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I want to thank Randy Barnett for commenting on my article, *A Textual-Historical Theory of the Ninth Amendment*. Professor Barnett's essays on the Ninth Amendment in the 1990s triggered the modern debate over the original meaning of the Ninth, and his recent book, *Restoring the Lost Constitution*, synthesizes his earlier work and presents a sophisticated theory of constitutional rights.[1] I welcome his thoughts and I completely understand his critical stance regarding my work; if my conclusions are correct they significantly undermine some of Barnett's key assertions about the original meaning and modern application of the Ninth Amendment. In his current essay, I believe that Barnett has identified some conceptual issues that could benefit from some additional clarification. His "individualist" reading of the Ninth and Tenth Amendments, however, is at odds with the common understanding of popular sovereignty at the time of the Founding and is contradicted by key pieces of historical evidence. Most of all, Barnett's failure to address Madison's actual testimony about the federalist meaning of the Ninth and Tenth Amendments critically undermines his effort to put a libertarian spin on an expressly federalist historical record.

Professor Barnett's response[2] and this Reply present only a snapshot of the larger historical debate between Barnett and myself regarding the original meaning of the Ninth Amendment. A more detailed look at the original sources which constitute the subject of this debate can be found in two articles I originally published in the *Texas Law Review* and in a forthcoming article in

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1. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004).

2. *See* Randy E. Barnett, *Kurt Lash's Majoritarian Difficulty*, 60 STAN. L. REV. 937 (2008).

the *Iowa Law Review*, *The Inescapable Federalism of the Ninth Amendment*.[3] The *Iowa* piece contains an extensive analysis of the historical documents and issues which informed the drafting, ratification, and application of the Ninth Amendment and provides a point-by-point comparison of Barnett's reading of the evidence with my own. In this brief Reply to Barnett's response essay, I want to clear up some terminological matters and focus on a few of his key historical claims.

I. TERMINOLOGY

A. *Federalism and Majoritarianism*

I begin with some issues of terminology. In his current essay, Barnett characterizes my approach to the Ninth Amendment as "majoritarian" (hence the title of his essay). In prior work, however, Barnett described my approach to the Ninth as *federalist*.[4] I think this latter term best captures my approach to the Ninth since it highlights one of the key differences between Barnett and myself in our reading of the historical record. For example, I *agree* with Barnett that the Ninth protects individual rights from federal abridgment. Where we differ involves the effect of the Ninth Amendment on the states. Barnett believes the retained rights of the Ninth are individual in nature and this limited set of rights is applied against the states by way of the Fourteenth Amendment's Privilege or Immunities Clause. I, on the other hand, view the Ninth as protecting both individual and collective rights against federal abridgment.[5] Although some individual rights originally left to state control were applied against the states through the adoption of the Fourteenth Amendment, many (indeed, most) remain under the collective control of the people in the states, free from undue federal interference (including interference from federal courts) even after the adoption of the Fourteenth. Aspects of the original federalist protections of the Ninth thus remain in effect.

3. *See* Kurt T. Lash, *The Inescapable Federalism of the Ninth Amendment*, 93 IOWA L. REV. (forthcoming 2008), *available at* http://papers.ssrn.com/abstract=953010.

4. *See* Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 19 (2006).

5. Professor Barnett finds it significant that I employ terms that are not (or are rarely) found in the original sources, such as "majoritarian" and "collective." Of course, neither can one find Barnett's preferred term "individual natural rights" in any original source discussing the Ninth Amendment. The reason Barnett and I use these terms is in order to communicate our best reading of the original meaning of the Ninth Amendment in terms familiar to modern constitutionalists.

B. *Individual v. Non-Individual Rights*

One of the issues which may give rise to some confusion regards how Professor Barnett and I define individual rights. As I use the term, individual rights are those which can be exercised by an individual alone. For example, a single individual may engage in the right to free speech by openly criticizing the government. Collective and majoritarian rights, on the other hand, can only be exercised by a defined group of individuals, for example the people in convention exercising their collective right to alter or abolish their form of government.[6] The theory of popular sovereignty maintains that no one person can (legitimately) exercise this power alone, but only as a participant in a collective act. The same is true for any action that requires the assent of a majority. One can, of course, conceive of collective and majoritarian rights as "individual rights" in the sense that each member of the defined group has a right to participate in the group action (a "share" of the collective right, if you will). But this does not make the collective or majoritarian right "individualist" unless one is willing to destroy the distinction between individual and non-individual rights. The Founders certainly did not.[7]

C. *Collective and Majoritarian Rights*

Professor Barnett believes that I have not properly distinguished between collective and majoritarian rights. Perhaps some clarification is in order, but Barnett is wrong to think the terms are completely independent. Collective rights *are* majoritarian rights. When meeting in their collective sovereign capacity (for example, in convention), a majority of "the people" have the right to determine their fundamental law.[8] Rights and powers which the people leave to the ordinary political process are *also* controlled through majoritarian procedures (both in voting for representatives and in representative voting). Thus, although I agree with Barnett that a retained sovereign right is not the same thing as a right held by a governing majority, the majority of the collective people nevertheless have the right to determine which of their

6. A single government act may violate *both* an individual and a collective right, such as occurred when Congress passed the Alien and Sedition Act. According to Madison, this Act violated both the individual right to free speech and the collective right of the states protected by the Tenth Amendment. *See* Kurt T. Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 895, 911 (2008).

7. At the time of the Founding, distinguishing between persons and "the People" was of critical importance. *See* CHRISTIAN G. FRITZ, AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA'S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR 93-100 (2008) (discussing early struggles over how to define the difference between the acts of mere individuals (and individual factions) and the true sovereign acts of "the people" in conventions).

