right to local self-government as deserving just as much protection as any other retained right of the people. According to James Madison, the first and second halves of the original version of the Ninth Amendment stated the "same thing." When the select committee of the First Congress (of which Madison was a member) decided to fix the redundant language of Madison's original proposal, they had a choice: they could keep Madison's original language banning the "enlarged" construction of federal power, or they could keep the original language regarding the preservation of retained rights. The committee chose the latter and, by so doing, rendered the provision a

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termed the *spirit* of the Tenth Amendment" (quoting Justice O'Connor's dissent in *Garcia*)).

As I have noted elsewhere, it is possible to view the popular-sovereignty language of the Tenth Amendment as calling for a narrow construction of federal power. *See* Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and "Expressly" Delegated Power*, 83 Notre Dame L. Rev. 101 (2008). This reading arises from an implication of the text, however, and not an expressly articulated rule of construction like that found in the Ninth Amendment.

11. 514 U.S. 549 (1995).

12. 529 U.S. 598 (2000).

13. 521 U.S. 507 (1997).

judicially enforceable right of the people, rather than a mere recommendation of federal policy.

In cases involving whether the federal government has overstepped its expressly delegated powers, therefore, the modern Supreme Court has been right to use judicial tools normally reserved for the protection of fundamental rights. The federal government's powers are limited in order to preserve the retained rights of the people, and protecting these rights has the effect—was *intended* to have the effect—of preserving the people's retained right to local self-government. Courts have the duty to actively preserve this right, just as they do all other rights enumerated in the Constitution. One of James Madison's key complaints about John Marshall's broad reading of federal power in cases like *McCulloch v. Maryland*[14] was that Marshall's approach removed the judicial branch from playing any role in determining whether an exercise of power was in fact necessary and proper.[15] To Madison, it was *essential* that the federal courts be available to step in and preserve the constitutionally mandated balance between federal and state power whenever necessary. Maintaining such a balance was a right of the people. As the Sedition Act proved, Madison was right to warn that tipping the balance too far in either direction would threaten individual liberty.

Properly understood, then, federalism is not about states' rights; it is about *our* rights, the retained rights of the people. This is why the federalist

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14. 17 U.S. 316 (1819).

15. In a letter to Spencer Roane, Madison wrote:

> But what is of most importance is the high sanction given to a latitude in expounding the Constitution which seems to break down the landmarks intended by a specification of the powers of Congress, and to substitute for a definite connection between means and ends, a Legislative discretion as to the former to which no practical limit can be assigned. In the great system of political economy having for its general object the national welfare, everything is related immediately or remotely to every other thing; and consequently a Power over any one thing, if not limited by some obvious and precise affinity, may amount to a power over every other. . . .
>
> Is there a Legislative power in fact, not expressly prohibited by the Constitution, which might not, according to the doctrine of the Court, be exercised as a means of carrying into effect some specified power?
>
> Does not the Court also relinquish by their doctrine, all controul on the Legislative exercise of unconstitutional power?

Letter from James Madison to Spencer Roane (Sept. 2, 1819), *in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 359, 360 (Marvin Meyers ed., 1973).

balance of power is not something the states may bargain away.[16] As Madison learned to his chagrin in the debate over the Bank of the United States, unduly broad exercises of federal power will almost invariably favor one region of the United States over another (if all regions are hurt, the legislation is less likely to be passed in the first place). This means that a significant number of states will generally have something to gain through the enactment of a particular federal policy—they will have an incentive, in other words, to relinquish their constitutionally guaranteed autonomy in exchange for some kind of political or monetary advantage. By enforcing the federalist limits on national power even in the face of state acquiescence, the Rehnquist Court appears to have understood that federalism belongs to the people, not the states. But by grounding decisions in the language of the Tenth Amendment, the Court obscured what is plain under the Ninth Amendment: local autonomy is a retained right of the people and can no more be bargained away by state representatives than it can be usurped by the federal Congress.

