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ARTICLES

A TEXTUAL-HISTORICAL THEORY OF THE NINTH AMENDMENT

Kurt T. Lash*

Despite the lavish attention paid to the Ninth Amendment as supporting judicial enforcement of unenumerated rights, surprisingly little attention has been paid to the Amendment's actual text. Doing so reveals a number of interpretive conundrums. For example, although often cited in support of broad readings of the Fourteenth Amendment, the text of the Ninth says nothing about how to interpret enumerated rights such as those contained in the Fourteenth. The Ninth merely demands that such enumerated rights not be construed to deny or disparage other nonenumerated rights retained by the people. The standard use of the Ninth Amendment, in other words, has nothing to do with its text. The standard theory of the Ninth also places the text in considerable tension with that of the Tenth Amendment. Although both the Ninth and Tenth Amendments close with the same reference to "the people," most contemporary scholars and courts treat the same term in the two amendments as having opposite meanings, with the Ninth referring to a single national people and the Tenth referring to the people in the several states. This Article addresses these and other textual mysteries of the Ninth Amendment and constructs a text-based theory of the Ninth that both explains its historical application and reconciles the Amendment with other texts in the Constitution, particularly the Tenth and Fourteenth Amendments.

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INTRODUCTION

This Article addresses the textual mysteries of the Ninth Amendment. The overall effort is to construct a text-based theory of the Ninth that both explains its historical application and reconciles the Amendment with other texts in the Constitution, particularly the Tenth and Fourteenth Amendments.

Once dismissed as an indecipherable inkblot,[1] the Ninth Amendment[2] has experienced something of a renaissance. A number of recent articles and books have enriched a previously moribund debate and significantly illuminated the original understanding of the Clause.[3] For example, we now know that the Amendment played a critical role in the debate over the original Bill of Rights and almost every major constitutional dispute of the nineteenth and early twentieth centuries.[4] This should finally bury the oft-repeated canard that the

1. *Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 249-55 (1987) (statement of Judge Robert H. Bork).

2. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

3. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004) [hereinafter BARNETT, RESTORING THE LOST CONSTITUTION]; Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1 (2006) [hereinafter Barnett, *Ninth Amendment*]; Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L. REV. 597 (2005) [hereinafter Lash, *Lost Jurisprudence*]; Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331 (2004) [hereinafter Lash, *Original Meaning*]. At least one major constitutional law textbook has reworked its discussion of the Ninth Amendment to take into consideration recent historical evidence regarding the Ninth. *See* PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 152-53 (Paul Brest, Sanford Levinson, Jack M. Balkin, Akhil Reed Amar & Reva B. Segal eds., 5th ed. 2006).

4. *See* Lash, *Lost Jurisprudence*, *supra* note 3 (discussing the role of the Ninth Amendment in the creation of current state law doctrine, slavery, the constitutionality of the New Deal, and the scope of incorporation doctrine); Lash, *Original Meaning*, *supra* note 3

Ninth Amendment languished in obscurity from the time of its drafting.[5] Second, despite earlier academic (and Supreme Court) pronouncements to the contrary, there exists a rich corpus of federal and state court opinions referring to the Ninth Amendment that stretches over the last two hundred years.[6] Although earlier research looked back no further than the time of the New Deal, we now know that judicial citation to the Ninth Amendment *ended* at the time of the New Deal.[7] The relative obscurity of the Amendment at the end of the twentieth century thus is a recent phenomenon, and not a characteristic of the Amendment from its inception.

The historical application of the Ninth, however, seems to be unrelated to, or even in tension with, the actual text of the Ninth Amendment. For more than one hundred years after its adoption, courts and commentators understood and applied the Ninth as a rule of construction preserving the autonomy of the states. Almost invariably paired with the Tenth Amendment, the Ninth was pressed into service in a wide variety of cases involving the need to limit federal power in order to preserve the right to local self government. States' rights, of course, is an issue traditionally associated with the Tenth Amendment—the only amendment in the original Bill of Rights to expressly mention the states. The Ninth, on the other hand, speaks of the retained rights of the *people*. Reading the Ninth as preserving states' rights appears to follow the approach of the Confederate Constitution which adopted a clause exactly like the Ninth—except it altered the language to protect the retained rights of "the people *of the several states*."[8] Such a reading also appears to ignore the

(discussing the role of the Ninth Amendment in delaying the approval of the Bill of Rights, the first Bank Bill, and the Second Bank of the United States).

5. *See* 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 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."); BENNETT B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT 27 (1955) ("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."); 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 vii (Randy E. Barnett ed., 1989) ("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* . . . ."); Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 223–24 (1983) ("After lying dormant for over a century and a half, the [N]inth [A]mendment to the United States Constitution has emerged from obscurity to assume a place of increasing, if bemused, attention. . . . Ninth [A]mendment analysis has proceeded in three stages. In the first stage, which lasted until 1965, the amendment received only perfunctory treatment from courts and commentators.").

6. *See* Lash, *Lost Jurisprudence*, *supra* note 3.

7. *Id.* at 688.

8. CONFEDERATE CONST. art. VI, § 5 (1861) (emphasis added).

obvious textual differences between the Ninth and Tenth Amendments, with the Tenth speaking of reserved powers and the Ninth speaking of retained rights. *Powers* seems the proper term when referring to prerogatives of governments (state or federal), whereas the word *rights* seems intuitively to refer to the immunities of individuals (not states).

On the other hand, despite the fact that the text of the Ninth appears to lend itself to the protection of individual rights, advocates of the individual rights theory of the Ninth have yet to produce a textual theory of the Ninth capable of judicial enforcement. Supreme Court references to the Ninth Amendment in early privacy cases such as *Griswold v. Connecticut*[9] and *Roe v. Wade*[10] supported an application of the Fourteenth Amendment, not the Ninth. Advocates of a libertarian reading of the Ninth focus on the issue of nonenumerated rights—a subject that only partially involves the Ninth Amendment—and have yet to produce a comprehensive theory of the text itself.[11] Opponents of the libertarian reading of the Ninth, on the other hand, generally deny that the Clause has any judicially enforceable meaning and claim that it merely echoes the general federalist declaration of the Tenth Amendment.[12] Thus, the contemporary debate regarding the Ninth has proceeded without either side feeling obligated to construct a judicially enforceable theory of the entire text.

In fact, taking the entire text of the Ninth Amendment seriously leads to some surprising results. For example, the Ninth Amendment is often cited as indirect support for a broad interpretation of liberty provisions such as the Due Process Clause. One cannot reject a due process liberty claim, the argument goes, on the grounds that no such liberty is listed in the Constitution. Doing so violates the Ninth Amendment's declaration that there are "other rights" retained by the people.[13] When one consults the full text of the Ninth

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9. 381 U.S. 479, 484, 487-93 (1965) (Goldberg, J., concurring).

10. 410 U.S. 113, 120, 122, 129 (1973).

11. For example, libertarian scholar Randy Barnett concedes that the Ninth Amendment may well have protected local majoritarian (collective) rights in addition to individual natural rights. *See* Barnett, *Ninth Amendment*, *supra* note 3, at 16 ("It is possible that the 'other' rights retained by the people were both individual and collective, in which case the collective rights model identifies a potential application of the Ninth Amendment beyond the protection of individual liberties."); *id.* at 21, 79 (further conceding that the Ninth Amendment may have originally protected collective rights). Barnett's theory of the Ninth Amendment, however, addresses only that aspect of the Ninth Amendment implicating individual natural rights.

12. *See* Caplan, *supra* note 5; Thomas B. McAffee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215 (1990).

13. *See, e.g.*, *Griswold*, 381 U.S. at 492 (Goldberg, J., concurring):

> Nor do I mean to state that the Ninth Amendment constitutes an independent source of rights protected from infringement by either the States or the Federal Government. . . . While the Ninth Amendment - and indeed the entire Bill of Rights - originally concerned restrictions upon federal power, the subsequently enacted Fourteenth Amendment prohibits the States as well from abridging fundamental personal liberties.

See also Barnett, *Ninth Amendment*, *supra* note 3, at 14 (criticizing *Carolene Products*

Amendment, however, this argument is revealed as a non sequitur. The Ninth declares that, no matter the interpreted scope of enumerated rights, there remains the possible existence of other *un*enumerated rights. One can have as narrow a reading of due process rights as one wishes without necessarily denying or disparaging the existence of "other rights." Thus, the most common contemporary use of the Ninth cannot be viewed as a command of the text.[14]

When one attempts to read the Ninth's text alongside of similar texts in the Constitution—an approach Professor Akhil Amar refers to as intratextualism[15]—the mystery deepens. The Ninth closes with a reference to "the people." This same term closes the text of the Tenth Amendment. However, despite the fact that these two amendments were placed side by side and ratified at the same time, contemporary scholarship treats the exact same language in opposite ways. Courts and commentators have long treated the closing phrase of the Tenth as a reference to the people in the several states. Thus, all powers not delegated away from or prohibited to the states are reserved to the control of the people *in* the several states. Modern commentary on the Ninth Amendment, on the other hand, generally views "the people" of the Ninth as an undifferentiated national body.[16] But if the people hold reserved powers on a state-by-state basis, why do they not hold retained rights in the same manner? Or, more bluntly, how likely is it that the same term can have radically different meanings in side-by-side sentences added to the Constitution at the same time?

This Article addresses such textual and historical conundrums. Unlike other contemporary accounts that tend to focus on the issue of unenumerated rights, I will address the entire text of the Ninth Amendment and consider what it means to *retain* a right and how constructions of the Constitution might threaten to "deny or disparage" the retained rights of the Ninth. Once we see the Amendment in its entirety, it becomes apparent why courts applied the Ninth Amendment in a manner preserving the right to local self government for more than one hundred years: this is the unavoidable operative effect of the text as a whole.

