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**The Lost Jurisprudence of the Ninth Amendment**

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## Articles

### The Lost Jurisprudence of the Ninth Amendment

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*It is widely assumed that the Ninth Amendment languished in constitutional obscurity until it was resurrected by Justice Arthur Goldberg in the 1965 case, *Griswold v. Connecticut*. In fact, the Ninth Amendment played a significant role in some of the most important constitutional disputes in our nation's history, including the scope of exclusive versus concurrent federal power, the authority of the federal government to regulate slavery, the right of the states to secede from the Union, the constitutionality of the New Deal, and the legitimacy and scope of incorporation of the Bill of Rights into the Fourteenth Amendment. The second of two articles addressing the lost history of the Ninth Amendment, *The Lost Jurisprudence* takes a comprehensive look at the Ninth Amendment jurisprudence that flourished from the early nineteenth to the mid-twentieth century. Though long assumed never to have received significant attention from the Supreme Court, the first discussion and application of the Ninth Amendment was, in fact, by Supreme Court Justice and constitutional treatise author Joseph Story. In a passage unnoticed since the nineteenth century, Justice Story interpreted and applied the Ninth Amendment precisely the way James Madison and the state ratifying conventions intended—as a rule of construction preserving the retained right of local self-government. Ignored by the framers of the Fourteenth Amendment, the Ninth Amendment and its attendant rule of construction were deployed by courts throughout the nineteenth and early twentieth centuries to limit the interpretation of federal powers and rights. Ubiquitously paired with the Tenth Amendment, the Ninth suffered the same fate as the Tenth at the time of the New Deal, when both were rendered mere “truisms” in the face of expansive constructions of federal power. By 1965, the Ninth was assumed to exist in a doctrinal and historical vacuum, an assumption that no one has questioned until now.*

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## I. Introduction

It is widely assumed that the Ninth Amendment<sup>1</sup> languished in constitutional obscurity until it was resurrected by Justice Arthur Goldberg in 1965.<sup>2</sup> In his concurring opinion in *Griswold v. Connecticut*, Justice

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

2. See EDWARD DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 64 (1957) (“There is no occasion for amazement when the fact comes to light that apparently there has never been a case decided which turned upon the Ninth Amendment. It has been invoked by litigants only ten times and in each instance without success.”); CALVIN R. MASSEY, *SILENT RIGHTS: THE NINTH AMENDMENT AND THE CONSTITUTION’S UNENUMERATED RIGHTS* 9–10 (1995) [hereinafter MASSEY, *SILENT RIGHTS*] (“Very little effort has been devoted to doctrinal argument for the simple reason that a majority of the Supreme Court has never relied upon the Ninth Amendment as the

Goldberg announced that “this court has had little occasion to interpret the Ninth Amendment.”<sup>3</sup> Pointedly citing Bennett Patterson’s 1955 book *The Forgotten Ninth Amendment*, Goldberg announced that he had located only three prior Supreme Court discussions of the Ninth Amendment, none of which offered much help.<sup>4</sup> There being no precedent to guide the Court, Goldberg consulted what he believed was the original understanding of the

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basis for any decision.”); *id.* at 224 n.17. (“Only seven Supreme Court cases prior to *Griswold* dealt in any fashion with the Ninth Amendment.”); BENNETT B. PATTERSON, *THE FORGOTTEN NINTH AMENDMENT 27* (1955) (“There has been no direct judicial construction of the Ninth Amendment by the Supreme Court of the United States of America. There are very few cases in the inferior courts in which any attempt has been made to use the Ninth Amendment as the basis for the assertion of a right.”); PROCESSES OF CONSTITUTIONAL DECISIONMAKING 113 (Paul Brest et al. eds., 4th ed. 2000) (“The title of Bennett Patterson’s 1995 book, *The Forgotten Ninth Amendment*, accurately captures the status of this provision of the Bill of Rights throughout most of our constitutional history.”); Eric M. Axler, *The Power of the Preamble and the Ninth Amendment: The Restoration of the People’s Unenumerated Rights*, 24 SETON HALL LEGIS. J. 431, 442 (2000) (“While the Amendment began as an important condition to the states’ ratification of the Constitution, it subsequently went unnoticed by the Supreme Court for 174 years.”); Randy E. Barnett, *Introduction: James Madison’s Ninth Amendment*, in 1 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT vii (Randy E. Barnett ed., 1989) [hereinafter RIGHTS RETAINED BY THE PEOPLE] (“For all but the last quarter of a century the amendment lay dormant, rarely discussed and justifiably described as ‘forgotten’ in the one book devoted to it.”); Raoul Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1, 1 (1980) (“Justice Goldberg rescued [the Ninth Amendment] from obscurity in his concurring opinion in *Griswold v. Connecticut*.”); *id.* at n.3. (“Prior to *Griswold* . . . the court had few occasions to probe the meaning of the Ninth Amendment.”); Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 223–24 (1983) (“After lying dormant for over a century and a half, the ninth amendment to the United States Constitution has emerged from obscurity to assume a place of increasing, if bemused, attention. . . . Ninth Amendment analysis has proceeded in three stages. In the first stage, which lasted until 1965, the amendment received only perfunctory treatment from courts and commentators.”); *id.* at 224 n.5 (“During this first period there were only the most glancing judicial and scholarly references to the ninth amendment, with no explicit construction of the amendment by the Supreme Court in the seven cases that represent the sum total of the Court’s pronouncements on the amendment prior to 1965.”); Knowlton H. Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L.J. 309, 319 (1936) (“There seems to be no case that decides the scope of the Ninth Amendment even in part. In decisions where it is mentioned, it is either grouped with the Tenth Amendment in decisions based upon or involving the latter, and hence concerning reservation or denial of power, or it is merely classified as one of the first ten which are held to be limitations on national and not on state power. No case has been found that uses the Ninth Amendment as the basis for the assertion or vindication of a Right.”); Mark C. Niles, *Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights*, 48 UCLA L. REV. 85, 89 (2000) (“N]o Supreme Court decision, and few federal appellate decisions, have relied on the Ninth Amendment for support.”); Norman Redlich, *Are There “Certain Rights . . . Retained by the People”?*, 37 N.Y.U. L. REV. 787, 808 (1962) (“The Ninth Amendment has been mentioned in several cases but no decision has ever been based on it.”) (citing cases listed in PATTERSON, *supra* at 27–35); Chase J. Sanders, *Ninth Life: An Interpretive Theory of the Ninth Amendment*, 69 IND. L.J. 759, 769 (1994) (“[U]ntil 1965, the Court mentioned the Ninth Amendment in fewer than ten cases. In all but one of these, the references were brief and passing.”); Eugene M. Van Loan, III, *Natural Rights and the Ninth Amendment*, 48 BYU L. REV. 1, 1 n.3 (1968) (citing only two pre-1900 cases, Van Loan concludes that “[i]n the few cases where anything more than a cursory reference to the ninth appeared, it was lumped with the tenth, as an innocuous rule of construction limiting the federal government to its delegated powers”).

3. *Griswold*, 381 U.S. at 490.

4. *Id.* at 490 n.6.

Founders. After quoting Madison's speech introducing the Bill of Rights to the House of Representatives and Joseph Story's *Commentaries*, Goldberg concluded that "[t]hese statements of Madison and Story make clear that the framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people."<sup>5</sup> Although Justices Hugo Black and Potter Stewart dissented, they agreed that the Ninth had been little used, and they derided their fellow Justice's "recent discovery" of the Clause.<sup>6</sup> Since *Griswold*, a lively scholarly debate has emerged over the meaning of the Ninth. All sides in this debate believe that the Amendment received little judicial construction prior to 1965.<sup>7</sup>

In fact, there is a surprisingly rich history of legal interpretation and judicial application of the Ninth Amendment prior to *Griswold*. Beginning in 1789 and extending to 1964, the Ninth Amendment played a significant role in some of the most important constitutional disputes in our nation's history, including the ratification of the Bill of Rights, the constitutionality of the Bank of the United States, the scope of exclusive versus concurrent federal power, the authority of the federal government to regulate slavery, the right of states to secede from the Union, the constitutionality of the New Deal, and the legitimacy and scope of incorporation doctrine.

In the first of two articles on the lost history of the Ninth Amendment, *The Lost Original Meaning*,<sup>8</sup> I presented previously missed or mislabeled evidence regarding the adoption and early understanding of the Ninth Amendment. Responding to calls from state conventions, including those from his home state of Virginia, Madison's draft of the Ninth Amendment expressed a rule of interpretation preventing the constructive enlargement of enumerated federal power.<sup>9</sup> Although the final draft used the language of retained rights, Madison insisted that the provision continued to protect the

5. *Id.* at 490.

6. *Id.* at 518–19 (Black, J., dissenting). Justice Black noted: My Brother Goldberg has adopted the recent discovery that the Ninth Amendment as well as the Due Process Clause can be used by this Court as authority to strike down all state legislation which this Court thinks violates "fundamental principles of liberty and justice," or is contrary to the "traditions and (collective) conscience of our people."

*Id.* (citing PATTERSON, *supra* note 2, at 4).

7. See *supra* note 2. Occasionally, some scholars acknowledge historical references to the Ninth Amendment, but these references are dismissed as not really involving the Ninth Amendment. See PATTERSON, *supra* note 2, at 32 ("There are a number of cases which briefly mention the Ninth Amendment by grouping it with the Tenth Amendment. However, these decisions do not actually discuss the Ninth Amendment, but actually discuss the Tenth Amendment."); Van Loan, *supra* note 2, at 1 n.3 ("In the few cases where anything more than a cursory reference to the ninth appeared, it was lumped with the Tenth, as an innocuous rule of construction limiting the federal government to its delegated powers.").

8. Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEXAS L. REV. 331 (2004) [hereinafter Lash, *The Lost Original Meaning*].

9. *Id.* at 360–62.

states from unduly broad interpretations of federal power.<sup>10</sup> In a critical speech before the House of Representatives, Madison linked the Ninth Amendment to the demands of the state conventions and explained that the purpose of the Ninth was to “guard[] against a latitude of interpretation” while the Tenth Amendment “exclude[ed] every source of power not within the constitution itself.”<sup>11</sup>

This second Article, *The Lost Jurisprudence*, takes up where the first left off. It takes a comprehensive look at the Ninth Amendment jurisprudence that flourished from the early nineteenth century to the mid-twentieth century. This jurisprudence is divided into three periods: Founding to Civil War, Reconstruction to the New Deal, and Post-New Deal to *Griswold v. Connecticut*.

During the first of these periods, Founding to the Civil War, courts interpreted the Ninth Amendment precisely along the lines anticipated by James Madison and insisted upon by the state ratifying conventions. Instead of being read as a source of individual rights, courts deployed the Ninth as a tool for preserving state autonomy. Of particular concern was the degree to which states could exercise concurrent authority over matters falling within the scope of enumerated federal power. In a previously unrecognized discussion of the Ninth Amendment, Justice Joseph Story described how the Ninth mandates a limited construction of federal power in order to preserve the concurrent powers of the states. Story’s reading of the Ninth Amendment echoed that of James Madison, and his opinion, though lost to us today, remained influential for more than a century.

Given its role in preserving states’ retained rights, the Ninth Amendment inevitably became entangled with the struggle over the southern institution of slavery. Both slave and free states attempted to use the Ninth Amendment to defend local regulations regarding slavery. No one, however, attempted to use the Ninth as a source of individual rights on behalf of the enslaved. Given their common ~~deployment~~ application as states’ rights provisions, it is no surprise that John Bingham left both the Ninth and Tenth Amendments off his list of privileges or immunities protected against state action by the Fourteenth Amendment.

In the period from Reconstruction to the New Deal, courts and commentators continued to cite the Ninth Amendment in conjunction with the Tenth as one of the twin guardians of state autonomy. Instead of reading the Ninth Amendment as foreshadowing the newly protected privileges or immunities of United States citizens, courts applied the rule of construction represented by the Ninth to *limit* the interpretation of Fourteenth Amendment rights. As the country moved into the new century and began to experiment with greater centralized control of labor and industry, the Ninth and Tenth

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10. *Id.* at 361.

11. James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791), in JAMES MADISON: WRITINGS 489 (Jack N. Rakove ed., 1999).

Amendments continued to serve as barriers against the expansion of federal power. So closely aligned were the Ninth and Tenth Amendments that courts regularly combined their language and treated them as expressing a single principle of limited federal power. More and more, the Tenth Amendment was read to contain its own rule of construction, obviating the need to separately analyze the Ninth. Nevertheless, in every case in which the Ninth was discussed, courts continued to follow the Madisonian reading of the Amendment.

In the third and final period discussed in this article, the New Deal to *Griswold*, the traditional reading of the Ninth Amendment disappeared during the dramatic reconfiguration of federal power that occurred after 1937. Although initially relied upon by courts in resistance to President Roosevelt's attempts to regulate the national economy, both the Ninth and Tenth Amendments were reduced to no more than truisms by Justice Robert's "switch in time." Free from the restraining rule of construction previously associated with the Ninth Amendment, the Supreme Court expanded the scope of federal power without regard to the impact on state regulatory autonomy.

The expansion of regulatory power at the time of the New Deal required a concomitant reduction in the Court's previously broad interpretation of liberty under the Due Process Clause. After 1937, the issue became how to reconstruct that liberty in light of the New Deal Court's general deference to the political process. In particular, having limited due process liberty to the rights listed in the text of the Bill of Rights, the New Deal Court had to decide whether all of the Bill of Rights should be incorporated against the states. It was here that the traditional doctrine of the Ninth Amendment made its last stand. Applying a rule of construction based on the Ninth and Tenth Amendments, the Supreme Court initially resisted incorporation claims in order to preserve the states' retained rights to establish local rules of criminal procedure. As the Court gradually incorporated most of the Bill of Rights, this final application of the traditional Ninth Amendment also faded away.

By the time Bennett Patterson wrote his book, *The Forgotten Ninth Amendment*, in 1955, almost all traces of the traditional Ninth Amendment had disappeared. James Madison's speeches and the Supreme Court's early opinions dealing with the Ninth Amendment had long been lost, and the vast jurisprudence of the Ninth Amendment was dismissed as really having to do with the Tenth Amendment. Thus, when Justice Arthur Goldberg penned his opinion in *Griswold v. Connecticut*, the Ninth Amendment appeared to exist in a doctrinal and historical vacuum.

This Article concludes by considering the possibility that, even if the traditional understanding of the Ninth Amendment until now has been lost, the rule of construction represented by the Ninth lives on. Although generally associated with the Tenth Amendment, the federalism jurisprudence of the contemporary Supreme Court echoes the same rule of

construction originally associated with the Ninth. Thus, when contemporary courts rule in favor of state autonomy, whether in regard to commerce or state authorized medicinal use of marijuana, they are echoing the voices of countless judges who throughout our constitutional history have sought to protect the retained right of the people to local self-government.