Finally, understanding that the great bulk of the Court's federalism jurisprudence fits within the original meaning of the Ninth Amendment (something that courts and commentators knew quite well for more than a century prior to the New Deal) answers the standard criticism that a federalist reading of the Ninth renders the clause redundant with the Tenth Amendment. This criticism is based on the illusion that the Court's current federalism jurisprudence belongs under the Tenth and not the Ninth. Although the Tenth can be viewed as calling for a limited construction of federal power (it declares that federal power is limited to powers actually expressed in the text of the Constitution), the fact remains that the text of the Tenth Amendment declares no more than the principle of expressly delegated power. At the time of the founding, although most states wanted this principle expressly added to the Constitution, it was not an especially controversial proposition; the list of powers in Article I seems to carry the necessary implication that Congress has only those powers listed in the document. Madison eventually changed his mind about the usefulness of a bill of rights, but he presented his proposed Tenth Amendment with the remark that he

16. A point emphasized by the Supreme Court in a number of its modern federalist decisions. *See, e.g.*, New York v. United States, 505 U.S. 144 (1992) (holding that the fact that states had supported the challenged exercise of federal power was irrelevant to determining whether the Constitution forbids the commandeering of state law to enforce federal policy).

still thought such a provision was unnecessary.[17] Even Edmund Randolph, who otherwise sought to restrict the interpretation of federal power, thought that the Tenth expressed an obvious principle and would have no "real effect."[18] The founding generation probably expected that the Tenth's declaration of enumerated federal powers would need to be enforced about as often as the clause requiring that presidents be at least thirty-five years old—rarely if at all, in other words. The far more likely danger was that Congress would broadly construe those powers that *were* delegated, thus making the Ninth Amendment a far more critical restriction on federal power.

The Tenth Amendment grew in prestige and rhetorical importance because of its express designation of the states as key players in the constitutional system. Emphasizing the independent existence of the states became increasingly necessary as High Federalists like John Jay and James Wilson (in the beginning) and Joseph Story and John Marshall (later on) insisted that "the people" of the Constitution were wholly national in character—which, if true, removed the theoretical underpinning of the rule of strict construction. That, of course, was their point, and that is why the idea triggered such a strong reaction by men like James Madison who were committed to a vision of retained powers and rights.[19]

The very concept of retained rights, of course, involved leaving certain matters in the hands of the people in the states. That is why for more than a century, the proponents of limited federal power had no difficulty in perceiving the close relationship between the Ninth and Tenth Amendments. But the Tenth Amendment's express naming of the *states* as the depository of all

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17. James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), *in* James Madison: Writings, *supra* note 5, at 437, 451 ("I find, from looking into the amendments proposed by the state conventions, that several are particularly anxious that it should be declared in the constitution, that the powers not therein delegated, should be reserved to the several states. Perhaps words which may define this more precisely, than the whole of the instrument now does, may be considered as superfluous. I admit they may be deemed unnecessary; but there can be no harm in making such a declaration.").

18. Letter from Edmund Randolph to George Washington (Dec. 6, 1789), *in* 5 Documentary History of the Constitution of the United States of America, 1786–1870, at 222, 223 (Wash., D.C., Dep't of State 1905).

19. Madison's particular objections to Marshall's opinion in *McCulloch* can be found in his "Detached Memoranda," *in* James Madison: Writings, *supra* note 5, at 745, 756 (noting that Marshall's opinion appeared to be based on "erroneous views," such as the idea that the Constitution was ratified "by people if meant people collectively & not by the states").

nondelegated power carried a rhetorical clarity that allowed the clause to overshadow the Ninth and become, in most people's minds, the primary guarantor of a limited construction of federal power.

Keeping this history in mind, we can now see how restoring the original meaning of the Ninth Amendment does not make the Ninth redundant with the Tenth Amendment; it merely restores the proper relationship between the two amendments. As Madison explained, it is the Tenth that "exclude[s] every source of power not within the Constitution itself," and it is the Ninth that "guard[s] against a latitude of interpretation" of those powers that *are* within the Constitution.[20] Put another way, if restoring this original vision seems to leave the Tenth Amendment with little to do, that is exactly what was intended from the beginning. Adding the Tenth was *supposed* to have been of little consequence.[21] The real work, as Madison foresaw, would be through the application of a rule of construction that, over time, would establish landmarks at the outer boundaries of federal power.

