



2010

Our Unsettled Ninth Amendment: An Essay on Unenumerated Rights and the Impossibility of Textualism

Louis Michael Seidman

Georgetown University Law Center, seidman@law.georgetown.edu

This paper can be downloaded free of charge from:

http://scholarship.law.georgetown.edu/fwps_papers/125

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.

Follow this and additional works at: http://scholarship.law.georgetown.edu/fwps_papers



Part of the [Constitutional Law Commons](#), and the [Legal History, Theory and Process Commons](#)

GEORGETOWN LAW

Faculty Working Papers



March 2010
Georgetown Public Law Research Paper No. 10-11

Our Unsettled Ninth Amendment: An Essay on Unenumerated Rights and the Impossibility of Textualism

Louis Michael Seidman

Professor of Law
Georgetown University Law Center
seidman@law.georgetown.edu

This paper can be downloaded without charge from:
Scholarly Commons: http://scholarship.law.georgetown.edu/fwps_papers/125/
SSRN: <http://ssrn.com/abstract=1567512>

Posted with permission of the author

**Our Unsettled Ninth Amendment:
An Essay on Unenumerated Rights and the Impossibility of Textualism**

Louis Michael Seidman*

* Carmack Waterhouse Professor of Constitutional Law, Georgetown University Law Center. Thanks to Randy Barnett, Samuel W. Buell, Michael Klarman, Victoria Nourse, Mark Tushnet and participants at the Duke Law School Faculty Workshop for commenting on an earlier draft of this article. I am more grateful than I can possibly say to Samantha Godwin and Mischere Kawas for wise counsel and outstanding research assistance.

**Our Unsettled Ninth Amendment:
An Essay on Unenumerated Rights and the Impossibility of Textualism**

The Ninth Amendment – our resident anarchic and sarcastic “constitutional jester”¹ – mocks the effort of scholars and judges alike to tame and normalize constitutional law. It is not as if the stern disciplinarians haven’t tried. We now have two generations worth of painstaking, erudite, and occasionally brilliant scholarship that attempts to rein it in.² Yet the amendment stubbornly resists control. It stands as a paradoxical, textual monument to the impossibility of textualism, an entrenched,

¹ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 33 (1980).

² For the leading examples, see Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223 (1983); Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 HASTINGS L. REV. 305 (1987); Charles J. Cooper, *Limited Government and Individual Liberty: The Ninth Amendment’s Forgotten Lessons*, 4 J. PUB. POL’Y 29 (1987); Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1 (1988); Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215 (1990); Akhil Reed Amar, *THE BILL OF RIGHTS AS A CONSTITUTION*, 61 U. CIN. L. REV. 49 (1992); Kurt T. Lash, *THE LOST ORIGINAL MEANING OF THE NINTH AMENDMENT*, 83 TEX. L. REV. 597 (2005) [cited herein as “*Lost Original Meaning*”]; Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1 (2006) [cited herein as “*It Means What it Says*”]; KURT T. LASH, *A TEXTUAL-HISTORICAL THEORY OF THE NINTH AMENDMENT*, 60 STAN. L. REV. 895 (2008) [cited herein as “*Textual-Historical Theory*”]; Randy E. Barnett, *Kurt Lash’s Majoritarian Difficulty: A Response to a Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 9937 (2008) [cited herein as “*Response to a Textual-Historical Theory*”].

settled instantiation of the inevitability of unsettlement. If it did not exist, constitutional skeptics would have had to invent it.

This essay has two parts. In Part I, I present a new and, I hope, persuasive, originalist account of the Ninth Amendment. My claim is that the Amendment deliberately leaves unsettled the status of unenumerated rights. Because of the Ninth Amendment, the Constitution does not “deny” or “disparage” these rights, but neither does it embrace or imply them. The amendment puts off to another day a final reckoning of the extent to which we are bound by constitutional text.

Although I use originalist methodology in Part I, I do not want to be understood as embracing originalism. Instead, this Part is an exercise in internal critique. As Part II explains, the Ninth Amendment states a truth that we would have to deal with whether or not it was part of the original text: No matter how comprehensive, no text can control the force of ideas and commitments that lie outside the text. This simple truth leaves the status of liberal constitutionalism permanently and inevitably unsettled. The day of final reckoning will never arrive.

I. A Nonoriginalist’s Account of the Ninth Amendment’s Original Meaning

The Ninth Amendment provides: “The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.” In a recent article, Randy Barnett, our most insightful and persistent Ninth Amendment scholar, identifies five separate possible interpretations of this single sentence.³ At the risk of eliding some subtle distinctions and unfairly dismissing some approaches, the list can be reduced to two primary contenders: the federalism

³ *It Means What It Says* at 3. Barnett identifies the following approaches: 1. The state law rights model; 2. The residual rights model; 3. The individual natural rights model; 4. The collective rights model; and 5. The federalism model. *Id.*

approach associated primarily with the work of Kurt Lash,⁴ and the individual natural rights approach, championed by Barnett himself.⁵

As we shall see, there is less difference between these two approaches than one might at first suppose.⁶ Still there is at least a difference in emphasis and perhaps some substantive difference as well. Both Lash and Barnett focus their attention on the words “others retained by the people” at the end of the sentence. Lash emphasizes a meaning of these words that focuses on rights of self-government on the state level. The amendment therefore guards against an expansive interpretation of federal power. Whereas the Tenth Amendment prohibits the exercise of unenumerated federal powers, the Ninth prohibits broad interpretation of the enumerated powers.⁷

Barnett does not dispute that the Ninth Amendment reinforces federalist constraints, but he tends to emphasize that the rights “retained by the people” also include individual natural rights. These rights, too numerous to list or even imagine, amount to a general presumption against government interference with an almost infinite range of private conduct that does not, in turn, interfere with the rights of others.⁸

Both of these approaches have important strengths although, as we shall see, they also share important weaknesses. In particular, both approaches are so fixated on deciphering a meaning of “rights . . . retained by the people” that they pay insufficient attention to what the amendment actually

⁴ See, e.g., *Lost Original Meaning; Textual-Historical Theory*.

⁵ See, e.g., *It Means What It Says*.

⁶ See p X, *infra*.

⁷ See, e.g., *Lost Original Meaning* at 336.

⁸ See, e.g., *Response to A Textual-Historical Theory* at 940. On the general presumption against government interference with private conduct, see generally RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004) [cited herein as “*Restoring the Lost Constitution*”].

prohibits -- the denial or disparagement of those rights *by means of the enumeration of textual rights*. I will argue that focusing on this prohibition makes clear that the Amendment leaves the status of unenumerated rights unresolved. Although the enumeration of some rights should not be construed to “disparage” unenumerated rights, it does not follow that these unenumerated rights exist or merit constitutional protection.

A. A Word about Methodology

Before exploring the strengths and weaknesses of the various approaches, a short discussion of methodology is in order. Although both Barnett and Lash style themselves “originalists,” they ask different questions, and it is therefore not altogether surprising that they reach different answers. Lash calls himself a “popular sovereignty” originalist because he grounds obligation to the Constitution on the decision by “the people” to ratify it. At least in his work on the Ninth Amendment, he gives substantial weight to the understanding of the ratifiers because “it is their action and authority that ‘breathes life’ into the constitutional text.”⁹ In contrast, Barnett focuses on the substantive justness of the Constitution, which, in turn, rests on the constraints imposed by its law-like quality. This leads him to focus on the “original public meaning” of the text,¹⁰ which he identifies as “how a reasonable member of the public (including, but not limited to, the framers and ratifiers) would have understood the words of the text (in context) at the time of its enactment.”¹¹

This is not the place for a sustained analysis of originalist methodology. It is enough to note that each of these approaches has significant difficulties. Lash must contend with the familiar problem that the intention of the individual ratifiers of the Ninth Amendment is frequently inconsistent, usually unknowable, and often nonexistent. To be sure, we have statements made by some of the drafters and

⁹ Kurt T. Lash, *The Inescapable Federalism of the Ninth Amendment*, 93 IOWA L. REV. 801, 813 (2008).

¹⁰ For a full explication of his theory, see *Restoring the Lost Constitution* at 92-93.