## II. Beginnings: The Ninth Amendment in Antebellum America

### A. *The Federalist Reading of the Ninth Amendment*

The reader is presumed to have already read the first of these two articles on the lost history of the Ninth Amendment. However, because the history presented in the first article plays an important role in understanding the jurisprudence that this Article recovers, a brief review is in order.

The state conventions that insisted on adding a Bill of Rights specifically suggested the addition of two separate amendments: One declaring the principle of enumerated federal power with all nondelegated power being reserved to the states, and the second declaring a rule of construction limiting the interpretation of enumerated federal power. Madison's proposed draft of the Bill of Rights included two provisions that mirrored the amendments suggested by the state conventions: a declaration of reserved nondelegated power and a rule of construction that prohibited the undue extension of federal power and preserved the people's retained rights.<sup>12</sup> Ultimately, these would become our Ninth and Tenth Amendments.

The final draft of the Tenth Amendment added the words "or to the people" but otherwise remained the same as Madison's original draft. The final draft of the Ninth Amendment, however, dropped the extension of power language while keeping the language of retained rights. Although Madison insisted that the meaning of the Ninth Amendment had not changed, the Virginia Assembly was not convinced and delayed its ratification of the Bill of Rights due to its concern that the demand for a rule limiting the interpretation of enumerated federal power had been ignored.<sup>13</sup> Other states, however, quickly ratified ten out of twelve proposed amendments, including what we know as the Ninth and Tenth.

While the Bill remained pending in Virginia, James Madison delivered a speech on the floor of the House of Representatives in which he explained the origin and meaning of the Ninth and Tenth Amendments. According to Madison, these amendments were intended to limit the federal government's ability to interfere with matters belonging under local or state control, including mining, agriculture, and commerce. The Ninth Amendment in particular prohibited any "latitude of interpretation" unduly extending the powers of the federal government into matters retained by the people of the

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12. Lash, *The Lost Original Meaning*, *supra* note 8, at 360.

13. *Id.* at 371–75.



several states.<sup>14</sup> Later that same year, Virginia abandoned its objections to the Ninth Amendment and ratified what we know as the Bill of Rights.<sup>15</sup>

This history, recounted in the first article, reveals the origins of the Ninth Amendment as a tool for limiting federal intrusion into matters believed best left under local control. Both the Ninth and Tenth Amendments guarded the principle of federalism by preserving the retained right of the people to local self-government. The amendments, however, differed in application. The Tenth Amendment ensured that the federal government could exercise only those powers enumerated in the Constitution, with all other powers generally reserved to the states. In theory, however, enumerated federal power could be so broadly construed as to allow the federal government to regulate all matters not specifically placed out of bounds by the Bill of Rights. The Ninth Amendment addressed this concern by ensuring that the rights enumerated in the Bill would not be construed as the only limits on federal power. The effect of the provision, as Madison explained in his letters and speeches, was to prevent any interpretation of enumerated federal power that would allow federal authority to extend into subjects left, as a matter of right, to the sovereign control of the people of the several states.

Over time, the Tenth Amendment also came to be read as expressing a rule of construction limiting the interpretation of federal power. No one disputed Madison's federalist reading of the Ninth Amendment, however, and both bench and bar continued to cite the Ninth as a federalism-based rule of interpretation for more than one hundred years. Before exploring those cases in depth, however, we should first consider the dog that did not bark: judicial interpretation of the Ninth Amendment as a source of unenumerated individual rights.

### B. *The Unenumerated Rights Cases*

Nineteenth century cases discussing the Ninth Amendment as a source of unenumerated rights are extremely rare.<sup>16</sup> Prior to the Civil War, there appear to have been only three attempts by litigants to raise such claims.<sup>17</sup>

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14. *Id.* at 384–93.

15. *Id.* at 379–84.

16. I have found no clear evidence that any party even made such a claim before a state court during this period. One possible exception is *In re Graduates*, 11 Abb. Pr. 301, 322 n.4 (N.Y. Sup. Ct. 1860), but the reference to the Ninth is obscure and made in passing.

17. One other possible unenumerated rights reference may be found in Justice Baldwin's circuit court opinion in *Magill v. Brown*, 16 F. Cas. 408 (C.C.E.D. Pa. 1833) (No. 8,952). In the midst of his 44 page opinion, Justice Baldwin briefly refers to the "personal rights . . . protected by the 2d and 3d clauses of section 9, art. 1, of the constitution, and the 9th amendment." *Id.* at 428. Although Baldwin describes the Ninth as protecting "personal rights," this is not inconsistent with a federalist reading of the Ninth. St. George Tucker also referred to the Ninth as protecting personal rights, but with a decidedly states' rights spin. See Lash, *The Lost Original Meaning*, *supra* note 8, at 396–97. In this regard, it is significant that Baldwin links the Ninth to restrictions on the federal government in Article I, § 9 and *not* to the restrictions on the states in Article I, § 10. Baldwin

All of these attempts were rejected by the courts. In 1799, an American citizen named Jonathan Robins was accused of committing murder on the high seas aboard a British war ship.<sup>18</sup> Under a treaty with Great Britain, Robins was to be extradited to Great Britain for prosecution.<sup>19</sup> Robins fought the extradition on the grounds that it denied him his constitutional right to trial by jury.<sup>20</sup> According to Robins's attorney, both the Ninth and Tenth Amendments reserved to the people the right to trial by jury.<sup>21</sup> The court rejected the claim without specifically discussing the Ninth and Tenth Amendments, instead summarily stating that "[t]he objections made to the treaty's being contrary to the constitution, have been so often and so fully argued and refuted, that I was in hopes no time would have been occupied on that subject."<sup>22</sup>

In *Holmes v. Jennison*, a Canadian citizen, accused of a murder committed in Canada, was arrested in Vermont.<sup>23</sup> On his own initiative, the Governor of Vermont directed the state court to deliver the prisoner to Canadian authorities, despite the fact that there was no extradition treaty in force between the United States and Great Britain, the sovereign authority over Canada.<sup>24</sup> In his argument before the Supreme Court, former Governor C. P. Van Ness<sup>25</sup> argued that the current Governor's unilateral action violated

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himself was a controversial figure on the Court whose opinions were described by fellow Justice Joseph Story as "so utterly wrong in principle and authority, that I am sure he cannot be sane." J. Story to J. Hopkinson, May 9, 1833, Hopkinson Papers, *reprinted in* 3-4 G. EDWARD WHITE, HISTORY OF THE SUPREME COURT, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-35, at 298 (1988).

18. *United States v. Robins*, 27 F. Cas. 825, 826 (D.C.S.C. 1799) (No. 16, 175).

19. *Id.*

20. *Id.* at 828.

21. According to Robins' attorney:

[Natural rights] not given up, formed a sacred residuum in the hands of the people, and which are unalienable by any act of legislation: that this was no visionary theory of ancient writers, but is the true and modern ground of all social union: and it is fully recognized in our free constitution; for by article 12th, of the amendments to our constitution, it is declared, "that all powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." And the 11th section declares, "the enumeration in the constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

*Id.* at 828-29.

22. *Id.* at 832.

23. 39 U.S. (14 Pet.) 540, 540 (1840).

24. *Id.* at 541-42.

25. When he was governor, Van Ness had been told by the U.S. State Department not to hand over the prisoner because an extradition treaty was still under negotiation. See CARL B. SWISHER, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD, 1836-1864, at 175 (1974) (noting that Van Ness, "meticulous about the exercise of constitutional powers," refused to honor extradition requests from the Governor of Canada, instead referring the request to Secretary of State Henry Clay). Apparently, when the governorship changed hands, the new governor was willing to extradite even without a federal treaty. See *id.* (indicating that other governors treated extradition requests as a matter of their own discretion).

the defendant's right to due process under the Fifth Amendment.<sup>26</sup> Calling on the Court to reverse its recent decision in *Baron v. Baltimore*,<sup>27</sup> Van Ness argued that the people retained inherent personal rights that should be respected by all governments, state and federal.<sup>28</sup> He distinguished the retained rights of the Ninth Amendment from the reservation of powers in the Tenth and argued that not only were such rights recognized in the Ninth Amendment, but also that the Bill of Rights should be read as granting the federal government power to protect these rights against state intrusion.<sup>29</sup> The Court rejected this attempt to reverse *Baron* and dismissed the case for want of jurisdiction without discussing Van Ness's interpretation of the Ninth and Tenth Amendments or his remarkable argument that the original Bill of Rights was a source of federal regulatory power.<sup>30</sup>

Instead of viewing the Ninth as protecting unenumerated rights, the Supreme Court during this period appeared to presumptively treat Ninth Amendment claims as involving the proper interpretation of federal power. In *Roosevelt v. Meyer*, Meyer wished to pay a debt he owed Roosevelt in notes issued by the United States.<sup>31</sup> There being some question whether the United States government had the power to issue such notes, the two parties went to state court seeking a judgment regarding the validity of the notes.<sup>32</sup> According to the record:

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26. *Holmes*, 39 U.S. at 555.

27. *Id.*

28. *Id.* at 556.

29. According to Van Ness:

But the distinction which I have endeavoured to establish between the limitations of power and the declarations of rights, is adopted in the clearest manner in the Constitution itself. The ninth article of the amendments declares, that "the enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." And the tenth article provides, that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Here we see that the framers of these amendments had no idea of confounding the limitations of power, and the declarations of rights; but treated each as distinct from the other. If the amendments had treated only of the former, certainly the reservation, both to the states and to the people, in the tenth article, would have answered every purpose. But the ninth article was deemed necessary as it regarded the rights declared to exist, in order to prevent the people from being deprived of others by implication, that might not be included in the enumeration.

It appears clear to my mind, then, that the provision in the Constitution to which I have referred, instead of limiting the powers of the general government, directly calls into action those powers for the protection of the citizen.

*Id.* at 557.

30. In all of the cases I have discovered that discussed the Ninth and Tenth Amendments, Van Ness's argument was the sole attempt to distinguish rights under the Ninth from powers under the Tenth. *But see* John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967, 1004-06 (1993) (discussing Van Ness's argument as evidence of an individual rights reading of the Ninth Amendment).

31. 68 U.S. (1 Wall.) 512, 513 (1863).

32. The notes had been issued according to an 1862 act that declared the notes should be "lawful money and a legal tender in payment of all debts, public and private, except duties on

[Roosevelt] *relied* upon certain provisions in the Constitution of the United States, namely Article I, section 8, clause 5, of the said Constitution, and Articles 5, 9, and 10 of the amendments thereof, the effect of which, as the said respondent *insisted*, was, that the debt, owing to the said respondent upon and by virtue of the bond and mortgage mentioned in the submission of the case, could not be paid against the will of the said creditor in anything but gold or silver coin . . . .<sup>33</sup>

The highest court of New York ruled that the notes were valid legal tender, and Roosevelt appealed to the United States Supreme Court. There, Meyer argued that the appeal should be dismissed on the grounds that the Supreme Court lacked jurisdiction to hear the case.<sup>34</sup> Section 25 of the Judiciary Act of 1789 granted the Supreme Court appellate jurisdiction “where is drawn in question the construction of any clause of the Constitution, or of a . . . statute of . . . the United States, and the decision is *against* the title, right, privilege, or exemption specially set up or claimed by either party under such clause of the said Constitution.”<sup>35</sup> According to Meyer, because the state court had *upheld* the validity of the Act, the Supreme Court had no jurisdiction to hear the appeal.<sup>36</sup> Although Roosevelt had included the Fifth, Ninth, and Tenth Amendments in his original claim, Meyer argued that these constitutional provisions were cited only in support of Roosevelt’s main argument that Congress had no power to issue the notes.<sup>37</sup> The Supreme Court agreed and dismissed the appeal for want of jurisdiction.<sup>38</sup> The Court thus treated Roosevelt’s Ninth Amendment claim not as an unenumerated right, but as a rule for construing federal power under the Bankruptcy Clause.<sup>39</sup>

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imports, and interest on the Federal debt.” *Id.* at 513 (emphasis omitted) (quoting Act of Feb. 25, 1862, ch. 33, § 1, 12 Stat. 345). The controversy over legal tender would continue after the civil war. *See infra* section III(B)(1) (discussing the *Legal Tender Cases*).

33. *Roosevelt*, 68 U.S. at 514–15.

34. *Id.* at 515–16.

35. *Id.* at 512–13 (alteration in original).

36. *Id.* at 515.

37. *Id.* at 515–16.

38. *Id.* at 517.

39. Roosevelt himself apparently recognized the problem and thus focused on the Fifth Amendment, not the Ninth, in his argument before the Supreme Court. *Id.* at 516. In the post-Civil War decision, *Trebilcock v. Wilson*, 79 U.S. (12 Wall.) 687 (1871), the Supreme Court viewed the denial of jurisdiction in *Roosevelt* as error. *Id.* at 692–93. According to Justice Field in *Trebilcock*, the claim could be construed as involving the right to be paid in specie under a proper construction of the Ninth and Tenth Amendments. *Id.* at 693–94. This was a denial of right involving the construction of the Fifth, Ninth, and Tenth Amendments and thus sufficient to satisfy the jurisdiction requirements of Section 25 of the Judiciary Act. *Id.* at 693. *Trebilcock* does not dispute the *Meyer* Court’s view that the Ninth and Tenth can be used to determine the scope of federal power; it only asserts that claims under the Fifth, Ninth, and Tenth Amendments raise rights sufficient to trigger jurisdiction.

Finally, while riding circuit in New Hampshire only two years after joining the Supreme Court, Justice Joseph Story decided *Society for the Propagation of the Gospel v. Wheeler*.<sup>40</sup> *Wheeler* involved a state law that allowed tenants to recover the value of improvements. The claim was that the law was:

[I]n contravention of the 2d, 3d, 12th, 14th and 20th articles of the bill of rights, in the constitution of New Hampshire; and of the 10th section of the first article, and the 9th article of the amendments, of the constitution of the United States; and is also repugnant to natural justice; and is therefore void.<sup>41</sup>

Justice Story dismissed the constitutional claim:

In respect also to the constitution of the United States, the statute in question cannot be considered as void. The only article which bears on the subject, is that which declares, that no state shall pass ‘any ex post facto law, or law impairing the obligation of contracts.’ There is no pretence of any contract being impaired between the parties before the court. The compensation is for a tort, in respect to which the legislature have created and not destroyed an obligation. Nor is this an ex post facto law within this clause of the constitution, for it has been solemnly adjudged, that it applies only to laws, which render an act punishable in a manner, in which it was not punishable, when it was committed. The clause does not touch civil rights or civil remedies.