Synthesizing the Federalist and Libertarian Constitutions

Even if the original Ninth Amendment reflected a commitment to a federalist (limited) construction of federal power, how can the principles of the Ninth Amendment be reconciled with the libertarian principles of the Thirteenth, Fourteenth, and Fifteenth Amendments? Haven't we moved away from the original federalist Constitution and embraced instead a more libertarian understanding of individual freedom—and a more nationalist vision of how those freedoms are to be enforced by both Congress and the courts?

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20. Madison's Bank Speech, *supra* note 5, at 489.

21. As Randolph wrote to George Washington, he expected that the Tenth Amendment would not have any "real effect." Letter from Edmund Randolph to George Washington (Dec. 6, 1789), *supra* note 18, at 223. On the other hand, even this fundamental principle of enumerated powers has been questioned at times in our constitutional history. Federalists arguably attempted to bypass their enumerated powers during the Sedition Act controversy by asserting the unenumerated power to enforce the common-law prohibition of seditious libel. *See supra* chapter 6. The Supreme Court itself seemed on the verge of abandoning the principle of enumerated powers in the *Legal Tender Cases*, though this foray was short-lived. *See supra* chapter 8.

There is no doubt that the Reconstruction Amendments altered the original scope of the Ninth Amendment, at least when it comes to individual rights and congressional power to pass legislation protecting those rights. But, as discussed in chapter 8, it is also clear that the members of the Reconstruction Congress and Reconstruction-era courts assumed the continued existence of states as independent sovereign entities. Even after 1868, there remained a general (if not universal) presumption of limited enumerated federal power, only now applied in the context of new grants of enumerated federal power to enforce the Reconstruction Amendments. This did not erase the federalist structure of the Constitution; it merely placed more power and rights on the national side of the balance. The post–Civil War Constitution thus contains remnant federalist principles from the founding *as well as* newly adopted libertarian privileges and immunities. Both sets of (older) federalist and (newly added) libertarian individual rights must be preserved as courts seek to synthesize the constitutional texts of the founding and Reconstruction.

As discussed in chapter 4, the fact of enumeration does not imply the necessity or superiority of enumeration. Accordingly, the remnant unenumerated retained rights of the Ninth (those not extinguished or transformed by the adoption of the Fourteenth Amendment) are no less important than the enumerated rights of the Fourteenth. This seems to follow logically from an analysis of both the text and the histories of the Ninth and Fourteenth Amendments. It leads, however, to a critical and perhaps startling conclusion: *the enumerated rights of the Fourteenth Amendment must not be construed in a manner that denies or disparages the remnant retained rights of the Ninth*. For example, Congress ought not to unduly extend its powers under Section 5 of the Fourteenth Amendment in a manner that wrongly intrudes upon a matter meant to be left to state control even after the adoption of the Fourteenth Amendment.[22]

Limiting one right to preserve the proper scope of another is not without precedent. The Supreme Court, for example, has limited its construction of the establishment clause to avoid impinging upon the right to free speech.[23] Similarly, reconciling the Ninth and Fourteenth Amendments requires

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22. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997).

23. *See, e.g.*, Capitol Square Review & Advisor Bd. v. Pinnette, 515 U.S. 753 (1995) (ruling that the establishment clause should not be so broadly construed as to prohibit private religious speech in a public forum).

limiting the reach of the Fourteenth in order to avoid impinging upon the unenumerated retained rights of the Ninth (and vice versa).

