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Federalism and the Protection of Rights: The Modern Ninth Amendment's Spreading Confusion

*Thomas B. McAfee**

I. INTRODUCTION

In the modern era, we have almost completely lost track of the relationship that the framers of the United States Constitution perceived between the structure of our federal system and the protection of popular rights. First, as we have come to think of "rights" almost exclusively in terms of the claims of individuals against government, we have lost the ability to hear the framers' voices referring to rights held by "the people" in their collective capacity, including the rights of the people within each of the sovereign states to govern themselves. Second, our familiarity with the modern judiciary's reliance upon specific textual rights provisions as "trumps" against otherwise valid claims of legislative authority has blinded us to the fact that civil rights claims based on a lack of governmental authority are also "individual rights" claims. The enormous expansion of federal power in the twentieth century has powerfully reinforced our tendency to denigrate, if not to miss completely, the framers' belief that the limited powers scheme of our federal system was an important guarantor of popular rights.¹

* Professor of Law, Southern Illinois University School of Law. J.D., University of Utah, 1979. This article is a revised version, with footnotes, of a presentation given at a symposium entitled "The Dilemma of American Federalism: Power to the People, the States, or the Federal Government?" held at Brigham Young University, October 1995. It presents a summary of a larger work, still in progress, analyzing the impact of modern misreadings of the Ninth Amendment in recent work on the relationship between federalism and individual rights in the founders' Constitution.

1. See *infra* notes 5-8, 26-32, 89-90 and accompanying text. See generally Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1243-47 (1990).

Blindness to a basic understanding of the framers' design of our federal structure is largely responsible for the confusion that surrounds our understanding of the Ninth Amendment. The Ninth Amendment reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."² Thirty years ago, in *Griswold v. Connecticut*,³ Justices Black and Stewart explained in separate dissenting opinions that the Ninth Amendment's reference to the other rights "retained by the people" alluded to the collective and individual rights the people "retained" by virtue of granting limited, enumerated powers to the national government.⁴ While the overwhelming evidence supports this interpretation of the amendment, it has been widely rejected. The single largest barrier to this interpretation's acceptance has been that the modern American mind has difficulty accepting the idea that the federal system itself was actually considered a sufficient guarantor of popular rights by those who drafted the Constitution.

The purpose of the Ninth Amendment was to ensure that the system of limited powers and reserved rights embodied in the Constitution would not be overturned in favor of a government of general legislative powers subject only to the specific restrictions stated in the Constitution and its amendments.⁵ Leading defenders of the Constitution clearly expressed their fear that the enumeration of rights could create an inference against a federal system of limited powers.⁶ The logic was simple: state constitutions presumed legislatures of general powers, and limited the exercise of that power in their constitutional declarations of rights. In contrast, the Constitution, like the Articles of Confederation, limited national power by granting specific powers which defined the few areas over which the national government was to have special competence.⁷ If specific limiting provisions were

2. U.S. CONST. amend. IX.

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

4. *Id.* at 507, 519-20 (Black, J., dissenting); *id.* at 527, 529-31 (Stewart, J., dissenting).

5. This view is defended at length in McAfee, *supra* note 1; see also Thomas B. McAfee, *A Critical Guide to the Ninth Amendment*, TEMPLE L. REV. (forthcoming 1996).

6. See McAfee, *supra* note 1, at 1249-65 (discussing arguments advanced by James Wilson, Alexander Hamilton, James Madison, James Iredell, and other leading defenders of the Constitution).

7. *Id.* at 1230-32 (speech by Wilson setting forth this dichotomy between the

included, they could be misconstrued to suggest that the national government was to be (like the governments of the states) a government of general powers limited only by the specific restraints stated in the Bill of Rights.⁸ In short, the fear was that by amending the Constitution to include a number of specific rights which they were anxious to preserve, the people might unwittingly undermine those rights already inherent in the structure of a limited federal system as established by the original Constitution.

Others contend, of course, that the Ninth Amendment's reference to other rights "retained by the people" points beyond the Constitution to implied limitations on the national government (and possibly on the states as well), which were to be deduced by judicial reference to natural law or to common law methodology.⁹ While the limited scope of this article does not permit a review of the powerful evidence favoring a Ninth Amendment interpretation that secures the central features of our federal system, it will address a critical portion of the overall debate. Critics of the "federal structure" reading of the Amendment have consistently displayed the modern propensity to denigrate or ignore the importance of the federal system as a means of securing popular rights. They have ridiculed that reading as confusing "rights" and "powers" and confounding the purposes of the Ninth and Tenth Amendments.¹⁰

state and federal governments); see *infra* note 8 (statement by James Iredell).

8. Perhaps the most forceful and unequivocal statement of this point was offered by James Iredell before the North Carolina Ratifying Convention. JAMES IREDELL, *DEBATES IN THE CONVENTION OF THE STATE OF NORTH CAROLINA* (July 28, 1788), reprinted in 4 *DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 149 (Jonathon Elliot ed., reprint ed. 1987) [hereinafter *ELLIOT'S DEBATES*] (A bill of rights would have been both "proper" and "necessary" "[i]f we had formed a general legislature, with undefined powers," as in "some of the American constitutions," because "it would have then operated as an exception to the legislative authority in such particulars"; but where the framers had "expressly defined" legislative "powers of a particular nature," "a bill of rights is not only unnecessary, but would be absurd and dangerous.").

9. For leading works setting forth this interpretation of the Ninth Amendment, see Thomas B. McAfee, *Prolegomena to a Meaningful Debate of the "Unwritten Constitution" Thesis*, 61 U. CIN. L. REV. 107, 107 n.4 (1992).

10. Indeed, a well known commentator has dubbed the Black/Stewart construction as the "federalism" reading of the Ninth Amendment. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 35 (1990); see also Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 6 (1988) (arguing that the Ninth Amendment cannot be about retained powers because the Tenth Amendment refers to powers while the Ninth Amendment refers to rights).

Strikingly, however, during the past few years a fascinating countertheme has emerged in the literature advocating a "fundamental rights" reading of the Ninth Amendment. Commentators have increasingly come to acknowledge that the federal system is properly understood as a structure for securing popular rights and that an important purpose of the Ninth Amendment was to preserve the rights that were deemed to be inherent in this structure.¹¹ One might have hoped that this recognition of the connection between the federal system and the preservation of popular rights would prompt commentators to give the traditional understanding of the Ninth Amendment a new and fairer hearing. But commentators simply read into the concern for popular rights embodied in the federal system the idea of implied affirmative limitations on the powers granted the national government by the Constitution.

The purpose of this article is to show that these attempts to read modern fundamental rights law back into the structure of the Constitution partake of the same fallacious assumptions that caused earlier commentators to improperly reject the idea that the federal structure could be the source of the other rights referred to in the Ninth Amendment. This article will briefly describe and criticize three variations on the common theme that the Ninth Amendment merely reflects a constitutional federal structure that includes unenumerated limitations on the powers granted to Congress in Article I.

Part II addresses the modern claim that, just as the Ninth Amendment's allusion to other rights "retained by the people" refers to affirmative prohibitions on powers granted by the

11. As examples of recent works acknowledging that the unenumerated rights referred to in the Ninth Amendment are rights built into the Constitution's federal structure, see Thomas C. Grey, *The Original Understanding and the Unwritten Constitution*, in TOWARD A MORE PERFECT UNION: SIX ESSAYS ON THE CONSTITUTION 145, 163-64 (Neil L. York ed., 1988); Steven J. Heyman, *Natural Rights, Positivism and the Ninth Amendment: A Response to McAfee*, 16 S. ILL. U. L.J. 327, 335 (1992); David N. Mayer, *The Natural Rights Basis of the Ninth Amendment: A Reply to Professor McAfee*, 16 S. ILL. U. L.J. 313, 318-19 (1992); Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171, 180 (1992). It is important to emphasize that while each of these commentators finds the idea of implied limitations on government authority to be an aspect of the federal structure of the Constitution, none embraces the traditional reading advocated by Justices Black and Stewart. Even so, each of these commentators acknowledges the close connection between the discussion of rights and powers in our federal system, and each should be reluctant to join the long-established practice of denigrating the traditional reading as an obviously implausible "federalism" reading.

Constitution, so the Tenth Amendment's allusion to powers reserved "to the people" refers to the same affirmative prohibitions. On this theory, the Tenth Amendment merely reinforces what the Ninth Amendment makes explicit, that there are certain inherent rights that serve to limit government power because they cannot be delegated among the "powers" of government; they are instead the reserved powers of the people. After raising questions whether this reading is the most natural explication of the Tenth Amendment text (Part II.A), this article will show that historically, the Tenth Amendment was viewed as performing a critical rights-protective function without regard to whether it was drafted in favor of the states or the people. The Amendment's reference to "the people," moreover, is most adequately explained as reflecting a desire to clarify that it is the people, after all, under the theory of the Constitution, who ultimately grant and retain governmental powers.

Part III responds to the argument that the unenumerated rights secured by the Ninth Amendment were more than simply preexisting natural or customary rights; they were affirmative rights limitations that were already implicit in the original constitutional scheme by virtue of the Necessary and Proper Clause. Under this "jurisdictional" interpretation of the Necessary and Proper Clause, as it is called, the word "proper" no longer plays a minimal, largely redundant function in the clause, as has been supposed; instead, the word provides the textual basis for judicial imposition of rights found to be fundamental in the common law and natural rights traditions. Part III not only provides an alternative textual exegesis of the Necessary and Proper Clause that calls into doubt the above-described interpretation (Part III.A), but also demonstrates that this novel reading runs against the grain of both the known purposes of the Necessary and Proper Clause and the overall thrust of the scheme of enumerated powers as a system for simultaneously securing effective government and protecting the rights of states and individuals (Part III.B).

Finally, Part IV addresses what is perhaps the most novel claim about the relationship between the Ninth Amendment and our federal system—the claim that the Amendment establishes the authority of states to recognize and protect fundamental rights so as to preempt even federal law passed pursuant to one of the powers enumerated in the Constitution. Opponents of the Constitution complained that the states'

declarations of rights could be overridden by the exercise of the expansive new powers given the national government by the Constitution; accordingly, it has been argued that one purpose of the Ninth Amendment was to reverse the priority in favor of federal law when it came to the fundamental rights found in the constitutions of the states. It will be shown, however, that concerns about federal supremacy were closely tied to the arguments made on behalf of a constitutional amendment clarifying that all powers not granted to the national government were reserved to the states. The net result was the adoption of the Tenth Amendment, not the Ninth (Part IV.A). In turn, this article will show that this sort of "Reverse Preemption Clause" reading of the Ninth Amendment is historically implausible and structurally unworkable in the constitutional scheme as adopted (Part IV.B).