¹¹ *It Means What It Says* at 5-6.

key players in the debate, although even this evidence is sketchy. For example, there is no extant record of the Senate's debate on the Amendment or of the House committee sessions where the final version of the Amendment was actually drafted. It is anyone's guess what the hundreds of other ratifiers thought, and there is no reason to suppose that they shared the views of the most vocal supporters of the Amendment. From what we do know about how people behave in large legislative bodies, it is likely that most of the silent supporters did not have firm or sophisticated views of any kind about the Amendment's precise meaning – especially since it was a small and relatively unimportant part of a much bigger package of amendments that demanded their attention. An approach that focuses on views that did not exist or cannot be discovered is an unpromising way of answering the specific questions that Lash and Barnett pose.¹²

Barnett faces problems that are even more daunting. As he, himself, acknowledges,¹³ we cannot establish the public meaning of the Ninth Amendment by consulting eighteenth century dictionaries in the way that we could establish the meaning of, say, "militia" or "commerce." The Ninth Amendment embodies a complex idea, not a thing or a practice that made its way into everyday speech. The concept that the enumeration of rights should not deny or disparage rights retained by the people therefore does not have a "public meaning" in anything like the usual sense of this term.

Barnett meets this difficulty by focusing on the purpose for which the phrase was used, rather than on the public meaning of the individual words.¹⁴ At this point, however, Barnett runs into his own trenchant critique of original-intent originalism. As Barnett himself might have pointed out, no one's

¹² These criticisms are hardly original with me. They are the staples of what has become a widely accepted critique of original intent methodology. See, e.g., Paul Brest, *The Misperceived Quest for the Original Understanding*, 60 B. U. L. REV. 204, 214-15 (1980).

¹³ See *It Means What It Says* at 7.

¹⁴ See *id.*

purpose was enacted into law. The “law” consists of the specific words of the Ninth Amendment, rather than the private purposes of the people who voted for it.

Moreover, Barnett faces even more difficulties in implementing his approach than Lash confronts. Recall that for Barnett it is the purpose of the general public, or, at least, the informed public, rather than the ratifiers’ purpose, that is relevant. But even if we focus on the small segment of the public that was reasonably well informed, it is far from clear how many of these people understood a specific purpose that the Ninth Amendment was designed to accomplish. To the extent that people did know about the Ninth Amendment and understood its purpose, they almost certainly thought different and contradictory things. Since virtually none of these people left a historical record of their thinking, how could we possibly determine what the majority view was?

Barnett meets this difficulty by doing the very thing he says he opposes -- putting heavy weight on the often decidedly nonpublic meaning that drafters of the amendment attached to it. His particular focus is on James Madison. Barnett rummages through Madison’s private correspondence¹⁵ and even the notes Madison wrote to himself¹⁶ in order to uncover his intentions. Barnett justifies this emphasis on the ground that even if Madison’s private intent is irrelevant, his understanding of the purpose of the amendment provides some evidence of how the amendment was generally understood.¹⁷ But once we abandon the position that the intention of the framers is entitled to special respect, the private musings of a single person are of very little probative value. This is especially so because as we shall see, Madison faced a particular political problem and had an idiosyncratic, if brilliant, solution to that

¹⁵ *Id.* at 48-49.

¹⁶ *Id.* at 34.

¹⁷ *Id.* at 37.

problem.¹⁸ There is no reason to believe that his intentions had anything to do with the broader aims of the ratifiers or with how those aims were understood by the general public.

I am an opponent, rather than a defender, of originalism, so it is not my burden to meet these challenges to originalist methodology. Moreover, since I oppose originalism generally, I need not choose between its various versions. In my originalist account that follows, I therefore do not distinguish sharply between the Lash and Barnett views, and I do not claim, as some supporters of originalism do, that my analysis produces a definitive answer. My argument is much more modest – that originalist scholars have overlooked a highly plausible meaning for the amendment and that this account makes at least as much sense as rival accounts. It is enough that there is historical controversy for the Ninth Amendment to be unsettled and for its unsettlement to destabilize the rest of the Constitution. Moreover, and more significantly, even if my interpretation of the Ninth Amendment is completely wrongheaded – indeed even if the Ninth Amendment had never been written – my interpretation of the Amendment nonetheless identifies a problem for which standard constitutional theory has no answer.

B. The Background

Before getting to these broader claims, we need to understand something about the background from which the Ninth Amendment emerged. All accounts begin with essentially the same narrative. When the newly drafted Constitution arrived at the ratifying state conventions, it met with something less than universal acclaim. Antifederalists made a particular point of criticizing the draft for lack of a bill of rights.¹⁹ Relatedly, they claimed that the Constitution was open to a reading that gave the federal government unlimited powers.²⁰ Federalist defenders of the draft made three responses.

¹⁸ See pp xx-xx, *infra*.

¹⁹ See, e.g., Robert ALLEN RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS, 1776-1791*, at 120-25 (1991)

²⁰ See, e.g., *id.* at 134-35.

First, they insisted that the Constitution created a federal government of limited, delegated, powers. Therefore, no bill of rights was necessary because Congress lacked the power in the first place to impinge on the rights that concerned the antifederalists.²¹ Second, they claimed that a bill of rights might actually be dangerous because it implied that such power might exist. For example, an amendment that in some circumstances protected freedom of the press might imply that there was a more general federal power to regulate newspapers in circumstances not covered by the amendment.²²

²¹ For example, James Wilson pointed out that all powers not granted to the federal government were reserved to the people and argued that “it would have been superfluous and absurd, to have stipulated with a federal body of our own creation, that we should enjoy those privileges, of which we were not divested either by the intention or the act that has brought that body into existence.” James Wilson, “State House Yard Speech, Oct. 6, 1787, *reprinted in* 1 COLLECTIVE WORKS OF JAMES WILSON 172 (2007).

²² Hamilton forcefully made the first two points in Federalist 84:

Why . . . should it be said that liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power. They might urge with a semblance of reason, that the Constitution ought not be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication, that a power to prescribe proper regulations concerning it was intended to be vested in the national government.

THE FEDERALIST NO. 84 (Alexander Hamilton). It is doubtful that Hamilton’s argument had much effect on the ratification process, however. His essay went into print after most of the states had already ratified the Constitution. See Robert Allen Rutland, *supra* note 19, at 181-82.

Finally, they argued that any specification of rights would inevitably be incomplete and that by enumerating some rights, a bill of rights might imply that others were not worthy of protection.²³

Although the Constitution ultimately received the imprimatur of the state conventions, several of the states proposed amendments to the draft, and some supporters of the Constitution committed themselves to the prompt addition of a bill of rights.²⁴ Among the proposals submitted by the states were several that contained express declarations about the protection natural rights.²⁵ Other proposals made clear that the federal government could exercise only enumerated powers.²⁶

²³ For example, James Iredell argued that enumerating rights “would be implying in the strongest manner, that every right not included in the exception might be impaired by government without usurpation; and it would be impossible to enumerate every one.” *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787* at 316 (JONATHAN ELLIOTT, ED 1863). *See also id.*, at 435-37 (speech by James Wilson).

²⁴ See Rutland, *supra* note 19, at 171, 173.

²⁵ North Carolina and Virginia both proposed a provision stating that “there are certain natural rights of which men, when they form a social compact, cannot deprive or divest their posterity, among which are the enjoyment of life and liberty, with the means of acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.” *THE COMPLETE BILL OF RIGHTS* 635-36 (NEIL H. COGAN, ED. 1997).

²⁶ For example, New York proposed inclusion of a provision stating that “every Power, Jurisdiction and right, which is not by the said Constitution Clearly delegated to the Congress of the United States, or the Departments of the Government Thereof, remains to the People of the Several States, or to their respective State Governments to whom they may have granted the same; And that those Clauses in the said Constitution, which declare that Congress shall not have or exercise certain powers, do not imply that Congress is entitled to any Powers not given by the said Constitution; but such Clauses are to be construed either as exceptions to certain specified Powers, or as inserted for greater Caution.” *Id.*, at 635.

In the first Congress, Representative James Madison made good on the commitment to amend the Constitution by proposing a Bill of Rights. Three provisions are particularly relevant to our story. First, Madison responded to the antifederalist argument that the Constitution should protect natural rights with a proposal that “there be prefixed” to the Constitution a declaration 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.”²⁷

Second, Madison responded to the federalist claim that a bill of rights would imply the absence of other natural rights with language that, after significant revision, became 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 the rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations on such powers, or as inserted merely for greater caution.”²⁸

In a famous statement in support of this provision, Madison noted that “[i]t has been objected . . . 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 the 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.” Madison conceded that “[t]his was one of the most plausible arguments I have ever heard urged against the admission of a bill of rights” but observed that “it may be guarded against” by enactment of what became the Ninth Amendment.²⁹

²⁷ “James Madison, Adding a Bill of Rights to the Constitution; Speech in Congress, June 8, 1789, *reprinted in* SELECTED WRITINGS OF JAMES MADISON 167 (RALPH KETCHAM, ED. 2006).