The remaining question then is, whether the act is contrary to the constitution of New Hampshire.<sup>42</sup>

In this passage, Story ignores the Ninth Amendment claim, despite the alleged violation of natural rights. Even though the case involved a claim of natural justice, Story viewed the Ninth Amendment as having no “bear[ing] on the subject.”<sup>43</sup> It is only after Story expressly moved from considering the federal Constitution to issues of state law that he addressed “natural justice.”<sup>44</sup> The implication is that, to Story, natural rights were a matter of state law and not a judicially enforceable aspect of the federal Ninth Amendment.<sup>45</sup>

The rarity and universal rejection of attempts to read the Ninth Amendment as a source of libertarian rights tracks the original understanding of the Ninth as a rule protecting the retained collective rights of the people of the several states. It is not that the Founding generation rejected the idea of

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40. 22 F. Cas. 756 (C.C.D.N.H. 1814) (No. 13,156).

41. *Id.* at 766.

42. *Id.* at 767 (internal citations omitted).

43. *See id.*

44. *Id.* at 767–68.

45. For a general discussion of how the original understanding of the Ninth Amendment relates to the Founding-era understanding of natural rights, see Lash, *supra* note 8, at 401–10.

individual natural rights. Far from it.<sup>46</sup> But claims of natural rights were presumptively matters of state law, distinct from the limitations on federal power imposed by the Ninth Amendment.<sup>47</sup> The initial application of the Ninth would come not in support of libertarian rights, but in support of the concurrent powers of state government.

### C. *Retaining the Concurrent Power of the States*

In all other cases not falling within the classes already mentioned, it seems unquestionable that the states retain concurrent authority with Congress, not only upon the letter and spirit of the eleventh amendment of the constitution, but upon the soundest principles of general reasoning.<sup>48</sup>

A critical issue in the early republic was determining the nature of federal power. If deemed exclusive, this would preclude state authority over any matter within the potential reach of the federal government. For example, federal authority to regulate interstate commerce had the potential to deny the states authority to regulate *any* matter touching commercial affairs. Because it was a hotly contested issue during the ratification debates, Alexander Hamilton in *The Federalist Papers* sought to placate antifederalist concerns by limiting exclusive federal authority to “three cases”:

**[Ind]** The principles established in a former paper teach us that the states will retain all *pre-existing* authorities which may not be exclusively delegated to the federal head; and that this exclusive delegation can only exist in one of three cases: where an exclusive authority is, in express terms, granted to the Union; or where a particular authority is granted to the Union and the exercise of a like authority is prohibited to the States; or where an authority is granted to the Union with which a similar authority in the States would be utterly incompatible.<sup>49</sup>

Under Hamilton’s approach, much depends on the third case and how one arrives at the conclusion that state power is “utterly incompatible” with federal authority. Those advocating the maximum degree of state autonomy argued for strict construction of federal power in cases involving matters traditionally under state control. In 1803, for example, St. George Tucker wrote that state governments “retain every power, jurisdiction and right not delegated to the United States, by the constitution, nor prohibited by it to the states.”<sup>50</sup> According to Tucker, the principles of the Ninth and Tenth

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46. See Lash, *The Lost Original Meaning*, *supra* note 8, at 401–10 (discussing judicial recognition and protection of natural rights as a matter of state law).

47. *Id.*

48. *Houston v. Moore*, 18 U.S. (5 Wheat) 1, 49 (1820) (Story, J., dissenting).

49. THE FEDERALIST No. 82, at 492 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

50. St. George Tucker, *View of the Constitution of the United States*, in 1 BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE

Amendments required that “the powers delegated to the federal government, are, in all cases, to receive the most strict construction that the instrument will bear, where the rights of a state or of the people, either collectively, or individually, may be drawn in question.”<sup>51</sup>

In the early 1800s, other courts echoed Tucker’s view that the Ninth and Tenth Amendments called for a narrow construction of federal power. In 1816, South Carolina courts were faced with the question whether states have the authority to prosecute persons passing counterfeit federal coins.<sup>52</sup> Although the Constitution expressly empowers the federal government to punish counterfeiters,<sup>53</sup> it was not clear whether this express enumeration should be interpreted to prohibit the states from punishing persons *passing* counterfeit coins. Writing for the South Carolina Supreme Court, Judge Grimke noted that the Constitution does not expressly grant Congress the power to punish persons passing counterfeit coins.<sup>54</sup> Applying a rule of construction based on the Ninth and Tenth Amendments, Judge Grimke concluded that this, then, was a power retained by the states:

[I]t does not appear that the power of punishing persons for passing counterfeit coin, knowing it to be counterfeit, was either expressly given to the Congress of the United States, or divested out of the individual States. Now the 9th section of the amendments to the constitution, as agreed to by the several States, and which has now become a component part of the constitution, declares, that the enumeration in the constitution of certain rights, shall not be construed to deny or disparage others retained by the people; and in the 10th section of the same, it is further provided, that the powers not delegated to the United States by the constitution, nor prohibited by it to the State, are reserved to the States, respectively, or to the people. When we examine the powers conceded by the individual states, we find no enumeration of this power given to Congress, and when we review the powers denied to the individual States, we discover no mention whatever of their being divested of this power. The individual States were in possession of this power before the ratification of the constitution of the United States; and if there is no express declaration in that instrument, which deprives them of it, they must still retain it, unless they should be divested thereof by construction or implication.<sup>55</sup>

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FEDERAL GOVERNMENT OF THE UNITED STATES; AND THE COMMONWEALTH OF VIRGINIA 141 (St. George Tucker ed., Augustus M. Kelley 1969) (1803) [hereinafter TUCKER, BLACKSTONE’S COMMENTARIES].

51. *Id.* at 154.

52. *State v. Antonio*, 3 S.C.L. (1 Brev.) 562 (1816).

53. U.S. CONST. art. I, § 8, cl. 6 (“[Congress shall have power] [t]o provide for the Punishment of counterfeiting the Securities and current Coin of the United States.”).

54. *Antonio*, 3 S.C.L. (1 Brev.) at 567–68.

55. *Id.*

Grimke read the Ninth and Tenth Amendments as applying to powers exercised by the states prior to the adoption of the Constitution.<sup>56</sup> If such powers are not expressly granted to the federal government or divested from the states, then under the Ninth Amendment, enumerated federal power should be interpreted in a manner retaining such rights to the states. Other courts repeated this idea of retained state power. In *Livingston v. Van Ingen*, the state of New York had granted a ferry monopoly to Robert Livingston and Robert Fulton<sup>57</sup> by virtue of their “new and advantageous” mode of transportation.<sup>58</sup> A competitor claimed that granting such monopolies was an exclusive power of the federal government under its enumerated powers to “promote the progress of science and useful arts” and to regulate interstate commerce.<sup>59</sup> Livingston’s counsel Thomas A. Emmet<sup>60</sup> responded that the federal government had only such power as was expressly granted and that all other powers were reserved to the states under the Ninth and Tenth Amendments.<sup>61</sup>

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56. From Judge Nott’s dissent in this case, it appears the Ninth Amendment was the primary clause relied on to support concurrent jurisdiction:

The advocates for a concurrent jurisdiction derive no support from the amendment of the constitution which has been relied on. It does not say that the powers not expressly delegated, &c., shall be reserved; but that the enumeration of certain rights shall not be construed to deny or disparage others retained by the people; and whether by express or necessary implication, the effect is the same.

*Id.* at 578 (Nott, J., dissenting).

57. This monopoly would be the subject of a great deal of litigation. *See, e.g., Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). In *North River Steamboat Co. v. Livingston*, 1 Hopk. Ch. 170 (N.Y. Ch. 1824), Livingston argued that neither the Ninth nor Tenth Amendment reserved powers or rights to the states, but only to “the people.” Thus, the state had no right to interfere with his ferry operations from one place to another in New York waters. *See id.* at 182–84. The court ignored his argument, ruling instead that his ferry run was protected under the holding of *Gibbons v. Ogden*, since it involved stops on both the New York and New Jersey sides of the water. *Id.* at 227–28.

58. 9 Johns. 507, 508 (N.Y. 1812).

59. *Id.* at 515.

60. Thomas Emmet argued a number of important cases in state and federal court, including the Supreme Court, between 1815 and 1824. *See* 3–4 WHITE, *supra* note 17, at 204–14. The culmination of his legal career was his argument before the Supreme Court in *Gibbons v. Ogden*. *Id.* at 210–11; *see also infra* note 112 and accompanying text.

61. According to Emmet:

In the year 1789, certain amendments to the constitution were proposed; and of the articles adopted, the ninth and tenth were, “that the enumeration in the constitution of certain rights, shall not be construed to deny or disparage others retained by the people.” That “the powers not delegated to the *United States* by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”

The convention of this state adopted the constitution with the explanation given by General *Hamilton*, who was a member, that no powers were conferred on congress but such as were explicitly given by the constitution.

*Livingston*, 9 Johns. at 550–51.



The highest court of New York, under the leadership of Chancellor Kent, upheld the monopoly.<sup>62</sup> Judge, and later Supreme Court Justice, Smith Thompson concurred in an opinion based on the Tenth Amendment, but used language that combined the Ninth (retained rights) and Tenth (nondelegated powers):

It is an undeniable rule of construction, applicable to the constitution of the United States, that all powers and rights of sovereignty, possessed and enjoyed by the several states, as independent governments, before the adoption of the constitution, and which are not either expressly, or by necessary implication, delegated to the general government, are retained by the states.<sup>63</sup>

As the nineteenth century progressed, the need to define the line between exclusive and concurrent federal power was diminished somewhat by court decisions that narrowed the scope of federal power to regulate interstate commerce.<sup>64</sup> For example, in 1863 the Supreme Court of Indiana ruled that Congress had no authority to regulate intrastate commerce, thereby obviating the issue of concurrent state power over the same activity.<sup>65</sup> Once again, the court's interpretation of the scope of federal power was informed by principles expressed in the Ninth and Tenth Amendments:

In the case at bar, it may, for the sake of the argument, be conceded, that Congress not only possesses the power, but the exclusive right, to regulate commerce among the several States, including the pilotage of vessels engaged in said commerce; and still the facts, so far as the record shows them, do not make a case falling strictly within the principle of the points thus conceded, because not involved. And why? The ninth amendment to the Constitution is as follows: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people," and tenth: "The powers not delegated to the *United States* by the Constitution, nor prohibited by it to the States, are reserved to the

62. *Id.* at 590.

63. *Id.* at 565. Judge Thompson goes on:

This has been the uniform understanding of the ablest jurists, ever since the formation of that government; and it is a rule indispensably necessary, in order to preserve harmony in the administration of the different governments, and prevent that collision which a partial consolidation is peculiarly calculated to produce. This was the object contemplated and intended to be secured by the tenth article of the amendments of the constitution, which declares, that the powers not delegated to the *United States* by the constitution, nor prohibited by it, to the states, are reserved to the states respectively, or to the people. If, then, the grant of the right or privilege claimed by the appellants, would, before the adoption of the constitution, have been a legitimate exercise of state sovereignty, it would, I think, under the rule of construction which I have suggested, be a strained interpretation of that instrument, to say such sovereignty has been thereby surrendered by the state.

*Id.*

64. *See infra* notes 300–326 and accompanying text.

65. *Barnaby v. State*, 21 Ind. 450, 452–53 (1863).

States respectively, or to the people.” The power conferred upon Congress to regulate commerce, it will not, we suppose, in view of these provisions, be contended, give jurisdiction over the navigable waters of a State, except as regards intercourse with other States of the Union, or with a foreign country.<sup>66</sup>

In other cases, however, the conflict between state and federal jurisdiction would be unavoidable. Those cases forced a determination of the degree to which state power ran concurrent with federal authority—an issue which called for the application of the Ninth Amendment.

*D. Justice Story and Houston v. Moore*

The tandem application of the Ninth and Tenth Amendments illustrated in the previous cases was repeated throughout the nineteenth century, with both clauses generally read as related expressions of state autonomy.<sup>67</sup> Given the Ninth Amendment’s role in preserving local autonomy, it is not surprising to find it generally paired with the Tenth. Occasionally, however, issues arose that seemed particularly suited for application of one or the other amendments. The Alien and Sedition Act controversy, for example, was particularly subject to a Tenth Amendment critique because Congress sought to exercise a nonenumerated power.<sup>68</sup> The construction of enumerated powers, on the other hand, seems particularly suited for the application of the Ninth Amendment. Although the Tenth reserves nondelegated powers to the states, the issue of concurrent state power involves matters conceded within Congress’s delegated powers. The issue is the degree to which that enumerated power denies or disparages the existence of concurrent state authority. Accordingly, in one of the Supreme Court’s most influential opinions on the exclusivity of enumerated federal power, it was the Ninth, not the Tenth, that informed the Court’s interpretation of the Constitution.

Joseph Story’s dissenting opinion in *Houston v. Moore* contains the earliest discovered discussion of the Ninth Amendment by a Supreme Court Justice. Although written in dissent, Justice Story’s analysis was influential

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66. *Id.*

67. In *State v. Bready*, counsel for the state argued that jurisdiction to issue writs of habeas corpus against the U.S. military was a power retained by the states under the Ninth and Tenth Amendments. 5 N.J.L. 639, 643 (N.J. 1819). Though Judge Southard concluded that some matters are within the exclusive jurisdiction of the federal courts, he further explained:

There are other questions, where the state and federal courts both have jurisdiction. They are such as existed and were the subjects of state cognizance and judicial notice before the formation of the general government, and are given to the *United States*, but altogether without words of exclusion used in application to the state. They are possessed by the federal courts because expressly given; they are retained by the states upon the impregnable ground that they have never been surrendered.

*Id.* at 644; see also *Henry Bickel Co. v. Wright’s Adm’x*, 202 S.W. 672, 674 (Ky. 1918) (“[T]he ninth and tenth amendments reserve to the states all powers not expressly delegated.”).