II. THE TENTH AMENDMENT AS A FUNDAMENTAL RIGHTS GUARANTEE

Traditionally the Tenth Amendment¹² has been understood as a purely structural guarantee designed to clarify the implications flowing from the Constitution's grant of limited powers to the national government. It makes explicit what was already implicit in Article I of the Constitution: that the federal government was to be a government of limited, rather than general powers, and that the states would continue to exercise power over the vast range of matters over which the national government was not granted authority. Madison confirmed this purpose when he presented a draft of what became the Tenth Amendment to the First Congress and acknowledged that many would think it completely unnecessary for this reason.¹³ Traditionally, most scholars have agreed with Justice Stone's well-known dictum that the

12. The Tenth Amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

13. JAMES MADISON, DEBATES IN THE HOUSE OF REPRESENTATIVES (June 8, 1789), reprinted in *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS* 85 (Helen E. Veit et al. eds., 1991) [hereinafter *CREATING THE BILL OF RIGHTS*] (acknowledging his understanding that the reserved powers amendment "may be considered as superfluous," but arguing that "there can be no harm in making such a declaration, if gentlemen will allow that the fact is as stated").

Tenth Amendment "states but a truism that all is retained which has not been surrendered."¹⁴

Thanks to the Ninth Amendment debate, however, creative scholars now offer the view that the Tenth Amendment actually refers to fundamental rights that serve to limit the powers granted to the national government and—after adoption of the Fourteenth Amendment—the powers of the states as well.¹⁵ These scholars observe that the amendment eventually adopted by the states was not the same amendment Madison described as purely declaratory of the original federal design.¹⁶ The fundamental rights reading is thus viewed as the result of what is deemed a portentous change of language adopted as the Senate considered the proposed amendment; the Senate added the words "or to the people" to the language describing to whom the powers "not delegated" were reserved.¹⁷ It is thus argued that

[t]he last four words of the Tenth Amendment *must have* been added to conform its meaning to the Ninth Amendment and to carry out the intent of both—that as to the federal government there were rights, not enumerated in the Constitution, which were 'retained . . . by the people,' and that because the people possessed such rights there were *powers* which neither the federal government nor the states possessed.¹⁸

14. *United States v. Darby*, 312 U.S. 100, 124 (1941). That the Tenth Amendment states a "truism" does not necessarily mean that the idea of state sovereignty underlying the amendment has no affirmative implications for limiting the exercise of national power. The dual system of sovereignty created by the Constitution presumes the existence of effective state governments; the Tenth Amendment reflects this commitment, even though its text states no affirmative limits on national power.

15. See Mayer, *supra* note 11, at 316-17 n.13; Norman G. Redlich, *Are There "Certain Rights . . . Retained by the People"?*, 37 N.Y.U. L. REV. 787, 806-07 (1962).

16. Redlich, *supra* note 15, at 807. Madison's eighth proposal stated in part: "The powers not delegated by this constitution, nor prohibited by it to the states, are reserved to the states respectively." MADISON RESOLUTION (June 8, 1789), reprinted in *CREATING THE BILL OF RIGHTS*, *supra* note 13, at 14. For Madison's view that this provision would be declaratory in nature, see *supra* note 13.

17. See HOUSE RESOLUTION AND ARTICLES OF AMENDMENT (Aug. 24, 1789), reprinted in *CREATING THE BILL OF RIGHTS*, *supra* note 13, at 41 n.23. The Senate added "or to the people" on September 7, 1789. *Id.*

18. Redlich, *supra* note 15, at 807 (initial emphasis added). Professor Mayer endorses this analysis by Professor Redlich. Mayer, *supra* note 11, at 316-17 n.13.

This fundamental-rights interpretation, however, rests on pure speculation, and everything about the text and history of the Tenth Amendment confirms that this interpretation is based solely on a preference for reading an anachronistic interpretation of the Ninth Amendment into the Tenth.

A. *The Constitutional Text*

The text of the Tenth Amendment itself states that what is reserved to the people and the states are the "powers not delegated."¹⁹ This language speaks of the residuum from powers actually given by the Constitution—the same language Madison employed to describe reserved powers.²⁰ While it is also true that rights limitations like those found in the first eight amendments were sometimes described as "powers" withheld from government, it seems unlikely that the framers would use the phrase "powers not delegated" to refer simultaneously to the residuum of powers not granted *and* to unspecified fundamental rights limitations on the powers actually granted.

More importantly, recognizing the phrase "powers not granted" as a straightforward reference to the residuum from the granted powers fits together well with the arguments advanced by those who defended the ratification of the Constitution. They repeatedly contended that "the people's" rights were adequately secured by limited grants of power to the national government in Article I.²¹ While Antifederalist critics of the

19. U. S. CONST. amend. X.

20. In fact, in the speech in which Madison indicated that his proposed Tenth Amendment merely restated the basic premise of the federal structure created by Article I, he also summarized the standard ratification-period defense of the Constitution as a "bill of powers, the great residuum being the rights of the people." DEBATES IN THE HOUSE OF REPRESENTATIVES (June 8, 1789), reprinted in CREATING THE BILL OF RIGHTS, *supra* note 13, at 82. Madison described this rights-protective feature of the Constitution, so central to the defense of the Constitution, which the Tenth Amendment was intended to reaffirm, long before the Senate adopted the language change on which Mayer and Redlich rely. That this represents a straightforward construction of the phrase "powers not granted" is also confirmed by Redlich's acknowledgement that the residuum from granted powers is precisely what that phrase would have referenced if additional language had not been added to the amendment. Redlich, *supra* note 15, at 807.

21. See, e.g., DR. CHARLES JARVIS, DEBATES IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS (Feb. 4, 1788), reprinted in 2 ELLIOT'S DEBATES, *supra* note 8, at 153 (contending that when individuals speak of the need for a bill of rights, "the first article [of the Constitution] . . . must remove every doubt on this head; as, by positively securing what is not expressly delegated, it leaves nothing to the uncertainty of conjecture, or to the refinements of implication, but is an explicit reservation of every right and privilege which is nearest and most

Constitution generally disagreed with the assessment that the enumerated powers scheme was a sufficient safeguard of popular rights, they agreed that a general reservation of sovereign power was of itself an important mechanism for securing the rights of the people.²² The Tenth Amendment's textual reference to powers reserved "to the people" thus perfectly fulfilled the rights-protective purpose Madison and others offered for a provision drafted in favor of reserved sovereignty to the states.²³ It also conformed nicely to the Ninth Amendment's reference to the people's other retained rights, even though not a fundamental rights provision.

B. *The Historical Context of the Tenth Amendment*

The contextual evidence provides additional confirmation that the meaning and purpose of the Tenth Amendment did not turn on whether it was drafted in favor of "the states," "the people," or both. The Tenth Amendment grew out of one of the fundamental objections advanced against the Constitution—that the Constitution's drafters had created an unlimited national government that would eventually subsume the states as sovereign entities. The Constitution omitted the provision that had been deemed the central clause of the Articles of Confederation by those most anxious to retain a state-centered system of government—Article II, the state sovereignty provision. Article II had provided that each state "retains every Power, Jurisdiction, and right, which is not by this confederation expressly delegated to the United States."²⁴ The Antifederalists argued that the omission of Article II raised an

agreeable to the people"); see also McAfee, *supra* note 1, at 1230-31; *supra* note 20 (Madison's speech describing the proposed Constitution as defining the "rights of the people" as "the great residuum" from the granted powers).

22. See McAfee, *supra* note 1, at 1244-45 (citing a number of Antifederalist advocates). Some even contended that an explicit reservation of sovereign power to the states might obviate the need for a bill of rights. See, e.g., SAMUEL SPENCER, DEBATES IN THE CONVENTION OF THE STATE OF NORTH CAROLINA (July 29, 1788), reprinted in 4 ELLIOT'S DEBATES, *supra* note 8, at 163 (moderate Antifederalist speaker claiming that with a reservation of every "power, jurisdiction, and right" not given to the national government, there would be no need for a bill of rights).

23. See *supra* note 20.

24. The Articles of Confederation are included in various documentary sources. See 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 86 (Merrill Jensen ed., 1976) [hereinafter RATIFICATION OF THE CONSTITUTION]. Produced originally under the general editorship of Merrill Jensen, this critical multi-volume resource is now edited by John P. Kaminski and Gaspare J. Saladino.

inference of unlimited sovereignty in the national government, especially given the natural tendency of interpreters to presume that the omission of such crucial language from a succeeding document must have a purpose.²⁵ Interpreters would thus conclude that the federal government possessed general powers that superseded all the powers of the states.²⁶

While the state sovereignty guarantee embodied in Article II referred to retained "rights," it is clear that this language reserved sovereign power to the states rather than providing specific individual rights limitations in the modern sense.²⁷ Even so, this sort of reservation of sovereign power was viewed as a critical means of securing popular rights. For example, if the Constitution forced the states to surrender all sovereign power to the national government, then the new government would possess the legal authority to invade common law and natural rights, which had previously been subject only to the limitations imposed by state law.²⁸ Equally important, this unlimited grant of power to the federal government would

25. See, e.g., AN OLD WHIG II (Oct. 17, 1787), reprinted in 13 RATIFICATION OF THE CONSTITUTION, *supra* note 24, at 400 (contrasting Article II's reservation of sovereignty with the proposed Constitution, in which there was nothing "which either in form or substance bears the least resemblance to the second article of the confederation").

26. See, e.g., CENTINAL V (Dec. 4, 1787), reprinted in 14 RATIFICATION OF THE CONSTITUTION, *supra* note 24, at 346 (omission of Article II's language "manifests the design of consolidating the states").

27. As I have observed elsewhere, the speeches and writings calling for a general reservation provision often used the language of Article II, but equally often referred only to the reservation of the "powers" not granted. McAfee, *supra* note 1, at 1245 n.120. Thus, while Virginia drafted its proposed reservation provision in the language of Article II ("power, jurisdiction, and right"), AMENDMENTS PROPOSED BY THE VIRGINIA CONVENTION (June 27, 1788), reprinted in CREATING THE BILL OF RIGHTS, *supra* note 13, at 19, Madison employed the less redundant terminology ("powers") in the draft Bill of Rights he proposed to Congress in June of 1789. MADISON RESOLUTION (June 8, 1789), reprinted in CREATING THE BILL OF RIGHTS, *supra* note 13, at 14.

28. Thus, the failure to include a general reservation of sovereign power would mean that "many valuable and important rights would be concluded to be given up by implication." GEORGE MASON, DEBATES IN THE CONVENTION OF THE COMMONWEALTH OF VIRGINIA (June 14, 1788), reprinted in 3 ELLIOT'S DEBATES, *supra* note 8, at 444. Again, however, the "rights" that would be "given up by implication," as George Mason asserted, were the entire body of rights that would be subject to invasion without limitation if the Constitution were construed as granting general powers—they were not unstated limitations on powers specifically granted in the Constitution. For citation to a sampling of the many statements by Antifederalists drawing this inference from the omission of Article II's language, see McAfee, *supra* note 1, at 1244 n.115.

mean in particular that the limits on power in favor of rights—traditionally secured by state declarations of rights—would be unprotected because of the lack of a federal counterpart to those declarations of rights.