²⁸ Speech of James Madison, 1 ANNALS OF CONG. 452 (1789),

²⁹ *Id.* at 439

Finally, Madison responded to the antifederalist claim that the Constitution could be read as giving the federal government plenary power and that a bill of rights might imply such general power with proposed language that, with minor revision,³⁰ ultimately became the Tenth Amendment: “The powers not delegated by the Constitution, nor prohibited by it to the States, are reserved to the States respectively.”³¹

Madison’s proposals were referred to a committee on which Madison himself served.³² Serving with him was Roger Sherman, and the committee apparently considered Sherman’s proposal, which would have guaranteed “natural rights which are retained by [the people] when they enter into Society.”³³ However, the Committee rejected Sherman’s proposal as well as Madison’s natural rights language. The committee also changed the Ninth Amendment to its present form, eliminating the reference to the “just importance” of the rights retained by the people and the language about enlarging the powers of government.³⁴ The House then approved the Amendments and sent them to the Senate.³⁵

Because the Senate met in secret, we know very little about the views of the Senators concerning the proposed amendments. We do know, however, that the Senate considered and rejected a provision that would have provided that “There are certain natural rights, of which men, when they

³⁰ On the House floor, the words “or to the people” were added to the end of the Amendment. *Id. at 761*.

³¹ THE ROOTS OF THE BILL OF RIGHTS: AN ILLUSTRATED DOCUMENTARY HISTORY 1028 (BERNARD SCHWARTZ, ED. 1980).

³² See CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 6 (HELEN E. VEIT ET AL., EDS. 1991).

³³ *Roger Sherman’s Draft of the Bill of Rights, reprinted in* THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 351 (RANDY E. BARNETT, ED. 1989).

³⁴ [cite]

³⁵ See THE COMPLETE BILL OF RIGHTS 1138 (NEIL H. COGAN, ED. 1997).

form a social compact, cannot deprive or divest their posterity; among which are the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property and pursuing and obtaining happiness and safety.”³⁶ The Senate then passed the House version of the Ninth Amendment, which was ultimately ratified by the states.³⁷

C. The Federalism View

Kurt Lash and some others³⁸ interpret this history as establishing that the Ninth Amendment was designed to prevent a broad interpretation of federal power that would deprive state citizens of the right to local self-government. On his reading, the “rights retained by the people” were the rights of the people collectively to make their own laws at the state level.³⁹

Lash’s detailed and meticulous marshalling of the evidence for this proposition is too extensive to repeat in full. Much of his argument is based upon proposed amendments from several of the state conventions that ratified the Constitution. He sees these proposed amendments as antecedents to the Ninth Amendment. Importantly, they spoke of limitations on federal power and prohibited latitudinarian interpretations of that power.⁴⁰

In addition, Lash emphasizes Virginia’s delay in ratifying the Bill of Rights, caused in part by concern that the Ninth Amendment no longer expressly referred to federal power.⁴¹ In a letter to Madison, Hardin Burnley, a member of the Virginia House of Delegates, informed Madison of former

³⁶ See SENATE JOURNAL, 1st Cong., 8 Sept.. 1789, at 107.

³⁷ See SENATE JOURNAL, 1st Cong., 25 Aug 1789, at 63-64.

³⁸ See, e.g., Thomas McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215 (1991); Russell Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223 (1983).

³⁹ See Kurt T. Lash, *The Inescapable Federalism of the Ninth Amendment*, 93 IOWA L. REV. 801, 801 (2008).

⁴⁰ See *id.* at 822-23.

⁴¹ See Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331, 331 (2004).

Governor and future Attorney General Edmund Randolph's objections to the Ninth and Tenth Amendments in the Virginia legislature.

His principal objection was pointed against the word retained in the [Ninth Amendment], and his argument if I understood it was applied in this manner, that as the rights declared in the [Bill of Rights sent to the states] 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 whether any other particular right was retained or not, it would be more safe, & more consistent with the spirit of the . . . 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 of rights reducible to no definitive certainty.⁴²

Clearly worried about the delay, Madison wrote to Washington that

[t]he difficulty stated [against] the amendments is really unlucky, and the more to be regretted as it springs from a friend to the Constitution. It is 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 later be secured by declaring that they shall not be abridged, or that the former not be extended.⁴³

⁴² Letter from Hardin Burnley to James Madison (Nov. 28, 1789), in 5 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786-1870 (F.B. ROTHMAN ED. 1998). [check]

⁴³ Letter from James Madison to George Washington, *in* 5 DOCUMENTARY HISTORY OF THE CONSTITUTION, *supra* note 42, at .at 221-22 . [check] Although Madison referred to Randolph as a "friend to the Constitution, Randolph had refused to sign the original draft in Philadelphia. He objected in part to the vagueness of the power granted to Congress and in part to the absence of explicit protection for individual rights. He ultimately decided to support the Constitution at the Virginia state convention, but to seek immediate amendments. *See* (2006).

Lash interprets Randolph's concern as amounting to a fear that the Ninth Amendment inadequately captured Virginia's desire to limit federal power to interfere with state self-governance. Madison's response, in turn, made clear that he viewed the preservation of rights and deprivation of power as amounting to the same thing.⁴⁴ Madison arguably made the same response publicly several months later when he gave a speech opposing legislation that would have established the Bank of the United States. Madison argued that the legislation was beyond Congress' powers and therefore violated the Ninth Amendment. As Madison then characterized the Ninth Amendment, it "[guarded] against a latitude of interpretation."⁴⁵ Only after this speech did the Virginia legislature ratify the Ninth Amendment. From all this, Lash infers that the Ninth Amendment is about federal powers, not individual rights.⁴⁶

What are we to make of Lash's argument? There can be no doubt that he identifies an important truth: Because the Bill of Rights applied only the federal government, its effect was to leave the areas it covered open to state regulation. In this sense, the entire Bill of Rights amounted to limitations on federal power and, to that extent, guaranteed a right of state self-governance. The point is most obvious with respect to the Establishment Clause, which was apparently designed to protect state establishments from federal interference.⁴⁷ But the point is also correct more generally. For example, the free speech clause did not so much protect freedom of speech as the freedom of states to choose whether to regulate speech without federal interference.

Many Americans at the time of the founding were content with this arrangement because they saw state governments as a bulwark against, rather than a threat to, individual liberty. Only with the

⁴⁴ See Kurt T. Lash, *The Inescapable Federalism of the Ninth Amendment*, 93 IOWA L. REV. 801, 838 (2008).

⁴⁵ 1 ANNALS OF CONG. 1951 (1791) (statement of Representative Madison).

⁴⁶ See Kurt T. Lash, *The Inescapable Federalism of the of the Ninth Amendment*, note 44 *supra*, at 847.

⁴⁷ See *e.g.*, AKHIL AMAR, THE BILL OF RIGHTS 36-39 (1998). [CHECK]

experience of secession and reconstruction, with the post Civil War constitutional amendments and the incorporation of the Bill of Rights, did people come to see the federal Constitution as a significant protection against state encroachment on individual rights.

But although Lash is surely correct about this point, the point also diminishes the significance of many of the contemporary comments on the Ninth Amendment upon which he relies. It would have been natural for members of the founding generation to refer to the Ninth Amendment – indeed to refer to the entire Bill of Rights – as protecting state power. In the absence of incorporation, this was the effect of any rights-protecting provision. It does not follow, though, that the Ninth Amendment was not a rights-protecting provision. Although its scope was limited to the federal government, its intent and effect was nonetheless to protect individual rights within that scope. The fact that the framing generation trusted the states to protect individual rights did not mean that they were unconcerned about federal incursions on these rights.