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footnote four, *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938), for limiting due process incorporation to textually enumerated rights).

14. As this Article will make clear, although the primary semantic (literal) meaning of the text is irrelevant to interpretations of other enumerated rights, the secondary or *implied* meaning of the Ninth may guide interpretations of other rights. *See infra* note 46 and accompanying text.

15. *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

16. *See, e.g.*, Barnett, *Ninth Amendment*, *supra* note 3, at 79 (rejecting an interpretation of "the Ninth Amendment as protecting, at least in part or perhaps even entirely, the collective rights of 'the people' as embodied in their state governments").

I. THE PARAMETERS AND POSSIBILITIES OF THE TEXT

> The enumeration, in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.[17]

This first Part focuses on the text of the Ninth Amendment and attempts to identify the textual parameters to which any account of the Ninth Amendment must conform. When appropriate, I will consider the historical record and attempt to identify which of the possible textual meanings are more or less plausible, given historical evidence of original public understanding. In this way, I hope to provide an account of the Ninth Amendment satisfactory in terms of both originalism[18] and textualism.[19]

All interpretive theories begin with the text; the words of the Constitution determine the parameters of possible meaning. Although not self-defining, the very idea of a written, enforceable constitution presupposes a sufficient degree of agreement regarding language and grammar as to allow judicial enforcement over time.[20] 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.[21] Whether this is true, analysis of the text sets the ground rules for any viable theory of constitutional meaning.

As the Article proceeds, I will distinguish *primary textual* (or semantic) meanings of the Ninth from *secondary implied* meanings arising from the text.[22] For example, as far as the primary meaning of the Ninth is concerned, the amendment comes into play only when the existence of certain enumerated

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17. U.S. CONST. amend. IX.

18. Most originalists today seek not the original intentions of the framers, but the original public meaning of the text. As described by Lawrence Solum, an originalist judge should:

> make a good faith effort to determine the original meaning, where original meaning is understood to be the meaning that (i) the framers would have reasonably expected (ii) the audience to whom the Constitution is addressed (ratifiers, contemporary interpreters) (iii) to attribute to the framers, (iv) based on the evidence (public record) that was publicly available.

Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 185 (2006).

19. For a helpful example of an interlocking use of originalism and textualism, see Amar, *supra* note 15. Amar's particular approach stresses the need to harmonize similar terms and phrases used in related passages in the Constitution. I follow the same approach in this Article.

20. *See* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 50-61 (1999).

21. *See id.*

22. I wish to thank Larry Solum for first raising with me the important distinction between semantic textual meaning and implied textual meaning. For a brief explanation of implied meanings or "implicature," see Stanford Encyclopedia of Philosophy, Implicature (May 6, 2005), http://plato.stanford.edu/entries/implicature.

rights is *construed* in a manner that denies or disparages other unenumerated retained rights. The text does not declare that unenumerated rights actually *exist* or that they be affirmatively protected, only that they not be denied or disparaged due to the existence of certain enumerated rights. On the other hand, the text does seem to *imply* that other retained rights exist and ought to be respected to the same degree as enumerated rights. This implied meaning is a *secondary* meaning arising from the text, but not actually required by the text. As we shall see, the content and scope of implied secondary meanings depends on what we identify as the primary meaning of the text.

We begin, however, at the beginning: the opening lines of the Ninth Amendment.

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

According to contemporary dictionaries, the meaning of "enumeration" was no different than that commonly understood today: to enumerate meant "to number" and an enumeration was simply "a numbering or count."[23] The opening phrases, "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" 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, ex post facto laws, etc). To the extent that additional support is necessary, this reading is supported by the history 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 nonenumerated (unlisted) rights were assigned into the hands of the government.[24] 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.[25] In his speech to the House of Representatives, Madison explained that the Ninth Amendment was meant in part to address such concerns about the implied relinquishment of rights due to the enumeration of other rights in the Constitution.[26] The general language of the Ninth tracks this concern by prohibiting erroneous inferences from the

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23. WILLIAM PERRY, THE ROYAL STANDARD ENGLISH DICTIONARY 224 (1st Am. ed., Worcester, Isaiah Thomas 1788), *microformed on* Early American Imprints, 1st series, No. 21385 (NewsBank, Inc.); *see also* JOHN ENTICK, ENTICK'S NEW SPELLING DICTIONARY 150 (Wilmington, Peter Brynberg 1800), *microformed on* Early American Imprints, 1st series, No. 37375 (NewsBank, Inc.) ("a number or counting over").

24. *See* James Madison, Speech in Congress Proposing Constitutional Amendments, June 8, 1789, *in* WRITINGS 437, 448-49 (Jack N. Rakove ed., 1999).

25. *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).

26. *See* Madison, *supra* note 24, at 448-49.

enumeration of *any* right in the Constitution, including those added after the adoption of the Ninth itself.[27]

But what of those rights enumerated in the original Constitution, such as those listed in Article I, Section 10? Those rights constrain the states and include the Impairment of Contracts Clause as well as immunity from ex post facto laws and bills of attainder. Because these rights are among those rights "enumerate[ed] . . . 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 of certain rights (including those enumerated against the states in Article I, Section 10) shall not be construed to deny or disparage others retained (against the states) by the people." Although textually possible, historically such a reading is highly implausible. First, we know that Madison's attempt to add an amendment expressly binding the states failed.[28] It seems unlikely that an express restraint on state action would fail but a text of unlimited restraint in the form of unenumerated rights against 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 binds only the federal government, not the states.[29] When one adds the fact that no one in the history of the Constitution has *ever* suggested such a reading of the Ninth, the odds that the "other rights" of the Ninth refers to unenumerated rights against the states becomes vanishingly small. Put another way, conventional wisdom is correct in at least this regard: the Ninth does not involve rights enforceable against the states.

There is, however, a way to read "the enumeration . . . of certain rights" in a manner that includes the rights 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 of certain rights (including those enumerated against the states in 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. As we shall see, this reading tracks how courts and commentators read the Ninth in the early years following its adoption and for decades afterwards. For now, it is enough to conclude that the reference to certain enumerated rights can include *all rights enumerated* in the Constitution, whether against the states or federal government, without doing violence to either the text or the history surrounding its adoption.

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27. Subsequent amendments might change the scope of the Ninth, but nothing in the original text or history precludes application of the Ninth's rule of construction in reference to rights enumerated in later amendments.

28. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998).

29. 32 U.S. (7 Pet.) 243, 247-50 (1833).

B. "*. . . 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. As a matter of semantic meaning, *all* the Ninth demands is that the enumeration of rights not be construed in a particular way.

The Ninth Amendment was the first provision added to the Constitution that solely addressed the issue of interpretation.[30] 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 (literally, for the Clause reads, "Congress shall have power . . . [t]o make all Laws which shall be necessary and proper . . . ."),[31] 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 which "abridg[es] freedom of speech."[32] The Ninth Amendment, however, is neither a grant of power nor a source of rights.[33] 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.[34]

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30. The second was the Eleventh Amendment.

31. U.S. CONST. art. I., § 8, cl. 18.

32. U.S. CONST. amend. I.

33. *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.").

34. 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 apparently unresolvable) issue. During the early decades of the Constitution, however, constitutional treatises spent a great deal of time exploring the basic principles of constitutional interpretation. *See, e.g.*, JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Carolina Academic Press 1987) (1833); St. George Tucker, *A View of the Constitution of the United States*, *in* 1 BLACKSTONE'S COMMENTARIES app. 140-339 (St. George Tucker ed., Phila., William Young Birch & Abraham Small 1803). 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 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 (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?"). Those who

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. Here, we might be tempted to follow John Marshall's reasoning in *Barron v. Baltimore*[35] and conclude that the Ninth's rule of construction applies only against the federal government. But this is required neither by the text of the Ninth nor Marshall's decision in *Barron*. According to Marshall, had the framers intended the Bill of Rights to serve as "limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention."[36] The rule of the Ninth Amendment, however, does not limit the powers of the state governments—quite the opposite, as we shall see. 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 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 *because* the right was not enumerated in the Federal Constitution *therefore* it was not retained by the people. In fact, all officials, whether state or federal, are bound by their oaths to support the Constitution and this includes respecting the rule of construction announced by the Ninth Amendment.

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

It is generally accepted that one of the central purposes[37] of the Ninth Amendment was to avoid the implication that the Bill of Rights was an exhaustive list of rights.[38] Just because a right was not specifically enumerated did not mean 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 addresses more than the denial of other rights. It also forbids

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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."

35. 32 U.S. (7 Pet.) 243, 247-50 (1833).

36. *Id.* at 250.

37. The historical evidence suggests that the Ninth Amendment had dual purposes: (1) preventing the disparagement of unenumerated rights and (2) limiting the construction of federal power. *See* Kurt T. Lash, *The Inescapable Federalism of the Ninth Amendment* (Loyola Law School Los Angeles Legal Studies, Paper No. 2006-3, 2006), *available at* http://ssrn.com/abstract=953010; *see also* Lash, *Original Meaning*, *supra* note 3.

38. *See* Madison, *supra* note 24, at 448-49.

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.[39] The Disparagement Clause 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 nonenumerated 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 nonenumerated 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 nonenumerated 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 interest.[40] Suppose, however, that a federal

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39. According to a contemporary 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, Edward O'Brien 1797), *microformed on* Early American Imprints, 1st series, 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 23, at 203 ("to treat with contempt; to lessen"); THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE 211 (5th ed., Phila., William Young 1789), *microformed on* Early American Imprints, 1st series, No. 45588 (NewsBank, Inc.) (defining "to disparage" as to "injure by union with something inferior in excellence"). Usage in newspapers and sermons generally used the term as meaning "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 & Walter S. Franklin eds., D.C., Gales & Seaton 1834), *available at* http://memory.loc.gov/ammem/amlaw/lawhome.html ("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 id.* at 202, 209 ("It has been alleged, to disparage the management under the present . . . ."); *Miscellanies*, THE WORCESTER MAGAZINE, July 17, 1788, at 1 ("And least of all does it become [a man] to disparage the [female] sex."); *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, 1st series, No. 22223 (NewsBank, Inc.) ("'Tis as easy to commend our neighbor as to disparage him"). All of these uses (insult, lessen, cheapen by inferior comparison) carry the connotation of diminishment.