Unsurprisingly then, every state convention that offered amendments to the Constitution included a proposed amendment based on Article II of the Articles of Confederation.²⁹ Whether framed in terms of reserving rights and powers to the states or the people, the basic idea remained the same—the national government was to be a government that would be supreme in a limited number of areas rather than *the* sovereign power in the nation. Thus Patrick Henry asserted before the Virginia ratifying convention that “a general positive provision should be inserted in the new system, securing to the states and the people every right which was not conceded to the general government.”³⁰ This was not understood as a request for the insertion of new limits on the powers granted by Article I. Instead, Henry was echoing the pervasive call for a general reservation-of-power clause that would operate to enhance the security of the people and the states against excessive federal power—power that could easily be employed in derogation of the traditional liberties protected by each of the states.

Similarly, the New York ratifying convention set forth what was probably the most precisely worded of all the proposed “general reservation” amendments:

[T]hat every Power, Jurisdiction, and right, which is not by the said Constitution clearly delegated to the Congress of the United States, or the departments of the Government thereof, remains to the People of the several States, or to their respective State Governments to whom they may have granted the same³¹

Additional constitutional amendments proposed by Virginia and other states spoke in terms of the reserved rights and

29. McAfee, *supra* note 1, at 1242.

30. PATRICK HENRY, *THE DEBATES IN THE CONVENTION OF THE COMMONWEALTH OF VIRGINIA* (June 16, 1788), *reprinted in* 3 *ELLIOT'S DEBATES*, *supra* note 8, at 150.

31. *NEW YORK PROPOSED AMENDMENTS (1788)*, *reprinted in* 2 *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 911-12* (Bernard Schwartz ed., 1971) (hereinafter *SCHWARTZ*); *see also* *THE RATIFICATION OF THE TWELVE STATES* (Sept. 28, 1787), *reprinted in* 1 *ELLIOT'S DEBATES*, *supra* note 8, at 334 (amendments proposed by Rhode Island) (stating proposed amendment in substantially the same language as the New York proposal).

powers of the states,³² but these provisions were just as often touted as important guarantees of popular rights. Provisions framed in terms of "the people," such as the New York provision, could equally be described as "states rights" proposals.³³ In the voluminous materials relating to the debate over ratification of the Constitution, there does not appear to be a single statement suggesting that there was thought to be a critical difference of substance between the New York and Virginia forms of the proposed amendment.

This is not to say that the distinction between "the people" and "the states" had no relevance to those who employed the terms. Indeed, the Federalist proponents of the Constitution frequently relied upon the doctrine of popular sovereignty to justify the Philadelphia Convention's decision to draft a new Constitution, rather than to follow the original charge to amend the Articles of Confederation, as well as to explain how governmental authority could be divided between the national and state governments without running into traditional opposition against divided sovereignty.³⁴ If the people were truly the sovereign, as posited in American revolutionary theory, they held authority to reconsider their commitment to the Articles of Confederation, and to surrender state power in favor of a stronger central government.³⁵ By contrast, the Antifederalists

32. See, e.g., THE RATIFICATION OF THE TWELVE STATES (Sept. 28, 1787), reprinted in 1 ELLIOT'S DEBATES, *supra* note 8, at 322 (Massachusetts) ("all powers not expressly delegated . . . are reserved to the several states"); *id.* at 325 (South Carolina) (states "retain every power not expressly relinquished by them"); *id.* at 326 (New Hampshire) (powers are "reserved to the several states"). For Virginia's proposed language, see MADISON RESOLUTION (June 8, 1789), reprinted in CREATING THE BILL OF RIGHTS, *supra* note 13, at 19.

33. Before the Massachusetts convention, Samuel Adams argued that a proposed amendment declaring that "all powers not expressly delegated to Congress are reserved to the several states" was "a summary of a bill of rights, which gentlemen are anxious to obtain." DEBATES IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS (Feb. 1, 1788), reprinted in 2 ELLIOT'S DEBATES, *supra* note 8, at 131.

34. See, e.g., Gordon S. Wood, *The Political Ideology of the Founders*, in TOWARD A MORE PERFECT UNION 7-19, (Neill York ed., 1988) (observing that the very idea and role of popular sovereignty was altered by Federalist attempts to confront the objections to shifting the locus of sovereignty from the states to the national government).

35. *Id.* at 22. Federalists reasoned that since "the people give some of their power to the institutions of the national government, some to the various state governments, and some at other extraordinary times to constitutional conventions for the specific purpose of making or amending constitutions," it follows that they "may take from the subordinate governments powers with which they have hitherto trusted them, and place those powers in the general government." *Id.*

tended to be stronger proponents of state power; many of them continued to see the states as the central building blocks in the union symbolized by the Constitution. These differing perspectives undoubtedly played a role in the tendency of some to emphasize the reserved powers of the states and for others to stress the concept of the reserved sovereign power of the people.

At the same time, the different formulations of various "general reservation" proposals do not reflect differences of great substance as to their intended meaning and application. Madison, for example, was an important proponent of the popular sovereignty rationales for explaining the Convention's authority and the Constitution's adoption of a popular ratification process. Yet he also served on the committee that drafted proposed amendments for the Virginia ratifying convention, which drafted its reserved powers provision in terms of powers reserved to the states. In his own draft, Madison followed Virginia's lead, also focusing on the reservation of sovereign power to the states.

What little evidence we have from the First Congress tends to confirm that the language change to the proposed amendment, adopted in the Senate, reflected the preference embodied in the New York proposal, namely, that a stated general reservation of power should reflect that it is the people who grant and reserve powers to both federal and state governments, and that therefore the reserved powers are reserved first to the people and second to the states. We do know that a similar proposal was offered in the House on August 22, 1789, but that Representative Daniel Carroll objected to the change "as it tended to create a distinction between the people and their legislatures."³⁶ The House Committee of the Whole thereafter rejected the addition of language that would have emphasized that the powers were reserved to the people.³⁷

36. DANIEL CARROLL, DEBATES IN THE HOUSE OF REPRESENTATIVES (Aug. 22, 1789), reprinted in CREATING THE BILL OF RIGHTS, *supra* note 13, at 193. An amendment with a similar purpose had also been proposed on August 18 by Rep. Thomas Tudor Tucker, who would have added a prefix to the proposed reserved powers provision, stating, "all powers being derived from the people," followed by the text being considered. *Id.* at 197. The reaction to this proposal, however, is obscure, inasmuch as it was combined with a proposal to insert the word "express" into the amendment, a change which Madison adamantly opposed. *See id.* Tucker's proposed changes were thus rejected by the House. *Id.*

37. *Id.* at 198.

The question of wording arose again in the Senate, undoubtedly because the House version seemed to harken back to the notion that it was the states who had delegated authority to the nation in the first instance. The Senate version of the Tenth Amendment conformed more completely to the theory of the Constitution defended by its chief proponents.³⁸ And since most of those who had criticized or defended the Constitution saw no great difference of substance in the basic thrust of the proposed amendment—with or without the reference to the people's reserved powers—it is not surprising that the language change passed with a minimum of discussion or debate.³⁹

In short, the unique history of the Tenth Amendment's development and the general theory of the nature of the Constitution provide a complete explanation of the purpose of adding language to the amendment as drafted by Madison and approved by the House of Representatives. The Tenth Amendment made explicit what was already implicit in Article I of the Constitution—the federal government would exercise delegated powers, and all other powers were reserved to the people and

38. See *supra* notes 33-34. For an illustration of the potential significance of the state-compact theory versus the view that the people of the nation adopted the Constitution, see the discussion in *McCulloch v. Maryland*, 17 U.S. 316, 402-05 (1819) (arguing against a state-compact theory employed by Maryland's counsel to justify strict construction of federal powers under Article I of the Constitution).

39. While research revealed no legislative debate on this change of language, in September of 1789 the states' rights advocate, Richard Henry Lee, objected vociferously to this change of language in the proposed reserved-powers provision in a letter written to a fellow Virginian, Patrick Henry. In his letter, Lee expressed bitter disappointment that additional amendments were not proposed by Congress, particularly in favor of states' rights, and then claimed that this additional language suggested that the reservation was on behalf of "[the] People of the *United States*, not of the *Individual States*," and that it thus "was evidently *calculated* to give the Residuum to the people of the U. States, which was the Constitutional language [*We the People &c.*] and to deny it to the people of the *Indiv. Stato.*" Letter from Richard Henry Lee to Patrick Henry (Sept. 14, 1789), in *CREATING THE BILL OF RIGHTS*, *supra* note 13, at 296. Lee's objection confirms that at least some Antifederalists feared the language referring to "the people" precisely because it lends additional support to the idea that the people of the entire United States constitute the sovereign power which establishes the Constitution, a view that undermines a state compact theory of the Constitution (the view that came to characterize the constitutional views of states' rights proponents who had opposed ratification of the Constitution). But notice that Lee did not suggest that the basic operational effect of the provision or the content of the guarantee embodied in the Tenth Amendment would be altered. Indeed, Lee's reading reflects the general consensus, described throughout the text above, that the "rights" secured by this reserved powers provision were defined as "the Residuum" from the powers granted to Congress. This language was not a reference to fundamental-rights limitations on the powers granted to the national government.

to the states. The reference to "the people" was added to underscore that it is the people who delegate and reserve powers. The rights reserved under the language originally proposed were the same rights as those reserved by the text finally adopted, and they consisted of all the liberty defined by the scope of the powers delegated by the Constitution. The Tenth Amendment is a general reservation of undelegated powers; it is not a fundamental rights provision.

III. THE "IMPROPER" EXERCISE OF FEDERAL POWERS

The traditional understanding of the Necessary and Proper Clause⁴⁰ is that it performs the mundane task of affirming the fundamental idea that Congress has the authority to exercise reasonable discretion in choosing the means by which to implement the goals set forth in the legislative powers granted by Article I, Section 8.⁴¹ As suggested by its derogatory nickname, the "Sweeping Clause" generated great fears among those who were concerned that the Constitution portended a tyrannical federal government. During the debate over ratification of the Constitution, the Constitution's Antifederalist opponents launched some of their harshest attacks on the Sweeping Clause, charging that its purpose was to grant unlimited authority to Congress so as to establish a "consolidated" government of general legislative powers that could displace state authority at will.⁴² In its defense, the Federalists denied that

40. U.S. CONST. art. I, § 8, cl. 18.

41. In the words of Chief Justice John Marshall, the clause reflected "the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the constitution, if that instrument be not a splendid bauble." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420 (1819); see also *THE FEDERALIST* No. 44, at 305 (James Madison) (Jacob E. Cooke ed., 1961) (explaining that rather than relying on the obvious inference that properly should have been drawn in favor of ancillary powers, the Philadelphia Convention included the clause to remove "a pretext which may be seized on critical occasions for drawing into question the essential powers of the Union"); *THE FEDERALIST* No. 33, at 205-06 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (explaining that the clause was introduced "for greater caution, and to guard against all caviling refinements in those who might hereafter feel a disposition to curtail and evade the legitimate authorities of the Union" and suggesting further that the Convention, fearing state jealousy of federal power, apparently thought it "necessary, in so cardinal a point, to leave nothing to construction").