Lash faces a daunting task in explaining away the considerable evidence that the Ninth Amendment addresses individual rights. We can begin with the language of the Amendment. It would have been easy enough to draft a provision that would have generally prevented broad interpretations of federal power. For example, the framers might simply have said that the powers granted to Congress shall not be broadly construed. Indeed, a proposal close to this was considered and rejected on the House floor. Representative Thomas Tucker of South Carolina moved to change the Tenth Amendment's language so as to deprive the federal government of "powers not *expressly* delegated by the Constitution."⁴⁸ Like the Ninth Amendment, this language embodies a rule of construction. But unlike the Ninth Amendment, the rule concerns powers rather than rights. Tucker's change would have

⁴⁸ See 1 ANNALS OF CONG. 790 (1789) (emphasis added).

barred the latitudinarian interpretations that, Lash insists, was the subject of the Ninth Amendment. Importantly, however, Tucker's proposal was defeated.⁴⁹

In contrast, to Tucker's proposal, the words of the Ninth Amendment neither limit Congress's powers to those expressly delegated nor say that the powers should be narrowly construed. Instead, the Amendment seems to be directed at a narrower evil: the inference of a denial or disparagement of unenumerated rights *from the enumeration of constitutional rights*. The constitutional rights that the Amendment refers to include, most prominently, the Bill of Rights protections to which the Ninth Amendment was appended. To be sure, in a world without incorporation, the rights referred to in the Ninth Amendment, like the enumerated rights in the Bill of Rights, were in some sense no more than limits on federal power. But the important point is that if the framers meant to preclude latitudinarian interpretations of federal power more generally, they would not have linked the Ninth Amendment to the specification of rights. Put differently, a broad interpretation of federal power that did not impinge on individual rights would not involve the evil that the language of the Ninth Amendment prohibits – viz. a disparagement of “other rights” that was an inference from the specification of named rights.

The evolution of the Ninth Amendment's language strongly supports this point. As initially drafted, the Amendment spoke to both the diminishment of rights and the enlargement of powers. By the time that the amendment emerged from the House Committee, the enlargement of powers language had been removed and all that remained was a prohibition against the diminishment of rights.⁵⁰ It seems strange, to say the least, that the framers would have deliberately eliminated the

⁴⁹ See *id.* Madison opposed the amendment on the ground that “it was impossible to confine a Government to the exercise of express powers; there must necessarily be admitted power by implication, unless the Constitution descended to recount every minutia.” *Id.*

⁵⁰ See *p. x, supra.*

“powers” language and included the “rights” language if the amendment was directed at powers rather than rights.⁵¹

Madison’s close involvement with the drafting of the Ninth Amendment helps explain why the Amendment that ultimately emerged focused on rights rather than powers. At least at this stage of his career, Madison was a strong nationalist. Despite his central role at the constitutional convention, he considered it a failure because Congress was not given the power to veto any state statute.⁵² When Representative Tucker, as noted above, tried to change the Tenth Amendment so as to limit Congress’ powers to those expressly delegated, Madison firmly and successfully objected on the ground that “it was impossible to confine a Government to the exercise of express powers.”⁵³

But although Madison was wary of efforts to limit federal power, he was deeply concerned about minority rights, even when they were infringed by the states.⁵⁴ For example, if Madison had had his

⁵¹ Lash insists that the “powers” language was removed because it was thought to be redundant with the rest of the Ninth Amendment. See Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, supra note 41, at 369. This explanation seems quite improbable given the fact that the rest of the Ninth Amendment spoke of rights, rather than powers. The more probable explanation, therefore, is that it was thought to overlap with the power restricting provisions in the Tenth Amendment. On Lash’s claim that Madison himself thought that the Ninth Amendment restricted powers, see pp xx, *infra*.

⁵² See, e.g., Charles F. Hobson, *The Negative on State Laws: James Madison and the Crisis of Republican Government*, 36 WM. & MARY Q. (3D SER.) 215 (1979). On the Convention’s skeptical reception of Madison’s proposal, see Larry Kramer, *Madison’s Audience*, 112 HARV. L. REV. 611, 649-53 (1999).

⁵³ See note 49, *supra*.

⁵⁴ During the debate over ratification of the Constitution, Madison, in a letter to Jefferson, sharply distinguished between friends of the Constitution, who “wish [for new amendments] to be carried no farther than to supply additional guards for liberty” and opponents who would “[abridge] the sum of power transferred from the States to the general Government.” 11 The Papers of James Madison 382-83 (Robert A. Rutland, ed.) (1962).

way, state governments would have been prohibited from violating the equal rights of conscience, the freedom of the press, and the trial by jury in criminal cases.⁵⁵ Indeed, Madison embraced federal power and wanted to limit state power precisely because he favored minority rights. As he famously argued in Federalist 10, a small republic was vulnerable to factions that might run roughshod over individual rights, whereas in a large republic “you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens.”⁵⁶

It is hardly surprising, then, that Madison would favor a Ninth Amendment that focused on the enlargement of individual rights rather than on the restriction of federal power. Moreover, Madison’s authorship of the Amendment places the proposed state amendments, on which Lash relies, in a very different light. These amendments were, indeed, concerned primarily with federal power. But the state amendments, at least in their strong form, were not the ones that Madison introduced.⁵⁷ Instead, he championed as his personal project the Ninth Amendment, which no state had proposed.

As Lash reports, members of the Virginia legislature were understandably upset when they saw what had happened to their proposals. They had asked their representative to write an amendment that dealt with federal power, but they got instead an amendment that spoke to individual rights.⁵⁸ It is

⁵⁵ For Madison’s draft language instantiating these prohibitions, see 5 THE ROOTS OF THE BILL OF RIGHTS 1027 (BERNARD SCHWARTZ, ED. 1980).

⁵⁶ THE FEDERALIST NO. 10, at 48 (James Madison) (CLINTON ROSSITER ED., 1992).

⁵⁷ See Rutland, note 19, *supra*, at 194 (“Amendments to Madison meant a bill of rights. To [Antifederalists] Clinton and Henry the word ‘amendments’ also connoted a weakening of the federal system in favor of the states”).

⁵⁸ Consider, for example, a letter from William Grayson, the Antifederalist Senator from Virginia, to Patrick Henry, the leading Antifederalist in Virginia, written after Madison had introduced his packet of amendments. Grayson complained that it was “out of [his] power to hold out to you any flattering expectations on the score of

hard to see how this disappointment supports Lash's view that the amendment was in fact about federal power.

Madison's letter to Washington in response to the Virginia difficulties is another matter. Barnett's argument to the contrary notwithstanding,⁵⁹ it does seem to support the view that Madison thought rights and powers bore a reciprocal relationship. If this were literally true, then the Ninth Amendment's reference to "rights" would be a reference as well to a broader limitation on federal powers, and not merely a reference to individual freedoms.

Similarly, Madison's bank speech seems to support Lash's position. Perhaps, as Barnett claims, Madison was worried that the Bank would violate some sort of individual right against monopoly,⁶⁰ but the more natural reading of his speech is that he believed that the Ninth Amendment forbade broad interpretations of federal power whether or not those exercises interfered with individual rights.

amendments." His concern was that the House was prepared to sacrifice changes in the power of the federal government in order to achieve measures that would "affect personal liberty alone." 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 759 (CHARLENE BANGS BICKFORD ET AL., EDs.) 759 (1992). Henry, in turn, complained of the "impediments [that are] cast in the way of those who wish to retrench the exorbitancy of power granted away by the constitution from the people." 3 WILLIAM WIRT HENRY, PATRICK HENRY: LIFE, CORRESPONDENCE AND SPEECHES 398 (1969). When Grayson and Richard Henry Lee, Virginia's other Senator, transmitted the amendments to the General Assembly, they wrote that the Amendments were "far short of the wishes of our Country" and that they had been unsuccessful in "bring[ing] to view the Amendments Proposed by our Convention and approved by the Legislature." 5 BERNARD SCHWARTZ, THE ROOTS OF THE BILL OF RIGHTS 1186 (1980).

⁵⁹ Barnett argues that the letter can be read as making clear that the Ninth Amendment was designed to achieve a single end – the securing of rights – but that there were two means to this end – an express declaration of rights and a limitation on federal powers. He reads Madison as saying that the two means to the end amount to the same thing. *It Means What It Says*, at 54.

⁶⁰ *Id.* at 69 n. 296.