40. *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).

court refused to provide the same level of scrutiny for a *nonenumerated* 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 due to the fact of nonenumeration is enough to render this interpretation in violation of the Ninth Amendment. It lessens the "strength" of the retained right and renders it less immune to government regulation. Put another way, this approach disparages the unenumerated right.

In a similar manner, the Disparagement Clause prevents treating enumerated rights as superior to nonenumerated 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 impairment of 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. It construes the fact of enumeration in a manner that disparages nonenumeration.[41] This rule does not control the outcome of the case; it merely prohibits one particular interpretive approach to resolving the issue.

D. *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 the Due Process or Privileges or Immunities Clauses of the Fourteenth Amendment. 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 *non*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 nonenumerated rights.[42] In fact, the above argument does not affect

41. 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).

42. Randy Barnett, for example, criticizes footnote four 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 3, 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

nonenumerated rights in any manner. A limited reading of the enumerated right to due process says nothing about whether other rights are retained beyond those encompassed by the enumerated right. 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 constitutions. Even if the court read the enumerated federal rights narrowly, there remained the additional question of whether the claimed right was nevertheless a nonenumerated 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.[43]

In terms of the literal semantic meaning of the text, then, a narrow construction of an enumerated right does not deny or disparage nonenumerated 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.[44] Whatever nonenumerated rights may be, by definition they exist outside the parameters of enumerated rights.[45]

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

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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. Penn. 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); 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 supports reading unenumerated rights into the Due Process Clause).

43. *See* Lash, *Original Meaning*, *supra* note 3, at 401-09 (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)).

44. *But see* Barnett, *Ninth Amendment*, *supra* note 3, at 14, 77 (arguing that *Carolene Products* footnote four violates the interpretive principle of the Ninth).

45. 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.

rights that denies or disparages other nonenumerated rights. Instead, it is the court's refusal to recognize rights beyond those enumerated which 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 must be distinguished from reliance on the Ninth Amendment as indirect or circumstantial support for a particular reading of a separate amendment. Depending on one's view of the Ninth, it could be used in general support of a broad (or narrow) reading of provisions such as the Due Process or Privileges or Immunities Clauses. But these secondary or *implied* meanings of the Ninth are contingent upon the primary meaning of the Ninth Amendment.[46] For example, if the Ninth protects unenumerated individual natural rights (and *only* individual natural rights), then this might lend circumstantial support to a similar reading of the Fourteenth Amendment. On the other hand, the Ninth may have been intended to preserve the retained rights of the people to local self government. If so, this counsels against reading the Ninth in support of broad readings of the Fourteenth Amendment's Due Process Clause that unduly interfere with local autonomy.

In sum: The Ninth Amendment prevents interpretations of enumerated rights that negatively affect unenumerated retained rights. 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 primary meaning of the Ninth Amendment (and this, in turn, depends on one's theory of constitutional interpretation).

E. *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 due to the fact that the concept of rights has undergone conceptual development since the Founding.[47] But even if one limits the investigation to the Founding period, common usage of the term rights

46. 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 four (which involves an interpretation of the Fourteenth Amendment's Due Process Clause) violates the principles of the Ninth Amendment. *See* Barnett, *Ninth Amendment*, *supra* note 3, at 14, 77.

47. *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 which remains influential in contemporary legal and political theory).

included—and this is a nonexclusive list: (1) alienable and unalienable natural rights;[48] (2) positive rights;[49] (3) individual rights;[50] (4) collective revolutionary rights;[51] (5) majoritarian democratic rights; and (6) the retained rights of the sovereign states.[52] Any or all of these may have been understood as comprising 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."[53] 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, this is how the New York Convention phrased the retained rights of the people in that state:

> [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 . . . .[54]

As New York's declaration illustrates, from the time of the Articles onward, the people 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.

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48. *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).

49. *See* Madison, *supra* note 24, at 448-49 (speaking of the positive rights secured under the proposed Bill of Rights such as trial by jury).

50. 1 ANNALS OF CONG. 760 (1789) (Joseph Gales ed., 1834) (statement of Rep. Benson) (discussing the unenumerated individual right of a man to "wear his hat if he pleased" or "go to bed when he thought proper").

51. *See* Madison, *supra* note 24, at 441 (proposing an amendment declaring "that the people have the indubitable, unalienable, and indefeasible right to reform or change their government").

52. *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.").

53. *See id.*

54. 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, *supra* note 5, at 356.

Although scholars often associate the "other (retained) rights" of the Ninth with individual natural rights,[55] the text itself carries no such limitation. In fact, there is strong historical support for the proposition that the retained rights of the people were considered so vast as to not be *capable* of enumeration.[56] Certainly no Founder (including James Madison) limited the protections of the Ninth to a particular kind of right.[57] 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, collective or even governmental.[58]

This is a critical point about the text of the Ninth Amendment: much scholarly work has gone into establishing that retained rights at the time of the Founding included individual natural rights.[59] 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. The remaining text of the Ninth Amendment itself provides some clues, as do closely related texts in the rest of the Bill of Rights.

F. *"[O]thers* retained *by the* people*"*

A *retained* right is a right withheld from government control.[60] The opposite of a retained right is an *assigned* right—one delegated to government control. This is how 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

55. *See generally* MASSEY, *supra* note 5; Barnett, *Ninth Amendment*, *supra* note 3; Suzanna Sherry, *The Ninth Amendment: Righting an Unwritten Constitution*, 64 CHI.-KENT L. REV. 1001 (1988).

56. *See, e.g.*, James Wilson, Remarks in the Pennsylvania Ratifying Convention (Nov. 28, 1787), *in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 388 (1976) ("In all societies, there are many powers and rights, which cannot be particularly enumerated.").

57. Professor Caplan argues that retained rights are those protected under the state constitutions. *See* Caplan, *supra* note 5. The historical evidence, however, suggests a much broader conception of retained rights. *See infra* notes 47-52 and accompanying text. At this point I wish only to point out that the text does not include Caplan's limitation.

58. *See* EMMERICH DE VATTEL, THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE: APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 53, 54 (Northampton, Mass. 1805) (1758) (describing the natural rights of nations).

59. *See* BARNETT, RESTORING THE LOST CONSTITUTION, *supra* note 3; MASSEY, *supra* note 5.

60. According to contemporary dictionaries, "to retain" meant "to hold in custody," PERRY, *supra* note 23, at 438, or simply "to keep," SHERIDAN, *supra* note 39, at 501.

> 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.[61]

According to Madison, the concern about adding a Bill of Rights was that all unenumerated rights would be "assigned" into the hands of the general government. It was to avoid this erroneous delegation of power that Madison proposed the Ninth Amendment. Thus, preventing erroneous denial or disparagement of retained rights, by definition, means preventing erroneous enlargement of government power over that particular subject.

1. *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 prohibited 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. 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).[62] Prior to the adoption of the Fourteenth Amendment, the right to regulate religion at a local level remained a right retained by the collective people of each state.

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 right 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.[63] 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.[64] In this way, the Sedition Act violated the individual right to free speech and the

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61. Madison, *supra* note 24, at 448-49.

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

63. *See* James Madison, Report on the Alien and Sedition Acts, January 7, 1800, *in* WRITINGS, *supra* note 24, 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."). For a discussion of the report and its relevance to debates over the Ninth Amendment, see Lash, *supra* note 37.

64. *See* Madison, *supra* note 63, 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).

people's collective right to regulate speech on a state level.[65]

Libertarian theories of the Ninth Amendment miss this critical dual nature of retained rights. To begin with, there is no reason to limit retained rights to *individual* rights (as libertarian scholars like Randy Barnett concede).[66] But most important, although retained rights may be individual *or* collective, the Ninth *always* guards the people's collective right to control the retained matter on a state level. For example, suppose one of the retained rights of the people is the right of self-defense. Should the federal government attempt to deny or disparage this right because it is not specifically enumerated, it 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 self-defense would (or would not) be regulated. Although one might argue that the principles of natural law preclude denying the right even on a state level, this would be a matter for state courts to decide and, ultimately, the people of each individual state.[67]

Suppose, on the other hand, that the federal government in 1792 decided that the right to self-defense was a natural right and that states were not adequately protecting this fundamental right. Accordingly, Congress passes the "Federal Self Defense Act" requiring states to protect to the individual right of self-defense. 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 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

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

66. *See* Barnett, *Ninth Amendment*, *supra* note 3, at 16 (conceding the possibility that the Ninth protected collective rights).

67. 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* Lash, *Original Meaning*, *supra* note 3, at 403; *see also* DE VATTEL, *supra* note 58, at 55 ("A nation then has a right to perform what actions it thinks fit, both when they do not concern the proper and perfects rights of any other [nation], and when it is bound to it only by an *internal* without any perfect *external* obligation. If it makes an ill use of its liberty, it offends; but others ought to suffer it to do so, having no right to command it to do otherwise. . . . It is therefore necessary, on many occasions, that nations should suffer certain things to be done, that are very unjust and blamable in their own nature, because they cannot oppose it by open force, without violating the liberty of some particular state, and destroying the foundation of natural society."). The work of de 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, *supra* note 34, at app. 151 (linking the work of de Vattel with the principles of the Ninth and Tenth Amendments).

the category of rights left to state majoritarian control, this does not change the operative effect (much less original purpose) of the Ninth and Tenth Amendments.