68. For a discussion of Tenth Amendment objections to the Alien and Sedition Act, see Lash, *The Lost Original Meaning*, *supra* note 8, at 410–13.

for the next one hundred years. It was cited by later Supreme Court justices and many state and federal courts as they continued to struggle with the line between state and federal power. In the countless articles and treatises discussing the Ninth Amendment, however, not one discusses Story's analysis of the Ninth Amendment in *Houston*. Despite the importance of the case,<sup>69</sup> it is not hard to understand why it was missed: Justice Story referred to the Ninth as the "eleventh amendment."<sup>70</sup> This is not a mistake. James Madison also referred to the Ninth as the Eleventh in his letters and in his speech on the Bank of the United States.<sup>71</sup> This usage reflects an early convention which referred to the first ten amendments according to their position on the original list of twelve.<sup>72</sup> In 1803, St. George Tucker published his treatise on the American Constitution, in which he referred to the Ninth and Tenth Amendments as "Articles 11 and 12."<sup>73</sup> The same year Story wrote his opinion in *Houston*, John Taylor published *Construction Construed*, in which he referred to the Ninth and Tenth Amendments as the "eleventh and twelfth."<sup>74</sup> As late as 1833, the Supreme Court referred to the Seventh Amendment as the Ninth—its place on the original list.<sup>75</sup> Over time, the convention changed and "Articles Three through Twelve" became known as the Bill of Rights and were renumbered One through Ten. This change in convention, however, has had the effect of obscuring Justice Story's important discussion of the Ninth Amendment in *Houston*. Rescued from

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69. *Houston* and its progeny account for roughly 25% of the Supreme Court's total jurisprudence on the Ninth Amendment. The case receives significant attention in G. Edward White's *History of the Supreme Court*. See 3–4 WHITE, *supra* note 17, at 535–41. Although at one point White quotes Story's reference to the "eleventh amendment," White does not discuss whether Story was referring to the Ninth. *Id.* at 572.

70. *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 49 (1820) (Story, J., dissenting).

71. James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791), in WRITINGS, *supra* note 11, at 489.

72. See, e.g., Letter from James Madison to George Washington (Dec. 5, 1789), in THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES AND ORIGINS 661 (Neil H. Cogan ed., 1997) [hereinafter THE COMPLETE BILL OF RIGHTS] (referring to the Ninth Amendment as the "eleventh").

73. See TUCKER, BLACKSTONE'S COMMENTARIES, *supra* note 50, at 151, 154.

74. JOHN TAYLOR, CONSTRUCTION CONSTRUED AND CONSTITUTIONS VINDICATED 46 (Leonard W. Levy ed., Da Capo Press 1970) (1820). According to Taylor:

The eleventh amendment prohibits a construction by which the rights retained by the people shall be denied or disparaged; and the twelfth reserves to the state respectively or to the people the powers not delegated to the United States, not prohibited to the states. The precision of these expressions is happily contrived to defeat a construction, by which the origin of the union, or the sovereignty of the states, could be rendered at all doubtful.

*Id.* (emphasis omitted).

75. *Livingston v. Moore*, 32 U.S. (7 Pet.) 469, 551 (1833) (referring to the current Seventh Amendment as the "ninth Article of the amendments of the constitution of the United States"); see also *Ex parte Burford*, 7 U.S. (3 Cranch) 448, 451 (1806) (referring to the Fourth Amendment as the "6th article of the amendments to the constitution").

obscurity,<sup>76</sup> Story's opinion stands as the Supreme Court's first and most relied upon discussion of the Ninth Amendment as an independent principle of constitutional law.<sup>77</sup>

I. *Houston v. Moore*.—*Houston* involved a state prosecution for failure to perform federal militia duty.<sup>78</sup> Pennsylvania law provided that “every non-commissioned officer and private, who shall have neglected or refused to serve when called into actual service,” would be courtmartialled by the state and punished according to the federal militia law of 1795.<sup>79</sup> In 1814, President Madison instructed the Governor of Pennsylvania to supply militiamen for the war against Great Britain. Houston, a private enrolled in the Pennsylvania militia, refused to join up with his detachment and was prosecuted and fined according to state law.<sup>80</sup> Houston's defense was that Pennsylvania law in this instance was “contrary to the constitution of the United States,” particularly Article I, Section 8, Clauses 15 and 16 of the Constitution, which grants Congress authority over the militia.<sup>81</sup> According to Houston, federal power over the militia was “exclusive of state authority,” and thus the states had no concurrent power to create courts martial and impose penalties for violating federal militia law, even when Congress had failed to create its own courts martial.<sup>82</sup>

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76. *Houston v. Moore* actually has been hiding in plain sight. In addition to being cited on the issue of concurrent state power, *Houston* has long been a part of discussions regarding militias and the Second Amendment. E.g., Michael A. Bellesiles, *The Second Amendment in Action*, 76 CHI.-KENT L. REV. 61, 99 n.319 (2000); J. Norman Heath, *Exposing the Second Amendment: Federal Preemption of State Militia Legislation*, 79 U. DET. MERCY L. REV. 39, 39–40 (2001); David B. Kopel, *The Supreme Court's Thirty-Five Other Gun Cases: What the Supreme Court Has Said About the Second Amendment*, 18 ST. LOUIS U. PUB. L. REV. 99, 183 (1999) (calling Story's citation to the “fifth” amendment a “typo” but not mentioning his citing the “eleventh”). Other language by Story in *Houston* regarding the Court's lack of power to expand the Constitution has also been cited in discussions of the power of the Supreme Court. See, e.g., Raoul Berger, *New Theories of “Interpretation”: The Activist Flight From the Constitution*, 47 OHIO ST. L.J. 1, 9 (1986) (“Understandably, Justice Story emphasized, ‘we are not at liberty to add one jot of power to the national government beyond what the people have granted by the constitution.’”).

77. Although Story's reference to the Ninth has been obscured, the case itself continues to be cited by the Supreme Court. See, e.g., *Tafflin v. Levitt*, 493 U.S. 455, 458–59 (1990).

78. *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 49 (1820). For an excellent discussion of *Houston*'s underlying facts from a non-Ninth Amendment point of view, see David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 B.Y.U. L. REV. 1359, 1379–84.

79. *Houston*, 18 U.S. at 58.

80. *Id.* at 2.

81. *Id.* at 47. Clause 15 allows Congress “[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.” U.S. CONST. art. I, § 8, cl. 15. Clause 16 allows Congress “[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.” U.S. CONST. art. I, § 8, cl. 16.

82. *Houston*, 18 U.S. at 4.

In response, the state argued that concurrent state power should be assumed on the grounds of state sovereignty. Citing the New York court's decision in *Livingston v. Van Ingen*,<sup>83</sup> Houston's lawyer declared:

The necessity of a concurrent jurisdiction in certain cases results from the peculiar division of the powers of sovereignty in our government; and the principle, that all authorities of which the states are not expressly divested in favour of the Union, or the exercise of which, by the states, would be repugnant to those granted to the Union, are reserved to the states, is not only a theoretical consequence of that division, but is clearly admitted by the whole tenor of the constitution.<sup>84</sup>

Writing for a splintered majority, Justice Bushrod Washington ruled that Congress had not provided federal courts with exclusive jurisdiction in these kinds of matters and upheld Houston's conviction.<sup>85</sup> Justice Story dissented on the ground that federal militia law applicable to this case contemplated a federal—not a state—court martial.<sup>86</sup> In his opinion, Story articulated principles of construction for determining whether federal power was concurrent or exclusive. He began by stating the importance of the case to issues of state sovereignty:

Questions of this nature are always of great importance and delicacy. They involve interests of so much magnitude, and of such deep and permanent public concern, that they cannot but be approached with uncommon anxiety. The sovereignty of a state in the exercise of its legislation is not to be impaired, unless it be clear that it has transcended its legitimate authority; nor ought any power to be sought, much less to be adjudged, in favour of the United States, unless it be clearly within the reach of its constitutional charter.<sup>87</sup>

Story then noted that a constitutional grant of power does not necessarily deny states concurrent authority over the same subject. His reasoning here deserves to be presented in full:

The constitution containing a grant of powers in many instances similar to those already existing in the state governments, and some of these being of vital importance also to state authority and state legislation, it is not to be admitted that a mere grant of such powers in

83. 9 Johns. 507, 508 (N.Y. 1812).

84. *Houston*, 18 U.S. at 8.

85. *Id.* at 28. In his opinion, Justice William Johnson found no reason for the case to have been heard by the Court; the state prosecution was ancillary to federal law—not in conflict with it—and the United States had not complained. *Id.* at 33 (Johnson, J., concurring). Johnson did not believe Houston was subject to federal law at all prior to his reaching the “place of rendezvous.” *Id.* at 36 (Johnson, J., concurring).

86. *Id.* at 68–69 (Story, J., dissenting). In his dissent, Story had “the concurrence of one of my brethren.” *Id.* at 76 (Story, J., dissenting). The Justice most likely to have concurred was Chief Justice John Marshall. See 3–4 WHITE, *supra* note 17, at 537. [cu pending—white]

87. *Id.* at 48 (Story, J., dissenting).

affirmative terms to Congress, does, *per se*, transfer an exclusive sovereignty on such subjects to the latter. On the contrary, a reasonable interpretation of that instrument necessarily leads to the conclusion that the powers so granted are never exclusive of similar powers existing in the states, unless where the constitution has expressly, in terms, given an exclusive power to Congress, or the exercise of a like power is prohibited to the states, or there is a direct repugnancy or incompatibility in the exercise of it by the states.<sup>[88]</sup> The example of the first class is to be found in the *exclusive* legislation delegated to Congress over places purchased by the consent of the legislature of the state in which the same shall be, for forts, arsenals, dock-yards, &c.; of the second class, the prohibition of a state to coin money or emit bills of credit; of the third class, as this court have already held, the power to establish an uniform rule of naturalization, and the delegation of admiralty and maritime jurisdiction. In all other cases not falling within the classes already mentioned, it seems unquestionable that the states retain concurrent authority with Congress, *not only upon the letter and spirit of the eleventh amendment of the constitution*, but upon the soundest principles of general reasoning. There is this reserve, however, that in cases of concurrent authority, where the laws of the states and of the Union are in direct and manifest collision on the same subject, those of the Union being ‘the supreme law of the land,’ are of paramount authority, and the state laws, so far, and so far only, as such incompatibility exists, must necessarily yield.

Such are the general principles by which my judgment is guided in every investigation on constitutional points. I do not know that they have ever been seriously doubted. They commend themselves by their intrinsic equity, and have been amply justified by the opinions of the great men under whose guidance the constitution was framed, as well as by the practice of the government of the Union. To desert them would be to deliver ourselves over to endless doubts and difficulties; and probably to hazard the existence of the constitution itself.<sup>89</sup>

The context of the discussion initially makes Story’s reference to the Eleventh Amendment puzzling. The Eleventh Amendment restricts the jurisdiction of federal courts to hear claims by individuals against states.<sup>90</sup> In this passage, however, Story is not discussing federal court jurisdiction, but the proper construction of federal legislative power. This, as we have seen, raises issues under the Ninth but not the Eleventh Amendment. The reference makes sense, however, if Story is understood to be using the early

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88. To this extent, Story appears to track Hamilton’s argument in *Federalist 82*. See *supra* note 49.

89. *Houston*, 18 U.S. at 48–50 (Story, J., dissenting) (second and third emphasis added) (footnotes omitted).

90. U.S. CONST. amend. XI.

convention of referring to provisions in the Bill of Rights according to their position on the originally proposed list of amendments.<sup>91</sup> Read this way, the passage not only makes sense, it becomes a textbook case for how to apply the Ninth Amendment's rule of construction.

One of the original purposes of the Ninth Amendment was to prevent the Bill of Rights from being construed to suggest that congressional power extended to all matters *except* those expressly restricted.<sup>92</sup> As Joseph Story would later write in his *Commentaries on the Constitution*:

[The Ninth Amendment] was manifestly introduced to prevent any perverse, or ingenious misapplication of the well known maxim, that

91. Additional evidence that Story is using the early convention comes later in his opinion when he refers to the Second Amendment as the "Fifth." See *Houston*, 18 U.S. at 52–53 (Story, J., dissenting) ("The fifth amendment to the constitution, declaring that 'a well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed,' may not, perhaps, be thought to have any important bearing on this point."). This reference clearly indicates that Story is using some different method of numbering the amendments, but this particular passage raises a mystery of its own. If Story were using the early convention, he would have referred to the Second as the Fourth Amendment. The fact that he calls it the Fifth raises the possibility of transcription error. In fact, some commentators have referred to Story's Fifth Amendment reference in this case as a "typo." See Kopel, *supra* note 76, at 183 (calling Story's citation to the "fifth" amendment a "typo," but not mentioning Story's reference to the "eleventh"). But if the "fifth" was a transcription error, this calls into question whether his "eleventh amendment" reference also was in error. This, however, is not likely. The reference to the "fifth" makes no sense unless this was a case of transposing an intended reference to the Fourth (now our Second) into a reference to the "fifth." The terms "Fourth" and "Fifth" are closely enough related to explain the error. Story's references to the eleventh amendment, however, need no such explanation. It makes perfect sense in the context of the discussion (other courts also believed issues of concurrent state power raised Ninth Amendment issues), and it fits with the common convention described in the text. In fact, viewing his references to the Eleventh under the convention helps to explain the mistaken reference to the "fifth." Additional support for the view that his reference to the "fifth" but not his reference to the "eleventh," was a mistake, is seen in how this passage was treated in later court decisions. Story's reference to the eleventh amendment is *quoted* in briefs to the Supreme Court, and by Supreme Court Justices themselves, in later cases without correction or any indication that the reference is mistaken. See *infra* notes 108–151. Lawyers before the Court in *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 130–31 (1824), for example, quoted Story's reference to the Eleventh Amendment, at a time when Justice Story was on the bench. Story rejected their claim in that case, but neither he nor the litigants indicated that the reference was mistaken in any way. The reporter's reference to the "fifth" Amendment in *Houston*, on the other hand, is never quoted again by any litigant or any court—state or federal.

92. In his speech introducing draft amendments to the House of Representatives, Madison addressed concerns regarding the addition of a Bill of Rights:

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

James Madison, Speech in Congress Proposing Constitutional Amendments, *reprinted in* WRITINGS, *supra* note 11, at 448–49. The "last clause of the 4th resolution" referred to by Madison was an early draft of the Ninth Amendment. See Lash, *The Lost Original Meaning*, *supra* note 8, at 360 (detailing the drafting history of the Ninth Amendment).

an affirmation in particular cases implies a negation in all others; and *é converso*, that a negation in particular cases implies an affirmation in all others. The maxim, rightly understood, is perfectly sound and safe; but it has often been strangely forced from its natural meaning into the support of the most dangerous political heresies. The amendment was undoubtedly suggested by the reasoning of the Federalist on the subject of a general bill of rights.<sup>93</sup>

In *Houston*, the defendant was attempting just such a “political heresy.” One of Houston’s arguments was that the sole power of the states to regulate on matters involving the militia was contained in the “reservation” clause of Article I, Section 8, Clause 16.<sup>94</sup> That clause, after granting Congress power to organize and discipline the militia, reserved to the states “the Appointment of the officers, and the Authority of training the Militia according to the discipline prescribed by Congress.”<sup>95</sup> According to Houston, this reservation implied that all power not expressly reserved to the states was exclusively in the hands of Congress.<sup>96</sup> Story rejected this argument, applying the rule of construction he believed declared by the Ninth Amendment:

It is almost too plain for argument, that the power here given to Congress over the militia, is of a limited nature, and confined to the objects specified in these clauses; and that in all other respects, and for all other purposes, the militia are subject to the control and government of the State authorities. Nor can the reservation to the States of the appointment of the officers and authority of the training the militia according to the discipline prescribed by Congress, be justly considered as weakening this conclusion. That reservation constitutes an exception merely from the power given to Congress ‘to provide for organizing, arming, and disciplining the militia;’ and is a limitation upon the authority, which would otherwise have developed upon it as to the appointment of officers. *But the exception from a given power cannot, upon any fair reasoning, be considered as an enumeration of all the powers which belong to the States over the militia.*[<sup>97</sup>] *What those powers are must depend upon their own constitutions; and what is not taken away by the Constitution of the United States, must be considered as retained by the States or the people.* The exception then ascertains only that Congress have not, and that the States have, the power to appoint the officers of the militia, and to train them according to the discipline prescribed by Congress.