For example, suppose that Congress decides that the states have failed to adequately educate children in reading, writing, and arithmetic. Believing that a poorly educated working class interferes with interstate commerce, Congress passes a law providing a federal private right of action for any person denied a free and adequate public education. It is likely that the Supreme Court would strike down such a law on the ground that it exceeds any reasonable construction of the interstate commerce clause.[24] Suppose, on the other hand, that Congress concludes that an adequate state-financed education is a privilege or immunity of U.S. citizens and accordingly passes the same law, only this time pursuant to Congress's powers under Section 5 of the Fourteenth Amendment. Further assume (as the Supreme Court would surely hold), that this kind of positive right to a state-funded education goes beyond the scope of enumerated rights protected by the Fourteenth Amendment.[25] This federal law thus infringes upon the retained right of local majorities to decide educational policy free from federal interference. Today, such a case would most likely be characterized as a Tenth Amendment states' rights case. It would be more appropriate, however, to view this as a Ninth Amendment retained-rights case. It is a simple example of how unduly broad constructions of rights under the Fourteenth Amendment might unduly interfere with rights retained by the people under the Ninth Amendment. This does not mean that the earlier Ninth Amendment trumps the later-in-time Fourteenth. It means only that the Ninth prevents, in Madison's words, any "latitude of interpretation" that impinges upon any of the retained rights of the people. In this regard, Congress is no more free to unduly extend its powers under Section 5 of the Fourteenth Amendment than it is under Section 8 of Article I.[26]

To modern ears, the idea of limiting the construction of individual rights in order preserve state autonomy may sound like an invention of radical

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24. *See* United States v. Lopez, 514 U.S. 549 (1995) (invalidating the Gun-Free School Zones Act).

25. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (finding that education is not a "fundamental right" that requires heightened scrutiny under the equal protection clause).

26. *See* United States v. Morrison, 529 U.S. 598 (2000) (invalidating portions of the Violence Against Women Act); *Flores*, 521 U.S. 507 (invalidating portions of the Religious Freedom Restoration Act).

states' rights theorists. In fact, the very nationalist Chief Justice John Marshall himself advanced the same theory of limited construction of rights running against the states. According to Marshall in *Trustees of Dartmouth College v. Woodward*:

> [E]ven marriage is a contract, and its obligations are affected by the laws respecting divorces. . . . [The contracts clause] in the constitution, if construed in its greatest latitude, would prohibit these laws. Taken in its broad, unlimited sense, the clause would be an unprofitable and vexatious interference with the internal concerns of a state, would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions, which are established for purposes of internal government, and which, to subserve those purposes, ought to vary with varying circumstances. . . . The general correctness of these observations cannot be controverted. That the framers of the constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us, is not to be so construed, may be admitted.[27]

Marshall asserted that rights enumerated in the Constitution against the states should not be construed in a manner that unduly interferes with the internal concerns of a state. This is a rule of construction that limits an enumerated right in order to preserve the autonomy of the people in the states. Marshall did not cite the Ninth Amendment, but his approach tracks the meaning of the Ninth Amendment's text and historical application.

The nature of retained unenumerated rights protected by the Ninth Amendment remained the same after 1868, even if the original scope of that amendment has been significantly reduced. Indeed, the adoption of the Fourteenth Amendment had no impact whatsoever on the operative effect of any post-1868 retained unenumerated right. Because these remnant retained rights retain their full value, the fact that "We the People" enumerated additional rights in the Fourteenth Amendment does not diminish in any way the equal importance of other rights retained under the Ninth.

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27. Trustees of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 627–29 (1819).

A Test Case: Medical Marijuana and the Retained Rights of the People

In 1996, the people of California passed the Compassionate Use Act, which allowed the use of marijuana for medicinal purposes.[28] Federal law, on the other hand, prohibits the personal use of marijuana for any reason.[29] Accordingly, when Diane Monson exercised what she thought was her right to cultivate and consume cannabis as a physician-prescribed treatment for her serious illness, the Drug Enforcement Agency ("DEA") stepped in and seized and destroyed her marijuana plants.[30] Ms. Monson, along with Angel Raich, subsequently filed suit in federal court seeking an injunction against the enforcement of the federal Controlled Substances Act as applied against anyone exercising a state-granted right to the medicinal use of marijuana. By the time the case reached the Supreme Court, the issue had been narrowed to whether the federal government had the power under the interstate commerce clause to preempt state laws like California's Compassionate Use Act.[31]