Once we recognize how the Ninth and Tenth Amendment work in tandem to keep certain matters under local control, it becomes clear that "the people" of the Ninth are no different than "the people" of the Tenth. The Tenth declares that all powers not delegated to the federal government or prohibited to the states are reserved to the states or to the people. It has never been seriously disputed that this is a reference to the people's right (whether viewed as a national people *or* as the people in the several states) to reserve certain powers to the control of local majorities who may at their discretion assign them into the hands of their state governments. Following what Akhil Amar refers to as intratextualism,[68] it seems logical that the same term in an adjoining provision adopted by the same people at the same time would have the same meaning.

We can confirm that the term "the people" meant the same thing in both the Ninth and Tenth Amendments by reference to a generous historical record. But before doing so, once again there is additional support for such a reading in the texts of the Ninth and Tenth Amendments. We know that retained rights, by definition, are rights not delegated to the control of the federal government. This seems clear enough from the term "retained", and it was expressly declared by the drafter of the Ninth, James Madison.[69] Retained rights, therefore, are powers not delegated to the national government. Under the text of the Tenth Amendment, all nondelegated powers are reserved to the states unless otherwise prohibited to the states by the Constitution. The only issue, therefore, is whether the retained rights of the Ninth involve matters "prohibited" to the states. This cannot be so, of course, for this would mean that all unenumerated rights are *automatically* withheld from both the state and federal governments. As explained above, there is no plausible historical argument that this was the understood meaning of the Ninth Amendment. It would result in the absurd scenario where the expressly enumerated retained rights of speech and nonestablishment would be left to local majoritarian control, but *all* unenumerated retained rights would be automatically removed from state control.[70]

Reading the Ninth Amendment in light of the textual commands of the Tenth allows for a harmonization of the texts. By reserving nondelegated powers "to the States respectively, or to the people,"[71] the Tenth allows the people of each state to decide whether their respective governments will exercise the nondelegated powers, or whether the people will reserve this

68. *See* Amar, *supra* note 15.

69. Madison, *supra* note 24, at 448-49.

70. The result becomes even more absurd when one considers the possibility of retained collective rights, such as the right to regulate education on a local level. This kind of collective right *cannot* logically be retained from state control.

71. U.S. CONST. amend. X.

power from both the federal and their state governments. For example, the federal government has no power to require music education in the public schools. Power to mandate the content of public education is reserved to the states respectively or to the people. This leaves the people of, say, Massachusetts free to require music education through a majoritarian decision of their legislature or to deny such power to their state government and reserve the right to the people as a matter of individual choice.

Once harmonized with the Tenth, retained rights under the Ninth Amendment work in a similar, though nonredundant, manner.[72] The retained rights of the people include those rights withheld from the federal government and under the control of the people on a state-by-state basis. The people of a given state may, however, assign control over these retained rights to their respective state governments. This is one of the core sovereign rights of the people and, again, by definition, such an assignment would occur on a state-by-state basis.

In sum, the text of the Ninth Amendment does not affect the interpretation of enumerated rights such as the Due Process Clause of the Fourteenth Amendment (or any other enumerated right). The text is solely concerned with constructions that deny or disparage *unenumerated* rights. The term "rights" is unrestricted, and there is nothing in the text of the Ninth to suggest that it refers to only a subcategory of retained rights (whether individual or majoritarian). Because "retaining" a right, by definition, means leaving that right to the majoritarian control of the people in the states, all retained rights are federalist in their operative effect in that they are retained to the majoritarian control of the people in the several states.

II. THE TEXT AND THE HISTORICAL RECORD

A. *Contemporary References to the Retained Collective Rights of the People*

The idea that retained rights were collective or federalist in nature is strongly supported by the historical record as well as by the text of the Ninth and Tenth Amendments. The testimony we have from the drafter of the Ninth (James Madison), the members of Congress who voted to propose the Ninth, and the members of the state assemblies who ratified the Ninth, are unanimous in describing the Ninth as a guardian of the sovereign rights of the people in the several states. Courts and commentators echoed this same understanding of the meaning and operative effect of the Ninth Amendment for over one hundred years.

To begin with, the historical record includes examples of the framers, ratifiers, and early Supreme Court Justices describing the right of local self

72. For a discussion of the separate and distinct roles of the Ninth and Tenth Amendments, see *infra* Part III.A.

government as one of the retained rights of the people. According to Ninth Amendment draftsman James Madison, "In establishing [the federal] Government, *the people retained other Governments* capable of exercising such necessary and useful powers as were not to be exercised by the General Government."[73]

Notice that Madison describes "the people" as having retained their local (state) governments. In coming together to form a national people, the people of the individual states retained their right to control matters "not to be exercised by the general government." This same idea is echoed by the state conventions that ratified the Constitution. According to the declaration of the New York Ratifying Convention:

> The 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.[74]

Once again, "the people" are described as retaining the autonomy over local government. The collective people of New York, in this case, reserved the authority to delegate any or all retained "power jurisdiction and right" to their state government, if they wished to do so. Nor was this mere wishful thinking on the part of Anti-Federalists who "lost" the debate over the proposed Constitution. We have already seen how Madison shared the same view of the retained right of the people to local government. Early Supreme Court decisions confirmed this common reading of the retained collective rights of the people in the states. Supreme Court Justice Samuel Chase, whose 1797 opinion in *Calder v. Bull* is regularly cited in support of a libertarian reading of the Ninth Amendment, expressly declared that all retained rights are left to the local control of state majorities. While sitting as a judge on Maryland's highest court, Justice Chase wrote, "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."[75]

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73. 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, 362 (Marvin Meyers ed., rev. ed. 1981) [hereinafter THE MIND OF THE FOUNDER] (emphasis added).

74. *See* Amendments Proposed by the New York Convention (July 26, 1788), *in* CREATING THE BILL OF RIGHTS, at 21-22; *see also* 1 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS 329 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott Co. 1891).

75. Campbell v. Morris, 3 H. & McH. 535, 554-55 (Md. 1797); *see* Calder v. Bull, 3 U.S. (3 Dall.) 386, 387 (1798) ("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."); *see also* Douglass' Adm'r v. Stevens, 2 Del. Cas. 489, 502 (1819) ("By the

There were, of course, disputed conceptions of "the people" in decades following the adoption of the Constitution.[76] Indeed, the precise nature of "the people" remained a fiercely contested issue in the period between the Founding and the Civil War[77]—and even after.[78] For our purposes, however, one need not decide whether "the people" refers to the undifferentiated people of the United States, or the separate people(s) in the several states, or—as Madison apparently believed—both. As far as the Ninth and Tenth Amendments are concerned, the result is the same whether one sees the people through a nationalist or federalist lens. All sides of the debate agreed that, however conceived, "We, the People," had the sovereign right to divide power between the national and local governments.[79] As Madison put it, "the people retained other governments capable of exercising such necessary and useful powers as were not to be exercised by the General Government."[80] In this way, "the

Constitution of the United States all power, jurisdiction, and rights of sovereignty, not granted by that instrument, or relinquished, are retained by the several states.").

76. One of the most hotly contested issues in constitutional interpretation in the early decades of the Constitution regarded whether the Constitution was a compact between the people of the individual states or a document establishing a single, national, and sovereign people. Early constitutional treatise writers such as St. George Tucker embraced the former, while nationalists like Joseph Story and John Marshall embraced the latter. For a general discussion of the competing positions, see Kurt T. Lash, *"Tucker's Rule": St. George Tucker and the Limited Construction of Federal Power*, 47 WM. & MARY L. REV. 1343 (2006). All sides in this debate, however, believed that all nondelegated powers, jurisdiction, and rights were left to the control of the people in the individual states.

77. *Compare* Tucker, *supra* note 34, *with* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (Marshall, C.J.). *See generally* G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835 (1988) (discussing the debate between compact theorists and nationalists like Story and Marshall).

78. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) (majority and dissenting opinions presenting conflicting views regarding the nature of the "people of the United States").

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, Federalists denied the claim, and moderates had no difficulty in reading the clause as reserving nondelegated power 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 74, at 295-96 (complaining about the language of the Tenth Amendment), *with* Letter from Edmund Randolph to George Washington (Dec. 6, 1789), *in* 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 56, at 223 ("The twelfth [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.").

80. Letter from James Madison to Spencer Roane (Sept. 2, 1819), *supra* note 73, at 362; *see also* JAMES SULLIVAN, OBSERVATIONS UPON THE GOVERNMENT OF THE UNITED STATES OF AMERICA 22 (Boston, Samuel Hall 1791) ("Sovereignty must by its very nature be absolute and uncontrolable by any civil authority, with respect to the objects to which it extends. A subordinate sovereignty is nonsense.: A subordinate uncontrolable sovereignty is a contradiction in terms: But there may be a political sovereignty, limited as to the objects of its extension: It may extend to some things, but not to others, or be vested for some purposes, and not for others.").

people" of both the Ninth and Tenth Amendments could be viewed as referring to We the People of the United States, and the retained rights and powers of the people in the individual states.[81]

B. *The Collective People of the Ninth Amendment*

This federalist view of the people's reserved rights was not limited to "the people" of the Tenth Amendment. Framers, ratifiers, and early Supreme Court Justices shared a similar view of the people's retained rights under the Ninth Amendment. In his 1791 speech against the proposed Bank of the United States, James Madison argued that federal power did not extend to chartering a Bank and that stretching the enumerated powers of Congress to include such power would violate the Ninth and Tenth Amendments. According to Madison, the Ninth "guard[ed] against a latitude of interpretation" while the Tenth "exclud[ed] every source of power not of exercising the within the Constitution itself."[82] Madison concluded that chartering a Bank violated the rights of the state to charter banks free from federal interference.[83] Madison's use of the Ninth is a stark example of how the retained rights of the Ninth included state majoritarian rights.