8. For example, a number of states ratified the original Constitution by majority vote, despite the existence of state constitutional provisions seemingly requiring a supermajority vote. *See* Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1049 (1988).

retained rights shall or shall not be delegated to a governing majority. Although Barnett may disagree with this on account of his libertarian theory of constitutional legitimacy, the Founders embraced a theory of government that Barnett affirmatively *rejects*: popular sovereignty.[9]

It is possible that part of what Barnett is driving at is the distinction between the ordinary majorities of the political process and the "higher law" majorities of the people acting in their collective sovereign capacity (such as during a constitutional convention). If so, Barnett is right to distinguish between the two kinds of majorities, but the distinction makes no difference to my overall thesis: the Ninth Amendment leaves certain matters under the control of the sovereign people in the states who may then either place the matter beyond the reach of ordinary political majorities (by enshrining a right in their state constitution) or leave the matter within the hands of the state legislature and the ordinary political process.[10] In other words, the point of my articles on the Ninth Amendment is not to celebrate majoritarianism as such, but to recapture the Ninth Amendment's federalist focus on the people's retained right to decide certain matters on a state level.

In past essays I have contrasted my federalist model with what I refer to as Barnett's libertarian model—a characterization to which he has not previously objected. Here, Barnett seems to think I use the term disparagingly,[11] preferring instead to call his approach "individualist" or an "individual rights" model of the Ninth Amendment. I cannot agree with Barnett's attempt to claim the rhetorical high ground as providing the "pro-individual rights" reading of the Ninth Amendment. Barnett's approach to the Ninth Amendment is no more protective of individual rights than mine (a point he seems to recognize, however grudgingly).[12] Both of us believe that the Ninth Amendment protected individual rights against federal action and *did not* protect individual rights against state action. Barnett, however, insists that the Ninth protected *only*

9. *Compare* BARNETT, *supra* note 1, at 11-14 (rejecting popular sovereignty as a normative theory of constitutional legitimacy), *with* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787 344-89 (1998) (describing the Founders' embrace of popular sovereignty). Although Barnett quixotically attempts to make sovereignty an individual right, outside of a monarchy, an individual cannot exercise sovereign power. This is what distinguishes individual from nonindividual rights.

10. Barnett embraces a libertarian theory of rights which constrains the power of the people in the states to pass certain laws, even in the absence of any specific constitutional restriction. *See generally* BARNETT, *supra* note 1. Whatever the merits of Barnett's normative theory of liberty, at the time of the Founding, the people of the states *did* exercise control over individual liberty on a variety of subjects that we today would consider violations of fundamental rights, from the establishment of religion to the prohibition of speech defaming Jesus Christ. *See* Kurt T. Lash, *Power and the Subject of Religion*, 59 OHIO ST. L.J. 1069 (1998).

11. *See* Barnett, *supra* note 2, at 965.

12. Barnett has never refuted my claim that my federalist reading of the Ninth also protects individual rights. *See id.* His argument is that I am wrong to read the Ninth as *also* protecting collective majoritarian rights.

individual rights and that this same set of rights is protected against state action by the Fourteenth Amendment. It is because his approach links the Ninth and Fourteenth Amendments and envisions a "presumption of liberty" against *any* government action that I label his approach libertarian.[13]

By embracing the term "federalist," I bear the burden of overcoming the pejorative associations of the term with the dark historical legacy of "states' rights" rhetoric. Today, it is common to view state majorities, and not the national government, as the more likely offender of individual freedoms. At the time of the Founding, however, the primary concern of those whose votes were critical to ratification was the potentially tyrannical federal government. This middle group generally considered preserving the sovereign prerogatives of the people in the states to be the best way of preserving individual rights. As Samuel Adams (an eventual supporter of the Constitution) wrote to Richard Henry Lee:

> I mean my friend, to let you know how deeply I am impressed with a sense of the Importance of Amendments; that the good People may clearly see the distinction, for there is a distinction, between the *federal* Powers vested in Congress, and the *sovereign* Authority belonging to the several States, which is the Palladium of the private, and personal rights of the Citizens.[14]

Men like Adams, who ratified the Constitution on the condition of an added Bill of Rights, did so because they believed that prohibiting any unduly latitudinous construction of federal power would protect state autonomy and thereby preserve individual liberty. If the idea of preserving individual liberty through the mechanism of state-protective amendments seems counterintuitive, one need only recall the controversy over the nationally enacted Alien and Sedition Acts. These statutes are stark reminders of how broad assertions of federal power can threaten individual liberty. Madison himself insisted that the Acts violated both individual freedom and the reserved powers of the people in the several states.[15]

D. *Democracy v. Majoritarianism*

Having labeled my approach "majoritarian," Professor Barnett proceeds to try and show how the key players in the Founding were *anti*majoritarian. In his attempt to establish the antimajoritarian nature of the Philadelphia Convention,

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13. Although I refute Barnett's claims about a libertarian Ninth Amendment, I take no position on the theoretical workability of libertarian constitutionalism.

14. Letter from Samuel Adams to Richard Henry Lee (Aug. 24, 1789), *in* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS, 286 (Helen E. Veit et al. eds., 1991).