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93. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1898 (Fred B. Rothman & Co. 1991) (1833) [hereinafter STORY, COMMENTARIES (1991 reprinting)].

94. *Houston*, 18 U.S. at 4–6.

95. U.S. CONST. art. I, § 8, cl. 16.

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

97. At this point in the online Westlaw transcription of the case there is an error: “What those powers are must other. Nor has Harvard College any surer title than constitutions.” The text quoted above is taken from the *United States Reports* and contains no noticeable errors.



Nor does it seem necessary to contend, that the power ‘to provide for organizing, arming, and disciplining the militia,’ is exclusively vested in Congress. It is merely an affirmative power, and if not in its own nature incompatible with the existence of a like power in the States, it may well leave a concurrent power in the latter.<sup>98</sup>

This previously unnoticed text, marred by a transcription error in the online Westlaw version,<sup>99</sup> deserves a place alongside Madison’s speech on the Bank of the United States in terms of the historical understanding of the Ninth Amendment. Having announced that determining the scope of exclusive federal power must be guided by the letter and spirit of the Ninth Amendment, Story then applies the rule of construction he describes in *Commentaries* as mandated by the Ninth. That rule forbids construing a reservation of rights to suggest that all other rights are surrendered. In this case, the enumeration of certain rights—the state’s right to appoint officers—must not be construed to deny or disparage other rights retained by the states—the right to create courts martial.

Story’s opinion in *Houston* describes the Ninth Amendment as limiting the interpreted scope of federal power in order to preserve state regulatory autonomy. This echoes James Madison’s description of the Ninth as “guarding against a latitude of interpretation” of federal power to the injury of the people’s retained rights.<sup>100</sup> Federal power is thus prevented from intruding into matters retained by the people who remain free to delegate that power to their state government as they see fit.<sup>101</sup> James Madison nominated Joseph Story to the Supreme Court. Thus, when Story notes that his “general principles . . . have been amply justified by the opinions of the great men under whose guidance the constitution was framed,” one cannot help but think of Story’s patron.<sup>102</sup>

As we shall see, courts throughout the nineteenth century echoed Story’s federalist reading of the Ninth Amendment, generally pairing it with

98. *Houston*, 18 U.S. at 51–52 (Story, J., dissenting). Note that in this passage Story links the principles expressed by the Ninth and Tenth Amendments. The Ninth limits the construction of federal power (in this case as not exclusive), while the Tenth reserves all nondelegated power to the states.

99. See *supra* note 97.

100. James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791), reprinted in WRITINGS, *supra* note 11, at 489.

101. In his *Commentaries*, Story wrote:

Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to state authorities, if invested by their constitutions of government respectively in them; and if not so invested, it is retained BY THE PEOPLE, as a part of their residuary sovereignty.

JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 712 (Carolina Academic Press 1987) (1833) [hereinafter STORY, COMMENTARIES (1987 reprinting)].

102. *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 50 (1820) (Story, J., dissenting).

the Tenth.<sup>103</sup> In *Houston*, however, Story cites the Ninth Amendment alone as the constitutional basis for his rule of construction limiting the scope of federal authority. The issue in *Houston* was the degree to which the enumerated power of the federal government displaced the power of the states to establish courts martial. This was not an issue of individual rights, but one of competing (or concurrent) powers. The fact that Story believed the “letter and spirit” of the Ninth Amendment applied in such a situation indicates that Story, like Madison, viewed the retained rights of the Ninth Amendment through a federalist lens. The Ninth limited the extension of enumerated federal power into areas of local concern retained by the people as a matter of right. To Story, constraining federal power (as opposed to guarding particular rights) was the central purpose of the Ninth.<sup>104</sup> Most strikingly, and uniquely among constitutional treatise writers, the chapter in Story’s *Commentaries* on the Ninth Amendment is titled “Non-Enumerated Powers.”<sup>105</sup> The title aptly describes his approach in *Houston*, where the Ninth was used to preserve the nonenumerated power of the states to concurrently discipline the militia. As we shall see, Story may have come to regret his opinion in *Houston*, especially as it appeared to conflict with the Marshall’s Court’s broad interpretations of federal power.<sup>106</sup> Nevertheless,

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103. In the 1835 Tennessee case, *State v. Foreman*, the state of Georgia passed an act allowing state courts jurisdiction over certain crimes committed within the Cherokee nation. In an attempt to escape prosecution, the defendant argued that federal treaties with the Cherokee denied state courts jurisdiction to hear such cases even when the crimes were committed within the state’s borders. The state responded that if this were the correct reading of the federal treaties, those treaties would be void under the Ninth and Tenth Amendment:

The states, by empowering the executive, with the advice and consent of the senate, to make treaties, did not surrender into their hands a power which could annihilate the states; for if by a treaty with the Indians, or any other nation, the treaty-making power can deprive the states of one attribute of sovereignty (not expressly surrendered), it can deprive them of all; and if jurisdiction, in express terms, were guaranteed to the Indians, and the right taken from the states, by the treaty, it would be void, because the exercise of this branch of jurisdiction is not one of the enumerated powers parted with by the states, but is, in fact, reserved to them by the 9th and 10th amendments to the Constitution.

A treaty the subject-matter of which violates the Constitution, or surrenders to other powers the individual and reserved rights of the states, is a nullity.

Argument of George S. Yerger, *State v. Foreman*, 16 Tenn. (8 Yer.) 543 app. at 560–61 (1835). The state of Georgia thus believed that states had both “reserved powers and rights” under the Ninth and Tenth Amendments. The state court concluded the treaty allowed state court jurisdiction without discussing the Ninth or Tenth Amendments. *Id.* at 334–37.

104. In his *Commentaries*, Story recounted the debates over adding a Bill of Rights and the Federalists’ warning that doing so “might even be dangerous, as by containing exceptions from powers not granted it might give rise to implications of constructive power.” 1 STORY, COMMENTARIES (1991 reprinting), *supra* note 93, at 277.

105. 3 STORY, COMMENTARIES (1991 reprinting), *supra* note 93, at 751. The chapter heading for Story’s discussion of the Tenth Amendment is “Powers Not Delegated.” *See id.* at 753. The same chapter headings are used in the one-volume abridged version of the *Commentaries* which Story prepared almost at the same time as the three-volume work. STORY, COMMENTARIES (1987 reprinting), *supra* note 101, at 711, 713.

106. *See infra* notes 125–128 and accompanying text.

Story never disavowed or modified in any way his original analysis of the Ninth Amendment in *Houston v. Moore*.

2. *The Influence of Story's Opinion*.—Story's reading of the Ninth amendment in *Houston* echoed that of St. George Tucker who also read the Ninth (which he too referred to as the "Eleventh") as expressing a rule of construction limiting the interpreted scope of federal power. In his 1803 edition of *Blackstone's Commentaries*, Tucker wrote that under the Ninth and Tenth Amendments, "the powers delegated to the federal government, are, in all cases, to receive the most strict construction that the instrument will bear, where the rights of a state or of the people, either collectively, or individually, may be drawn into question."<sup>107</sup> This strict construction of enumerated federal power came under fire as Chief Justice John Marshall sought to establish a far broader reading of federal authority.

a. *Gibbons v. Ogden*.—Four years after *Houston* was decided, lawyers before the Supreme Court quoted significant portions of Story's opinion in one of the most important cases regarding federal power in the nineteenth century, *Gibbons v. Ogden*.<sup>108</sup> *Gibbons* involved yet another dispute over New York's grant of a steam navigation monopoly to Robert Fulton and Robert Livingston. The New York courts having previously upheld the monopoly in cases such as *Livingston v. Van Ingen*,<sup>109</sup> the monopoly now was challenged on the ground that it interfered with Congress's exclusive power to regulate interstate commerce.<sup>110</sup> The case, according to G. Edward White, has been "acknowledged as the high point of advocacy on the Marshall Court."<sup>111</sup> Thomas A. Emmet<sup>112</sup> represented Fulton and Livingston and their assignee, Aaron Ogden. In his lengthy argument before the Court, Emmet claimed that states retained concurrent power to regulate commerce and cited Tucker's Ninth and Tenth Amendment based rule of construction,<sup>113</sup> (now) Justice Thompson's opinion in *Livingston v. Van Ingen*,<sup>114</sup> and Story's opinion in *Houston v. Moore*.<sup>115</sup> According to Emmet, concurrent state power to regulate commerce must give

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107. TUCKER, BLACKSTONE'S COMMENTARIES, *supra* note 50, at 154.

108. 22 U.S. (9 Wheat.) 1, 130–31 (1824).

109. 9 Johns. 507, 561 (N.Y. 1812).

110. *Gibbons*, 22 U.S. at 17.

111. 3–4 WHITE, *supra* note 17, at 211.

112. Emmet's name is misspelled in the United States Reports. See *Gibbons*, 22 U.S. at 79.

113. *Id.* at 86.

114. *Id.* Thompson was appointed to the Supreme Court in 1823. Due to his daughter's death, Thompson did not join the Court until February 10, 1824, the day after the arguments in *Gibbons* had concluded. See Norman R. Williams, *Gibbons*, 79 N.Y.U. L. Rev. 1398, 1429–30 (2004); see also 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 607 (1928); David P. Currie, *The Constitution in the Supreme Court: State and Congressional Powers, 1801–1835*, 49 U. CHI. L. REV. 887, 944 n.399 (1982).

115. *Gibbons*, 22 U.S. at 86.

way only in cases involving a direct conflict between state and federal regulation.<sup>116</sup> On this point, Emmet quotes that portion of Justice Story's opinion in *Houston* that refers to the "11th Amendment."<sup>117</sup> There is no indication that Emmet believed that Story's reference to the Eleventh was in error,<sup>118</sup> and there is no attempt by Emmet to link the passage to his discussion of the Tenth Amendment several pages earlier in his brief.<sup>119</sup> As in *Houston*, this is a freestanding Ninth Amendment argument in favor of a limited reading of federal power. Nor is it surprising that Emmet picked up on Story's Ninth Amendment argument—Emmet had made the same argument himself before the New York courts *prior* to Story's opinion in *Houston*, relying then on Tucker's Ninth and Tenth Amendment-based rule of construction.<sup>120</sup> Nor was Emmet's reading idiosyncratic. His co-counsel Thomas Oakley also referred to Story's eleventh amendment passage in *Houston*.<sup>121</sup> Although his argument in *Gibbons* regarding the Tenth Amendment has been recognized, scholars have completely missed Thomas Emmet's reliance on the Ninth.<sup>122</sup>

In striking down the state monopoly, Chief Justice John Marshall did not directly address either the Ninth or Tenth Amendments. Instead, he rejected Ogden's argument that Congress lacked power to grant Gibbons a coasting license and went on to rule that the state monopoly was in direct conflict with the federal license and thus invalid under the Supremacy Clause.<sup>123</sup> Rather than grapple with Emmet's Ninth Amendment argument,

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116. *Id.* at 130–31. Emmet made a similar argument in *North River Steamboat Co. v. Livingston*:

What, then is this trade which congress can regulate? It is that carried on from within the geographical limits of one state to within those of another. It has no relation to the trade or contracts between individuals. How can congress regulate the trade and intercourse between man and man, even though they should reside in different states or countries? Its regulations can only act on commerce as a mass, carried on between two tates or nations. This trade thus defined together with foreign trade, is all that it belongs to congress to regulate; the rest remains to the states, under the domination of internal trade, and which it is not therefore necessary to define. It includes all that is not taken by the constitution out of the general mass of commerce. It belongs to the states individually, not because the constitution has given it to them—for that instrument gives nothing whatsoever to the states—but because it appertains to sovereign power, and has not been delegated to congress; and the grants of power which are made to congress, so far as they may interfere with the rights of states, are to receive the strictest construction.

1 Hopk. Ch. 170, 217–18 (N.Y. Ch. 1824) (citing TUCKER, BLACKSTONE'S COMMENTARIES, *supra* note 50, at 154).

117. *Gibbons*, 22 U.S. at 130–31.

118. Emmet could have, for example, paraphrased the passage without quoting.

119. *Id.* at 87.

120. *See supra* note 116.

121. *Gibbons*, 22 U.S. at 41 n.a.

122. *See, e.g.,* Currie, *supra* note 114, at 944 n.396. I have not discovered any scholarly reference to Emmet's Ninth Amendment argument or to his quoting Story's opinion from *Houston*.

123. *Gibbons*, 22 U.S. at 240. Justice Story was on the Court at the time of *Gibbons*, but wrote no opinion. Even if Story still held the views he announced in *Houston*, he would have agreed with

or his colleague's opinion in *Houston*, Marshall simply denied there was *any* provision in the Constitution which restricts the interpretation of enumerated power:

This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said, that these powers ought to be construed strictly.<sup>124</sup> But why ought they to be so construed? Is there one sentence in the constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants, expressly, the means for carrying all others into execution, Congress is authorized "to make all laws which shall be necessary and proper" for the purpose. But this limitation on the means which may be used, is not extended to the powers which are conferred; nor is there one sentence in the constitution, which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule.<sup>125</sup>

In his earlier opinion in *McCulloch v. Maryland*, Marshall similarly ignored the Ninth Amendment despite its key role in James Madison's original argument against the Bank.<sup>126</sup> In *Gibbons*, Marshall once again ignores the Ninth, despite Emmet's reference to the Ninth and Justice Story's opinion in *Houston*.<sup>127</sup> Instead, Marshall announced that Congress' power to regulate commerce is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."<sup>128</sup> What was implicit in *McCulloch* was now express in *Gibbons*: The powers of the federal government were to be construed as having no limits beyond those expressly "prescribed in the constitution." The conflict between Marshall's rule of construction and the language and purpose of the Ninth

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the result in *Gibbons*; Story believed that the federal commerce power was exclusive. See David P. Currie, *The Constitution in the Supreme Court: Contracts and Commerce, 1836-1864*, 1983 DUKE L.J. 471, 476.