There is evidence that Madison's colleagues in the House shared the same view of the Ninth Amendment. John Page, a member of the House when Madison proposed the Bill of Rights, also described the Ninth as protecting both the rights of individuals and the states. In his 1799 campaign pamphlet, John Page argued that the Alien and Sedition Acts were "not only unnecessary, impolitic, and unjust, but unconstitutional."[84] According to Page, the Acts violated the retained rights of the states as protected by the Ninth and Tenth

81. For additional Founding-era examples of references to "the people" on a state level, see SULLIVAN, *supra* note 80, at 37 ("As individuals retain all the powers under a free government, which are not surrendered by the form of their constitution, so all the powers, which existed in the governments of the several states before the establishment of the general government, are yet held by them, excepting those which the people have taken back, and surrendered by that system."); Letter from James Madison to Spencer Roane, *supra* note 80, at 362 ("Within a single state possessing the entire sovereignty, the powers given to the government by the People are understood to extend to all the acts whether as means or ends required for the welfare of the community, and falling within the just range of government.").

82. James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791), *in* WRITINGS, *supra* note 24, at 480, 489.

83. *Id.* at 490.

84. JOHN PAGE, ADDRESS TO THE FREEHOLDERS OF GLOUCESTER COUNTY 9 (Richmond, John Dixon 1799). Page was a member of Congress from 1789 to 1797 and Governor of Virginia from 1802 to 1805. Library of Congress, Congressional Biographical Directory, http://bioguide.congress.gov. Thus, not only was he in Congress when Madison gave his bank speech, he was a representative from Virginia at the time that state was considering the Bill of Rights. He would have been well aware of Madison's opposition to the bank—indeed, the men regularly corresponded.

Amendments (which he refers 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 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*. . . .[85] [And the Act is further unconstitutional b]ecause 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) . . . .[86]

Hardin Burnley, a member of the Virginia House of Delegates, supported ratification of the Ninth Amendment on the grounds that the provision would "protect[] the rights of the people & of the States."[87] John Overton, a member of the second North Carolina Ratifying Convention that ratified the Ninth Amendment, similarly viewed the Ninth as working alongside the Tenth to preserve the retained state right of "self-preservation." Writing as a judge on the Tennessee bench, Overton declared:

> [N]ations 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. Vattel is of this opinion, and, what is more satisfactory, the Federalist, and the American author of the Notes to Blackstone's Commentaries [Tucker], two of the most eminent writers on jurisprudence, are of the same opinion.[88]

St. George Tucker, Professor at the College of William and Mary from 1788-1804, wrote in his influential *View of the Constitution* that the Ninth Amendment guarded the people's collective right to alter or abolish their form of government. According to Tucker, 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."[89] Supreme Court Justice Joseph Story, in the first Supreme Court opinion to discuss the Ninth Amendment, read the Ninth as preserving the concurrent powers of state majorities.[90]

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85. PAGE, *supra* note 84, at 13.

86. *Id.* at 14.

87. Letter from Hardin Burnley to James Madison (Nov. 28, 1789), *in* 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 56, at 219.

88. Glasgow's Lessee v. Smith, 1 Tenn. (1 Overt.) 144, 166 (1805) (citing the Ninth and Tenth Amendments).

89. Tucker, *supra* note 34, at app. 154.

90. Houston v. Moore, 18 U.S. (5 Wheat.) 1, 20-21 (1820) (Story, J., dissenting).

These are but a few examples of historical testimony by those immediately involved with creating and ratifying the Ninth Amendment, as well as early scholarly and judicial commentary. As I have presented elsewhere, the historical record contains literally hundreds of additional references to the Ninth Amendment as a provision reserving *all* retained rights, individual and majoritarian, to the control of local majorities.[91] The historical record thus strongly supports my reading of the text.[92] There is no evidence that the term "rights" was understood in a restrictive manner, but there does exist extensive, uncontradicted evidence that the term was understood to preserve local control of both individual and majoritarian rights.

C. *Summing Up the Semantic Meaning of the Text*

The text of the Ninth Amendment forbids constructions that deny or diminish rights retained by the people on a state-by-state basis. Put another way, the text forbids constructions that interfere with the retained right to local self government. Even those retained rights that are individual in terms of their application against the federal government are *collective* in terms of their being retained under local majoritarian control.

Embedded in the text of the Ninth, thus, are two separate forbidden rules of construction: First, the fact of enumeration must not be read to imply the *necessity* of enumeration. Second, the fact of enumeration must not be read to suggest the *superiority* of enumeration. Whatever the content of unenumerated retained rights, the fact that they are not enumerated does not suggest a lower status. Finally, nothing in the text of the Ninth forbids narrow interpretations of enumerated rights. Such interpretations, even if in error, do not deny or disparage *other* unenumerated retained rights.

III. INTRATEXTUALISM: THE TEXT OF THE NINTH AMENDMENT IN THE CONTEXT OF THE CONSTITUTION

The text of the Ninth Amendment does not stand alone, but is integrated into the overall text of the Constitution—and a proper construction of the Ninth must likewise integrate the Ninth into the rest of the constitutional text. Because the above analysis reads the Ninth as preserving the prerogatives of state majorities, the question arises whether this renders the Ninth redundant with the Tenth Amendment. Also, even if the Ninth was originally understood as a guardian of local autonomy, later amendments substantially altered the original federalist structure of the Ninth Amendment. The Fourteenth

91. *See* Lash, *Lost Jurisprudence*, *supra* note 3; Lash, *supra* note 37.

92. Even the strongest proponent of a libertarian reading of the Ninth Amendment concedes that the historical evidence supports a federalist reading of the Ninth and Tenth Amendments. *See* Barnett, *Ninth Amendment*, *supra* note 3, at 5.

Amendment in particular seems to remove whole categories of rights from local control and place them under the protection of the national government. It is possible that the Fourteenth Amendment radically altered the scope and function of the Ninth Amendment, thus rendering its original meaning irrelevant. The following section seeks to reconcile the Ninth with the Tenth and Fourteenth Amendments in a manner that leaves all three with independent meaning and application.

A. *The Ninth and Tenth Amendments*

My analysis of the text and history of the Ninth Amendment might seem to render the Ninth and Tenth Amendments redundant guardians of state rights. Closely examined, however, the text of the two amendments reveals related provisions imposing somewhat overlapping, but distinct, constraints on federal power. The Tenth limits the federal government to only enumerated powers. The Ninth limits the *interpretation* of enumerated powers. Both provisions are necessary if federal power is to be effectively constrained.

In the ratification debates, Federalist advocates of the Constitution promised that the federal government would have only certain enumerated powers, leaving all nondelegated powers, jurisdiction, and rights to the individual sovereign states. As Madison explained in the Federalist Papers, this left the great mass of regulatory authority over everyday matters in the hands of state majorities.[93] Federalists justified the lack of a Bill of Rights on the grounds that adding a list of enumerated rights might imply that federal power had no limits beyond those expressly enumerated in the Constitution.

The problem with this argument, as Anti-Federalists pointed out, was that the proposed Constitution already had a list of enumerated rights in Article I, Sections 9 and 10. Thus, there already existed the potential for implied (and otherwise) unlimited federal power. In order to win a sufficient number of votes to ratify the Constitution (and avoid a second convention), Madison agreed to propose a Bill of Rights. There remained, however, the problem of how to do so without implying an otherwise unlimited interpretation of federal power. An obvious solution, and one proposed by most state ratifying conventions, was the addition of a clause expressly declaring that Congress's powers were limited to those enumerated in the Constitution, with all other non-delegated non-prohibited powers remaining with the states. Madison obligingly adopted such an approach by proposing what became our Tenth Amendment.

But, by itself, the Tenth was inadequate if the goal was preventing the federal government from extending itself into all areas except those expressly

93. THE FEDERALIST NO. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961) ("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.").

declared off-limits in a Bill of Rights. The Necessary and Proper Clause granted Congress the power to exercise unenumerated powers when "necessary and proper" to advancing an enumerated end. It was possible that Congress might attempt to extend its enumerated powers by way of this Clause to such a degree as to effectually arrogate to itself all powers except those expressly denied in the Bill of Rights. Should Congress do so, this would not violate the express terms of the Tenth Amendment,[94] for it would be no more than an exercise of those means necessary to advancing delegated powers. It would, however, have the effect of completely obliterating the people's retained right to local self government beyond those subjects expressly listed in the Bill.

Preventing this undue extension of implied powers requires a rule of construction controlling the interpretation of enumerated federal power. The Ninth Amendment declares that there exist restrictions on federal power beyond those expressly enumerated in the Constitution. Such a rule can have no other application except in regard to the limited construction of *enumerated* federal power.

In this way, the Ninth and Tenth Amendments accomplish the same goal of limiting the scope of federal power, but do so in different ways. The Tenth limits the government to enumerated ends, while the Ninth Amendment limits the scope of Congress's implied means to advance those enumerated ends. In particular, the Ninth prohibits the federal government from claiming that the only limit to its "necessary and proper powers" are those expressly enumerated in the Constitution. The people have other rights that *also* constrain the scope of enumerated federal power. Applied in tandem (as they invariably were),[95] the Ninth and Tenth establish that all retained powers and rights are left under the control of the people in the states who may then delegate the same to their state governments, or expressly retain them under their state constitution. Not only does this reading of the text reconcile the Ninth with its historical application, but it also has the happy effect of giving the same meaning to "the people" in both the Ninth and Tenth Amendments.

B. *The Ninth and Fourteenth Amendments*

The debate over the original meaning of the Fourteenth Amendment began with its enactment and shows no sign of abating a century and a half later.[96] It

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94. It is possible to read the Tenth Amendment in a manner that would preclude such a broad construction of federal power. I explore the historical evidence supporting such a reading in a forthcoming article. Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty and "Expressly" Delegated Power*, 83 NOTRE DAME L. REV. (forthcoming May 2008).