Despite earlier rulings that seemed to suggest that Congress's power to regulate local noncommercial activity did not reach this far,[32] in *Gonzales v. Raich* the Supreme Court ruled 6 to 3 in favor of the federal government. According to Justice John Paul Stevens, regulating personal use of marijuana, even under noncommercial conditions, was an essential part of a broader federal commercial regulatory program (in this case, the federal war on black-market drugs).[33] The majority based its decision on an earlier New Deal–era case, *Wickard v. Filburn*,[34] which upheld a federal ban on the personal cultivation and consumption of homegrown wheat on the grounds

28. Cal. Health & Safety Code § 11362.5 (West 2007).

29. *See* Controlled Substances Act, 84 Stat. 1242 (1970) (codified as amended at 21 U.S.C. §§ 801–971).

30. Gonzales v. Raich, 545 U.S. 1, 7 (2005).

31. *Id.* at 8–9.

32. *See* United States v. Lopez, 514 U.S. 549 (1995); United States v. Morrison, 529 U.S. 598 (2000).

33. *See Raich*, 545 U.S. at 20–21.

34. 317 U.S. 111 (1942).

that this practice undermined a federal regulatory program seeking to stabilize the market price of wheat.[35]

Wickard, along with *United States v. Darby*,[36] was part of the New Deal revolution in which the Supreme Court rejected strict construction of federal power and embraced instead Chief Justice John Marshall's expansive definition of federal power in *McCulloch v. Maryland* and *Gibbons v. Ogden*. One of the key aspects of these New Deal cases was judicial deference to Congress's determination that a particular local activity had a sufficient effect on interstate commerce to bring it within the regulatory authority of the federal government. Having abandoned the Ninth and Tenth Amendments as declarations of the people's retained rights, the Court declined to require Congress to *prove* that its regulation was actually necessary. Instead, following the approach of John Marshall in *McCulloch*, the Court left it up to Congress to decide whether a particular regulation was a necessary and proper use of an enumerated power. Although earlier cases like *Lopez* and *Morrison* seemed to suggest that the Court had moved away from New Deal deference and would now require a certain degree of factual proof to justify federal regulation of local noncommercial activities, the majority in *Raich* returned to the deferential standard of *Wickard* and *Darby*.[37] Whether destroying Diane Monson's garden was truly essential to the federal war on drugs was, according to the Court, a matter for the national government to decide, not Ms. Monson, and certainly not the people of the state of California.

One of the ironies of the case was that the plaintiffs had originally raised a claim based on the Ninth Amendment, as well as a claim based on a limited reading of the federal commerce power.[38] The Ninth Amendment claim was based on the *Griswoldian* reading of the Ninth as a source of unenumerated individual natural rights, in this case, the right to personal medicinal use of marijuana. Had the claim prevailed, it would have *required*, not just *allowed*, California, and every other state, to permit the medicinal use

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35. *Raich*, 545 U.S. at 31 ("Our decision in *Wickard* is of particular relevance." (internal citation omitted)).

36. 312 U.S. 100 (1941).

37. *Id.* at 22 ("In assessing the scope of Congress' authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a "rational basis" exists for so concluding.")

38. *See* Raich v. Ashcroft, 248 F. Supp. 2d 918, 922 (N.D. Cal. 2003).

of cannabis. Although the plaintiffs subsequently attempted to revive a combined Fifth and Ninth Amendment claim in federal court following the decision in *Raich v. Ashcroft*, their effort was unsuccessful.[39] Diane Monson and Angel Raich thus joined a long line of similarly unsuccessful plaintiffs who sought to use the Ninth as a source of unenumerated individual rights.