124. This is probably a reference to St. George Tucker's argument regarding "strict construction."

125. *Gibbons*, 22 U.S. at 187-88. Marshall continues in a passage that also seems directed at Tucker's argument:

Powerful and ingenious minds, taking, as postulates, that the powers expressly granted to the government of the Union, are to be contracted by construction, into the narrowest possible compass, and that the original powers of the States are retained, if any possible construction will retain them, may, by a course of well digested, but refined and metaphysical reasoning, founded on these premises, explain away the constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use. They may so entangle and perplex the understanding, as to obscure principles, which were before thought quite plain, and induce doubts where, if the mind were to pursue its own course, none would be perceived. In such a case, it is peculiarly necessary to recur to safe and fundamental principles to sustain those principles, and when sustained, to make them the tests of the arguments to be examined.

*Id.* at 222.

126. See Lash, *The Lost Original Meaning*, *supra* note 8, at n.405.

127. An opinion Marshall most likely joined. See *supra* note \_\_\_\_.

128. *Gibbons*, 22 U.S. at 196.

Amendment is striking. Despite the Ninth's declaration that enumerated restrictions on power are not to be read as exhaustive, Marshall reads them in just such a manner. In fact, during his entire tenure on the Supreme Court, Marshall never once referred to the Ninth Amendment, despite repeated references to it by bench and bar as a rule prohibiting expansive readings of federal power.

*b. New York v. Miln.*—Although John Marshall declined to address the Ninth Amendment, other Justices were not so reticent. When serving on New York's highest court, future Supreme Court Justice Smith Thompson had given a sympathetic ear to Thomas Emmet's Ninth Amendment arguments in *Livingston v. Van Ingen*.<sup>129</sup> In *New York v. Miln*,<sup>130</sup> Justice Thompson adopted those arguments as his own. *Miln* involved a New York statute which required ship captains to furnish local authorities with a list of all passengers being brought into the state. The Supreme Court upheld the state law,<sup>131</sup> with Justice Story dissenting on the grounds that this was a regulation of commerce belonging exclusively to the federal government.<sup>132</sup> In his concurrence, Justice Thompson disagreed with Story's view of state power in the case and quoted Story's own words in *Houston* in support of concurrent state power to regulate commerce:

[Concurrent state power] is fully recognised by the whole court, in the case of *Houston v. Moore*. . . . Mr. Justice Story, who also dissented from the result of the judgment, is still more full and explicit on this point. The constitution, says he, containing a grant of powers, in many instances similar to those already existing in the state governments; and some of these being of vital importance also to state authority and state legislation, it is not to be admitted, that a mere grant of such powers, in affirmative terms, to congress, does, *per se*, transfer an exclusive sovereignty on such subjects to the latter. On the contrary, a reasonable interpretation of that instrument necessarily leads to the conclusion that the powers so granted are never exclusive of similar powers existing in the states; unless [citing exceptions] . . . . In all other cases, not falling within the classes already mentioned, it seems unquestionable that the states retain concurrent authority with congress; not only upon the letter and spirit of the eleventh amendment of the constitution, but upon the soundest principle of reasoning.<sup>133</sup>

In his earlier *Van Ingen* opinion, then-Judge Thompson cited the Tenth Amendment in support of his view of concurrent state power.<sup>134</sup> In *Miln*,

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129. See *supra* note 63 and accompanying text.

130. *New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837).

131. *Id.* at 143.

132. *Id.* at 161 (Story, J., dissenting).

133. *Id.* at 150–51 (Thompson, J., concurring).

134. See *supra* note 63 and accompanying text.

however, Justice Thompson says nothing about the Tenth Amendment, despite its role in the opinions of other Justices.<sup>135</sup> Instead, Justice Thompson is content to let Story's construction of the Ninth Amendment suffice as textual grounding for the proper rule of interpretation.<sup>136</sup>

c. *Prigg v. Pennsylvania*.—Other Justices, as well as high ranking executive officials, also embraced Story's reading of the Ninth Amendment in *Houston*. In *Prigg v. Pennsylvania*, the Supreme Court struck down Pennsylvania's personal liberty law of 1826 on the grounds that it interfered with the enforcement of the federal Fugitive Slave Act and the Constitution's Fugitive Slave Clause.<sup>137</sup> In defense of the law, Pennsylvania's Attorney General, Ovid F. Johnson, argued that federal law should not be read to displace all state regulation on the subject of fugitive slaves. In support of his argument, Johnson quotes Story's position in *Houston*:

Supposing the power to pass laws on the subject of fugitive slaves to be concurrent, the learned counsel on the other side contended that it had been exercised by Congress; that the whole ground of legislation was provided for; that the right of the states was thereby superseded, and that the act of Assembly of Pennsylvania was absolutely void. To all these positions, he would answer, in addition to what had already been advanced, that Congress had not covered the whole ground; . . .

He could not, on this branch of the case fortify his argument with stronger reason or authority than by quoting the words of Mr. Justice Story, in the case of *Houston v. Moore*. On this basis, he did not fear to let it rest. "The constitution, containing a grant of powers in many instances similar to those already existing in the state governments, and some of these being of vital importance also to state authority and state legislation, it is not to be admitted that a mere grant of such powers in affirmative terms to Congress, does, per se, transfer an exclusive sovereignty on such subjects to the latter. On the contrary, a reasonable interpretation of that instrument necessarily leads to the conclusion that the powers so granted are never exclusive of similar powers existing in the states, unless where the Constitution has expressly in terms given an exclusive power to Congress, or the exercise of a like power is prohibited to the states, or there is a direct

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135. Both Justice Barbour's opinion for the Court and Justice Baldwin's individual opinion, taken from his *Constitutional Views*, reference the Tenth Amendment. See *Miln*, 36 U.S. at 132; HENRY BALDWIN, A GENERAL VIEW OF THE ORIGIN AND NATURE OF THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES, 181–97 (photo. reprint 2000) (1837).

136. In his dissent, Story does not disavow his earlier opinion in *Houston*, but argues that *Gibbons* established the exclusive power of Congress to regulate matters affecting interstate commerce. *Miln*, 36 U.S. at 154–56 (Story, J., dissenting). For a discussion of Story's "silence" in *Miln*, see *infra* subpart II(D)(3).

137. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 612 (1842) ("The [Fugitive Slave Clause] manifestly contemplates the existence of a positive unqualified right on the part of the owner of the slave, which no state law or regulation can in any way qualify, regulate, control, or restrain.").

repugnancy or incompatibility in the exercise of it by the states.” And also, “In all other cases not falling within the classes already mentioned, it seems unquestionable, that the states retain concurrent authority with Congress, not only on the letter and spirit of the eleventh amendment of the Constitution, but upon the soundest principles of general reasoning.”<sup>138</sup>

In his opinion striking down the Pennsylvania law, Justice Story did not dispute the Attorney General’s reading of *Houston*. Instead, Story argued that the power to regulate on the subject of fugitive slaves was exclusively federal in nature. Here, Story referred not to his own opinion in *Houston*, but to Chief Justice Marshall’s formulation in *Sturges v. Crowninshield* that “[w]herever the terms in which a power is granted to Congress, or the nature of the power require, that it should be exercised exclusively by Congress, the subject is as completely taken from the state legislatures, as if they had been forbidden to act.”<sup>139</sup>

Although Story did not repute (or even acknowledge) his earlier approach in *Houston*, his reasoning seemed to weaken *Houston*’s presumption of concurrent state power. In a separate opinion, Justice Peter Daniel noted the departure. Although concurring in the judgment, Daniel nevertheless felt “constrained to dissent from some of the principles and reasonings which that majority in passing to our common conclusions, have believed themselves called on to affirm.”<sup>140</sup> Arguing that states had concurrent power to regulate on the subject of fugitive slaves, Justice Daniel quoted Story’s passage in *Houston v. Moore*, including Story’s statement regarding the “eleventh amendment.”<sup>141</sup>

*d. Smith v. Turner.*—Justice Daniel would find another occasion to quote Story’s *Houston* dissent in *Smith v. Turner*,<sup>142</sup> one of the so-called Passenger Cases.<sup>143</sup> In *Smith*, the Supreme Court struck down a state tax on incoming sea passengers,<sup>144</sup> drawing a dissent from Justice Daniel. Daniel began his analysis of the Constitution by announcing two principles: First,

138. *Id.* at 600–01. Johnson later cites the Tenth Amendment in support of the Pennsylvania law. *See id.* at 602 (“These cases are clearly left to the guardianship of the states themselves. The tenth article of the amendments to the constitution assures this right; and self-respect, if not self-protection, demands its exercise.”).

139. *Id.* at 622 (quoting *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193).

140. *Id.* at 650 (Daniel, J., concurring).

141. *Id.* at 654 (Daniel, J., concurring). Daniel misquotes Story, but not in a manner that undermines the point. Daniel states: “In all other cases not falling within the classes already mentioned, it seems unquestionable that the states retain concurrent authority with Congress, not only under the eleventh amendment of the Constitution, but upon the soundest principles of general reasoning.” *Id.* Daniel drops Story’s language regarding the “letter and spirit.” *See supra* text accompanying note 89.

142. 48 U.S. (7 How.) 283, 498 (1849) (Daniel, J., dissenting).

143. The other case was *Norris v. City of Boston*, 45 Mass. (4 Met.) 282 (1842).

144. *Smith*, 48 U.S. at 409.



under the Tenth Amendment, Congress has only delegated power, and second, those powers are subject to a limiting rule of construction.<sup>145</sup> Rejecting statements in an earlier case by Justice Baldwin that federal power over commerce was exclusive,<sup>146</sup> Daniel invoked Justice Story's opinion in *Houston*:

In opposition to the opinion of Mr. Justice Baldwin, I will place the sounder and more orthodox views of Mr. Justice Story upon this claim to exclusive power in Congress, as expressed in the case of *Houston v. Moore* with so much clearness and force as to warrant their insertion here, and which must strongly commend them to every constitutional lawyer. The remarks of Justice Story are these:—"Questions of this nature are always of great importance and delicacy . . . ."<sup>147</sup>

Daniel proceeds to quote this entire section of Story's opinion, including Story's reference to the "eleventh amendment."<sup>148</sup> Justice Daniel then remarks that "[h]ere, indeed, is a commentary on the Constitution worthy of universal acceptance."<sup>149</sup> No one in the majority responded to Daniel's point regarding the "clearness and force" of Story's opinion in *Houston*, nor did they dispute Story's interpretation of the Ninth Amendment.<sup>150</sup> Instead, Justice Grier simply defended his decision to invalidate the state law against criticism that he had engaged in a latitudinarian interpretation of federal power.<sup>151</sup>

145. *Id.* at 496 (Daniel, J., dissenting). According to Daniel:

1st. Then, Congress have no powers save those which are expressly delegated by the Constitution and such as are necessary to the exercise of powers expressly delegated.  
2d. The necessary auxiliary powers vested by art. 1, sec. 8, of the Constitution cannot be correctly interpreted as conferring powers which, in their own nature, are original, independent substantive powers; they must be incident to original substantive grants, ancillary in their nature and objects, and controlled by and limited to the original grants themselves.

*Id.* (citations omitted). To these, he adds a third principle: "The question, whether a law be void for its repugnancy to the Constitution, ought seldom, if ever, to be decided in the affirmative in a doubtful case." *Id.* Justice Daniel's second point seems related to James Madison's argument in his speech on the Bank of the United States. According to Madison, unenumerated "necessary and proper" powers (ancillary powers) should not include "great and important powers." Important powers such as these required their own specific enumeration. See Lash, *The Lost Original Meaning*, *supra* note 8, at 389.

146. *Smith*, 48 U.S. at 498. (Daniel, J., dissenting) (referring to *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449, 511 (1841)).

147. *Id.* at 498 (quoting *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 48 (1820) (Story, J., dissenting)).

148. In this instance, Daniel's quotation is correct.

149. *Smith*, 48 U.S. at 499 (Daniel, J., dissenting).

150. Story's tenure on the Court ended with his death in 1845.

151. *Smith*, 48 U.S. at 459. According to Grier:

The Constitution of the United States, and the powers confided by it to the general government, to be exercised for the benefit of all the States, ought not to be nullified or evaded by astute verbal criticism, without regard to the grand aim and object of the instrument, and the principles on which it is based. A constitution must necessarily be an instrument which enumerates, rather than defines, the powers granted by it. *While*

Given that *Houston* included the Supreme Court's first discussion of the Ninth Amendment penned by no less a Justice than Joseph Story and that it was quoted in its entirety by later litigants and Supreme Court justices,<sup>152</sup> it seems surprising that this interpretation of the Ninth Amendment has gone so long unnoticed. In fact, Story's approach to concurrent state powers has remained influential throughout the history of the Supreme Court. Numerous state and federal courts have cited it in cases struggling to define the line between state and federal power, and the Supreme Court itself continues to favorably cite *Houston* in cases involving questions of concurrent state power.<sup>153</sup> Over time, however, *Houston's* connection to the Ninth Amendment has been forgotten. Ironically, the sad fate of Story's opinion in *Houston v. Moore* may have been welcomed by Story himself.

### 3. *The Silence of Justice Story.*—

In his *View of the Constitution of the United States*, Tucker had read the Ninth and Tenth Amendments as together creating a rule of strict interpretation regarding the construction of federal power.<sup>154</sup> According to Tucker:

As [a federal compact] it is to be construed strictly, in all cases where the antecedent rights of a *state* may be drawn in question [citing the 12th Amendment]; as a social compact it ought likewise to receive the same strict construction, wherever the right of personal liberty, of personal security, or of private property may become the subject of dispute; because every person whose liberty or property was thereby rendered subject to the new government, was antecedently a member of a civil society to whose regulations he had submitted himself, and under whose authority and protection he still remains, in all cases not expressly submitted to the new government. [citing the 11th and 12th Amendments]. The few particular cases in which he submits himself

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*we are not advocates for a latitudinous construction, yet "we know of no rule for construing the extent of such powers other than is given by the language of the instrument which confers them, taken in connection with the purpose for which they are conferred."*

*Id.* (emphasis added).