It is not clear how much weight to attach to these statements. Both of them reflect no more than Madison's views, which were not necessarily either the views of other ratifiers or the "public meaning" of the Amendment. Moreover, Madison's letter to Washington came at a time when Virginia's ratification of the Amendment was in doubt. It would have been natural for him to have minimized the difference between the amendment he wrote and the amendment members of the Virginia legislature favored. Similarly, Madison's bank speech was designed to achieve a particular purpose. It is certainly not unheard of for an advocate in this position to use the tools at hand to achieve his goals, even though the advocate knows that those tools were originally intended for another purpose.

The key point, however, is this: At most, Lash's argument establishes that Madison and others thought the Ninth Amendment limited federal powers even when those powers did not run up against individual rights. There is nothing in his argument suggesting that those powers were somehow unlimited when they *did* run up against rights. It would seem, then, that Lash's position does not really contradict the individual rights view; rather it subsumes and broadens it. Since Barnett, in turn, thinks that the Ninth Amendment was also designed to protect the values of federalism, it is not clear what the difference between them amounts to.

D. The Individual Rights View

None of this is to say that the individual rights view is without problems. As indicated above, there is very strong evidence that the "rights retained by the people" was meant at least to include individual rights whether or not it was limited to those rights. It does not follow, however, that the framers meant to claim that there were such rights apart from those enumerated in the constitutional text or that, if they existed, they were constitutionally protected.

Barnett's position, like Lash's, overlooks the fact that if the framers had wanted to provide constitutional protection for such rights, there was a very direct way to do so. Indeed, we do not have

to speculate on the language they might have used to achieve this goal. Many state constitutions had express declarations of natural rights. For example, the Pennsylvania constitution provided that “all men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness.”⁶¹

Similarly, when states submitted proposed amendments to the new Constitution, some of them suggested natural rights provisions. A proposed amendment from North Carolina was typical: “there are certain natural rights of which men, when they form a social compact, cannot deprive or divest their posterity, among which are the enjoyment of life, and liberty, with the means of acquiring, possession and protecting property, and pursuing and obtaining happiness and safety.”⁶²

We have already seen that Madison and Sherman also proposed natural rights amendments, and that a similar provision was proposed in the Senate.⁶³ Yet Congress adopted none of the state provisions, and the Madison, Sherman, and Senate proposals were all defeated. Nor is that the end of the matter. Madison’s initial draft of the Ninth Amendment praised the “just importance” of unenumerated rights.⁶⁴ Yet when the amendment emerged from the House committee, even this indirect endorsement of natural rights had been removed.

To summarize, then, on five separate occasions, Congress was presented with provisions that would have expressly accomplished what Barnett claims the Ninth Amendment achieved by implication.

⁶¹ Quoted in THE COMPLETE BILL OF RIGHTS, *supra* note 25, at 639.

⁶² 4 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA 243 (1833).

⁶³ See pp xx, *supra*.

⁶⁴ See pp xx, *supra*.

It failed to adopt any of these measures. Remarkably, to my knowledge, no commentator on the Ninth Amendment has emphasized this fact.

Of course, sometimes when language is left out of a document, it is omitted because it is redundant. If the Ninth Amendment clearly mandated protection for natural rights, this might provide an explanation for the rejection of other natural rights language. But at very best, the Ninth Amendment protects natural rights by implication. Those who favor the individual rights model bear the burden of explaining why Congress would pass a measure that, at most, indirectly did precisely what it repeatedly refused to do directly.

Moreover, a careful examination of the text of the Ninth Amendment makes clear that it does not even protect natural rights indirectly.⁶⁵ Consider first whether the Amendment makes natural rights a part of the Constitution. True, the Amendment's first use of the word "rights" was clearly intended to refer to constitutional rights. They are the rights "enumerated in the Constitution." If we had no other contextual clues, it would be fair to assume that when the same word – "rights" – is used later in the same sentence, it was intended to have the same meaning. Hence, one might think that the rights which are not to be "denied or disparaged" are also constitutional rights.

But here there are very strong contextual clues to the contrary. The second category of rights the Amendment refers to are "other" rights – that is to say, other than the rights enumerated in the Constitution. In other words, the amendment tells us how to interpret the rights that are part of the Constitution. It says that these constitutional rights should not be construed to deny or disparage

⁶⁵ It is deeply ironic that some defenders of the individual rights view emphasize careful reading of the text. *See, e.g.*, DANIEL A. FARBER, *RETAINED BY THE PEOPLE: THE "SILENT" NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON'T KNOW THEY HAVE* 4 (2007) (emphasizing the "plain meaning of the Ninth Amendment and insisting that "[a]ll we have to do is look fully at what [the Amendment] says.") As explained below, the "plain meaning" of the text neither embraces nor implies the existence of unenumerated rights.

unenumerated rights. But the unenumerated rights nonetheless remain “unenumerated.” They are “other” than the rights contained in the Constitution.

In recent scholarship, Barnett himself has retreated from the position that the Ninth Amendment makes the rights constitutional, but he now claims that the Amendment implies the existence of such rights.⁶⁶ This concession papers over an important ambiguity. If Barnett really means to say that the implied rights are not “constitutional,” then on standard, modern accounts of constitutional interpretation, such rights have no legal force.⁶⁷ Indeed, Barnett himself is firmly identified with those who claim that we must look to the public meaning of constitutional text when deciding upon legal enforcement. On this approach, nontextual Ninth Amendment rights are on a par with, for example, a putative right to health care. There may indeed be such a right in the abstract sense, but at least on standard accounts, a court would exceed its authority if it enforced the right. Similarly, political actors who failed to enact health care legislation might violate rights in some sense, but they should not be subject to the criticism that they were acting unconstitutionally.⁶⁸

But Barnett clearly thinks that Ninth Amendment rights are enforceable. Perhaps, then, he means to say that the rights are indeed constitutional, but that their constitutional status is only implied

⁶⁶ See Randy E. Barnett, *The Misconceived Assumptions about Constitutional Assumptions*, 103 Nw. U. L. REV. 615, 622-24 (2009).

⁶⁷ To be clear, my skepticism on this score is limited to claims that these rights have legal force *on standard accounts*. Those accounts assume that legal obligation is exhausted by the requirements of positive law. I offer a nonstandard account below. See p. xx, *infra*.

⁶⁸ I am assuming here that there is in fact *not* a constitutional right to health care. Of course, there may be such a constitutional right, and, if there is, legislators can be legitimately criticized for acting unconstitutionally if they fail to recognize it, even in circumstances where the right is not judicially enforced. I am simply making the obvious point that if a right is not constitutionally grounded, then those who ignore it cannot be criticized for acting unconstitutionally.

rather than directly mandated. It is, of course, possible for the Constitution to imply rights, just as it might imply powers. There would be nothing anomalous about a Court enforcing such implied rights or about criticizing a legislator as acting unconstitutionally if she violated them.

But the problem here is that the Ninth Amendment does not seem to contain such an implication. An amendment that recognized the “just importance” of such rights would imply that these rights are constitutional, but although Madison initially proposed this language,⁶⁹ this is not the amendment that Congress enacted and that the states ratified. The actual amendment says only that the enumeration of rights should not be read as denying or disparaging other rights, not that these other rights necessarily exist. At most, the Amendment implies that these rights *might* exist or that some people might *think* that they exist, not that they actually exist.

A supporter of the implication theory would not doubt rely on the seeming clarity of the words “rights . . . retained by the people.” After all, the Amendment specifically refers to these rights, rather than to “rights that might or might not be retained by the people” -- language we might expect to see if the framers meant to keep the question open. But this focus on the words “retained by the people” distracts attention from what the Amendment actually prohibits. The Amendment refers specifically to retained rights, but it says only that these right should not be denied or disparaged *on the ground of the enumeration of other rights*. It does not say that it is wrong to deny or disparage the rights on some other ground -- for example on the ground that natural rights are simply “nonsense on stilts.” Thus, one might easily accept the proposition that enumeration of some rights does nothing to change the status of putative unenumerated rights, but still insist that these rights do not exist or should not be constitutionally enforced.

We can see this point if we inject similar language into a modern setting. Suppose, for example, that there was a dispute under existing labor law about whether undocumented workers have a right to

⁶⁹ See p. x, *supra*.

form labor unions. Suppose further that Congress is considering a law that expressly grants unionization rights to other groups – say, managerial employees or graduate teaching fellows. Congressmen who favored this legislation but did not want the law to be construed so as to pretermitt the claim of undocumented workers might add a provision stating that “nothing in this legislation shall be construed to deny or disparage the right of undocumented workers to join unions.” Opponents of unions for undocumented workers who nonetheless favored union rights for the other groups might vote for this legislation as part of a compromise because the provision leaves intact their position that undocumented workers had no union rights in the first place. If the legislation passed, it would hardly follow that Congress had mandated or even implied that undocumented workers had such rights. So too, people who voted for the Ninth Amendment were not conceding that there were unenumerated rights. The Amendment means only that the existence vel non of such rights is not changed by the enumeration of other rights.