95. *See* Lash, *Lost Jurisprudence*, *supra* note 3.

96. For a small sample of contemporary scholarship addressing the original meaning of the Fourteenth Amendment, see AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY (2005); AMAR, THE BILL OF RIGHTS, *supra* note 28; MICHAEL KENT CURTIS, NO

is not necessary for our purposes to resolve this debate and specifically define the scope of the Fourteenth Amendment.[97] The text alone allows for some general conclusions about the relationship of the Ninth and Fourteenth Amendments, regardless of the ultimate determined scope of provisions such as the Due Process and Privileges or Immunities Clause.

1. *The Ninth Amendment and incorporation doctrine*

After establishing the national and state citizenship of all persons born in the United States, the next sentence of Section 1 of the Fourteenth Amendment declares that "no state shall" abridge the privileges or immunities of United States citizens or deny any person the right to due process or equal protection under 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 or all of the first eight amendments, or whether they (also) include certain unenumerated rights such as the right to privacy or the common law right to pursue a trade.[98] No scholar or judge has ever suggested that the Fourteenth Amendment incorporates the Ninth Amendment. From the earliest incorporation cases to modern doctrine, the Court has consistently limited the scope of incorporation doctrine to the first eight amendments.[99]

The history surrounding the adoption of the Fourteenth Amendment supports the long-standing position of the courts that neither the Ninth nor Tenth Amendments are proper candidates for incorporation. Throughout the first half of the nineteenth century, the Ninth and Tenth Amendments were viewed as preserving the autonomy of the states. Despite the incentive to raise every possible liberty claim in opposition to slavery, abolitionists never referred to the Ninth Amendment in support of their cause. Instead, in the years leading up to the Civil War, both the Ninth and Tenth Amendments were invoked on behalf of slavery and the right of states to secede from the

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STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1990); as well as the work of John Harrison and Raoul Berger, among others.

97. In my own work, I have argued that the Fourteenth Amendment should be interpreted as having incorporated the Free Exercise and Establishment Clauses of the First Amendment, but not the Ninth and Tenth Amendments. *See* Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085 (1995); Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106 (1994).

98. *See* Kurt T. Lash, *Two Movements of a Constitutional Symphony: Akhil Reed Amar's* The Bill of Rights, 33 U. RICH. L. REV. 485 (1999) (book review).

99. *See* Lash, *Lost Jurisprudence*, *supra* note 3, at 673-74. In fact, courts originally cited the Ninth Amendment to support rejecting a theory of total incorporation. *See id.* at 675.

Union.[100] It is no surprise then that the man who drafted Section 1 of the Fourteenth Amendment, John Bingham, left both the Ninth and Tenth Amendments off of his list of individual privileges or immunities protected against state action by the Fourteenth Amendment.[101] In sum, the testimony of courts and commentators is unanimous on at least this issue: the Fourteenth Amendment does not incorporate the Ninth.

But if the retained rights of the Ninth are not *part* of the Fourteenth Amendment, then they must be *reconciled* with the Fourteenth. All of the rights now protected by the Fourteenth Amendment originally fell within the category of rights removed from the federal government and left as an initial matter under the control of the people in the states. This includes everything from chartering a bank to establishing a religion to providing due process for deprivation of life liberty and property. What in 1791 had been left to the collective control of the people in the states, after 1868 became a matter of the individual rights of "United States citizens" and "persons" (to use the language of the Fourteenth Amendment). More, what was once under the Ninth a statement of powers *denied* to the federal government becomes under Section 5 of the Fourteenth a declaration of powers *delegated* to the regulatory authority of the federal government. In this way, the Fourteenth Amendment clearly altered the scope of the Ninth.

But not all of the rights originally retained under the Ninth were subsumed by the Fourteenth. The collective majoritarian rights protected under the Ninth cannot logically be applied against collective state majorities any more than the reserved powers of the Tenth Amendment can be applied against the states. For example, assuming local control of education was an original right retained by the people, this right cannot sensibly be applied *against* state majorities. The same would be true for all retained collective or majoritarian rights. 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.

2. *Reconciling the Ninth and Fourteenth Amendments*

We know from our textual analysis of the Ninth Amendment that the fact of enumeration does not imply the necessity or superiority of enumeration. Accordingly, the remnant unenumerated retained rights of the Ninth (post-

100. *See id.* at 639-42.

101. John Yoo points out that state constitutions during the nineteenth century adopted provisions echoing the language of the federal Ninth Amendment. *See* John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967 (1993). Although I think this is important evidence that the language of the Ninth could be viewed to support individual rights, these state constitutional provisions cannot trump the extensive express testimony regarding the public understanding of the federal clause itself. Unlike the Free Exercise and Establishment Clauses, which appear to have been embraced as individual rights provisions by the Civil War, no such transformation appears to have occurred with the Ninth Amendment. *See* Lash, *Lost Jurisprudence*, *supra* note 3, at 643-52.

1868) are no less important than the enumerated rights of the Fourteenth. This seems to follow logically from our analysis thus far. 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. Moving beyond the bare semantic meaning of the Ninth, the text of the Ninth also seems to imply that the rights of the Fourteenth should not be unduly extended in a manner that intrudes upon the people's retained right to local self government. 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.

The need to limit the scope of potentially clashing rights is not without precedent. The Court limits the scope of the Establishment Clause in order to avoid impinging upon the right to free speech.[102] Similarly, reconciling the Ninth and Fourteenth Amendments requires 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 music and the arts. Believing that this denial violates substantive due process rights under the Fourteenth Amendment, Congress exercises its power under Section 5 of that amendment and passes a law providing a private cause of action for any individual denied "adequate opportunity" to receive training in music and the arts. Further assume (as the 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.[103] As such, the law infringes the retained right of local majorities to decide educational policy free from federal interference.

The same would be true should Congress attempt to pass the same law as necessary and proper to advancing their power to regulate interstate commerce.[104] Congress is no more free to unduly extend their powers under Section 5 of the Fourteenth Amendment than they are under Section 8 of Article I.[105] This does not mean the earlier Ninth Amendment trumps the later-in-time Fourteenth. It does mean that the Ninth prevents, in Madison's words,

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102. *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).

103. *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).

104. *See* United States v. Lopez, 514 U.S. 549 (1995) (invalidating the Gun-Free School Zones Act).

105. *See* United States v. Morrison, 529 U.S. 598 (2000) (invalidating portions of the Violence Against Women Act); City of Boerne v. Flores, 521 U.S. 507 (1997) (invalidating portions of the Religious Freedom Restoration Act).

any "latitude of interpretation"[106] that impinges upon any of the retained rights of the people.

The above analysis should look familiar to those who followed the federalist jurisprudence of the Rehnquist Court. Cases like *City of Boerne v. Flores*[107] and *United States v. Morrison*[108] use a similar limited analysis of Congress's power under Section 5 in order to preserve the autonomy of the states. The Court grounded this jurisprudence, however, in the Tenth Amendment, not the Ninth.[109] Elsewhere I have traced the rise of the Tenth Amendment as a rule of construction and how it came to eclipse the Ninth as the prime textual expression of limited federal power.[110] In fact, the Ninth and Tenth were generally cited in tandem throughout the nineteenth and early twentieth centuries as the twin guardians of federalism.[111] Both clauses, however, fell into judicial disfavor at the time of the New Deal and by the time the Rehnquist Court began to reinvigorate the principles of federalism, the Ninth Amendment had been "rediscovered" by the Warren and Burger Courts and adopted as a declaration of uneneumerated individual rights.[112] This left the Tenth as the prime constitutional reference to the principle of federalism. The text of the Tenth Amendment, of course, does not expressly declare a rule of strict construction.[113] The Supreme Court has acknowledged as much,[114] and critics of the modern federalism jurisprudence have been quick to point out the lack of textual justification for decisions like *Boerne* and *Morrison*, as well as other federalism decisions like *Lopez* and *Printz*.[115] A textual theory of the

106. James Madison, Speech in Congress Opposing the National Bank, February 2, 1791, *in* WRITINGS, *supra* note 24, at 480, 489.

107. 521 U.S. 507 (1997).

108. 529 U.S. 598 (2000).

109. *See Morrison*, 529 U.S. at 617-18; *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring). For a general discussion of the Rehnquist Court's reliance on the Tenth Amendment in its federalism decisions, see Kurt T. Lash, *James Madison's Celebrated Report of 1800: The Transformation of the Tenth Amendment*, 74 GEO. WASH. L. REV. 165 (2006).

110. Lash, *supra* note 109.

111. *See* Lash, *Lost Jurisprudence*, *supra* note 3.

112. *Id.* at 708-13.

113. As I will argue in a forthcoming paper, the last-minute addition of "or to the people" to the Tenth Amendment may have been understood to imply the need for strict construction of federal power according to the principles of popular sovereignty. *See* Lash, *supra* note 94.

114. *See*, *e.g.*, 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.").

115. Printz v. United States, 521 U.S. 898 (1997); *see* Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 288-93 (2000); H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 899 (1999); Edward L. Rubin & Malcolm Feeley,

Ninth Amendment, however, supports the federalist approach of these decisions with the additional benefit of historical support.