What makes the plaintiffs' claim in *Raich* ironic is that under the original understanding of the Ninth Amendment, they had a powerful argument indeed. A claim based on the original understanding of the Ninth would not involve whether an individual has an unenumerated right to use marijuana for medicinal purposes, but whether the people of California have the retained right to decide the matter for themselves. Like all constitutional rights, this liberty is not absolute. As a retained right, however, it can be defeated only by a proper showing of governmental need. A court must apply heightened scrutiny and the government must provide facts sufficient to justify the federal intrusion upon an otherwise retained right.

The retained rights of the Ninth Amendment are protected not by having the Court identify in serial fashion one unenumerated right after another but by forbidding the government to claim that the only limits to its power are those expressly enumerated in the Constitution. This approach carries the necessary textual implication[40] that federal power must be defined in a more limited manner than it would be if the only limits were those enumerated in the Constitution. Not only must this limited definition of federal power avoid *denying* the existence of a general body of retained rights beyond those listed in the Constitution, but it must also avoid *disparaging*, or limiting, the proper scope of this supratextual body of freedom. The constraining force on the interpreted scope of federal power imposed by this collective body of retained rights preserves an area of retained rights beyond that protected by the first eight amendments to the Constitution (or any other enumerated right).

This area of retained freedom is left to the sovereign control of the people in the states. This occurs by definition whenever a right is retained from the federal government. The most striking historical example of this rule is James Madison's argument that the Sedition Act violated the retained individual

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39. Raich v. Gonzales, 500 F.3d 850 (2007).

40. Professor Lawrence Solum has helpfully distinguished necessary textual implications, which are a matter of textual interpretation, from nonnecessary implications, which are a matter of textual construction. *See* Lawrence B. Solum, *Semantic Originalism* (Illinois Pub. Law Research Paper No. 07-24, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244.

natural right to freedom of speech *and* the Tenth Amendment's reservation of powers to the people of the states. Since *Raich* involved the proper construction of an enumerated power (interstate commerce), this calls for the application of the Ninth Amendment's rule of construction, not the Tenth Amendment's declaration of enumerated federal power. Applying the Ninth, however, would have the same operative effect as cases applying the Tenth: the Court would be engaged in protecting the retained sovereign powers and rights of the people in the states—in this case, the people of the state of California.

Just as in other matters involving the people's retained rights, the Court must construct a test for determining whether the government has in fact denied or disparaged the retained rights of the people. In his speech opposing the Bank of the United States, James Madison sketched a series of interpretive rules that he believed ought to be applied in cases involving the proper balance between federal and state power. Madison's primary rule was that "[a]n interpretation that destroys the very characteristic of the government cannot be just."[41] To Madison, this included any rule that left it to Congress to decide for itself whether its regulation was actually necessary and proper to advance an enumerated end.[42] Such a rule would amount to placing the fox in charge of the henhouse and would inevitably destroy the limitation on federal power that the state ratifying conventions had been promised and that the Ninth and Tenth Amendments were meant to preserve. The basic thrust of both the Ninth and Tenth Amendments was that Congress was to have only expressly enumerated powers, and these powers included only those means necessarily incident, or closely related, to an enumerated power. There are various ways the Court might go about enforcing this rule of construction, but the approach in cases like *United States v. Lopez* and *United States v. Morrison* seem appropriate, in that they required Congress to *prove* that its regulation was closely related to the federal power to regulate interstate commerce.

In *Raich*, this would have been a difficult test for the government to pass. Since Diane Monson's activities did not actually involve interstate commerce (they were noncommercial and purely intrastate), reaching these activities would be a matter of Congress's implied power to regulate matters otherwise retained by the people in the states. Under the Ninth Amendment, justifying

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41. Madison's Bank Speech, *supra* note 5, at 482.