42. GEORGE MASON, *OBJECTIONS TO THE CONSTITUTION OF GOVERNMENT FORMED BY THE CONVENTION*, reprinted in 2 *THE COMPLETE ANTI-FEDERALIST* 13 (Herbert J. Storing ed., 1981) (under Necessary and Proper Clause, "the State Legislatures have no Security for the Powers now presumed to remain to them; or the People for their Rights"); *LETTERS OF CENTINEL V* (Nov. 30, 1787), reprinted in 2

the Necessary and Proper Clause carried the implication of unlimited power, contending that if the principle set forth by the clause were not accepted, there would have been no point in empowering the national government.⁴³ To these ends, they assured their opponents that the clause was purely declaratory in nature, that it merely set forth the principle of agency that would have followed naturally, with or without such an explicit text, from the necessity of ancillary authority even in a system of limited grants of power.⁴⁴

THE COMPLETE ANTI-FEDERALIST, *supra*, at 168-69 (under Necessary and Proper Clause "[w]hatever law congress may deem necessary and proper for carrying into execution any of the powers vested in them, may be enacted"); LETTERS FROM THE FEDERAL FARMER IV (Oct. 12, 1787), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra*, at 247 (while people may hope Congress will act consistently with traditional limiting principles, under Necessary and Proper Clause, Congress "will not be bound by the constitution to pay respect to those principles"); ESSAYS OF BRUTUS XI (Jan. 31, 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra*, at 421 (clause "leaves the legislature at liberty, to do every thing, which in their judgment is best"); ARISTOCRATIS, THE GOVERNMENT OF NATURE DELINEATED OR AN EXACT PICTURE OF THE NEW FEDERAL CONSTITUTION (1788), *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST, *supra*, at 208 n.** (treating clause as evidence of scheme to create aristocratic rule).

43. *See, e.g.*, Letter from C. William Cranch to John Quincy Adams (Nov. 26, 1787), *in* 14 RATIFICATION OF THE CONSTITUTION, *supra* note 24, at 226 ("If they had not power to 'make all laws which shall be necessary & proper for carrying into effect [sic] execution the foregoing powers' . . . , the powers would be of no service."); A LANDHOLDER V (Dec. 3, 1787), *reprinted in* 14 RATIFICATION OF THE CONSTITUTION, *supra* note 24, at 338 (without acknowledgment of this authority, the powers would "be evaded by the artful and unjust"); THE FEDERALIST No. 44, at 302 (James Madison) (Jacob E. Cooke ed., 1961) (Necessary and Proper Clause is a provision "by which efficacy is given to all the rest").

44. In the words of Madison:

Had the Constitution been silent on this head, there can be no doubt that all the particular powers, requisite as means of executing the general powers, would have resulted to the government, by unavoidable implication. No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it, is included.

THE FEDERALIST No. 44, at 304-05 (James Madison) (James E. Cooke ed., 1961); *see also* THE FEDERALIST No. 33, at 204 (Alexander Hamilton) (James E. Cooke ed., 1961) (clause declares "a truth, which would have resulted by necessary and unavoidable implication from the very act of constituting a Foederal [sic] Government, and vesting it with certain specified powers"); *id.* at 205 ("[A] power to lay and collect taxes must be a power to pass all laws *necessary* and *proper* for the execution of that power; and what does the unfortunate and calumniated provision in question do more than declare the same truth . . . ?"); JAMES WILSON, THE PENNSYLVANIA CONVENTION DEBATES (Dec. 4, 1787), *reprinted in* 2 RATIFICATION OF THE CONSTITUTION, *supra* note 24, at 482 (clause says "no more than that the powers we have already particularly given shall be effectually carried into execution").

But the Constitution's leading ratification-era proponents lacked the help of modern legal commentators. The consequence was that they overlooked the fact that the clause their opponents derided as the Sweeping Clause was actually the most powerful limiting clause in the original Constitution. As Gary Lawson and Patricia B. Granger have concluded,⁴⁵ the Federalists should have demonstrated how Antifederalist fears of the Constitution were belied by the powerful constraining effect of the Necessary and Proper Clause. As construed and applied by Lawson and Granger, the so-called Sweeping Clause might have been better nicknamed the "Back Draft Clause," because it would have served as an open-ended jurisdictional limitation on the powers actually delegated to the national government by the Constitution. Such a limitation favoring principles of separation of powers, states' rights, common law, and natural rights, was apparently to be explicated over time by the judiciary.⁴⁶ By using the "Back Draft Clause" as a weapon, the Federalists' defense against the charge that the Supremacy Clause, the omission of a bill of rights, and the Constitution as a whole served to consolidate power in an unlimited national government would have been greatly simplified.

A. *The Text of the Necessary and Proper Clause*

Lawson and Granger contend that, when read in historical context, the word "proper" itself suggests a fundamental limitation on Congress' powers. They first observe that the word's definitions circa 1787 included both the idea of being "fit," "adapted," or "suitable," on the one hand, as well as the idea of being peculiarly within a particular domain or not "belonging to more."⁴⁷ They contend that the latter meaning, which they

45. Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993).

46. They write:

We submit that the word "proper" serves a critical, although previously unacknowledged, constitutional purpose by requiring executory laws to be peculiarly within Congress's domain or jurisdiction—that is, by requiring that such laws not usurp or expand the constitutional powers of any federal institutions or infringe on the retained rights of the states or of individuals. The Sweeping Clause, so construed, serves as a textual guardian of principles of separation of powers, principles of federalism, and unenumerated rights.

Id. at 271.

47. *Id.* at 291.

describe as "jurisdictional," was the meaning probably intended by the framers, both because it was common "in contexts involving the allocation of governmental powers"⁴⁸ and because this understanding would avoid conflict with "the venerable legal maxim of document construction that presumes that every word of a statute or constitution is used for a particular purpose."⁴⁹ After all, the alternative meaning of the term, referring to fitness or suitability, would render "proper" as redundant of "necessary," leaving the former without any real function in the clause.

But the above maxim exists in tension with other maxims that require the meaning of general terms to be limited according to their proximity and relation to other words used in the same text.⁵⁰ Strikingly, in *McCulloch v. Maryland*, Chief Justice Marshall, on whom the authors rely in support of the maxim they invoke,⁵¹ applied the principle underlying these other maxims in rejecting Maryland's argument that the term "necessary" required a law to be essential or indispensable. Based on the premise that "we may derive some aid from that with which [the word 'necessary'] is associated," Marshall found that the "only possible effect" of the framers' adding the term "proper" was "to qualify that strict and rigorous meaning" and "to present to the mind the idea of some choice of means of legislation, not straitened and compressed within the narrow limits for which gentlemen contend."⁵² Having apparently already concluded that the term "proper" had been employed to refer to

48. *Id.*

49. *Id.* at 290.

50. The maxim "that words are to be read in context with the neighboring words in the same document (*noscitur a sociis*) recognizes that in the field of communication the whole transcends the parts." REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 233 (1975) (footnote omitted). A closely related maxim, *eiusdem generis*, states "that if a series of more than two items ends with a catch-all term that is broader than the category into which the preceding items fall but which those items do not exhaust, the catch-all term is presumably intended to be no broader than that category." *Id.* at 234. While the latter maxim does not literally apply here, inasmuch as "necessary and proper" does not constitute a series of more than two items, the underlying idea, that general words might properly be given a limiting construction so as to fit with surrounding language, may well apply here. Of course, scholars have tended to agree that the maxims can almost never be substituted for a careful analysis of the context of the legal language being construed, including evidence of the known purposes of the enactment in question. *See, e.g., id.* at 229.

51. Lawson & Granger, *supra* note 45, at 290 (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 414-15 (1819)).

52. *McCulloch*, 17 U.S. (4 Wheat.) at 419.

measures that are "fitting" or "adapted" to accomplish authorized ends, Marshall argued that his more "limited construction" of "necessary" better squares with "the usual course of the human mind," and avoids attributing to the framers the use of contradictory terms.⁵³

Beyond confirming that Marshall did not perceive the word "proper" as playing a critical jurisdictional role, the Chief Justice's analysis raises important questions regarding the jurisdictional interpretation offered by Lawson and Granger. The term "necessary," particularly as construed in *McCulloch* and ever since, merely restates what the framers believed would be apparent even without such a clause: namely, that Congress' powers implicitly include authority to take action as needed to accomplish the authorized ends. In contrast, Lawson and Granger suggest that the word "proper" plays a critical role as the textual source of important, external limitations on congressional authority.⁵⁴ Indeed, their interpretation appears to warrant limiting Congress' powers in ways that would seem strained based upon the wording of the grants of power themselves, especially because it would provide a basis for imposing unwritten limitations on Congress in behalf of unenumerated individual rights. Thus, the more limited interpretation of the word "proper," as suggested by Chief Justice Marshall, fits more cohesively with the word "necessary" and with the purpose of the clause, which—as confirmed by various spokesmen—is to simply declare the existence of an ordinary power of Congress.⁵⁵

Alternatively, there is a construction of "proper" that fits with all of the maxims referred to above and also comports with the purpose of including an executory power provision in the first place. It is possible that the term "proper" was employed because, on the one hand, it fits with "necessary" to

53. *Id.* at 418-19. Earlier in the opinion, Chief Justice Marshall previewed this criticism as follows: "The word 'necessary' is considered as controlling the whole sentence, and as limiting the right to pass laws without which the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory." *Id.* at 413.

54. Lawson & Granger, *supra* note 45, at 271.

55. On this reading of the Sweeping Clause, Congress' powers are not understood to be wholly discretionary, let alone limitless; it is simply that, beyond the limits on executory authority suggested by Chief Justice Marshall's construction of the Necessary and Proper Clause, the limits on Congress' executory authority are external to the Clause and are found in the text and structure of the balance of the Constitution (including its subsequent amendments).

suggest that Congress has a reasonable, but limited, discretion to implement its powers and on the other hand, it confirms what would be true without any executory power clause: that Congress' ancillary powers are subject to constitutional limitations or, in other words, that Congress' executory power is only effective within the jurisdictional parameters of the Constitution.⁵⁶ Under this construction, the term makes a distinctive contribution in that it provides a barrier against misconstructions that could occur if the term "necessary" were used alone—for example, the idea that Congress could pass any law with a requisite connection to promoting an authorized end, notwithstanding limitations stated or implied elsewhere in the Constitution.⁵⁷ At the same time, it is read so as to fit well with the term "necessary" and not to turn a clause authorizing ancillary powers into a powerful limiting clause and an independent source of prohibitions on congressional power. This interpretation neither renders the Clause wholly superfluous nor potentially revolutionary in its implications.⁵⁸

56. There are "jurisdictional" limits on Congress' powers found in the doctrine of separation of powers and in the limiting provisions included in Article I, Section 9. The word "proper" would add something of significance if part of its purpose were to reaffirm or clarify that such limits apply equally to Congress' discretionary power to select "means" to accomplish delegated "ends" as they do to acts not relying on the Sweeping Clause. But Lawson and Granger give us no reason to think that the term "proper" was intended as a touchstone for unwritten limitations as to which there could have been no debate nor any ratification.