The idea of limiting the construction of rights enumerated against the states in order preserve state autonomy might sound like a modern invention of the Rehnquist Court. In fact, Chief Justice John Marshall himself advanced this very theory of limited construction of rights running against the states. According to Marshall in *Dartmouth College*:

> [E]ven marriage is a contract, and its obligations are affected by the laws respecting divorces. That the [Impairment of 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.[116]

According to Marshall, 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 states. Marshall did not cite the Ninth Amendment, but his approach tracks the implied meaning of the text and its historical application. Unless the Fourteenth Amendment repealed the Ninth Amendment sub silencio, the nature of retained unenumerated rights remains the same after 1868, even if the scope of those rights has been significantly reduced. Indeed, the adoption of the Fourteenth Amendment has *no impact* on the operative effect of any remnant retained unenumerated right. Because these remnant unenumerated rights retain full value, the fact that some rights are enumerated (such as those listed in the Fourteenth Amendment) does not diminish in any way the equal importance of *other* retained rights.

IV. THE NINTH AMENDMENT AND JUDICIAL REVIEW

The judicial branch is constrained by the Ninth Amendment just as much as the political branches. So, for example, courts must not construe the enumeration of certain rights in the Constitution to imply otherwise unconstrained federal power.[117] In fact, it seems that only a studied avoidance

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Federalism: Some Notes on a National Neurosis, 41 UCLA L. Rev. 903, 927-28 (1994).

116. Trustees of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 627-29 (1819).

117. This fits within the semantic meaning of the Ninth, for a conclusion that federal

of the Ninth Amendment could explain the Marshall Court's declaration that congressional power "acknowledges no limitations, other than are prescribed in the constitution,"[118] for this too violates the express terms of the Ninth by suggesting that the fact of enumeration implies the necessity of enumeration.[119]

Courts do not violate the Ninth Amendment, however, if they limit the scope of substantive due process to textual rights such as those listed in the first eight amendments to the Constitution.[120] Although some Ninth Amendment theorists believe such a limited reading of due process conflicts with the Ninth,[121] that such a reading does not deny or disparage the existence of other, unenumerated rights. As discussed above, narrow construction of enumerated rights has no effect on the *other rights* retained by the people. To the extent that the Due Process Clause (or, better, the Privileges or Immunities Clause) protects unenumerated rights against state action, the precise content of such rights must be identified through an act of interpretation focused on that particular clause and not on the basis of the Ninth Amendment.

Moreover, the text of the Ninth Amendment seems to prohibit an unenumerated rights interpretation of the Fourteenth Amendment. The people's retained rights include collective majoritarian rights which, by definition, cannot be applied against the states. Even in regard to retained unenumerated individual rights, the text leaves these under the control of the people in the several states absent an express mandate in the Constitution itself. As John Marshall explained in *Barron v. Baltimore*, the framers of the Constitution employed express language when they meant to bind the states. This rule of construction was not abandoned with the adoption of the Fourteenth Amendment—indeed, the drafters of the Fourteenth expressly *followed* the rule of *Barron*.[122] To the degree that the Reconstruction Amendments require the states to protect certain fundamental rights, this must be the result of a textual interpretation of express provisions like the Due Process or Privileges or Immunities Clause. If privacy and other individual autonomy rights are to be applied against the states, it must be on the merits of the Fourteenth

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power is otherwise unconstrained contains the unstated premise that unenumerated rights do not have the same constraining effect as enumerated rights. In this way, reading federal power as having no other constraints except those enumerated in the Constitution denies or disparages other rights retained by the people.

118. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824).

119. For a discussion of the Marshall Court's repeated refusal to address the Ninth despite its being raised by parties before the Court, see Lash, *Lost Jurisprudence*, *supra* note 3, at 604-09.

120. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (rejecting the unenumerated right to contract, but suggesting that there may be room for stricter scrutiny of rights listed in the Bill of Rights); *see also* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943) (suggesting that the Court should apply strict scrutiny in cases involving the incorporation of rights specifically listed in the Bill of Rights).

121. *See* Barnett, *Ninth Amendment*, *supra* note 3, at 14.

122. *See* AMAR, *supra* note 28, at 164.

Amendment itself and not an implied absorption of the retained unenumerated rights of the Ninth.

A. *Towards a Theory of Judicial Enforcement*

The above analysis establishes that the Ninth Amendment limits the undue extension of enumerated federal powers and rights against state majorities. Undue extension of either threatens rights meant to be retained by the people. This is not complicated as a matter of theory. However, even if we have correctly identified the original meaning of the Ninth, we are left having to construct a doctrine that effectuates the meaning of the text.

One could argue, of course, that judicial enforcement of the Ninth Amendment is inappropriate. Perhaps the protection of local self government should be left to the political branches under the assumption that the structure of the Constitution adequately protects the states from federal overreaching. As the Supreme Court noted in *Garcia*, states can utilize their representative status in the House and Senate (as well as the Electoral College) and arguably counter undue expansion of federal authority to the detriment of the states.[123] The difficulty with this theory, however, is that it leaves enforcement of the people's right to self government to state governments who may have an incentive to bargain away their autonomy in exchange for federal benefits. As the text of the Ninth reminds us, however, the retained rights guarded by the Ninth are the retained rights of the *people*. Only the people in their sovereign capacity may waive or alter the federalist division of power between national and local governments.

The man most responsible for the Ninth Amendment, James Madison, was adamant about the need for judicial enforcement of the line between federal and state authority. According to Madison, "the permanent success of the Constitution depend[ed] on a definite partition of powers between the general and state governments."[124] It was "of great importance as well as of indispensable obligation, that the constitutional boundary between them should be impartially maintained."[125] Madison objected to the Marshall Court's broad reading of federal power because it "seem[ed] to break down the landmarks intended by a specification of 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."[126] By making "expediency & constitutionality" convertible terms, the Supreme Court had relinquished "all controul on the legislative exercise of unconstitutional powers" and placed the

123. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985).

124. James Madison, Veto Message, March 3, 1817, *reprinted in* THE MIND OF THE FOUNDER, *supra* note 73, at 307.

125. Letter from James Madison to Spencer Roane (May 6, 1821), *in* THE MIND OF THE FOUNDER, *supra* note 73, at 363.

126. *Id.* at 359.

federalist limits of federal power "beyond the reach of judicial cognizance."[127] To Madison at least, judicial enforcement of the people's retained rights was "indispensable."

In fact, if limited to its semantic meaning, judicial enforcement of the Ninth is fairly straightforward. Courts must not construe the fact of enumeration in a manner that denies or disparages retained rights. The *only* time the semantic meaning comes into play is when a court or government official insists that the fact of enumeration suggests the necessity or superiority of enumeration. The underlying principle of the Ninth, however, implies the existence of retained rights beyond those expressly enumerated in the Constitution. Federal authority was not meant to extend to all areas of life *except* those expressly placed off-limits. Put another way, the text of the Ninth Amendment suggests a preexisting limitation on federal power—a limitation enforceable by courts in situations beyond those triggered by the primary semantic meaning of the Ninth Amendment.

Exactly how the courts should effectuate the secondary *implied* principles of the Ninth Amendment is a matter of constitutional construction as opposed to a particular doctrine mandated by the text of the Ninth Amendment.[128] As usual, James Madison provides us an early sketch of such a constructed theory of judicial enforcement of the people's retained unenumerated rights. In his 1791 speech against the Bank of the United States, Madison laid out the following principles of 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.[129]

The "very characteristic of the government" Madison insisted on protecting involved limited, enumerated federal power as envisioned by the ratifying conventions and declared in the statements they submitted when they ratified the Constitution. This characteristic would be destroyed if Congress could extend their implied powers to include "great and important powers" never meant to be "left to construction."[130] The rule of limited construction of federal power was implicit in the Constitution itself, but expressly declared by the

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127. *Id.* at 360.

128. For a helpful discussion of the distinction between constitutional interpretation and constitutional construction, see WHITTINGTON, *supra* note 20, at 7-14.

129. *Id.*

130. *Id.*

Ninth and Tenth Amendments, "the former, as guarding against a latitude of interpretation—the latter, as excluding every source of power not within the constitution itself."[131] In this particular case, Madison argued that the power to charter a bank or any other corporation was a great and important power that required express enumeration. The attempt to construe the enumerated powers of the federal government to include such a charter altered the essential nature of limited government and, therefore, violated the retained rights of the states under the Ninth and Tenth Amendments.

Madison's opponents on the Bank Bill objected that Madison had taken a mere policy debate and turned it into a matter of "rights."[132] In fact, Madison treated the federalist division of power as a right reserved to the people in the states, and his approach to guarding that right is quite similar to the modern Court's application of strict scrutiny. Responding to Spencer Roane's criticism of the Court's interpretation of federal power and jurisdiction in *Cohens v. Virginia*, Madison wrote that when it came to the exercise of federal power, "the means of execution should be of the most obvious and essential kind; & exerted in the ways as little intrusive as possible on the powers and police of the states."[133] Thus, laws affecting the states must be "obvious and essential" (compelling) and executed in a manner "as little intrusive as possible" (that is, by using the least-restrictive alternative). This approach also echoes the modern Court's interpretation of federal power in cases like *Lopez*, which require an actual nexus with interstate commerce,[134] and the "proportional and congruent" test of Congress's Section 5 powers articulated in *Boerne*.[135] Again, it has been common to view these decisions as application of the "spirit" of the Tenth Amendment. The same jurisprudence, however, could be applied under the Ninth Amendment with greater textual and historical justification.

In addition to reserving certain subjects to local control, the Ninth Amendment also counsels against construing federal power as exclusive of concurrent state authority, unless absolutely necessary. Some of the earliest applications of the Ninth Amendment involved the question of concurrent versus exclusive federal power. Those favoring a presumption in favor of current state authority cited the Ninth Amendment in support of a limited reading of exclusive federal power. In *Houston v. Moore*, the first Supreme Court opinion to discuss the Ninth Amendment, Justice Joseph Story agreed:

> The constitution containing a grant of powers in many instances similar to

131. Madison, *supra* note 82, at 489.

132. *See* Memorandum from Roger Sherman to James Madison (Feb. 4, 1791), *in* 13 THE PAPERS OF JAMES MADISON 382 (Charles F. Hobson & Robert A. Rutland eds., 1981) ("The only question that remains is—Is a Bank a proper measure for effecting these purposes? And is not this a question of expediency rather than of rights?").