15. *See* James Madison, Virginia Resolutions Against the Alien and Sedition Acts, Dec. 21, 1798, *in* WRITINGS 589 (Jack N. Rakove ed., 1999); *see also* Madison, Report on the Alien and Sedition Acts (1800), *in* WRITINGS, *supra*, at 608 [hereinafter Madison, Report on the Alien and Sedition Acts].

for example, Barnett quotes concerns about "democracy" and equates these with concerns about majoritarianism.[16] The Founders concerns about "democracy," however, referred to the failure of wisdom and virtue in the state legislatures, not the fundamental concept of majority rule.[17] Many of the Founders (and all of the ones quoted by Barnett in this section) believed that the ruling class should be made up of a natural aristocracy, men of education and property who understood the long term needs of the community. The radically egalitarian nature of the Revolution, however, opened the doors to a much broader class of political representatives which, in the minds of many Founders, diluted both the virtue and economic wisdom necessary for a properly functioning legislature.[18] The men who met in Philadelphia were members of the aristocracy who had suffered through the consequences of this "leveling" of democratic rule.[19] Madison shared the Founders' general concerns about "leveled democracy," and thus stressed the republican benefits of majoritarian elections held in an extended republic.[20] This process would both protect minorities (a group which included creditors) and help ensure that federal legislation would reflect the long term *collective* interests of the community thus avoiding many of the "democratic" problems plaguing the states. In short, concerns about "democracy" were not so much antimajoritarian as they were pro-republican, a very different matter.[21]

State legislation, however, remained a problem which Madison unsuccessfully attempted to address through a proposed amendment which would have protected the individual right to religious and expressive freedom in the states.[22] Madison's failed amendment illustrates his commitment to individual rights, a fact that leads Barnett to insist that Madison must have drafted a Bill which also protected individual rights. I, of course, agree: Madison *did* draft a Bill protecting individual rights. What is at issue is whether these were the *only* rights protected by the Bill. Barnett's purely individualist

16. *See* Barnett, *supra* note 2, at 943.

17. *See* WOOD, *supra* note 9, at 474-75.

18. *See id.*

19. Barnett insists that I explain how my view of the Ninth differs from the Republican Guarantee Clause. One obvious difference is that the Ninth limits federal power whereas the Guarantee Clause stands as a *grant* of federal authority to intervene in cases of local insurrection, a problem often attributed to an unduly "democratic" spirit. *See generally* FRITZ, *supra* note 7, at 80-116 (discussing how fear of popular insurrection influenced the Framers).

20. *See* THE FEDERALIST NO. 10, at 82-84 (James Madison) (Clinton Rossiter ed., 1961).

21. As Madison put it in *Federalist No. 10*, "To secure the public good and private rights against the danger of such a faction, and *at the same time to preserve the spirit and form of popular government is then the great object to which our inquiries are directed.*" *Id.* at 80 (emphasis added).

22. *See* 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: MARCH 4, 1789-MARCH 3, 1791, at 158 (Linda Grant De Pauw et al. eds., 1972).

reading of the Ninth and Tenth Amendments leads him to take a purely individualist view of the concept of "the people." Analyzing this claim requires us to back up a bit and consider the nature of popular sovereignty at the time of the Founding.

E. *Popular Sovereignty and the Federal Constitution*

American popular sovereignty has its roots in England where "the people" came to be associated with the people's representatives in Parliament. The emphasis here was not on individual citizens, but on a collective governmental body meeting in its official capacity. As Edmund Morgan put it, "[m]ere people, however many in number, were not *the* people."[23] Instead, Parliament was viewed as the embodiment of the *people themselves*.[24] The concept of popular sovereignty found its way to the English colonies where it evolved in the period between the Revolution and the adoption of the Constitution, with the critical development being a distinction between the government and the sovereign people. As chronicled by Gordon Wood, the idea evolved that the people collectively held ultimate law making authority which they exercised when meeting in special extra-governmental conventions.[25] As Chris Fritz has recently noted, although "the people" at the time of the Founding excluded numerous groups, the concept remained nevertheless collective.[26] No doubt, each member of the accepted polity held a "share" of the "people's sovereignty," but this is what makes the right collective as opposed to individual.

Prior to the adoption of the Constitution, "the people" existed as independent sovereigns in the "free and independent" states. When the people met in their state conventions to consider the proposed Constitution, one of the major issues became whether they would remain an independent sovereign people after ratifying the Constitution. The issue of potential "consolidation" kept many moderates on the fence in regard to the proposed Constitution. Federalists who supported the Constitution thus were at pains to assure these doubters that ratifying the Constitution would not affect a "consolidation" of the states into one unified and undifferentiated mass.[27] As Alexander Hamilton wrote in *Federalist No. 32*, "State governments would clearly retain all the

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23. EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 60 (1988).

24. *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 9 (1991) (discussing how under the English Parliamentary system, the government has the full sovereign authority to act in the name of "We the People").

25. *See* WOOD, *supra* note 9, at 319-43.

26. *See* FRITZ, *supra* note 7, at 5.

27. *See* WOOD, *supra* note 9, at 524-32 (discussing Federalist assurances that the proposed Constitution would not result in the consolidation of the states into a single national mass).

rights of sovereignty which they before had, and which were not by [the Constitution] *exclusively* delegated to the United States."[28] Madison similarly insisted that the proposed Constitution was "neither a national nor a federal Constitution, but a composition of both," which "leaves to the several States a residuary and inviolable sovereignty over all [non-delegated] objects."[29] It was because the doubters were not altogether convinced by these promises that supporters of the Constitution ultimately were forced to produce a Bill of Rights ensuring limits on the power of the federal government. In short, had the Ninth and Tenth Amendments declared a unified national people, not only would they have been rejected by the states, this would have imperiled the Federalist effort to ratify and preserve the Federal Constitution.[30]

Although Barnett is right to view James Madison as suspicious of state majorities, in 1791 Madison's primary concern was passing a Bill that would answer concerns raised in the state conventions which, if unanswered, might ultimately lead to a second national convention. This required drafting a Bill of Rights that reflected the concerns of moderates in the state conventions who were far more comfortable with local government than with extensive powers of the proposed and untried national government. The result was a series of amendments which managed to simultaneously protect individuals against federal action while preserving the retained sovereign rights and powers of the people in the states.[31] As United States Supreme Court Justice Samuel Chase wrote only a few years after the adoption of the Bill of Rights:

> 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.[32]

Having clarified some of the critical terms in this debate, before moving to the history it is worth pausing a moment to clarify Professor Barnett's and my claims about the Ninth Amendment. I claim that the Founders understood the "other rights" of the Ninth Amendment to include all manner of retained rights, individual and otherwise. [33] The Ninth established a rule of strict construction which reserved ultimate authority over all these rights to the collective

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28. FEDERALIST NO. 32, at 198 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

29. FEDERALIST NO. 39, at 246, 245 (James Madison) (Clinton Rossiter ed., 1961).

30. LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 39 (1999) (discussing Madison's belief that adding a Bill of Rights would help head off a second constitutional convention).

31. *See* FRITZ, *supra* note 7, at 205-06 ("Madison—like many other Americans—viewed the people as a collective sovereign—made up of the people of the several states.").

32. Campbell v. Morris, 3 H. & McH. 535, 554-55 (Md. 1797).

33. It is important to bear in mind that rights at the time of the Founding included all of these categories. *See* RICHARD A. PRIMUS, THE AMERICAN LANGUAGE OF RIGHTS 124 (1999) ("Rights [at the time of the Founding] were predicated sometimes of individuals, sometimes of government institutions, sometimes of "the people" as a collective, sometimes of abstractions like colonies or countries.").

sovereign people in the several states. Professor Barnett insists, on the other hand, that the "other rights" of the Ninth include *only* individual rights. Indeed, Barnett insists that *every* time "the people" is used in the Bill of Rights it refers to individual people and not the people as a collective.[34] In light of the history surrounding the Bill of Rights in general, and the Ninth Amendment in particular, Barnett has chosen a burden too heavy to carry.

II. HISTORY

A. *The Ninth Amendment as Madison's "Sui Generis" Contribution to the Bill of Rights*

Professor Barnett insists that Madison drafted an Amendment which reflected the Federalists' worries about how a Bill of Rights might be read as an exclusive list of limitations on federal power, and that none of the proposals emanating from the state conventions addressed this particular concern. [35] A quick look at the state proposals contradicts his assertion. Consider, for example, Virginia's 17th proposed amendment:

> That those clauses which declare that Congress shall not exercise certain powers be not interpreted in any manner whatsoever to extend the powers of Congress. But that they may be construed either as making exceptions to the specified powers where this shall be the case, or otherwise as inserted merely for greater caution.[36]

This is a straightforward attempt to avoid reading a list of enumerated rights as implying otherwise unlimited federal power. This is the very concern that Barnett claims the state proposals did not address. [37] Other states proposed

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34. *See* Barnett, *supra* note 2, at 946.

35. *Id.* at 108.

36. Amendments Proposed by the Virginia Convention (June 27, 1788), *in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 675 (Neil H. Cogan ed., 1997) [hereinafter COMPLETE BILL OF RIGHTS]. North Carolina submitted the same proposal as Virginia. James Madison was a member of the committee that drafted the Virginia proposal, and he expressly noted the role the Virginia proposals played in his proposed draft of the Bill of Rights. *See* Letter from James Madison to George Washington (Nov. 20, 1789), *in* 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1185 (Bernard Schwartz ed., 1971).

37. Oddly, Barnett associates Virginia's seventeenth proposed amendment with Article II of the Articles of Confederation. *See* Barnett, *supra* note 2, at 961 n.116 (Article II of the Articles of Confederation "tracks Virginia's 17th proposed amendment"). This is not correct. Article II states, "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." Art. II, Articles of Confederation (1781). This is clearly echoed in Virginia's first proposed amendment which stated "[t]hat each State in the Union shall respectively retain every power, jurisdiction and right which is not by this Constitution delegated to the Congress of the United States or to the departments of the Federal Government." Amendments Proposed by the Virginia Convention (June 27, 1788), *in* COMPLETE BILL OF RIGHTS, *supra* note 36, at 675. Both Article II and Virginia's first

similar amendments.[38] Although these proposals use the language of denied powers rather than "enumerated rights," the meaning was the same to the Founders. As Madison wrote the same year he drafted the Ninth Amendment, limiting federal power amounted to the "same thing" as securing a right.[39] Madison's original version of the Ninth echoed the same concern raised by Virginia and other states:

> The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people; or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.[40]

Madison's draft has a fairly obvious relation to Virginia's "17th proposal" (which Madison *also* helped draft). Although the ultimate deletion of the "enlarged powers" language raised concerns in Virginia, Madison insisted that the final version of the Ninth continued to reflect the same concerns raised by Virginia's 17th proposal. At the time, Madison explained all of this in a letter to George Washington.[41] Although Barnett and others have attempted to characterize this letter as meaning something other than its plain language, recently uncovered evidence involving the debate in the Virginia Assembly strongly supports the view that Madison meant what he wrote.

B. *The Virginia Debates*

Ignoring what Madison actually *said* about the final language of the Ninth Amendment,[42] Barnett embraces a reading of the Ninth that Madison expressly *rejected*—the exaggerated claims of the Anti-Federalist majority in the Virginia Senate. This is puzzling for a number of reasons, not the least of which is the fact that, if their reading of the proposed Bill of Rights reflected any kind of widespread understanding, the Ninth (and probably the entire Bill) would have been rejected.[43] This was, after all, the Anti-Federalists' goal.[44] In other works,

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proposed amendment are obvious precursors to the Tenth Amendment.