57. This construction could even be described as a "jurisdictional" interpretation, provided it is understood that the jurisdictional boundaries are the ordinary ones, external to the Sweeping Clause, for which the term proper serves as a textual confirmation. The Clause, on this reading, does not establish any "internal limits" on the grants of power in Article I, Section 8.

58. The suggestion that the term "proper" might serve a dual purpose in the clause granting executory power accords with a similar analysis that Lawson and Granger supply of the grant of legislative power to Congress to enforce the Reconstruction Amendments. The Thirteenth through Fifteenth Amendments empower Congress to enforce the amendments by "appropriate" legislation, and the question raised concerns "why the drafters of the Reconstruction Amendments did not simply follow the language of the Sweeping Clause." Lawson & Granger, *supra* note 45, at 311 n.189. Pointing to evidence that the framers intended to convey essentially the same idea, Lawson and Granger reason that the word "appropriate" provides "a good substitute for the phrase 'necessary and proper'" because it "can plausibly function as a synonym both for 'proper' in its jurisdictional sense and for 'necessary' in its sense of fitness for a particular end." *Id.* Similarly, the term "proper" can plausibly reinforce both a sense of fitness for a particular end and compliance with limitations imposed by the Constitution.

The somewhat more restricted reading of the term "proper" suggested above also fits more comfortably into the substitute framework of the Reconstruction Amendments that employed the term "appropriate," inasmuch as there is no histor-

B. The Historical Context of the Necessary and Proper Clause

These alternative interpretations of the Necessary and Proper Clause also more fully comport with the positions taken during the debate over the ratification of the Constitution. Contending against the need to add a freedom of the press guarantee to the Constitution, James Wilson not only observed that Article I did not grant any power to regulate the press, but also emphasized that a freedom of the press provision *would have* been essential if Article I had granted to Congress power "to regulate literary publications."⁵⁹ Since Congress had not been granted any regulatory power over the press, however, there was no need for such a guarantee.⁶⁰ But if the word "proper" in the Necessary and Proper Clause served as a reference to unspecified limitations on the powers granted, based on widely accepted limiting norms, Wilson's example would fail. For even if Congress had been given power to regulate literary publications, such power would have been subject to an implied limitation in favor of a free press. Liberty of the press, after all, had been protected under state declarations of rights and was viewed by many as a natural and inalienable right because it was an outgrowth of freedom of thought and speech.⁶¹

Even so, Wilson stated the conventional understanding. When Madison presented a draft of a proposed bill of rights to Congress, he referred to the arguments against the need for a bill of rights, which cited the Constitution's limited powers scheme. Explaining that he now believed that a bill of rights could guard against abuses of congressional power, Madison used the example of a criminal statute that might be enforced with a general search warrant if there were no constitutional guarantee against unreasonable searches and seizures.⁶² Mad-

ical evidence suggesting that the enforcement clauses of those amendments were intended to generate significant "internal" limitations on congressional authority—limitations going beyond compliance with the limiting norms contained in the Bill of Rights and elsewhere in the Constitution.

59. JAMES WILSON, SPEECH IN THE STATE HOUSE YARD (Oct. 6, 1787), reprinted in 2 RATIFICATION OF THE CONSTITUTION, *supra* note 24, at 168.

60. *Id.*

61. Unsurprisingly, Lawson and Granger include freedom of the press among the rights that they believe are secured by the jurisdictional limits imposed by the Sweeping Clause even without a bill of rights. Lawson & Granger, *supra* note 45, at 318-19.

62. See JAMES MADISON, DEBATES IN THE HOUSE OF REPRESENTATIVES (June 8, 1789), reprinted in CREATING THE BILL OF RIGHTS, *supra* note 13, at 82-83. Madison gives his hypothetical in this fashion: "The general government has a

ison expressed his belief that without a Fourth Amendment the power to authorize general search warrants would have been available to Congress under the Necessary and Proper Clause.⁶³ Again, however, if the key to a limited delegation of powers was to be the requirement that laws be "proper" as well as "necessary," Madison's example would have had no force. Indeed, Madison would have been arguing at most for the value of adding clarity to prior-existing limitations, rather than for the necessity of adding a bill of rights to the Constitution to secure basic liberties.

Madison's analysis strikes a fair balance between the Federalists' somewhat inflated claims about the rights-protective capacity of enumerated powers and the overblown Antifederalist claims that the Constitution portended an unlimited national government. For at least a century, the federal government under the Constitution remained a government directed toward a small number of national concerns, suggesting that the Federalist defense of the omission of a bill of rights was not wholly implausible. At the same time, it seems difficult to deny the force of the Antifederalist arguments that if it was essential to secure the right to jury trial in criminal cases, it was equally essential to secure the other procedural rights traditionally associated with due process of law.⁶⁴ The Federalists never managed to provide any effective responses to these arguments. Even though rights such as freedom of religion and of the press seemed to bear out Federalist theories, later cases such as the inaugural free speech cases of the modern era, in which general criminal statutes designed to support the war effort in World War I were challenged under the First Amendment, suggest that Madison's conclusion as to the poten-

right to pass all laws which shall be necessary to collect its revenue; the means for enforcing the collection are within the direction of the legislature: may not general warrants be considered necessary for this purpose, as well as for some purposes which it was supposed at the framing of their constitutions the state governments had in view." *Id.*

63. As reflected in his presentation of the hypothetical, one way Madison made this clear was by drawing a direct comparison between the discretionary power conferred upon Congress by the Necessary and Proper Clause and the discretion held by state governments pursuant to their general legislative powers. He concluded: "If there was reason for restraining the state governments from exercising this power, there is like reason for restraining the federal government." *Id.* at 83. *But see* Lawson & Granger, *supra* note 45, at 323 & n.229.

64. *See, e.g.,* LETTERS FROM THE FEDERAL FARMER XVI (Jan. 20, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 42, at 326.

tial reach of the Necessary and Proper Clause was well-grounded.

Madison's analysis, moreover, is consistent with the alternatives to the broad jurisdictional reading of the Necessary and Proper Clause as described above. On the other hand, it cannot be reconciled with the broad jurisdictional reading proffered by Lawson and Granger. It is Madison's analysis, however, that comports with the weight of the historical evidence, including evidence of a pattern of design running from the Articles of Confederation to Article I of the Constitution and evidence of the framers' understanding of the enumerated powers scheme in the design of the Constitution.

IV. STATE POWER TO CREATE AND PROTECT FUNDAMENTAL RIGHTS FROM FEDERAL INTRUSION

The final theory linking the federal system to fundamental rights is the most novel and perhaps least plausible of the group. As has been demonstrated, those who opposed the Constitution often linked the concern for protecting personal liberty to the preservation of state authority. A variation on this theme was the claim that the Supremacy Clause (and the Constitution generally) empowered Congress to enact laws capable of preempting state laws, including basic individual rights embodied in state declarations of rights.⁶⁵ This line of attack countered the argument that a bill of rights was unnecessary because the people's rights would continue to be secured by the declarations of rights in state constitutions. This argument rested on a premise of a limited national government that had not been empowered to override those rights.⁶⁶ The debate

65. See, e.g., GEORGE MASON, *GEORGE MASON'S OBJECTIONS TO THE CONSTITUTION OF GOVERNMENT FORMED BY THE CONVENTION*, reprinted in 2 *THE COMPLETE ANTI-FEDERALIST*, *supra* note 42, at 11 (observing that "the Laws of the general Government being paramount to the Laws and Constitutions of the several States, the Declarations of Rights in the separate States are no security").

66. As early as the constitutional convention, Roger Sherman had argued that there was no need for a bill of rights under the proposed Constitution because the people's rights would continue to be secured by the state constitutions. Sherman, of course, would have had no disagreement with Mason as to the legal effect of the Supremacy Clause. The real substance of their disagreement concerned whether the powers granted to the national government granted sufficiently broad authority to invade the fundamental rights included in the state declarations of rights. Some opponents of the Constitution, however, relied on the text of the Supremacy Clause as independent evidence that the framers of Constitution intended to create a consolidated, all-powerful government over the nation as a whole. See, e.g., *LETTERS*

that ensued over the potential threat that federal supremacy posed to fundamental rights protected under state law has prompted some scholars to suggest that the other rights "retained by the people" in the Ninth Amendment consists of, or at least includes, rights secured by state law.⁶⁷

The most extreme version of this theory, set forth in several works by Professor Calvin R. Massey,⁶⁸ actually posits that one intention of the Ninth Amendment was for it to serve as a kind of "Reverse Preemption Clause." For example, rights protected as fundamental by state constitutions would trump inconsistent acts of Congress, despite the Supremacy Clause, because the inclusion of rights in a state constitution would assure their status as rights "retained by the people" and thus as limits on the scope of federal power.⁶⁹ Not surprisingly, Massey's claim that the Ninth Amendment secures state-created rights as affirmative limitations on federal power had not been advanced by a single commentator between 1789 and the 1980s. This reading, moreover, presents an incoherent amalgamation of diametrically opposed readings of the text and history of the Ninth Amendment.

OF CENTINEL V (Nov. 30, 1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 42, at 168 (arguing that if the "foregoing powers should not suffice to consolidate the United States into one empire, the Convention" added the Supremacy Clause "as if . . . to prevent the possibility of a doubt").

67. See, e.g., Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223 (1983); Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 HASTINGS L.J. 305, 322-29, 343 (1987); cf. Michael W. McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 CHI.-KENT L. REV. 89, 94-99 (1988) (also suggesting that state-law rights, along with other federal positive law rights, are among the unenumerated rights to which the Ninth Amendment refers).

68. CALVIN R. MASSEY, *SILENT RIGHTS: THE NINTH AMENDMENT AND THE CONSTITUTION'S UNENUMERATED RIGHTS* 123-73 (1995) [hereinafter MASSEY, *SILENT RIGHTS*]; Massey, *supra* note 67; Calvin R. Massey, *The Antifederalist Ninth Amendment and its Implications for State Constitutional Law*, 1990 WIS. L. REV. 1229 [hereinafter Massey, *Antifederalist Ninth Amendment*]; Calvin R. Massey, *Anti-Federalism and the Ninth Amendment*, 64 CHI.-KENT L. REV. 987 (1988) [hereinafter Massey, *Anti-Federalism*].