133. Letter from James Madison to Spencer Roane (May 6, 1821), *supra* note 125, at 365.

134. *See* United States v. Lopez, 514 U.S. 49, 558 (1995).

135. City of Boerne v. Flores, 521 U.S. 507, 519-20 (1997).

> 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. . . . 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 [ninth] amendment of the constitutio*n,[136] but upon the soundest principles of general reasoning.[137]

At issue in *Houston* was whether the states had concurrent authority along with the federal government to discipline the militia once it was called into active duty. One of Houston's arguments was that the sole power of the states to regulate on matters involving the militia was contained in the "reservation" clause of Article I, Section 8, Clause 16.[138] 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."[139] Houston argued that this reservation implied that all power not expressly reserved to the states was exclusively in the hands of Congress.[140] 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

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136. Story here refers to the "eleventh amendment," reflecting an early terminology which listed the provisions of the Bill of Rights in terms of their placement on an original list of twelve proposed amendments. The Ninth and Tenth were the eleventh and twelve articles on the original list. *See* Lash, *Lost Jurisprudence*, *supra* note 3, at 614-15. Even absent this historical convention, it is clear from the text that Story is, in fact, referring to the Ninth. *See* Houston v. Moore, 18 U.S. (5 Wheat.) 1, 21 (1820) (Story, J., dissenting) (explaining, in the same discussion, that "what is not taken away by the Constitution of the United States, must be considered as retained by the States or the people").

137. *Houston*, 18 U.S. at 20 (Story, J., dissenting) (emphasis added) (footnotes omitted).

138. *Id.* at 4-6 (majority opinion).

139. U.S. CONST. art. I, § 8, cl. 16.

140. *Houston*, 18 U.S. at 4 (stating that Houston argued that "the constitutional power of Congress over the militia, is *exclusive* of State authority").

> 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.*[141] *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.[142]

Notice that Story's opinion (which remained influential for decades), provides a literal application of the Ninth Amendment in a case dealing solely with the majoritarian right to local self government. The fact that the states are granted *some* rights in terms of regulating the militia shall not be construed to deny or disparage *other* unenumerated regulatory rights over the militia retained by the states or the people. Reading federal power to be exclusive in this case was both unnecessary and contrary to the letter and spirit of the Ninth Amendment.

B. *Summary*

Early discussion and application of the Ninth Amendment present at least three separate rules of application. First, and most obviously, the fact that some rights are enumerated must not be construed to suggest a lack of other unenumerated rights retained to the states or to the people. Second, the greater and more important a power, the more likely its absence from the enumerated powers of Congress reflects a determination to leave the matter under the control of local governments. Third, in determining the boundary between national and local authority, federal power should be construed to extend only to those means "obvious and necessary" to advancing an enumerated end. Not only are courts authorized to patrol this boundary, they are duty-bound to maintain the line separating state and federal authority and guard local autonomy as one of the retained rights of the people.

The first rule is a straightforward application of the text. Obscured by the modern emphasis on individual rights, the text points beyond libertarian political theory and protects all unenumerated rights, including the collective

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141. 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.

142. *Houston*, 18 U.S. at 3 (Story, J., dissenting) (emphasis added).

right of the people to local self government. The Ninth Amendment thus grounds federalism in the text of the Constitution and establishes it as a constitutional right. Because such rights cannot be denied or disparaged on account of their unenumerated status, this places collective majoritarian rights on equal ground with enumerated individual rights. Both are to receive equally vigorous judicial protection. Although generally associated today with the Tenth Amendment, it is the text of the Ninth that calls for a limited construction of enumerated federal power in order to avoid *disparaging* the right of the people to keep certain matters under local control.

The second rule suggests there are some powers which, even if plausibly "necessary and proper" to the advancement of an enumerated end, nevertheless are of such important or critical nature as to require specific enumeration. This rule falls within the scope of the Ninth Amendment because it involves limiting the construction of enumerated federal power in order to avoid denying a right meant to be retained by the people.[143] In essence, it establishes a method for identifying a retained right. Once again, we can find analogies in the modern jurisprudence of the Tenth Amendment. Cases like *New York v. United States*[144] and *Printz v. United States*[145] involved whether Congress could exercise their necessary and proper powers in a manner that commandeered state legislators or state officials. According to the Court in *Printz*, "Although the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty.'"[146] Allowing federal control of state authorities would critically undermine the federalist separation of powers, for "[i]t is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority."[147] Nor was there any historical evidence suggesting "that the Federal Government may command the States' executive power in the absence of a particularized constitutional authorization . . . ."[148] The power to "commandeer" state governments in the service of federal policy was of such a significant nature that it required specific enumeration, even if Congress could establish this means as necessary and proper to an enumerated end.[149]

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143. James Madison's argument regarding the need to expressly enumerate great and important powers was acknowledged by Alexander Hamilton in his defense of the Bank. *See* Alexander Hamilton, Opinion on the Constitutionality of the Bank, *in* 8 PAPERS OF ALEXANDER HAMILTON 63, 119 (Harold C. Cyrettt ed., 1965). The same rule was pressed by litigants in *McCulloch v. Maryland* and implicitly accepted by John Marshall in his opinion, though without citing the Ninth Amendment as the textual expression of the rule. *See* 17 U.S. (4 Wheat.) 316, 373-74, 411 (1819).

144. 505 U.S. 144 (1992).

145. 521 U.S. 898 (1997).

146. *Id.* at 918-19 (quoting THE FEDERALIST NO. 39 (James Madison)).

147. *Id.* at 928.

148. *Id.* at 909.

149. The same rule would apply to interpretation of federal power to abrogate state sovereign immunity under the doctrine of the Eleventh Amendment. Caleb Nelson, for

Finally, as a constitutional right, legislative encroachment on the autonomy of local majorities must be *justified* as meeting an obvious and essential enumerated federal responsibility. It was essential to Madison that the scope of Congress's implied powers not be left to the discretion of the political branches, but judicially determined and enforced. In reviewing the scope of federal power, courts were to ensure that "the means of execution should be of the most obvious and essential kind; & exerted in the ways as little intrusive as possible on the powers and police of the states."[150] Madison's rule implies the need to establish a sufficient nexus between the chosen means and the enumerated end. Or, as the Supreme Court has suggested, Congress may not "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."[151] The Supreme Court's late nineteenth century Commerce Clause jurisprudence has been criticized as drawing artificial distinctions between matters that "directly or indirectly" affected interstate commerce. Similar criticism has been leveled at the current Court's distinction between commercial and non-commercial local activity. Artificial or not, such distinctions can be viewed as attempts to require a sufficient nexus between implied and enumerated power. The issue is not simply whether the asserted power arguably implicates a federal responsibility, but whether allowing such an extension effectively erases the distinction between matters local and matters national—a distinction mandated by both the Ninth and Tenth Amendments.

In addition to requiring a sufficient degree of nexus, the third rule requires that federal power be "exerted in the ways as little intrusive as possible on the powers and police of the states."[152] For example, even if Congress has authority under Section 5 of the Fourteenth Amendment to protect free exercise of religion against certain state actions, the scope of justified congressional action depends upon the degree of state interference with an enumerated right. Or, as the Court has put it, congressional action must be "congruen[t] and proportional[]" in light of the identified problem.[153] The Ninth Amendment demands that the unenumerated rights of the people have equal status with enumerated rights. Thus, a line must be drawn between retained majoritarian rights and enumerated individual rights in a manner that gives both equal regard and respect. The same rule applies, of course, to all exercises of

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example, has suggested just this kind of limitation on federal jurisdictional power, though he attributes the rule to an independent limitation on the scope of federal power. *See* Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1640 (2002).

150. Letter from James Madison to Spencer Roane (Sept. 2, 1819), *supra* note 73, at 365.

151. United States v. Lopez, 514 U.S. 549, 567-68 (1995).

152. Letter from James Madison to Spencer Roane (Sept. 2, 1819), *supra* note 73, at 365.

153. *See* City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

congressional power.

Strict scrutiny is generally reserved for government actions that impinge upon protected rights. The text of the Ninth Amendment reminds us that maintaining an area of retained local autonomy is itself a right of the people. As early constitutional treatise writer St. George Tucker explained, under 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."[154]

CONCLUSION: A MODEST PROPOSAL

The case law I have drawn upon is generally associated with the Tenth Amendment-based federalism jurisprudence of the current Supreme Court. In many ways, the textual theory I have presented in this paper, both primary-semantic and secondary-implied, amounts to the modest proposal that this jurisprudence be grounded in the Ninth, and not the Tenth Amendment. Doing so would have the benefit of placing that jurisprudence on firmer textual and historical ground. There are various normative justifications for doing so. To the extent that one's constitutional theory is based on the concept of popular sovereignty, both the text and historical record suggest that the people insisted on preserving areas of community life beyond the reach of the federal government. The normative case for federalism, of course, has been and will continue to be a subject of intense debate. Once associated with intransigent state resistance to desegregation, the notion of states' rights today has a more progressive ring. Recent claims of the right to local self government involve not entrenched racism, but the right to implement affirmative action programs. Issues such as the medicinal use of marijuana and physician-assisted suicide also raise issues of local self government. Thus, even apart from popular sovereignty theory, modern theories of justice and personal autonomy may find utility in a federalist system of divided power.

In the end, however much power has been delegated into the hands of the federal government, the text of the Ninth Amendment reminds us that we retain innumerable liberties, both individual and majoritarian. Drawing the line between rights assigned and rights retained requires drawing a line between federal and local control. This separation of power is one of the fundamental rights of the people.

154. *See* Tucker, *supra* note 34, at app. 154.