42. Letter from James Madison to Spencer Roane (Sept. 2, 1819), *supra* note 15, at 360.

the exercise of such implied power requires the federal government to prove that the power to ban personal cultivation and noncommercial use of marijuana was necessarily incident to the general power to regulate interstate commerce. At the very least, this requires the government to prove that banning the use of homegrown marijuana for medical purposes, even when such use is authorized by state law, is necessary to the proper functioning of a broader commercial regulatory program. But even this test may be too generous to the federal government given that it is based on New Deal precedents that embraced John Marshall's broad view of federal power—a view that ignored the constraining interpretive rules of the Ninth and Tenth Amendments.[43] If the Supreme Court were to revisit some of the broader articulations of federal power handed down at the time of the New Deal (and by the Marshall Court), the government would be even *less* likely to prevail in a case like *Raich*.[44] It is possible, of course, that the government might nevertheless prevail even under the original understanding of the Ninth Amendment.[45] What would not have occurred, however, is anything like the majority opinion in *Gonzales v. Raich*, which left it to Congress to decide for itself whether it was infringing upon the retained unenumerated rights of the people.

Conclusion

The history of the Ninth Amendment is inextricably bound to the history of federalism under the American Constitution. A founding-era commitment to retained state-level sovereignty brought the Ninth into being, and it was the

43. The idea that Congress can potentially regulate local noncommercial activity that undermines a broad federal regulatory program comes from the New Deal–era case *Wickard v. Filburn*, 317 U.S. 111 (1942). The *Wickard* Court expressly based its reading of federal power on Marshall's approach in cases like *Gibbons v. Ogden*. *See Wickard*, 317 U.S. at 120 ("At the beginning, Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded." (citing *Gibbons*)).

44. Whether the Court should follow the approach of the New Deal Court raises important issues of stare decisis, a doctrine that I believe the Court is well advised to adhere to in many (though not all) circumstances. For an analysis of when stare decisis may apply and when it should not apply, *see* Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437 (2007).

45. Although the Court applied only rational-basis review, and thus did not require specific findings, it nevertheless noted that Congress had engaged in a degree of fact-finding in regard to the effect of intrastate drug activity on interstate commerce. *See* Gonzales v. Raich, 545 U.S. 1, 12 n.20, 21 n.32 (2005).

very strength of this commitment that caused it to be partially eclipsed by the Tenth Amendment. The rejection of federalism as a constraint on federal power led to the disparagement of both amendments during the New Deal.

In short, as goes our national commitment to federalism, so goes the Ninth Amendment. To those who might disagree, I would simply point to the decidedly unsuccessful attempt to rework the Ninth into a declaration of libertarian freedom. Efforts in this direction have resulted only in a smaller and altogether unenforceable clause in the Bill of Rights. The original Ninth was a far more robust provision intended to restrict the construction of federal power in order to preserve *all* powers, jurisdictions, and rights not expressly delegated to the national government. This rule of construction can be enforced—indeed *has* been enforced—by the federal courts under a different and more doctrinally fragile guise. The tenuous nature of this enforcement, however, can be seen in the waning commitment of even the Rehnquist Court to place meaningful and judicially enforceable limits on federal authority (see *Raich*).

From one perspective, this makes any effort to restore the original federalist understanding of the Ninth Amendment rather quixotic. There seems to be little willingness, at least on the part of the Supreme Court, to embrace a robust principle of federalism and the strict construction of federal power. On the other hand, however, perhaps it is the perceived lack of textual or historical warrant for such a rule that has left federalism in such a precarious position. If so, the history presented in this book offers an opportunity to place that jurisprudence on more solid footing.

In the end, whether the Ninth Amendment has a future as an enforceable provision in the Bill of Rights depends on our national commitment to maintaining a Madisonian balance between state and national power. Not too long ago, the very idea of state autonomy invoked visions of state resistance to the protection of fundamental constitutional and civil rights. Today, however, the picture is more complicated. Medical marijuana, physician-assisted suicide, state regulation of marriage, local enforcement of federal immigration policy, state policies regarding funding for religious education, and the perennial debate over abortion—all involve the issue of local autonomy from federal coercion and control. Preserving (or rejecting) state autonomy in all of these areas would not track the platform of either major political party. Nor should it. The right to local self-government is a right retained by all people and can be exercised in whatever political direction the people please. What we have forgotten, what we have lost, is that the right to local self-government is more than an idea. It is a right enshrined in the Constitution itself.

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