152. Story's reference to the Eleventh Amendment was cited in other courts as well. See *Commonwealth v. Nickerson*, 128 N.E. 273, 276 (Mass. 1920); *In re Booth*, 3 Wis. 1, 75–76 (1854) (Crawford, J., dissenting); *Crow v. State*, 14 Mo. 237, 326–27 (1851) (Napton, J., dissenting) In *Crow*, Judge Napton prefaced his quote of Story's Eleventh Amendment by noting:

The general rule on this subject has been aptly and forcible expressed by Judge Story, in *Houston v. Moore* and as that distinguished jurist has not been supposed to have any disposition to enlarge the powers of the States at the expense of any just right of the federal government, I prefer to adopt his views, expressed in his own language, as the basis of further investigation.

*Crow*, 14 Mo. at 326–27 (citation omitted).

153. See *Tafflin v. Levitt*, 493 U.S. 455, 458–59 (1990) (citing Justice Washington's opinion in *Houston v. Moore*).

154. TUCKER, *BLACKSTONE'S COMMENTARIES*, *supra* note 50, at 151.

to the new authority, therefore, ought not to be extended beyond the terms of the compact, as it might endanger his obedience to that state to whose laws he still continues to owe obedience; or may subject him to a double loss, or inconvenience for the same cause.<sup>155</sup>

When Story cited the Eleventh Amendment as a federalist rule of construction in *Houston*, he did so in a legal context in which both bench and bar would have been familiar with Tucker's similar federalist construction of the "Eleventh."<sup>156</sup> Tucker's reading was not controversial and, as the last section showed, it was warmly embraced by states' rights advocates in the years that followed.

But Tucker's strict construction of federal power was directly at odds with the broad interpretation of federal power pressed by John Marshall in cases like *McCulloch v. Maryland* and, especially, *Gibbons v. Ogden*. In *Gibbons*, despite the Ninth Amendment argument raised by Thomas Emmet, Marshall nevertheless declared "nor is there one sentence in the constitution" that called for a strict construction of federal power.<sup>157</sup> Perhaps because Story's use of the Ninth in *Houston* conflicted with Marshall's absolute statement in *Gibbons*, it fell into disfavor among those supporting Marshall's nationalist reading of the Constitution.

Treatise writers William Rawle and James Kent published their respective works on American constitutional law after the Supreme Court issued its opinion in *Gibbons*. Like other constitutional treatises written in the 1820s and early 1830s, those of Rawle and Kent were more nationalist in their interpretations of federal power than were earlier works like those of St. George Tucker.<sup>158</sup> Both writers acknowledged Story's earlier opinion in *Houston*, but both omitted his reference to the Ninth Amendment. For example, in his *View of the Constitution*, William Rawle paraphrased Story's language in *Houston* in his discussion of the concurrent jurisdiction of state courts,<sup>159</sup> but he omits Story's specific reference to the "eleventh amendment."<sup>160</sup> Similarly, in his 1826 *Commentaries on American Law*,

155. *Id.* Randy Barnett cites Tucker's rule of strict construction regarding federal interference with personal rights in support of an unenumerated natural rights reading of the Ninth Amendment. See BARNETT, RESTORING THE LOST CONSTITUTION, *supra* note 2, at 241–42. As the above shows, Tucker placed both the Ninth and Tenth Amendments in a decidedly federalist context. Tucker could not possibly have been referring to individual natural rights if the Ninth was meant to prevent interference with, or adding to, an individual's prior obligations to the state.

156. According to Saul Cornell, Tucker's *Commentaries* was "an instant publishing success" and "became the definitive American edition of Blackstone until midcentury." SAUL CORNELL, THE OTHER FOUNDERS 263 (1999).

157. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 187–88 (1824).

158. See White, *supra* note \_\_, at 86–95.

159. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 205 (photo. reprint 2003) (2d ed. 1829).

160. Using language that tracks Story's language in *Houston* almost verbatim, Rawle writes:

The Constitution containing a grant of powers in many instances similar to those already existing in the state governments, and some of these being of vital importance

James Kent cited Story's opinion in *Houston* and described it as having "defined with precision the boundary line between the concurrent and residuary powers of the states, and the exclusive powers of the union."<sup>161</sup> Kent then closely paraphrased Story's actual opinion in *Houston*, but omitted Story's reference to the Ninth.<sup>162</sup> James Kent and Joseph Story had begun corresponding with one another in 1819,<sup>163</sup> and Story later praised this particular section of Kent's *Commentaries* (which, in turn, praised Story).<sup>164</sup> Whatever the reasons for Kent's failure to include Story's reference to the Ninth, it would not have gone unnoticed by Story. Most likely, Story approved of the omission, because he himself ultimately abandoned the idea that the Ninth Amendment played any role in restricting the interpretation of federal power.

When Joseph Story published his *Commentaries on the Constitution* in 1833, he dedicated the work "to the Honorable John Marshall," whose "expositions of constitutional law enjoy a rare and extraordinary authority. They constitute a monument of fame far beyond the ordinary memorials of

to state authority and state legislatures, a mere grant of such powers, in affirmative terms to congress, does not *per se* transfer an exclusive sovereignty on such subjects to the latter.

On the contrary, the powers so granted would not be exclusive of similar powers existing in the states, unless the Constitution had expressly given an exclusive power to congress, or the exercise of a like power were prohibited to the states, or there was a direct repugnancy or incompatibility in the exercise of it by the states. . . .

In all other cases not falling within these classes the states retain concurrent authority. [Here, Rawle omits Story's reference to the Eleventh Amendment.]

There is this reserve, however, that in cases of concurrent authority where the laws of the states and of the United States are in direct and manifest collision on the same subject, those of the United States being the supreme law of the land are of paramount authority, and the state laws so far, and so far only, as such incompatibility exists must necessarily yield [citing *Houston v. Moore*, 5 Wheat. 48. Per Story, J.].

*Id.* at 204–05. In addition to omitting Story's reference to the Ninth Amendment, Rawle also omitted the Ninth and Tenth Amendments from his description of constitutional restrictions on the federal government. *Id.* at 135. The omission of the Ninth Amendment from this list is significant because Rawle believed the restrictions of the first eight amendments also bound the states. *See id.* at 135–36; *see also* AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 145 (1998) (discussing Rawle). Rawle apparently read both the Ninth and Tenth Amendments in a federalist light. Although Rawle's work is known for its defense of secession, Rawle shared Marshall's nationalist approach to federal power. For example, Rawle indirectly criticizes Tucker's strict construction of federal power, *see* RAWLE, *supra* note 159, at 31 ("A strict construction, adhering to the letter, without pursuing the sense of the composition, could only proceed from a needless jealousy, or rancorous enmity."), and he expressly praises Marshall's opinion in *Gibbons*. *Id.* at 82.

161. JAMES KENT, *Lecture XVIII*, in 1 COMMENTARIES ON AMERICAN LAW 365 (1826).

162. *Id.* at 366 ("In all other cases, the states retain concurrent authority with Congress [Kent omits Story's reference to the Eleventh Amendment], except where the laws of the states and of the union are in direct and manifest collision on the same subject . . .").

163. 3–4 WHITE, *supra* note 17, at 105.

164. 1 STORY, COMMENTARIES (1991 reprinting), *supra* note 93, at 424 n.1 (noting that, after citing *Gibbons*, "Mr. Chancellor Kent has given this whole subject of exclusive and concurrent power a thorough examination; and the result will be found most ably stated in his learned Commentaries, Lecture 18").

political and military glory.”<sup>165</sup> In addition to refuting states’ rights theories such as those advanced by James Madison and Thomas Jefferson in their Virginia and Kentucky Resolutions,<sup>166</sup> Story spends considerable time refuting Tucker’s “strict construction” theory of federal power. Tucker himself had based his arguments on the writings of Vattel, and the Ninth and Tenth Amendments.<sup>167</sup> Story strongly criticizes Tucker’s reliance on Vattel and the Tenth Amendment,<sup>168</sup> but he says nothing about Tucker’s reliance on the Ninth. Instead, Story treats Tucker’s Ninth Amendment-based “social compact” argument as if it were based on *nothing at all*.<sup>169</sup>

As the proper alternative to Tucker’s strict construction approach, Story presents Chief Justice Marshall’s formulation of federal power in *McCulloch* and *Gibbons*. First, Story presents an extended quote from *Gibbons* including Marshall’s assertion that there is not a single sentence in the Constitution that suggests a limited reading of federal power.<sup>170</sup> Story then goes on to adopt Marshall’s reasoning in *McCulloch*, which construes the enumeration of rights in Article I, Section 9 to suggest an otherwise broad degree of federal power—despite the obvious conflict with the clear demand of the Ninth Amendment.<sup>171</sup> Having established the proper approach to federal power, Story next addressed the concurrent powers of the states. In *Houston*, Story suggested that a limited reading of exclusive federal power was supported by the letter and spirit of the “eleventh amendment.” In his *Commentaries*, Story paraphrases his opinion in *Houston*, but, as had Rawle and Kent, he omits his reference to the Ninth Amendment.<sup>172</sup> Story does not modify or correct the earlier reference, he simply does not repeat it, despite numerous citations to the very page in *Houston* that includes the reference.

Having committed himself to Marshall’s view that there is no text suggesting a limited reading of federal power, Story embarks on a lengthy discussion of the variety of ways state power must give way before federal authority. Following Marshall’s lead in *McCulloch* and *Gibbons*, Story’s

165. *Id.* at iii.

166. *See, e.g., id.* at 287 n.1, 289 n.1.

167. TUCKER, BLACKSTONE’S COMMENTARIES, *supra* note 50, at 151.

168. 1 STORY, COMMENTARIES (1991 reprinting), *supra* note 93, at 393.

169. *See id.* at 396. Story states:

When it is said, that the constitution of the United States should be construed strictly, viewed as a social compact, whenever it touches the rights of property, or of personal security, or liberty, the rule is equally applicable to the state constitutions in the like cases. The principle, upon which this interpretation rests, *if it has any foundation*, must be, that the people ought not to be presumed to yield up their rights of property or liberty, beyond what is the clear sense of the language and the objects of the constitution.

*Id.* (emphasis added).

170. *Id.* at 401–02.

171. *Id.* at 413–15. For a discussion of how Marshall’s approach in *McCulloch* conflicts with the Ninth Amendment, see Lash, *The Lost Original Meaning*, *supra* note 8, at 417–22.

172. 1 STORY, COMMENTARIES (1991 reprinting), *supra* note 93, at 421–22.

interpretation of federal power is unfettered by any restrictive rule of construction, much less by the Ninth Amendment. In essence, Story argues that states retain only those powers that are left over after a proper interpretation of federal power.<sup>173</sup> This is a restatement of the Tenth Amendment and, in fact, Story asserts that his rules “are confirmed by the positive injunctions of the tenth amendment.”<sup>174</sup> The critical issue, of course, involved determining what constitutes a reasonable interpretation of federal power—a subject James Madison and St. George Tucker believed was addressed by the Ninth Amendment. Not only did Story avoid addressing Tucker’s Ninth Amendment argument when criticizing Tucker’s rules of interpretation, he remained silent regarding his own use of the Ninth in *Houston* as a rule of construction.

Despite these omissions, remnants of Story’s earlier federalist reading of the Ninth still can be found in his *Commentaries*. Story places his discussion of the Ninth Amendment in a chapter entitled “Non-Enumerated Powers.”<sup>175</sup> When one considers the common contemporary description of the Ninth Amendment as guarding unenumerated *rights*,<sup>176</sup> Story’s title is startling. It shows that Story agreed with Madison that preserving retained rights amounts to the same thing as preserving local power against undue federal intrusion. It also explodes the myth that the Ninth deals only with rights while the Tenth deals only with powers.<sup>177</sup> If nothing else, Story’s heading should put to rest that erroneous categorical assumption. Given Story’s nationalist approach to federal power, his description of the Ninth

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173. *Id.* at 431–33.

174. *Id.* at 433. In his section on the Tenth Amendment, Story cites, among other cases, *Houston v. Moore* and the page in that case containing the “eleventh amendment” passage. The cite is out of place; it has nothing to do with the specific proposition discussed in the text (involving the decision to not add the word “expressly” to the Tenth Amendment), and its inclusion remains obscure. One could argue that this cite raises the possibility that the *Houston* reference to the “eleventh amendment” was a mistaken reference to the Tenth. I believe this is unlikely, however, for a number of reasons. First, the cite itself makes no sense, even in terms of the Tenth Amendment discussion to which it is linked. Second, Story cites to this specific page in *Houston* repeatedly in his *Commentaries*. See, e.g., *id.* at 424 n.2, 428 n.2. Despite these numerous citations, however, Story never once suggests that the page contains an error. Moreover, neither lawyers nor courts believed the passage contained any error, for they quoted it in briefs and judicial opinions. The fact that the passage was embraced by others and never corrected by Story suggests that it did not contain an obvious error. It did, however, contain an application of the Ninth Amendment that Story no longer advocated.

175. 3 STORY, COMMENTARIES (1991 reprinting), *supra* note 93, at 751. The chapter heading for Story’s discussion of the Tenth Amendment is “Powers Not Delegated.” See *id.* at 753. The same chapter headings are used in the one-volume abridged version of the *Commentaries* that Story prepared almost at the same time as the three-volume work. STORY, COMMENTARIES (1987 reprinting), *supra* note 101, at 711, 713.

176. See, e.g., THE COMPLETE BILL OF RIGHTS, *supra* note 72, at 627 (labeling the chapter on the Ninth Amendment as “Unenumerated Rights Clause”).

177. This point seems well established by Madison’s description of the Ninth Amendment in his speech on the Bank of the United States. See Lash, *The Lost Original Meaning*, *supra* note 8, at 387–90. Story’s chapter heading for the Ninth simply makes the point as clear as is historically possible.

takes on even greater significance as, in effect, an admission against interest. Story shared John Marshall's broad interpretation of congressional power and he had no incentive to describe any clause in the Constitution as limiting federal authority if the issue was in doubt. If anything, one would expect a nationalist like Story to try and minimize the impact of the Ninth Amendment on federal power and, in fact, this may have been Story's intent.

Although Story indicates that the role of the Ninth is to preserve the non-enumerated powers of the states, he says nothing about the Ninth serving as a rule for construing *federal* power. Instead, he appears to treat the Ninth as a mere restatement of principles declared by the Tenth Amendment. In the index to his Commentaries under the heading "Rights Reserved to the States and People," Story refers the reader to his discussion of the Ninth *and* Tenth Amendments.<sup>178</sup> Under the heading "Reserved Powers and Rights of the People," Story refers the reader to the same amendments.<sup>179</sup> Clearly, Story believed that the ~~the~~ Ninth and Tenth Amendments expressed related principles of limited federal authority. Story was unwilling, however, to follow his earlier approach in *Houston* and read the Ninth as constraining the interpreted scope of enumerated federal power.