69. According to Professor Massey, "state citizens have the power, through their state constitutions, to preserve areas of individual life from invasion by the federal Congress in the exercise of its delegated powers." Massey, *Antifederalist Ninth Amendment*, *supra* note 68, at 1233. As he himself characterizes this view: "This is radical stuff, for it amounts to a form of reverse preemption." *Id.*

A. *State-Law Rights and the Ninth and Tenth Amendments*

As originally set forth in the work of Russell Caplan, upon which Professor Massey relies, the "state-law rights thesis" was an attempt to reinforce the close historical link between the Ninth and Tenth Amendments. The thesis posited that the Ninth Amendment took the role of securing the "rights" existing under state law that had been guaranteed by Article II of the Articles of Confederation.⁷⁰ As we have seen, Article II was the state sovereignty provision of the Articles, and it provided that each state "retains . . . every Power, Jurisdiction, and right, which is not by this confederation expressly delegated to the United States."⁷¹ But Article II was a "rights" guarantee in exactly the same sense that the Tenth Amendment is a rights guarantee—it secured for the states all the sovereign power not granted to the nation.⁷² The security this added to personal rights was purely an indirect result. One implication of this retained sovereignty was that the rights guaranteed by state law would continue to be secure to the extent that powers actually delegated to the national government did not include authority sufficient to displace such state-law rights.⁷³

Caplan reached nearly the same conclusion by a different logical path. He reasoned that the "rights" referred to, and secured by, Article II of the Articles of Confederation were the individual rights guarantees found within state law, whether constitutional or statutory.⁷⁴ Inasmuch as the Tenth Amendment, unlike Article II, refers only to "powers" and not to "rights," Caplan concluded that the Ninth Amendment provides

70. According to Caplan, "the ninth and tenth amendments both derived from article II of the Articles of Confederation." Caplan, *supra* note 67, at 262. Caplan also contends that the Ninth Amendment has its origins in the amendments proposed by the Virginia ratifying convention that correspond with the Ninth and Tenth Amendments. *Id.* at 254 n.132.

71. ARTICLES OF CONFEDERATION art. II (emphasis added), reprinted in 1 ELLIOT'S DEBATES, *supra* note 8, at 79.

72. See *supra* note 26 and accompanying text.

73. As Caplan explained, under Article II the "states retained the right of self-government and, consequently, the right to enact and maintain laws regarding individual liberties." Caplan, *supra* note 67, at 236; see also *supra* notes 26-27 and accompanying text.

74. Caplan, *supra* note 67, at 243 (contending that "enforceable rights beyond those enumerated in the Constitution (or in the form of federal statutes) would exist only in the governments of the various states"); *id.* at 262-63 (arguing that the Ninth and Tenth Amendments were each derived from Article II and "were paired in the final version of the Bill of Rights . . . because of their analogous residual purposes").

the textual grounding for securing "rights" under state law—subject to the exercise of powers actually granted by the Constitution.⁷⁵ In support of this reading, Caplan pointed to a statement attributed to Edmund Randolph, linking together the texts of the Virginia equivalents of the Ninth and Tenth Amendments.⁷⁶ Therefore, for Caplan, just as with reserved "powers" under the Tenth Amendment, the security given these rights by the Ninth Amendment depended entirely on an appropriate construction of federal powers to determine whether those powers extended far enough to permit federal preemption of such state-law rights.⁷⁷

Professor Massey, on the other hand, culls from Caplan's analysis the bare conclusion that the Ninth Amendment was at least in part "an attempt to be certain that rights protected by state law were not supplanted by federal law simply because they were not enumerated."⁷⁸ But, contrary to Caplan's analysis, Massey finds that the Ninth Amendment's state-law rights trump federal powers in the event of conflict.⁷⁹ He rests this conclusion on two arguments: (1) the textual argument that if unenumerated state-law rights limit only state power and not federal power, these unenumerated rights would be "disparaged" vis-à-vis the enumerated rights that do limit federal power;⁸⁰ and (2) the historical claim that Antifederalists seeking to limit federal power would not have agreed to a pro-

75. *Id.* at 254-55. At first glance, Caplan's conclusion might seem more plausible because the Virginia proposal that corresponds to the Tenth Amendment used Article II's "rights, powers, and jurisdiction" language while Madison's Tenth Amendment proposal used only "powers." *But see infra* note 86 and accompanying text (arguing that the meaning of the general reservation provision does not turn on whether "power" alone is used and that additional language from Article II is viewed as redundant).

76. *Id.* at 256 n.138.

77. *Id.* at 261 (Ninth Amendment rights "cannot form a basis for holding acts of Congress unconstitutional" because they are not "transcendent federal norms" but only rights within state law).

78. MASSEY, SILENT RIGHTS, *supra* note 68, at 121-22 (citing Caplan, *supra* note 67, at 254); *see also id.* at 123-24 (stating that "even originalist commentators such as Russell Caplan have concluded that the Ninth Amendment 'simply provides that the individual rights contained in state law are to continue in force under the Constitution until modified or eliminated by state enactment, by federal preemption, or by a judicial determination of unconstitutionality'").

79. *Id.* at 124 (arguing that "ninth Amendment rights are, by definition, federal constitutional rights, whatever their ultimate source may be").

80. *Id.* The Ninth Amendment forbids interpreters to "deny or disparage" the other rights retained by the people. U.S. CONST. amend. IX.

vision protecting fundamental state-law rights only against state governments.⁸¹

A fundamental problem, however, is that Massey's two arguments for refusing to limit state-law rights are equally grounds for calling into question Caplan's conclusion that the Ninth Amendment was about securing state-law rights.⁸² Thus if we reject Caplan's attempt to analogize the protection given state-law rights by the Ninth Amendment to the protection given residual state powers by the Tenth, as Massey insists we must based on the Ninth Amendment's prohibition on disparaging unenumerated rights, we equally undercut the major piece of evidence Caplan relies upon to link the Ninth Amendment to securing fundamental state-law rights—Edmund Randolph's statement linking together the basic thrust of the Virginia equivalents of the Ninth and Tenth Amendments.⁸³ Similarly, if it is true that the Antifederalists would not have been satisfied with a simple reassurance that state-law rights would not be displaced except by the legitimate exercise of delegated power, it follows that the very foundation of Caplan's thesis—that the Ninth Amendment grows out of Article II of the Articles of Confederation—must equally be rejected.⁸⁴

81. According to Massey, Caplan's reading "assumes that the Antifederalists failed to realize that the ninth amendment would not do what they demanded of it: preserve individual rights rooted in state law against federal invasion. Given the evident and overriding concern of the Antifederalists on this point, it is highly unlikely that the Antifederalists would have acceded to an amendment so ill-suited to their purpose." Massey, *Antifederalist Ninth Amendment*, *supra* note 68, at 1244. This view of the Ninth Amendment "is to lose all sight of its Antifederalist origins." *Id.* at 1245. For a conflicting view as to the Antifederalist role in the formulation of the Ninth Amendment, see *infra* notes 90-92 and accompanying text.

82. Indeed, what is remarkable is that Massey states these contradictory conclusions without questioning the line of analysis by which Caplan reasoned that state-law rights were protected by the Ninth Amendment, including his use of evidence linking both the Ninth and Tenth Amendments to Article II of the Articles of Confederation.

83. See *supra* note 76 and accompanying text.

84. Massey's suggestion that his own state-law rights interpretation is bolstered because other commentators, most notably Robert Bork and Raoul Berger, have followed Caplan's lead in perceiving the Ninth Amendment as a guarantee of rights secured by state law, Massey, *Antifederalist Ninth Amendment*, *supra* note 68, at 1238 n.50, is thus unwarranted. In each case, the author links up with Caplan's idea that the rights secured by the Ninth Amendment are state-law rights in their nature and concludes that the Ninth Amendment performs the same function for state-law rights that the Tenth Amendment performs for state powers. While Caplan and those who have followed his lead may well have confounded the purposes of the Ninth and Tenth Amendments, see *infra* note 87 and accompanying

In addition, Massey's state-law rights thesis and Caplan's analysis each begin at fundamentally opposite starting points for understanding the project embodied in the Ninth Amendment. Caplan sees the Amendment as an outgrowth of Article II and a complementary provision to the Tenth Amendment's general reservation of all power not granted to the national government. Massey sees the Ninth Amendment as an expansion of the limiting provisions of the first eight amendments, and thus as complementary to the idea of stating affirmative limitations on powers granted to government. While these views are superficially similar, virtually every bit of evidence that would support Caplan's reading would undermine Massey's, and vice-versa.

The key to understanding the relationship between concerns about state-law rights and the Bill of Rights is to realize that the fear of displacement of state law was really a variation on the general Antifederalist themes of unlimited powers and consolidated government. Maryland's Antifederalist minority, for example, proposed that "Congress shall exercise no power but what is expressly delegated by this constitution."⁸⁵ Its proponents claimed that, pursuant to this provision, the "general powers given to Congress" by the Necessary and Proper Clause and the Supremacy Clause would be restrained, constructive powers prevented, "those dangerous expressions by which the bills of rights and constitutions of the several states may be repealed by the laws of Congress, in some degree moderated," and "the exercise of *constructive* powers wholly prevented."⁸⁶ This state-law rights argument and proposal, of course, lead directly to the Tenth Amendment as drafted by Madison. Furthermore, they underscore that inferences against rights to be reserved structurally—by the grant of limited powers and the reservation of all powers not granted—were feared as much as deficiencies in the elaboration of specific, affirmative limitations on government power.

In other words, the debate over the significance of the Supremacy Clause begged the question presented by the balance

text, the evidence and analysis they rely upon hardly further Massey's conception of the project embodied in the Ninth Amendment.

85. ADDRESS OF A MINORITY OF THE MARYLAND RATIFYING CONVENTION (May 6, 1788), reprinted in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 42, at 94.

86. *Id.* at 94-95. It should be noted that this proposal is simply another version of the general reservation clause demanded by Antifederalists at every convention. It is a functional equivalent of the Tenth Amendment.

of the debate over the Constitution as a whole. The Constitution's defenders conceded that the Supremacy Clause meant that federal law would displace conflicting state law, but they denied that the powers granted to the national government were extensive enough to present a real threat to traditional rights secured by state law. Those who opposed the Constitution believed that the Supremacy Clause eliminated the security of state-law guarantees because the rest of the Constitution could be read to grant so much power to the national government as to render state law protections ineffective, if not meaningless. The debate over the Supremacy Clause became simply another angle from which to continue the dialogue between those demanding and those opposing a bill of rights in general and a clause reserving power to the people and the states in particular.

Caplan then argues correctly that the resolution of the debate over the continuing efficacy of state-law rights can be linked to Antifederalist demands that the Constitution include a provision analogous to Article II of the Articles of Confederation. However, Caplan is wrong in asserting that the provision called for by this debate is the Ninth Amendment; rather, it is the Tenth Amendment. In both the ratification-period debate, as well as in the proposals offered by the state ratifying conventions, the demand for a general reservation provision was cast in terms of reserved "powers" or reserved "rights," as well as in terms of "rights, powers, and jurisdiction" (the language of Article II).⁸⁷ There is no evidence suggesting that the variations in the proposed language of these demands implied any difference in the substance of the proposed amendment. In every case, what was proposed was a general reservation of sovereign power that would secure rights guaranteed by state law to the extent that the powers actually granted to the national government did not conflict with them.