38. *See* Lash, *supra* note 3, at notes 49-54 and accompanying text.

39. *See* Letter from James Madison to George Washington (Dec. 5, 1789), *in* 5 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786-1870, at 221–22 (1905) [hereinafter DOCUMENTARY HISTORY OF THE CONSTITUTION].

40. James Madison, Speech in Congress Proposing Constitutional Amendments, June 8, 1789, *in* WRITINGS, *supra* note 15, at 437, 443.

41. *See* Letter from James Madison to George Washington (Dec. 5, 1789), *in* 5 DOCUMENTARY HISTORY OF THE CONSTITUTION, *supra* 39, at 221-22.

42. I am referring to Madison's remarks both in his letter to Washington, *supra* note 40, and in his speech against the proposed Bank of the United States. *See* James Madison, Speech in Congress Opposing the National Bank, Feb. 2, 1791, *in* WRITINGS, *supra* note 15, 480, 480-90.

43. The Senate majority's claims about the Tenth Amendment, for example, were an obvious effort to make the Tenth as objectionable as possible by claiming that it referred to the consolidated people of the United States, rather than the people in the several states. The

I have emphasized the importance of the dispute over the Ninth Amendment in the Virginia Assembly.[45] Not because I think the Anti-Federalists had the correct understanding of the Ninth, but because the Virginia debate in its entirety sheds important light on letters Madison and others wrote in response to that debate. Again, interested readers can find my full analysis of the Virginia Debates in another article.[46] For now, it is enough to say that Barnett's reliance on the unsuccessful politically driven views of the Virginia Anti-Federalists is a rather curious choice for representing the true original meaning of the Ninth and Tenth Amendments.[47] I'll stick with Madison.

Madison did not limit his federalist description of the Ninth Amendment to his private letters but publicly announced this understanding in a major speech that he delivered while the Bill of Rights remained pending in the states.[48] I have discussed Madison's speech opposing the Bank of the United States in detail elsewhere[49] but readers should be aware that not only does this speech contain a detailed account of the origins and meaning of the Ninth and Tenth Amendments, it stands as the most detailed discussion of any of the first ten amendments while the Bill remained pending before the states.

In his speech, Madison explained that advocates of the proposed Constitution had assured doubters in the state conventions that delegated federal power would be narrowly construed.[50] The state conventions had appended declarations along with their notice of ratification reflecting their

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Tenth Amendment would never have been ratified under such a reading given the widespread fears (and Federalist denials) that the proposed Constitution would consolidate the states into a single undifferentiated national people. For an historical study of the true, and rather surprising, purpose behind the addition of "or to the people" to the Tenth Amendment, see 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).

44. *See* LEVY, *supra* note 30, at 42 (discussing how the Anti-Federalists in Virginia wished to "sabotage the Bill of Rights").

45. Barnett gently chides me for seeming to have abandoned claims made in earlier pieces regarding the significance of the Virginia debates regarding the Ninth Amendment. *See* Barnett, *supra* note 2, at 953 n.71. Once again, this essay focuses on the text of the Ninth Amendment and discusses history only as it supports the apparent meaning of the text. For an in depth study of Virginia Debates and their significance in terms of the original meaning of the Ninth Amendment, see Lash, *supra* note 3, at notes 103-33 and accompanying text.

46. *See* Lash, *supra* note 3.

47. If one accepts the Senate Report as an accurate representation of the public meaning of the proposed amendments, then presumably one accepts the Senate's claim that the Free Exercise Clause "does not prohibit the rights of conscience from being violated or infringed," and the Establishment Clause allows Congress to "levy taxes, to any amount, for the support of religion or its preachers; and any particular denomination of Christians might be so favored and supported by the general government . . . ." *See* Saturday, December 12, 1789, JOURNAL OF THE SENATE OF THE COMMONWEALTH OF VIRGINIA 60, 62 (Richmond 1828).

48. *See* Madison, *supra* note 42, at 480-490.

49. *See* Lash, *supra* note 3 (manuscript at 38 & n.134).

50. *See* Madison, *supra* note 42, at 489.

reliance on the rule of strict construction.[51] According to Madison, the Bill of Rights had been added to make this rule an express part of the Constitution with the Ninth Amendment preventing a "latitude of interpretation" and the Tenth Amendment "excluding every source of power not within the constitution itself."[52] Finally, Madison insisted that the proper application of these amendments would protect the reserved powers of the state governments.[53] Madison thus presented the Ninth and Tenth Amendments as federalist guardians of the collective powers and rights of the people in the states. No account of the original meaning of the Ninth Amendment is complete (to put it mildly) without addressing Madison's Bank speech, but it is nowhere to be found in Barnett's essay.

C. *St. George Tucker*

> "[The federal Constitution] is a compact freely, voluntarily, and solemnly entered into by the several states, and ratified by the people thereof, respectively . . . ."
> —St. George Tucker[54]

Historians familiar with Tucker's work and its place in early constitutional theory know that Tucker presented a sophisticated and influential federalist reading of the Constitution as a compact between the people of the individual states. A strong advocate of the retained sovereignty of the people in the states, Tucker believed that the original Articles of Confederation remained operative even after the adoption of the federal Constitution unless expressly overruled. This meant that Tucker believed states continued to retain all powers, jurisdictions and rights not expressly delegated to the United States, including the "right of withdrawing itself from the confederacy without the consent of the rest."[55] Not surprisingly, Tucker's states' rights view of the Constitution came under heavy fire in Joseph Story's *nationalist* 1833 Commentaries on the Constitution.[56]

Barnett insists that Tucker embraced an individual rights reading of the Ninth Amendment. If by this Barnett means that Tucker believed the rights

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51. *Id.*

52. *Id.*

53. *Id.* at 490.