I do not mean to dispute the fact that some or all of the framers in fact believed that natural rights existed. The belief in natural rights was quite widespread at the time of the framing. But it is one thing to believe that such rights exist, and another to constitutionalize this belief. For reasons that are spelled out in the next section, there are substantial reasons for thinking that Madison failed to assemble a supermajority for constitutional protection of natural rights.

E. The Unsettlement View

If the Ninth Amendment neither embodies nor implies the existence of either individual natural or federalism rights, then what does it do? Is the Amendment superfluous or meaningless? In fact it is neither, but in order to understand its function and meaning, one must first understand the difficult and delicate political task that Madison faced. Although he himself was unquestionably a proponent of minority rights,⁷⁰ the House was at best indifferent to his proposals and at worst completely hostile.

⁷⁰ See pp xx, *supra*.

Many members thought that the country had more important business to attend to,⁷¹ and many others saw no reason to revisit the only recently ratified constitutional text.⁷²

For Madison and his allies, this opposition was no small matter. He and other federalists had made a commitment to consider a bill of rights.⁷³ At the time the House debated his proposals, two states remained outside the Union,⁷⁴ and other states plausibly threatened to convene a new constitutional convention if no action were taken.⁷⁵ It was therefore urgent that Congress act quickly.

In this environment, it was important to minimize opposition to the proposals. Madison repeatedly emphasized the necessity of avoiding anything that would provoke further controversy. For

⁷¹ Many congressmen, including Jackson, Sherman, White, Vining, Goodhue, and Livermore, objected to discussing the Bill of Rights proposals until Congress passed a collections bill and established a judicial system. See 1 ANNALS OF CONG. 439-465 (JOSEPH GALES ED., 1834); THE AMERICAN REPUBLIC: PRIMARY SOURCES 446-451 (BRUCE FROHNEN ED. 2002) available at <http://files.libertyfund.org/files/669/Frohn-0082-EBk-v4.pdf>.

⁷² Representatives Jackson, Sherman, and Gerry expressed this view. See 1 ANNALS OF CONG. 439-465 (JOSEPH GALES ED., 1834).

⁷³ While campaigning for his seat in Congress against James Monroe, Madison made a firm commitment that he would sponsor a Bill of Rights. Labunski, note 43, *supra*, at 159. For the position of other Federalists during the ratification struggle, see Rutland, note 19, *supra*, at 189 (“adoption of a federal bill of rights conceded by all but the most hardened Federalists”).

⁷⁴ See *id.*, at 203 (noting that the fact that North Carolina and Rhode Island had not yet ratified the Constitution affected debate about the Bill of Rights because “Congress was anxious to complete the ratification process”).

⁷⁵ At the Constitutional Convention, itself, Edmund Randolph moved that there be a second convention, and no less a luminary than Benjamin Franklin seconded his motion. Labunski, *supra* note x, at 11. On Madison’s fears about a second convention, see *id.* at 52-53. Before Madison introduced his proposed amendments in the House, two representatives presented resolutions from New York and Virginia demanding a new convention. *Id.* at 190.

example, he wrote to his friend Edmund Pendleton that his proposed amendments were “restrained to points on which least difficulty was apprehended. Nothing of a controvertible nature ought to be hazarded by those who are sincere in wishing for the approbation of 2/3 of each House, and 3/4 of the State Legislatures.”⁷⁶ Similarly, he told his colleagues on the floor that “if we confine ourselves to an enumeration of simple and acknowledged principles, the ratification will meet with but little difficulty. Amendments of a doubtful nature will have a tendency to prejudice the whole system.”⁷⁷

Madison faced opposition from two sources.⁷⁸ First, some members of Congress thought that a Bill of Rights was unnecessary or unduly constricting. For example, Representative James Jackson of Georgia argued that a bill of rights,

if . . . not dangerous or improper, . . . is at least unnecessary. . . . [W]hat reason [is there] for the suspicions which are to be removed by this measure? Who are Congress, that such apprehensions should be entertained of them? Do we not belong to the mass of the people? Is there a single right that, if infringed, will not affect us and our connexions as much as any other person? . . . View for a moment the situation of Rhode Island, and say whether the

⁷⁶ Letter from James Madison to Edmund Pendeleton (June 21, 1789) in 5 THE WRITINGS OF JAMES MADISON, COMPRISING HIS PUBLIC PAPERS AND HIS PRIVATE CORRESPONDENCE, INCLUDING HIS NUMEROUS LETTERS AND DOCUMENTS NOW FOR THE FIRST TIME PRINTED (GAILLARD HUNT, ED. 1900).

⁷⁷ 1 ANNALS OF CONG. 765-66 (JOSEPH GALES ED., 1834).

See also Robert Allen Rutland, *The Papers of James Madison* 250 (1962) (letter to Samuel Johnston noting that Madison wanted to avoid “all . . . alternations as would either displease the adverse side, or endanger the success of the measure); *id.*, at 272 (letter to Thomas Jefferson stating that “everything . . . that might endanger the concurrence of two-thirds of each House and three-fourths of the States was studiously avoided”) [check]

⁷⁸ *See* Rutland, note 19, *supra*, at 206 (noting that Madison played two factions off against each other and that his task “called for political tight-rope walking”).

people's rights are more safe under State Legislatures than under a Government of limited powers? Their liberty is changed to licentiousness.⁷⁹

Members of Congress were especially suspicious of measures that had an indefinite scope. John Vining of Delaware complained of the "uncertainty with which we must decide on questions of amendment, founded merely on speculative theory."⁸⁰ William Smith of South Carolina objected to the Eighth Amendment because "it seems to have no meaning in it. . . . What is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines? . . . [W]e ought not to be restrained from making necessary laws by any declaration of this kind."⁸¹ And Representative Jackson referred to the entire exercise of approving the amendments as "treading air."⁸²

Given this sort of opposition, it is not surprising that Madison and his colleagues backed away from provisions expressly protecting nebulous and unspecified natural rights. It was difficult enough to persuade two thirds of the House that the enactment of relatively specific rights did not involve "treading air." The effort to constitutionalize an amorphous set of "natural rights of man" must have seemed truly daunting, especially given the risk that the entire enterprise might unravel.

But Madison also faced opposition from another quarter. Some members of Congress, probably including Madison himself, favored constitutional protection for natural rights. One might think that their disappointment in not getting specific protection for these rights would not have caused them to oppose the rest of the package that at least provided protection for enumerated rights. But that disappointment might turn into opposition if they thought that the enactment of some rights would actually make matters worse by prejudicing the protection of others. Hence, Madison's worry that "by

⁷⁹ 1 ANNALS OF CONG., *supra* note 78, at 459-460.

⁸⁰ *Id.*, at 447.

⁸¹ *Id.* at 782-83.

⁸² *Id.* at 442.

enumerating particular exceptions to the grant of power, [a bill of rights] 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.”⁸³

Confronted by resistance on both sides, Madison did what great politicians always do: He kicked the can down the road.⁸⁴ The Ninth Amendment, in effect, leaves the argument about natural rights where it was before the Bill of Rights was adopted. It tells proponents of natural rights that a vote for the Bill of Rights would not jeopardize their position. Passage of the measure would not “disparage” or “deny” the existence of such rights. But opponents of constitutionalizing nebulous rights could also be satisfied. They had successfully beaten back efforts to include any express guarantee of the rights. From their perspective, the Ninth Amendment did no more than leave natural rights supporters with an argument that they would have had anyway even if there had been no Bill of Rights— viz., that there were enforceable rights that existed outside the constitutional text.

II. The Unsettled Ninth Amendment

If my interpretation of the Ninth Amendment is correct, what are its implications? The Ninth Amendment means that it is up to us rather than the Framers to decide whether there are unenumerated rights and whether, if there are such rights, they should be judicially enforced.⁸⁵

⁸³ *Id.*, at 456.