The Ninth Amendment protects exactly the same rights—those defined as the residuum from the powers delegated to the nation by the Constitution—but from an entirely different potential threat. As described above, Federalists feared that a bill of rights that attempted to enumerate specific limitations on the powers delegated by the Constitution, might

87. See, e.g., AMENDMENTS PROPOSED BY THE STATES (June 27, 1788), reprinted in CREATING THE BILL OF RIGHTS, *supra* note 13, at 19 (Virginia proposed amendment that included language tracking Article II); *supra* notes 29-32.

threaten the rights secured structurally by implying that the federal government was limited only by the specific rights contained in the bill of rights.⁸⁸ A related argument was that the enumeration of fundamental rights as to which no power had in fact been granted could raise an inference that powers had been granted for which such enumerated rights served as "exceptions" or "limitations."⁸⁹ The Constitution's Antifederalist critics, who demanded a bill of rights, further argued that the partial enumeration of rights in the proposed Constitution itself suggested the same implications that the Federalists feared from a bill of rights. The Ninth Amendment's true purpose—to secure the rights reserved by the Constitution's enumerated powers scheme—is reflected in Virginia's seventeenth proposed amendment, drafted by Madison and prominent Antifederalists, and later drawn upon by Madison in drafting the Ninth Amendment.⁹⁰ This proposal prohibited an inference of extended national powers from the enumeration of specific clauses limiting the exercise of federal powers and clarified that these stated limitations might in some cases be mere "cautionary" provisions that did not qualify any power actually granted.⁹¹

When the Ninth and Tenth Amendments are understood in this way, it becomes clear why Massey's attempt to turn the state-law rights concerns of the Antifederalists into a sword against delegated federal powers must fail. In the first place, if the goal of these amendments was to ensure that state-law

88. See *supra* notes 6-8 and accompanying text. The Federalists feared that the attempt to set forth a comprehensive set of rights would be taken as exhausting the people's rights as against the new government, in effect demolishing the distinction between the federal government, intended as a government of enumerated powers, and the state governments, which were conceived as governments of general powers. See, e.g., *supra* note 8 (statement by James Iredell).

89. THE FEDERALIST No. 84, at 579 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

90. Madison served with prominent Antifederalists George Mason and Patrick Henry on a committee appointed by the Virginia ratifying convention to draft the Virginia proposed amendments. McAfee, *supra* note 1, at 1236.

91. Virginia's seventeenth proposal read:

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

VIRGINIA RATIFYING CONVENTION (1788), reprinted in 2 SCHWARTZ, *supra* note 31, at 844.

rights secured by reserved state sovereignty remained unthreatened, the "rights" referred to in the Ninth Amendment would in no sense be "disparaged." They would only be disparaged if, contrary to the amendment's command, interpreters inferred enlarged rights-threatening federal power from the enumeration of the specific limitations in the Constitution and Bill of Rights.⁹² Massey's other argument against Caplan's state-law rights analysis—that the Antifederalists would have insisted that state-law rights serve as affirmative limits on federal power—is simply not supported by history. The evidence overwhelmingly shows an insistence by the Antifederalists that the Constitution should be amended to include the rights-protective features of *both* specific affirmative limitations on delegated powers and a general reservation of all powers not granted. At the same time, the Antifederalists were full participants in the process by which amendments were proposed by the state ratifying conventions, and none of the conventions that proposed amendments included any proposals for an amendment that would have qualified the Supremacy Clause or empowered states to overcome its effect by the adoption of individual rights guarantees in state law.⁹³

92. After all, no one claims that the rights secured by Article I's enumerated powers are "disparaged" simply because they do not serve as affirmative limitations on delegated powers, nor that the rights that Antifederalists sought to protect in the Tenth Amendment are "disparaged" because they flow from the "truism" that all not granted is reserved to the states and people. But these are all "unenumerated" rights. Moreover, if the summary of the historical purpose of the Ninth Amendment set forth in the text is correct, these sources of rights are the proper baselines for comparison, and the text of the Ninth Amendment is fully implemented by recognizing that it protects state-law rights, but only in a limited way. See also McAfee, *supra* note 1, at 1247 n.131. This criticism of the text-based "disparagement" argument as question-begging was advanced in 1990, but in his subsequent works Massey continues to rely heavily on this textual argument as though it had great independent weight in the debate. Despite the proffered critique, Massey disappointingly writes as though the point is both unassailable and unchallenged.

93. The statement in the text is true notwithstanding Massey's assertion that his reading receives "[e]xplicit support" from "such declarations" as the one he states was "proposed by the Pennsylvania ratification convention." Massey, *Antifederalism*, *supra* note 68, at 997. The proposed amendment in question provided that "every reserve of the rights of individuals" in the various state constitutions "shall remain inviolate, except so far as they are expressly and manifestly yielded or narrowed by the national Constitution." PROCEEDINGS OF THE MEETING AT HARRISBURG, IN PENNSYLVANIA (Sept. 3, 1788), reprinted in 2 ELLIOT'S DEBATES, *supra* note 8, at 545. However, the Pennsylvania ratifying convention did not propose any amendments to the Constitution. The proposed declaration to which he refers was drafted in September of 1788, almost a year after Pennsylvania ratified the Consti-

B. State-Law Rights and the Supremacy Clause

The "Reverse Preemption Clause" theory of the Ninth Amendment not only rests in unsupported speculation, but it is inherently implausible as well. Madison and the Federalist-dominated First Congress would never have advanced or accepted a constitutional amendment that so dramatically qualified federal supremacy.⁹⁴ During the ratification debate the

tution, and was adopted by a "convention" comprised of Antifederalist opponents of the Constitution. *See id.* at 542. In addition to adopting a specific list of proposed amendments, a number of which contemplated significant structural changes reflecting fundamental objections to the Constitution as adopted, *id.* at 545-46, this convention also proposed a second "general convention" for the purpose of revising the Constitution, *id.* at 544. The work of this particular convention was not, in short, of a nature to have been a likely source to which Madison would have looked in drafting his proposed bill of rights. Considering that the Ninth Amendment, especially as drafted and proposed by Madison, closely tracks language actually adopted by the Virginia Ratifying Convention, *see McAfee, supra* note 1, at 1278-82, there is no reason to think that this "Harrisburg" amendment influenced the drafting at all.

Moreover, it is extremely unlikely that even this "Harrisburg" amendment was intended to have the effect that Massey attributes to the Ninth Amendment. The amendment does not by its terms purport to give state constitutional rights priority over the exercise of federal powers, but to preserve them "except so far as they are expressly and manifestly yielded or narrowed by the national Constitution." PROCEEDINGS OF THE MEETING AT HARRISBURG, IN PENNSYLVANIA (Sept. 3, 1788), *reprinted in* 2 ELLIOT'S DEBATES, *supra* note 8, at 545. There is every reason to think that the Constitution's express and unqualified grant of power to Congress to raise and support an army, to use a prominent example from the ratification debates, would be understood as trumping state constitutional limits on the creation of standing armies in peacetime even under the "Harrisburg" amendment. While this proposed amendment could potentially have suggested a strict construction of federal powers, it is a virtual certainty that, had such a proposal received serious consideration, the requirement that state constitutional provisions be "expressly or manifestly" yielded to the nation would have been eliminated for the same reasons that the word "expressly" was eliminated from the Tenth Amendment over the objections of the Antifederalists. *See* THE FEDERALIST No. 44, at 303-04 (James Madison) (Jacob E. Cooke ed., 1961) (stating reasons framers did not track Article II's use of term "expressly" in stating principle of reserved sovereignty); *cf. Massey, supra* note 67, at 310-11 n.27 (explaining language change in Ninth Amendment away from a focus on "power" to a focus on "rights" as a decision against restricting congressional power to "the express grant of the Constitution" and reflecting "Madison's commitment, at the time, to a strong federal system").

94. Thus, Massey insists that the Ninth Amendment should be viewed as part of the "Antifederalist constitution," consisting especially of the Ninth through Eleventh Amendments, which he claims were "concerned with preserving the states as autonomous units of government and as structural bulwarks of human liberty." Massey, *Antifederalist Ninth Amendment, supra* note 68, at 1231. In support of this conclusion, he relies mainly on the Antifederalist demands for a bill of rights during the debate over ratification, as well as the close historical association of the Ninth with the Tenth Amendment—a provision universally demanded by Antifederalist critics of the Constitution. *Id.* While it is true that without the pres-

Federalists were adamant that federal supremacy over the limited objects of national power would have been implicit in the enterprise at hand, even without an express clause stating the principle of supremacy,⁹⁵ and that such supremacy was absolutely essential to the achievement of the goals of establishing a new constitution with enlarged powers.⁹⁶ Given that Massey sees the Ninth Amendment as reflecting "a desire to retain for the states maximum flexibility in defining the content of retained rights," he is not troubled by the prospect that

asures generated by the Antifederalists' demands that the Constitution more adequately secure traditional rights we may not have obtained a Bill of Rights, it does not follow that the meaning of crucial provisions is to be sought in Antifederalist political and constitutional philosophy.

Massey's analysis ignores the work of constitutional historians showing that the Federalist supporters of the Constitution dominated the amendment process, consistently supporting Madison's fixed determination to insert only amendments that secured long-established fundamental rights that would not be controversial. Letter from James Madison to Edmund Randolph (June 15, 1789), in 12 MADISON PAPERS 219 (explaining that under his proposed amendments "the structure & stamina of the Govt. are as little touched as possible," and that the proposed amendments would be limited to those "which are important in the eyes of many and can be objectionable in those of none"); Paul Finkelman, *The Ten Amendments as a Declaration of Rights*, 16 S. ILL. L.J. 351, 368-78 (1992) (describing how Madison and his Federalist counterparts in Congress systematically supported well-established individual rights guarantees while rejecting proposed amendments that "sounded in structure" and were viewed as posing a threat to the powers established by the Constitution); Donald S. Lutz, *The States and the U.S. Bill of Rights*, 16 S. ILL. L.J. 251, 258 (1992) (careful review of state proposals and Madison's proposed amendments confirms that Madison "avoided any alteration in the institutions defined by the Constitution, largely ignored specific prohibitions on national power, and opted instead for a list of rights that would clearly connect with the preferences of state governments, but would not increase state power vis-à-vis the national government defined in the Constitution"). Similarly, the Tenth Amendment was drafted to reaffirm the assumptions implicit in Article I without suggesting a rule of strict construction of national power, and Antifederalist attempts to insert the word "expressly" were defeated. See HOUSE COMMITTEE REPORT (July 28, 1789), reprinted in CREATING THE BILL OF RIGHTS, *supra* note 13, at 33 n.33 (reporting that on August 18 and 21, 1789, the House Committee of the Whole rejected a proposal to insert the word "expressly" in the proposed reserved powers amendment); HOUSE RESOLUTION AND ARTICLES OF AMENDMENT (Aug. 24, 1789), reprinted in CREATING THE BILL OF RIGHTS, *supra* note 13, at 41 n.21 (reporting that on September 7, 1789 the Senate also rejected a motion to insert "expressly").

95. See, e.g., THE FEDERALIST No. 33, at 204 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (Supremacy Clause "would have resulted by necessary and unavoidable implication from the very act of constituting a Federal Government, and vesting it with certain specified powers").