54. St. George Tucker, *View of the Constitution of the United States*, *in* 1 BLACKSTONE'S COMMENTARIES app. 140, app. 155 (photo. reprint 1969) (St. George Tucker ed., William Birch Young & Abraham Small 1803).

55. St. George Tucker, *Of the Several Forms of Government*, *in* 1 BLACKSTONE'S COMMENTARIES, *supra* note 54, at app. 7 & app. 75.

56. See, e.g., 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 393-407 (Melville M. Bigelow ed., William S. Hein & Co. 5th ed. 1994) (1833). For a discussion of Story's treatment of Tucker's constitutional theories, see Kurt T. Lash, *"Tucker's Rule": St. George Tucker and the Limited Construction of Federal Power*, 47 WM. & MARY L. REV. 1343, 1382 (2006).

protected by the Ninth *included* individual rights, I would agree. Barnett, however, insists that Tucker had a purely individualist reading of the people in both the Ninth and Tenth Amendments. This simply is not true. For example, Tucker's first reference to the Ninth and Tenth Amendment presents them as protecting collective rights, in particular the collective right of the people to alter or abolish an abusive government.[57] Even in those places where Tucker speaks of the people's retained personal individual rights, he clearly follows the federalist model I present in my article regarding the dual nature of retained individual rights. According to Tucker, the reason *why* federal power must be strictly construed when impinging upon personal rights is because the individual remains under a *prior* obligation to the collective people of his particular state.[58]

The entire thrust of Tucker's work was to construct a federalist theory of state autonomy. This is certainly how his treatise was received at the time. For example one of Tucker's contemporaries, Judge John Overton, a member of the second North Carolina Ratifying Convention that ratified the Ninth Amendment cites the exact same passage Professor Barnett reads as establishing an "individualist" account of the Ninth. Unlike Barnett, however, Overton reads Tucker as presenting a federalist reading of the Ninth and Tenth Amendments.[59] So did later commentators like Joseph Story. In the end, whatever else one makes of Tucker, one cannot understand his work as conflicting in any way with his fundamental theory of the retained sovereignty of the people in the several states. Doing so contradicts a mountain of historical scholarship, the understanding of his contemporaries, and the testimony of Tucker himself.

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57. According to Tucker:

> It must be owned that Mr. Locke, and other theoretical writers, have held, that "there remains still inherent in the people a supreme power to remove or alter the legislative when they find the legislative act contrary to the trust reposed in them: for, when such trust is abused, it is thereby forfeited, and devolves to those who gave it."

2 BLACKSTONE'S COMMENTARIES, *supra* note 54, at 161. In the footnote accompanying this text, Tucker states "[t]his principle is expressly recognized in our Government" and cites the Ninth and Tenth Amendments (which Tucker refers to as "Amendments to the C.U.S. Art. 11, 12"). *Id.* at n.25.

58. Tucker, *supra* note 54, at app. 151 ("[A]s a social compact it ought likewise to receive the same strict construction, wherever the right of personal liberty, of personal security, or of private property may become the subject of dispute; because every person whose liberty or property was thereby rendered subject to the new government, was antecedently a member of a civil society to whose regulations he had submitted himself, and under whose authority and protection he still remains, in all cases not expressly submitted to the new government.").

59. *See* Kurt T. Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 896, 918-19 (2008). Barnett rests his reading of Tucker on the same passage cited in support of federalist reading by Judge Overton. *See* Barnett, *supra* note 2, at 960.

D. *The Tenth Amendment*

One of the more surprising aspects of Barnett's essay is his attempt to characterize the people as a solely "individualist" expression throughout the Bill of Rights. I do not dispute that the term could be used in conjunction with individual as well as collective rights, but Barnett insists that "when the Bill of Rights uses the term 'the people' it consistently refers to individuals and not political collectives or electoral majorities, and all the enumerated rights it protects belong to individuals and not collectives or majorities."[60] Rather startlingly, Barnett insists that "the people" is used only in an "individualist" and not a collective sense in both the Ninth *and* Tenth Amendments. His only evidence in support of this rather unprecedented claim about the Tenth is the Report of the Virginia Senate and the fact that "people" is used in reference to individual rights elsewhere in the Bill of Rights and in statements made by the majority in *Chisholm v. Georgia*.[61]

To begin with, I disagree with his reading of the Virginia Senate and the *Chisholm* majority. These were not attempts to establish an individualist reading of "the people." Instead, both examples involve attempts to establish a *national* reading of "the People" (though for very different reasons). Nevertheless, I do not deny that rights of the people were understood to include individual as well as collective rights. All such rights, however, were retained under the sovereign control of the collective people in the states. Thus, when Congress passed the Sedition Act, Madison maintained that it had violated the individual right to free speech, and trespassed on a matter reserved to the collective people in the states under the Tenth Amendment.[62] Tucker also referred to powers reserved to the people under the Tenth Amendment as including individual rights—but only those prohibited to both the federal and state governments by the federal *and state* constitutions. Reserving powers to the people, and not their state governments, in other words, required a collective act of the sovereign people in the states.[63]

On the other hand, Barnett is right to point out that Tucker read both the Ninth and Tenth Amendments as calling for a strict construction of federal power, and that this differs from statements I've made in the past that only the Ninth, and not the Tenth, represented a rule of construction.[64] As far as

60. Barnett, *supra* note 2, at 926.

61. *Id.* at 953-54.

62. *See* Madison, *supra* note 15, at 610.