⁸⁴ On the widespread legislative tendency to create deliberate ambiguity in order to enact a measure, see Victoria Nourse & Jane Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 614-16 (2000).

⁸⁵ The only statement in the literature that I have found that comes close to this position is a cryptic remark in Justice Scalia’s dissenting opinion in *Troxel v. Granville*, 530 U.S. 57 (2000). Scalia writes that “the Constitution’s refusal to ‘deny or disparage’ other rights is far removed from affirming any one of them.” *Id.*, at 91. This is

Although the Ninth Amendment does not tell us what our decision should be, it emphasizes that constitutional text provides no excuse for avoiding a decision.

My position should therefore not be confused with Robert Bork's famous "ink blot" theory. In testimony before the Senate Judiciary Committee, Bork analogized the Amendment to a provision hidden under an ink blot. He argued that with no way to know what the provision said, judges should simply ignore it.⁸⁶

Bork is correct when he argues that the Ninth Amendment tells us nothing about which if any natural rights exist and should be enforced, but he is incorrect when he claims that therefore the Amendment can be ignored. Suppose that we take Bork literally, and imagine that a part of the Constitution was in fact covered by an ink blot. True, we would then not know what the provision said, but we would know one thing that it certainly did not say: it did not deny or disparage unenumerated rights. The Ninth Amendment tells us that ambiguities in the text are simply no excuse for the failure to come to grips with the arguments of supporters of these rights.

The Amendment therefore presents us with a paradox, which, years ago, Jefferson Powell explored on the interpretive level. During the heyday of original-intent originalism, Powell argued that correct as far as it goes. It does not acknowledge, however, that the Ninth Amendment also fails to *disaffirm* these rights. The Amendment would have no purpose at all if it did not leave open the possibility that such rights existed and could be enforced.

⁸⁶ See Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearings before the Senate Comm. on the Judiciary, 100th Cong. 249 (1989) (testimony of Robert Bork.) ("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.") Judge Bork has made a similar argument, and used the same analogy, with respect to the privileges or immunities clause of the Fourteenth Amendment. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 166 (1990).

this brand of originalism was contradictory because the original intent of the framers was not to have their words read according to their original intent.⁸⁷ The Ninth Amendment presents a similar paradox on the substantive level. Textualists tell us that judges and others should stay within the four corners of the constitutional text when deciding or opining on a constitutional issue. But the text of the Ninth Amendment prohibits us from staying within the four corners of the text.

In this sense the Ninth Amendment is crucially different from other provisions in the Constitution that have open texture. For example, the Fourth Amendment requires that searches and seizures should be “reasonable.” Without a constitutional definition of “reasonableness,” one must inevitably go beyond the bare words of the text to give the Amendment meaning. Still, the open texture of the Fourth Amendment does not make text irrelevant. Depending on the version of textualism one adheres to, one might look to constitutional structure or to other provisions of text to give the reasonableness requirement meaning. One might also claim that what the textual term “reasonable” means what an average American living in the latter part of the nineteenth century thought it meant or what the people who wrote the language intended it to mean. To be sure, the text may provide the interpreter with discretion, but the discretion is also bounded by text.

The Ninth Amendment is different because it expressly discredits text. It tells us that the status of putative unenumerated rights should not be determined by reference to text, whether the meaning of that text is derived from structure, intertextuality, ordinary usage, or original intent. The Ninth Amendment therefore forces textualism to swallow its own tail. Although it neither embraces nor rejects natural rights, the text of the Amendment provides that text should not be read as settling the controversy over natural rights. A faithful textualist must therefore look outside the text to decide whether we should recognize natural rights and, if so, what those rights should be.

⁸⁷ See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 903-04 (1985).

This paradox, in turn, goes a long way toward discrediting the various arguments for textualism. These arguments are in any event always vulnerable because they necessarily rest on nontextualist premises. Unless we are to accept textualism as no more than an article of faith, textualists will always have to advance some argument outside the text and its original meaning for why we should be bound by the text and its original meaning. For example, textualists sometimes claim that the text, taken as a whole, should be respected because it promotes freedom and prosperity,⁸⁸ or because it constrains the discretion of judges,⁸⁹ or because it provides a highly useful focal point that avoids needless conflict.⁹⁰ These arguments may be right or wrong, but a judge who accepted them would be relying upon contestable empirical and normative assertions that are not grounded in the text – the very thing that textualists are not supposed to do.

If this were the only problem with textualism, perhaps we could live with the difficulty. It is after all a feature of all systems of thought that purport to be exclusionary that they depend on the truth of propositions that the system purports to exclude. For example, as Richard Brandt has taught us, even a believer in God's law must provide an argument for why it is that God's law should be obeyed.⁹¹

But the Ninth Amendment creates an additional problem for textualists that is different from that faced by theists. It is not just that constitutional text cannot establish its own truth and must therefore rely on external justification. The Constitution actually denies its own truth. The Ninth

⁸⁸ See e.g., *Restoring the Lost Constitution* at 48-51.

⁸⁹ See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 44 (1997); Aileen Kavanaugh, *Original Intention, Enacted Text, and Constitutional Interpretation*, 47 AM. J. JURIS. 255, 259-60 (2002).

⁹⁰ See, e.g., David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L. J. 1717, 1732-38 (2003).

⁹¹ See R.B. BRANDT, *ETHICAL THEORY* 61-82 (1959); R.B. Brandt, *The Morality and Rationality of Suicide*, in A HANDBOOK FOR THE STUDY OF SUICIDE 61, 65-66 (SEYMOUR PERLIN ED., 1975).

Amendment tells us that we must, as a matter of constitutional obligation, consider the validity of rights claims that are not grounded in the Constitution. Because the rights are not grounded in the Constitution, it follows that their validity will necessarily depend on arguments that are also outside the Constitution. In this way, the text denies its own authority.

It is important to understand that this problem is different from and deeper than the problem created when the Constitution incorporates another body of law by reference. For example, on some readings, the text of the “Declare War” clause incorporates nontextual standards drawn from the international law of war.⁹² Similarly, positivists like Jules Coleman have recognized that while the moral status of an enactment is irrelevant to its status as law, a law like the Constitution might nonetheless incorporate external moral standards.⁹³ Provisions like these pose no problem for textualism because it is the authority of the text itself that establishes the binding authority of norms that are outside the text. The Ninth Amendment would be similar if it had consisted of one of the natural rights measures that Congress considered but defeated. Such a provision would amount to a textual directive to consider extratextual sources. The actual Ninth Amendment, in contrast, deprives the text of authority by telling us not to consult the text when deciding on the legal status of extratextual norms.

For just this reason, the conventional view that rights standing outside the Constitution have no legal status⁹⁴ does not hold in the Ninth Amendment context. As noted above, we often use rights language to describe claims that are extra-constitutional, like the putative right to health care. In most contexts, use of this language does not imply that judges should enforce the right. Justice Scalia has

⁹² See, e.g., John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 243 (1996).

⁹³ Coleman calls this stance “inclusive positivism.” For a defense, see generally JULES COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY* (2001).

⁹⁴ See p xx, *supra*.

suggested that the Ninth Amendment should be understood in the same way.⁹⁵ But this view runs up against the Ninth Amendment's explicit command that we not rely upon text to determine the status of these extra-constitutional rights. If these rights exist, then it would surely "disparage" them to deny them judicial enforcement, and whatever else we do, we cannot rely on text to ground such disparagement.

Of course, there may nonetheless be strong non-textual reasons to disparage these rights by leaving them unenforced. Nothing that I have said defeats arguments for respect for text so long as the arguments are not themselves grounded in text. Without relying on the authority of text, one might still insist that text provides a necessary focal point or is an essential constraint on the power of judges or an important check on untrammelled political conflict. The many historical cases where text has been ignored without serious adverse consequences⁹⁶ throw some doubt on these claims, but they surely

⁹⁵ "[T]he Constitution's refusal to "deny or disparage" other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people." *Troxel v. Granville*, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting).