96. See, e.g., THE FEDERALIST No. 44, at 306 (James Madison) (Jacob E. Cooke ed., 1961) (attack on Supremacy Clause reflects "indiscreet zeal" inasmuch as without it the Constitution "would have been evidently and radically defective," and a "saving clause" in favor of state constitutions would have reduced the new national government to impotence).

federal laws within the scope of the powers granted by the Constitution could be valid in some states but not in others.⁹⁷ James Madison, however, saw it as a fatal objection to any attempt to preserve state powers against federal supremacy that "a treaty or national law of great and equal importance to the States, would interfere with some and not with other Constitutions, and would consequently be valid in some of the States at the same time that it would have no effect in others."⁹⁸

Moreover, considering the vagueness and generality of the Ninth Amendment, especially when read as a guarantee of affirmative limitations on government in favor of rights rather than as a clause securing the rights implicit in the original federal structure, the First Congress would have viewed a "reverse preemption" purpose, had it actually been proffered, as a rule lacking any sort of meaningful limits. Nothing in the Amendment's text suggests any possible limiting principle by which to judge the potential scope and implications of a provision guaranteeing state constitutional rights. One obvious consequence of a lack of a limiting principle would be that preexisting state constitutional rights that the framers had purposefully rejected would properly be held to limit federal power. To use the most obvious example, there is no question that the framers of the Constitution granted Congress an unqualified power to raise standing armies.⁹⁹ This was true even though opposition to peacetime standing armies, as a threat to liberty, had deep taproots in English constitutionalism,¹⁰⁰ and several state declarations of rights had stated limitations on the use of standing armies.¹⁰¹ A prohibition on standing armies was one

97. MASSEY, *SILENT RIGHTS*, *supra* note 68, at 134; *see also id.* at 135 (acknowledging that many would be troubled "that some Americans would enjoy more individual liberty than others," but arguing that this sort of outcome is implicit in our federal system).

98. *THE FEDERALIST* No. 44, at 306 (James Madison) (Jacob E. Cooke ed., 1961).

99. *See* JOYCE L. MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* 150-52 (1994).

100. JOHN P. REID, *THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION* 49 (1988) (stating that there were "few principles better established in eighteenth-century law than that a standing army was unconstitutional"). Indeed, Reid notes that among the colonies' grievances leading to the American Revolution was the claim that England had illegally kept standing armies in the colonies in times of peace. JOHN P. REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION* 175 (1986).

101. *See, e.g.*, *THE CONSTITUTION OF VIRGINIA—1776*, § 13, *reprinted in* 7 *THE*

of the most oft-stated demands for inclusion in a federal bill of rights,¹⁰² and such a prohibition was proposed in Congress even after Madison pointedly omitted it from the guarantees he drafted.¹⁰³ Considering that limits on standing armies were viewed as essential guarantees of liberty, particularly by the Antifederalists to whom Massey attributes the Ninth Amendment, these provisions would logically be included among the "retained rights" under Massey's theory, and would not give way to conflicting federal law. That the deliberate decision to extend this very power in the federal Constitution—a decision that engendered great controversy and was fiercely opposed as well as strongly defended—could be effectively nullified by the Ninth Amendment is simply not plausible.¹⁰⁴

FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 3814 (Francis N. Thorpe ed., 1909) (hereinafter THORPE) (providing "that standing armies, in time of peace, should be avoided, as dangerous to liberty"); THE CONSTITUTION OF NORTH CAROLINA—1776, Decl. of Rts. § 17, reprinted in 5 THORPE, *supra*, at 2788. In addition, Maryland and New Hampshire had provisions recognizing the danger of standing armies, but only requiring the consent of the legislature. THE CONSTITUTION OF MARYLAND—1776, Decl. of Rts. § 26, reprinted in 3 THORPE, *supra*, at 1688; THE CONSTITUTION OF NEW HAMPSHIRE—1784, Bill of Rts. § 25, reprinted in 4 THORPE, *supra*, at 2456.

102. See generally MALCOLM, *supra* note 99, at 155-56.

103. See HOUSE COMMITTEE REPORT (July 28, 1789), reprinted in CREATING THE BILL OF RIGHTS, *supra* note 13, at 30 n.13 (proposal to require a two-thirds majority in Congress to create a standing army in peacetime rejected in House of Representatives on August 17, 1789); HOUSE RESOLUTION AND ARTICLES OF AMENDMENT (Aug. 24, 1789), reprinted in CREATING THE BILL OF RIGHTS, *supra* note 13, at 38-39 n.13 (Senate rejects similar proposed amendment by a recorded vote of nine to six on September 4, 1789).

104. Indeed, this power of Congress fits quite obviously into Madison's criticism that any system of exemption of fundamental state law could rob essential federal laws of critical uniform application. See *supra* note 96. It is not even clear how such a state-law right could be enforced, whether by a prohibition of the state's citizens from service in such a standing army or a ruling that the federal army could not be stationed within the boundaries of the state protecting this right. While Massey might suggest that this prohibition is not the sort of liberty-bearing individual right contemplated by his understanding of the Ninth Amendment, given that it secures liberty for the collective citizenry by a structural limitation on power, it would be difficult to build a case that the founding generation would have relied upon any such distinction. After all, both the First Amendment right to assemble and petition and the Second Amendment declaration of the importance of a well-regulated militia, supported by the people's right to keep and bear arms, constitute guarantees that run in favor of the people collectively as much as to individuals. If rights retained by the sovereign people of the several states are not to be "disparaged" because of the Ninth Amendment, it is difficult to provide a principled ground for rejecting a right many Americans deemed among the most fundamental.

Similarly, the text of the Ninth Amendment provides no clue as to how to resolve the conflicts among rights to which such a regime would inevitably give rise. For example, Massey assumes that the Supremacy Clause dictates that a right "with its substantive source in federal law," such as one of the rights enumerated in the Bill of Rights, prevails over a state constitutional guarantee with which it conflicts.¹⁰⁵ But if state constitutional rights might prevail over enumerated federal powers, notwithstanding the Supremacy Clause, as Massey's theory posits, it is not clear why state-law rights might not also prevail over rights rooted substantively in federal law. In fact, Massey does not explain how to reconcile this priority for rights rooted in federal law with the Ninth Amendment's asserted purpose to establish that "[t]he citizens of each state would be entitled to define their relationship with all of their governmental agents."¹⁰⁶ Nor does he attempt to explain how giving priority to enumerated federal rights fits together with the argument that the Ninth Amendment itself prohibits disparaging the unenumerated retained rights. Thus, Massey's own Supremacy Clause argument appears to give the unenumerated retained rights the lesser status he elsewhere rejects.

Recognizing that the Supremacy Clause and structural analysis cannot do all of the work required to avoid unwelcome outcomes of his states' rights thesis, Massey eventually simply delegates to the Supreme Court the task of preventing potential state abuses that such a guarantee might permit. According to Massey, the Supreme Court should determine whether particular state constitutional guarantees were truly designed

105. Massey, *Antifederalist Ninth Amendment*, *supra* note 68, at 1255.

106. *Id.* at 1248. Remarkably enough, Massey even relies on this Supremacy Clause technique to resolve the conflict between a hypothetical state constitutional "right to life" guarantee and *Roe v. Wade*, 410 U.S. 113 (1973). To the extent, however, that *Roe* itself is based on a Court-created unenumerated right of privacy, and thus is properly seen as a Ninth Amendment right, a question raised is why a judicially-created right should prevail over one adopted by the people of a state. Without entering the mysteries of the Fourteenth Amendment and any difficulties associated with incorporating the Ninth Amendment, it might be wondered why the Supreme Court's view of unenumerated rights should prevail over the views of the sovereign people of a particular state—especially given the purpose attributed to the Ninth Amendment in the statement quoted above in the text. Can there be any doubt, after all, how the Antifederalists would have resolved such a conflict if they were choosing between rights deemed fundamental by the people of the individual states and those deemed fundamental by the United States Supreme Court? It is difficult to think that the Antifederalists would have interpreted "their" amendment the way Massey does.

“to limit the ability of any government—state or federal—to invade the individual rights the sovereign people deem precious,”¹⁰⁷ or merely to “frustrate national policies squarely within the legitimate powers of the national government.”¹⁰⁸ Ultimately, even as to state guarantees reflecting a bona fide theory of individual liberty, the Court would be empowered “to limit putative ninth amendment rights to those that do not significantly impair other existing and recognized fundamental rights.”¹⁰⁹ While Massey offers an extensive analysis as to how the Court might go about the task of balancing fundamental rights and federalism values and prioritizing fundamental rights,¹¹⁰ the suggested approach reads like a rescue operation designed to avoid the clear implications of granting subordinate units the power to create rights that trump federal power. Apart from Massey’s failure to link any of this more extended analysis to any plausible theory of the text and history of the Ninth Amendment, these qualifications substitute unbridled judicial discretion to balance national interests with state constitutional rights for what would otherwise be a states’ rights guarantee. Such an outcome would have pleased the Antifederalists by supplying the means of sabotaging the federal system established by the unamended Constitution.

V. CONCLUSIONS

What all these commentators share is an unwillingness to accept the straightforward understanding that the federal structure, as originally conceived, served in part to secure popular rights and that it was the device of enumerated powers that the Ninth and Tenth Amendments were intended to preserve. One obvious reason for this is that while these proponents of expansive readings of the Ninth Amendment refer to restoring our federal system as a guarantee of liberty, they are more in favor of expansive national power to secure fundamental rights than of federalism as it was originally conceived. If we want the Ninth and Tenth Amendments to serve the cause

107. Massey, *Antifederalist Ninth Amendment*, *supra* note 68, at 1256-57.

108. *Id.* at 1256. Along similar lines, Massey suggests that the Court might invalidate state law guarantees that threaten “the kind of economic or social balkanization that the original Constitution was designed to prevent” along the lines of modern dormant commerce clause doctrine. *Id.* at 1263; *see also id.* at 1263-65.

109. *Id.* at 1257.

110. *See, e.g.,* MASSEY, *SILENT RIGHTS*, *supra* note 68, at 148-73.

of liberty, while remaining true to the Constitution as it was drafted and understood, the best solution may be to look more sympathetically at the Supreme Court's decisions in *New York v. United States*¹¹¹ and *United States v. Lopez*.¹¹²

Another implication is that we might be forced to acknowledge that we have come to value other goals above those of the liberties secured by our federal system. Perhaps the Antifederalists were right, and it is a good thing we included a federal Bill of Rights. If the rights we obtained in the Bill of Rights, as supplemented by subsequent amendments, are insufficient, Article V of the Constitution sets forth a method for adding additional rights. The one thing we should not do is misread the Constitution and its history to justify informally amending the Constitution to secure limits on government that the framers never conceived of and would never have adopted; nor should we empower the judiciary in ways that the framers, with good reason, would never have thought acceptable.

111. 505 U.S. 144 (1992) (limiting federal power to dictate action by state governments based on the assumptions underlying our federal scheme).

112. 115 S. Ct. 1624 (1995) (recognizing for the first time in 60 years limits on the regulatory powers of Congress under the commerce clause).