63. Tucker cites, in this regard, the rights protected from federal or state action in Article I, Sections 9 and 10. *See* 1 BLACKSTONE'S COMMENTARIES, *supra* note 54, at app. 308-09. These restrictions on state power, of course, did not go into effect until after being ratified by the people in their separate state conventions. As Chris Fritz has recently put it, these state ratifying conventions simultaneously ratified the federal constitution and amended their own state constitution to the degree necessary to accommodate the federal text. *See* FRITZ, *supra* note 7, 140.

64. *See, e.g.*, Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L.

Tucker's reading of the Tenth as a rule of construction is concerned, it is clear that he was deeply influenced by James Madison's 1800 *Report on the Virginia Resolutions*, a report that focused on Tenth Amendment objections to the Alien and Sedition Acts.[65] However, Tucker was not alone in reading the Tenth as calling for a narrow construction of federal power.[66] Thus, I concede that although the primary semantic meaning of the Tenth simply declares the principle of reserved non-delegated power, the text was often read as implying a rule of strict construction. Barnett may believe that conceding this secondary (implied) meaning of the Tenth somehow undermines my claims about the Ninth. I think not. As my research of the Founding has progressed, I have become more and more convinced that these amendments were generally understood as working in combination. This explains the remarkably consistent pattern of their joint citation in support of the retained sovereignty of the people in the several states.[67] Nevertheless, I remain convinced that Madison presented the *best* original semantic understanding of the amendments in his speech, where he presented the Ninth as controlling a latitude of construction and the Tenth as limiting the federal government to delegated powers..

E. *The Relevance of the Eleventh Amendment*

Finally, I strongly *agree* with Barnett's view that the debates which led to the adoption of the Eleventh Amendment are relevant to our understanding the original meaning of the Ninth. I have felt this way for some time (actually, it was research into the Eleventh Amendment that ultimately led me to the Ninth). A deep investigation of the original meaning of the Eleventh Amendment is beyond the scope of this (already long) reply. There are a few intriguing clues, however, that suggest the issue is well worth exploring.

To begin with, notice the text of 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.[68]

REV. 331, 336 (2004) (the Tenth "does not prevent expansive interpretations of enumerated federal powers" (emphasis omitted)).

65. *See* Madison, Report on the Alien and Sedition Acts, *supra* note 15, at 608; Kurt T. Lash, *James Madison's Celebrated Report of 1800: The Transformation of the Tenth Amendment*, 74 GEO. WASH. L. REV. 165, 182-83 & n.141 (2006). In my upcoming Iowa piece, *The Inescapable Federalism of the Ninth Amendment*, *supra* note 3, I explain *why* Madison focused on the Tenth Amendment, and not the Ninth, in his criticism of the Alien and Sedition Acts. *See id.* at nn. 229-49 and accompanying text.

66. *See generally* Lash, *supra* note 43.

67. Full a comprehensive account of the post-adoption jurisprudence of the Ninth and Tenth Amendments, see Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L. REV. 597 (2005).

68. U.S. CONST. amend. XII.

Why add the seemingly superfluous phrase "shall not be construed" instead of simply stating that "the judicial power of the United States shall not extend"? The phrase would not be superfluous, of course, if it was meant to signal that the *Chisholm* majority had wrongly construed the judicial power of the United States. An original version of the Eleventh, in fact, did not include the "construed" language—it was rejected. We also know that those who led the movement to add the amendment understood that they had three choices: accept the Court's decision (and prepare to be sued); reject the Court's reasoning and add an amendment clarifying the original understanding; or accept the Court's reasoning as correct, but nevertheless add an amendment because the results now seemed inexpedient. [69] The second view, that the Court had misconstrued the Constitution, was repeated throughout the states that called for a response to *Chisholm*.[70] Again, the text also appears to coincide with the second choice. Finally, had the amendment been drafted as an exception from otherwise preexisting power, this would have called into play the rule of construction where an exception to a rule strengthens the otherwise applicable rule. This is John Manning's view of the Eleventh, a view Barnett expressly shares.[71] This approach reads the Eleventh as expressing the very opposite rule of the Ninth: the enumeration of one immunity *shall be construed* to deny other immunities. But the Eleventh appears to be drafted in precisely the opposite manner: the language "shall not be construed" suggests that,

69. See John Hancock's Address to the Massachusetts General Court (Sept. 18, 1793), *reprinted in* 5 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, 417 (Maeva Marcus ed., 1994) [hereinafter DOCUMENTARY HISTORY OF THE SUPREME COURT].

70. For just a few of many examples, see *Brutus*, INDEP. CHRON. (Boston, Mass.), July 18, 1793, *reprinted in* DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 69, at 392 ("If you acquiesce in the construction given to the Federal Constitution, relative to the judiciary powers thereby vested in the Federal Government, (which two of the Associate Judges have decided in favor of their own jurisdiction) you will seal your own *extinction*, as a legislative body."); Governor John Hancock, Address to the Massachusetts General Court (Sept. 18, 1793), *in* DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 69, at 416 ("I cannot conceive that the People of this Commonwealth, when they, by their representatives in Convention, adopted the Constitution of a General Government, expected that each State should be held liable to answer on *compulsory civil process*, to every individual resident in another State or in a foreign kingdom. Three Judges of the United States of America, having solemnly given it as their opinion, that the several States are thus liable, the question has thus become highly important to the people."); *Proceedings of the Georgia House of Representatives*, AUGUSTA CHRON., Dec. 14, 1792, *reprinted in* DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 69, at 161-62 ("Be it resolved by the Senate and House of Representatives of the state of Georgia . . . that they do not consider the 2d section of the 3d article of the federal constitution to extend to the granting power to the supreme court of the United States, or to any other court having jurisdiction under their authority, or which they may at any period hereafter under the constitution, as it now stands, constitute.").