⁹⁶ My current favorite example is the flagrant and long standing violation of Article I, sec. 3, cl. 1 and sec. 1 of the Eighteenth Amendment concerning the terms of Senators. Both provisions require that Senators shall have six year terms. To be sure, Article I, sec. 3, cl.2 contains an exception to this general rule for the first group of Senators, who were to be divided into three groups to serve two, four, and six years respectively. But the framers made no exception for Senators chosen after the first election. Yet ever since Vermont joined the United States as the first new state in 1791, the provision has been ignored. One new Senator from a new state has always been assigned a term of less than six years in order to provide for staggered senatorial elections. For summaries, see *Classification of Senators*, in GEORGE P. FURBER, PRECEDENTS RELATING TO THE PRIVILEGES OF THE SENATE OF THE UNITED STATES, S. DOC NO. 52-68 at 191-203 (2d Sess. 1893); HENRY H. GILFRY, PROCEEDINGS OF THE SENATE RELATING TO THE CLASSIFICATION OF THE UNITED STATES SENATORS, S. DOC NO. 62-334 (2d Sess. 1912); FLOYD M. RIDDICK, THE CLASSIFICATION OF UNITED STATES SENATORS, S. DOC. NO. 89-103 (2d Sess. 1966).

remain available. For present purposes, it is enough to insist that the mere existence of the text does not take the question of obedience off the table.

Indeed, if my interpretation of the Ninth Amendment is correct, then the requirement of obedience actually faces in the opposite direction. On my interpretation, the people who are willing to go outside the text are the ones who are obeying constitutional commands; it is the textualists who are flouting the text.

For example, if this reading of the Ninth Amendment is correct, then Justice White had it backwards when he argued in *Bowers v. Hardwick* that “[t]he Court . . . comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language . . . of the Constitution.”⁹⁷ It is the *Bowers* Court itself that is acting illegitimately when it does just what the Ninth Amendment prohibits by inferring the absence of nontextual rights from constitutional text.

So far as I can determine, this procedure has been questioned only once. During the debate about selection of Senators from the new state of Alaska, Senator Butler complained that the “Constitution of the United States provides . . . that the Senate . . . shall be composed of Senators chosen for 6 years. Any attempt to elect a Senator for what is called a short term is clearly in direct violation of the Constitutions.” 104 CONG. REC. 12317 (1958) (statement of Sen. Butler). But Butler’s primary concern seems to have been that Alaska, rather than the U.S. Senate, was attempting to determine the terms of Senators. *See id.* In any event, Senator Eastland quickly responded that the “rule [of classification] has been applied as long as there has been a United States,” *id.* at 12319 (statement of Sen. Eastland), and the Senate proceeded to allocate Senate terms to Alaska’s Senators in the traditional manner. *See RIDDICK, supra*, at 30. For all that appears, the country’s peace and prosperity has not been put at risk by this egregious and apparently deliberate constitutional violation.

⁹⁷ *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986).

But if Justice White is wrong, then so too are his critics, or at least those critics who claim that the Ninth Amendment mandates gay rights.⁹⁸ Although the Amendment means that we must come to grips with natural rights arguments, it does not follow that we must accept them. On the contrary, the Ninth Amendment leaves it up to us to decide whether the case for nontextual, natural rights has been made out. Although the text does not “deny” or “disparage” them, there are powerful nontextual arguments available to us today for why these rights should nonetheless be rejected. Of course, there are also powerful nontextual arguments available to us today for why these rights should be accepted. In other words, the Ninth Amendment leaves the status of these rights unsettled.

Suppose, though, that my interpretation of the Ninth Amendment is mistaken. As noted above, my skepticism about originalism leads me to make only very modest claims. I want to insist that there is some basis for my interpretation and that there is at least as much evidence supporting it as evidence that supports its rivals. I do not want to claim, however, that text and history provides definitive answers to this and other constitutional puzzles.

For someone convinced of these modest claims, the Ninth Amendment serves the same function that it would if my reading were unambiguously correct. Modern political actors would then confront a choice between interpretations and, in the absence of good evidence to support one claim over the other, would need some external standard. They would therefore have to make their own judgment about the appropriateness of using unenumerated natural rights to decide constitutional questions.

What if even my modest claims fail and readers are completely unconvinced by my account and believes that Lash, or Barnett, or some other scholar has it right? Even if my claims about the Ninth

⁹⁸ See, e.g., DANIEL A. FARBER, *RETAINED BY THE PEOPLE: THE “SILENT” NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON’T KNOW THEY HAVE* 131 (2007) (recognition of constitutional rights for gay people “is an important vindication of the notion of fundamental rights that underlies the Ninth Amendment.”)

Amendment's meaning are completely wrongheaded— indeed, even if there had never been a Ninth Amendment – some of what the Amendment asserts on my reading would still be true.

Suppose, first, that there had been no Ninth Amendment. A textualist would then be free to read the Constitution as denying or disparaging the existence of nontextual rights. We would therefore no longer face the paradox of a text that denies its own validity. But if a text cannot deny its own truth, neither can it establish its own authoritativeness. Even without a Ninth Amendment, it would remain open to believers in natural rights to claim that those rights trumped, or at least supplemented, the constitutional text. We do not have to speculate about this possibility. This is the very claim people made before the Ninth Amendment was written. As we have seen, Madison wrote the Ninth Amendment so as to avoid the inference, which he rejected, that a written constitution precluded the existence of nontextual rights. In 1789, with no Ninth Amendment on the books, others were free to accept the inference and to read the Constitution as denying or disparaging nontextual rights. Yet the defenders of these rights, including Madison himself, nonetheless vociferously insisted that they existed and should be enforced.

Justice Samuel Chase famously took the same position seven years after the Ninth Amendment was adopted. In *Calder v. Bull*,⁹⁹ he confronted a claim that the Connecticut legislature had impaired vested rights. Because the Ninth Amendment did not apply to the states, the enumeration of some rights in the Constitution might be read as denying and disparaging the rights claimed by the plaintiff. Chase nonetheless thought that these rights should be enforced because “an act of the legislature (for I cannot call it a law), contrary to the great first principles in the social compact, cannot be considered a rightful exercise of legislative authority.”¹⁰⁰

⁹⁹ 3 U.S. 386 (1798).

¹⁰⁰ *Id.*, at 388.

If this was a claim that Madison and Chase could make in the eighteenth century, then it is also a claim that is available to us today. Perhaps the modern Constitution denies or disparages an important claim of justice. For example, one might conclude that the Constitution, read in good faith, precludes Congress from providing voting rights to residents of the District of Columbia. As Madison and Chase remind us, this is not the end of the argument. There is always an antecedent question that must be asked before text can bind us: Why should I obey this?

The same question confronts us if my interpretation of the Ninth Amendment is wrong and Lash or Barnett is correct. If those who embrace natural rights can insist upon them in the absence of constitutional text – as Madison and his allies did before the enactment of a Bill of Rights – then those who deny them can also insist upon their position. Just as eighteenth century citizens read the Constitution against background assumptions about the appropriate spheres of federal and state government, so too we can employ our own background assumptions. On all accounts, including Barnett’s and Lash’s, the Ninth Amendment was written because its authors recognized that no text can capture all the concerns that we need to consider when we try to do justice. But this limitation on text also applies to the Ninth Amendment itself and would be there, and we would have to respond to it, no matter what the Ninth Amendment said.

The Eleventh Amendment, which also speaks about constitutional construction and which is almost contemporaneous with the Ninth, provides a useful analogy. The Eleventh Amendment provides: “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.” By its terms, the Amendment applies only to suits in federal court between a state and a noncitizens of that state. Despite this language, however, the Supreme Court has held that federal suits between states and their own citizens¹⁰¹ and federally mandated suits

¹⁰¹ Hans v. Louisiana, 134 U.S. 1 (1890).

in against states in state courts¹⁰² are also barred. The Court has conceded that this sovereign immunity “neither derives from, nor is limited by, the terms of the Eleventh Amendment.”¹⁰³ Instead, the reason for the bar is a set of background assumptions about the nature of federal judicial power – assumptions that would exist whether or not there were an Eleventh Amendment. In other words, the construction of the Constitution, which the Eleventh Amendment commands, is available and applies in cases not covered by the Eleventh Amendment. So, too, it is open to some people to claim that there are background assumptions about individual rights that would exist whether or not there were a Ninth Amendment.

III. Conclusion

No wonder, then, that the Ninth Amendment remains the Constitution’s orphaned provision, that Judge Bork treats it as an ink blot, and that the most plausible interpretation of its language has been ignored. A true understanding of the Ninth Amendment provides an entry point into the deconstruction of constitutional obligation. And we couldn’t have that, could we?

¹⁰² Alden v. Maine, 527 U.S. 706 (1999).

¹⁰³ *Id.* at 713.