71. *See* Randy E. Barnett, *The People or the State?:* Chisholm v. Georgia *and Popular Sovereignty*, 93 VA. L. REV. 1729, 1743-48 (2007).

instead of declaring an exception to a pre-existing power, the amendment clarifies the proper application of a pre-existing rule. The Manning-Barnett approach thus seems to conflict with both the text and the views of those who called for the amendment.

But these are just textual and historical clues. They suggest that an investigation of the historical Eleventh Amendment may reveal a far deeper connection between the Ninth, Tenth and Eleventh Amendments than has yet been appreciated. While I cannot hope to sufficiently explore those connections here, I'll close this section with the statement of a theorist whose views Professor Barnett respects: St. George Tucker. Here is Tucker's statement on the Eleventh Amendment:

> If it be asked, what would be the consequence in case the federal government should exercise powers not warranted by the constitution, the answer seems to be, that where the act of usurpation may immediately affect an individual, the remedy is to be sought by recourse to that judiciary, to which the cognizance of the case properly belongs. Where it may affect a state, the state legislature, whose rights will be invaded by every such act, will be ready to mark the innovation and sound the alarm to the people [citing the Federalist Papers]: and thereby either effect a change in the federal representation, or procure in the mode prescribed by the constitution, further "declaratory and restrictive clauses", by way of amendment thereto. An instance of which may be cited in the conduct of the Massachusetts legislature: who, as soon as that state was sued in the federal court, by an individual, immediately proposed, and procured an amendment to the constitution, declaring that the judicial power of the United States shall not be construed to extend to any suit brought by an individual against a state.[72]

Tucker cites *Chisholm* as an "act of usurpation" or the "exercise [of] powers not warranted by the constitution." The proper remedy for usurpations affecting the state involve the state legislatures "sound[ing] the alarm *to the people*", who can then either use the majoritarian process to remove offending representatives or exercise their sovereign right to seek "declaratory and restrictive" amendments. Tucker's example of the people's response to a recent "act of usurpation" was the addition of the Eleventh Amendment.

Tucker (and the states that called for an amendment) believed that the *Chisholm* majority erroneously construed the Constitution. But what exactly was the perceived error? The text of Article III, after all, authorized federal courts to hear suits "between a state and citizens of another state." The only way the *Chisholm* majority could have erred would be if they should have strictly construed this clause to refer only to those suits where a state is a party plaintiff, not a defendant, thus preserving the immunity of the state from suits brought by private individuals. The need to strictly construe the delegated powers of Article III was the basis of Justice Iredell's dissent in *Chisholm*.[73]

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72. Tucker, *supra* note 54, at app. 153.

73. Chisholm v. Georgia, 2 U.S. 419, 449-50 (1793) (Iredell, J., dissenting) ("I think every word in the Constitution may have its full effect without involving this consequence,

The Eleventh Amendment, in other words, may have been a response to a perceived failure to apply the very rule of construction meant to be established by the Ninth and Tenth Amendments.

CONCLUSION

If I am right about the original understanding of the Ninth and Tenth Amendments, why then did the Confederate States feel compelled to add the words "of the several states" to their version of these clauses?[74] After all, according to my theory, this was already the original understanding of the clauses. Professor Barnett's analysis has already hinted at an answer to this question. Although the reasoning of the *Chisholm* majority was rebuked by the adoption of the Eleventh Amendment, the same strongly nationalist reading of federal power was restored by John Marshall, first in dicta, in *Fletcher v. Peck*,[75] and later as a matter of law in cases like *McCulloch v. Maryland*[76] and *Gibbons v. Ogden*.[77] The latter two of these cases triggered vociferous objections,[78] with James Madison in particular objecting to Marshall's suggestion in *McCulloch* that the people existed only in a national capacity and had no independent sovereign existence in the several states.[79] Madison feared that unduly nationalist opinions like Marshall's threatened the delicate balance between the federal government and the states. We know, of course, that the

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and that nothing but express words, or an insurmountable implication (neither of which I consider, can be found in this case) would authorise the deduction of so high a power.").

74. *See* CONFEDERATE CONST. art. VI, § 5 (March 11, 1861) ("The enumeration, in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people of the several states."); *id.* § 6 ("The powers not delegated to the Confederate States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people thereof.").

75. 10 U.S. (6 Cranch) 87, 139 (1810) ("The constitution as passed, gave the courts of the United States jurisdiction in suits brought against individual states. . . . This feature is no longer found in the constitution; but it aids in the construction of those clauses with which it was originally associated.").

76. 17 U.S. 316, 404-405 (1819) ("The government of the Union, then (whatever may be the influence of this fact on the case), is, emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.").

77. 22 U.S. (9 Wheat.) 1, 71, 75 (1824) ("This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said, that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the constitution which gives countenance to this rule? . . . [The commerce power], like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.").

78. *See* G. Edward White, *The Marshall Court and Cultural Change, 1815-35*, at 1, 541-80 (1988).

79. *See* James Madison, Detached Memoranda, 1819?, *in* WRITINGS, *supra* note 15, at 745, 755-56 (criticizing Marshall's "expounding the power of Congs—as if no other Sovereignty existed in the states supplemental to the enumerated power of Congs").

center did not hold and the nation ultimately divided over competing notions of national power and state sovereignty. Accordingly, when the Confederate States drafted their own constitution, they restored language which reflected what they (and Madison) believed had been the original understanding retained powers and rights. For his part, Madison rejected the secessionist ideas of Calhoun and the Nullifiers. But he likewise rejected the wholly nationalist ideas of men like Alexander Hamilton and John Marshall. Indeed, in many ways the story of the Ninth Amendment is the story of "Madison's Middle" and his vision of a nation neither wholly national nor wholly federal.