The tension between his words in *Houston* and his later nationalist interpretation of the Constitution was noticed by his colleagues on the bench, who in cases like *Miln* and *Prigg* quoted Story's own words in *Houston* as a remonstrance against his nationalist vision of federal power. Still, in his judicial opinions, Story remained silent. He neither corrected nor modified his earlier view of the "eleventh amendment" nor did he address Ninth Amendment-based readings of the Constitution like those proposed by St. George Tucker. Like Marshall, Story chose to ignore the Ninth Amendment, rather than debate its meaning.

Although later courts continued to cite Story's opinion in *Houston*, they often echoed his *Commentaries* and omitted his language regarding the

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178. 3 STORY, COMMENTARIES (1991 reprinting), *supra* note 93, at 774.

179. *Id.* at 773. A similar collapsing of the Ninth and Tenth Amendments can be found in Peter Du Ponceau's, *A Brief View of the Constitution of the United States* 44-45 (1834). Treating the Ninth as if it were a single clause with the Tenth, Du Ponceau remarks:

The enumeration in the constitution of certain rights, is not to be construed to deny or disparage others retained by the people; and the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people. This article differs from a similar one in the confederation in this, that the word *expressly* is here left out, which leaves room for implied powers, without the admission of which the constitution could not be carried into effect.

*Id.* Like Story, Du Ponceau treats the Ninth as no more than a declaration of the enumerated powers theory of federal power. Also like Story, and as is generally found in the treatises of the late 1820s and 30s, Du Ponceau minimizes the impact of both the Ninth and Tenth Amendments on federal power. As did all treatise writers of antebellum America, however, Du Ponceau assumed the Ninth was linked to the Tenth as a statement regarding the limited powers of the federal government.

“eleventh amendment.”<sup>180</sup> As the convention for referring to the Bill of Rights changed, Story’s earlier reference to the eleventh amendment became ever more obscure. In time, Story’s opinion in *Houston* came to be associated with principles underlying the Tenth Amendment.<sup>181</sup> For example, in the 1843 Michigan case, *Harlan v. People*,<sup>182</sup> Judge Felch wrote his own version of Story’s opinion, replacing the “eleventh amendment” with the Tenth. After citing Story’s opinion in *Houston*, Judge Felch wrote:

And it is affirmed, by the same authorities, that a mere grant of power in affirmative terms, does not, *per se*, transfer an exclusive sovereignty on such subjects to the Union. In all cases not falling within either of the classes already mentioned, the states retain either the sole power, or a power which they may exercise concurrently with congress. This results not only from the general principles on which the Union is founded, but is within the letter of the tenth article of the amendments to the constitution, which declares that “the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”<sup>183</sup>

This passage is taken straight from Story’s opinion; Felch simply changed “letter and spirit of the eleventh amendment” to “the letter of the tenth.”<sup>184</sup> Felch either believed Story made a mistake, or he agreed with Story’s later position that the issue was best considered through the lens of the Tenth. In either event, Story’s reference to “the eleventh” and its significance to the early understanding of the Ninth Amendment was, literally, erased.

4. *The Significance of Houston v. Moore*.—Although long forgotten as an opinion dealing with the Ninth Amendment, Justice Story’s opinion in *Houston v. Moore* is significant for a number of reasons. Judges and scholars seeking the original meaning of the Ninth Amendment have often turned to the views of James Madison and Joseph Story.<sup>185</sup> Until now, however, the

180. *E.g.*, *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533, 548 n.30 (1944); *Norfolk & W.R. Co. v. Commonwealth*, 24 S.E. 837, 838 (Va. 1896); *Helm v. First Nat’l Bank of Huntington*, 43 Ind. 167, 169 (1873).

181. *See Keller v. U.S.*, 213 U.S. 138, 145 (1909) (quoting a different passage from Story’s opinion in *Houston v. Moore* and associating his reasoning with the Tenth Amendment). The story of how the Tenth Amendment came to replace the Ninth as a rule of construction deserves a separate treatment. *See* Kurt T. Lash, *Madison’s Celebrated Report: The Roots of Federalism and the Transformation of the 10th Amendment* (Jan. 14, 2005) (manuscript on file with the author).

182. 1 Doug. 207 (Mich. 1843).

183. *Id.* at 211.

184. Compare Story’s opinion in *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 49 (1820).

185. *E.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 489–90 (1965) (Goldberg, J., concurring). Scholarly references to Madison and Story in works discussing the Ninth Amendment are ubiquitous. For only a few such examples, see LEONARD LEVY, *ORIGINS OF THE BILL OF RIGHTS* 244, 246–60 (1999) (discussing Story and Madison); MASSEY, *SILENT RIGHTS*, *supra* note 2, at 146–47, 168 nn.172–73 (discussing Madison and Story); THOMAS B. MCAFFEE, *INHERENT RIGHTS*,



views of these Founding-era figures remained critically incomplete. Although his *Commentaries* linked the Ninth to the Tenth Amendment as a statement of principle, *Houston v. Moore* suggests Justice Story's original views on how the Ninth Amendment actually should be applied. Written within the lifetime of those who drafted and ratified the Clause, Story's opinion illuminates the general understanding of the Ninth Amendment in the period immediately following its adoption. Story's reading of the Ninth was not contradicted by any other Justice and his specific analysis of the Ninth Amendment was quoted by Supreme Court justices and the finest lawyers in the United States. Moreover, no other account of the Ninth Amendment was proposed by any Justice on the Court at the time or for the next one hundred and fifty years—a phenomenon which strongly suggests that Story's opinion presented the commonly accepted view of the Ninth as a federalism-based rule of construction, even if the application of that rule was sporadic. Indeed, Story and Marshall's later reluctance to even acknowledge the Ninth makes sense if it was widely regarded as a rule supporting state autonomy. Finally, because Story's opinion in *Houston* adopts the Madisonian reading of the Ninth Amendment—a reading itself based on proposals from the state conventions—*Houston v. Moore* establishes a link between the state conventions, Madison's interpretation of the Ninth Amendment, and the common understanding of the Ninth in the period following its adoption.<sup>186</sup> This approach viewed the Ninth as actively limiting the construction of delegated federal power in the service of state autonomy.

*Houston v. Moore* also illustrates how the Ninth Amendment could be closely related to the Tenth and yet still retain an independent role in constitutional interpretation. *Houston* did not examine whether enumerated federal power existed. The issue was whether concededly delegated federal power should be construed in a manner that disparaged the concurrent rights of the states. Answering this question required a rule of interpretation, and it is the Ninth, not the Tenth, which expressly provides such a rule. The ultimate fate of *Houston v. Moore*, however, raises an intriguing possibility. Scholars have often dismissed historical references to the Ninth Amendment because they believed that such references really were about the Tenth.<sup>187</sup> Judge Felch's rewriting of Story's *Houston* analysis in *Harlan v. People* suggests that the opposite may be true: Past cases that refer to the Tenth Amendment may really be about the Ninth.

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THE WRITTEN CONSTITUTION, AND POPULAR SOVEREIGNTY: THE FOUNDERS' UNDERSTANDING 79 (2000) (discussing Madison); Randy E. Barnett, *Introduction: James Madison's Ninth Amendment*, in 1 THE RIGHTS RETAINED BY THE PEOPLE, *supra* note 2, at 1 (discussing Madison); Knowlton H. Kelsey, *The Ninth Amendment of the Federal Constitution*, in 1 RIGHTS RETAINED BY THE PEOPLE, *supra* note 2, at 102–03 (discussing Story).

186. See generally Lash, *The Lost Original Meaning*, *supra* note 8.

187. See, e.g., PATTERSON, *supra* note 2, at 32.

As the rest of this Article explains, later courts did not share the Marshall Court's reluctance to cite and rely on the Ninth Amendment. Marshallian nationalism was eventually replaced by decidedly states' rights oriented interpretations of the Constitution. Marshall's approach to the Ninth and Tenth Amendments would return, however, in the constitutional upheaval known as the New Deal.<sup>188</sup>

*E. The Ninth Amendment and "the Enumeration . . . of Certain Rights"*

Just as the principle of state autonomy suggested a limited reading of enumerated federal power, that same principle supported a limited reading of constitutional restrictions on the *states*. John Marshall himself, prior to his opinions in *McCulloch* and *Gibbons*, acknowledged the role of federalism in interpreting the provisions in Article I, Section 10. For example, in *Trustees of Dartmouth College v. Woodward*, Chief Justice Marshall wrote of the need to limit the potential scope of the Impairment of Contract Clause in order to avoid interfering with the "internal concerns of a state."<sup>189</sup> He noted:

[E]ven marriage is a contract, and its obligations are affected by the laws respecting divorces. That the clause in the constitution, if construed in its greatest latitude, would prohibit these laws. Taken in its broad, unlimited sense, the clause would be an unprofitable and vexatious interference with the internal concerns of a state, would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions, which are established for purposes of internal government, and which, to subserve those purposes, ought to vary with varying circumstances. . . .

The general correctness of these observations cannot be controverted. That the framers of the constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us, is not to be so construed, may be admitted.<sup>190</sup>

Even as ardent a nationalist as John Marshall believed that the framers intended a limited construction of constitutional rights in order to avoid "restrain[ing] the states in the regulation of their civil institutions." Although Marshall does not cite the Ninth Amendment, his approach follows both the letter and spirit of the Ninth by limiting the construction of an enumerated power or right—in this case, freedom from impaired contracts—to preserve other rights retained by the people, such as local control of civil institutions. Later courts recognized the relation between Marshall's words in *Dartmouth*

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188. See *infra* section IV(B)(2).

189. 17 U.S. (4 Wheat.) 518, 628 (1819).

190. *Id.* at 627–28.

and the rule of construction expressed by the Ninth Amendment and they cited *Dartmouth* accordingly.<sup>191</sup>

Antebellum courts generally were not as reluctant as John Marshall to recognize the Ninth Amendment as limiting the construction of enumerated rights against the states. In *Anderson v. Baker*,<sup>192</sup> the Supreme Court of Maryland declined to give an expansive reading to Article I, Section 10's prohibition of ex post facto laws, citing as justification the Ninth and Tenth Amendments:

Prohibitions on the States, are not to be enlarged by construction. To do so, would violate the spirit and object of the 9th and 10th amendments to the Constitution of the United States, viz.: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." These were intended to prevent argumentative implications of power not delegated; to exclude any interpretation by which other powers should be assumed beyond those which are granted.<sup>193</sup>

The idea that the Ninth Amendment and its attendant rule of construction limited the scope of rights-bearing provisions as well as power-granting provisions would prove particularly significant in the next great period of constitutional law, when courts had to reconcile the federalism principles of the Founding with the individual rights provisions of the Fourteenth Amendment.<sup>194</sup>

#### F. Slavery

I shall support the Amendts. proposed to the Constitution that any exception to the powers of Congress shall not be so construed as to give it any powers not *expressly* given, & the enumeration of certain rights shall not be so construed as to deny others retained by the people—& the powers not delegated by this Constn. nor prohibited by it to the States, are reserved to the States respectively; if these amendts. are adopted, they will go a great way in preventing Congress from interfering with our negroes after 20 years or prohibiting the

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191. See *George v. Bailey*, 274 F. 639, 640–44 (W.D.N.C. 1921); see also *infra* notes 323–326 and accompanying text.

192. 23 Md. 531 (1865). The case upheld the right of a state to alter its constitution to impose restrictions on the franchise (a test oath in this case) against a claim that this violated the ex post facto restriction in Article I, Section 10. *Id.* at 624–25.

193. *Id.* at 624.

194. See *infra* notes 273–288 and accompanying text.

importation of them. Otherwise, they may even within the 20 years by a strained construction of some power embarrass us very much.<sup>195</sup>

As a rule of construction preserving the autonomy of the states, the Ninth Amendment was caught up in the struggle over slavery from its very beginning. Throughout the antebellum period, courts struggled to find what Madison referred to as the “just equilibrium” between national and local powers.<sup>196</sup> Cases decided by the nationalist Marshall court, such as *Martin v. Hunters’ Lessee*,<sup>197</sup> were resisted by some state courts as violating the balance established by the Ninth and Tenth Amendments. In *The Ohio*,<sup>198</sup> for example, future Chief Justice of the Ohio Supreme Court, T.W. Bartley, relied on the Ninth and Tenth Amendments in an opinion rejecting the authority of the Supreme Court to review state court opinions:

We may here promise, that it is a settled rule of interpretation, founded on sound reason, that every written instrument conferring limited and expressly defined powers must be strictly construed; and that to warrant the exercise of special authority thus delegated, the grant of it, must appear affirmatively and distinctly to be within the terms of the prescribed limits. If this rule be important in any instance, it is so in its application to the written constitution of a government of limited and expressly defined powers. If the exercise of doubtful authority, derived by vague and far-fetched construction and implication, be warranted or allowed, a written constitution will be of but little consequence as a restraint upon ambition and cupidity. The rigid application of the strict rule of construction above mentioned, is also authoritatively required by the ninth or tenth additional amendatory articles of the constitution, declaring that the powers not expressly delegated, are reserved, and that the enumeration of certain rights in the constitution shall not be construed to deny or disparage those retained. Without this express requirement of a strict construction, the constitution would not have been adopted by the states.<sup>199</sup>

In 1856, having been elevated to Chief Justice of the Ohio Supreme Court, Bartley repeated his view that the Ninth Amendment protected the right of the states to maintain the peculiar institution of slavery. In *Anderson v. Poindexter*, the Ohio Supreme Court ruled that slaves automatically

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195. Letter from William L. Smith to Edward Rutledge (Aug. 10, 1789), in *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS* 273 (Helen E. Veit et al. eds., 1991) [hereinafter *CREATING THE BILL OF RIGHTS*].

196. Letter from James Madison to Spencer Roane (May 6, 1821), in *WRITINGS*, *supra* note 11, at 773.

197. 14 U.S. (1 Wheat.) 304 (1816).

198. *Stunt v. The Steamboat Ohio*, 3 Ohio Dec. Reprint 362 (Hamilton Dist. Ct. 1855).

199. *Id.* at 365–66. Although Bartley’s decision was reversed on appeal, *see The Ohio v. Stunt*, 10 Ohio St. 582, (Ohio 1856), the next year, Judge Bartley joined the Ohio Supreme Court as Chief Justice and issued the same opinion in dissent. *See Piqua Bank v. Knoup*, 6 Ohio St. 342, 347–48 (Ohio 1856) (Bartley, C.J., dissenting).

became free once they set foot on the free soil of Ohio.<sup>200</sup> Concurring in the judgment, Bartley disagreed with the reasoning of the Court which he believed was overly dismissive of state rights:

Having guaranteed to the people of each state inviolability in their rights of private property, and security in their domestic tranquility; having declared that the powers enumerated in the constitution should not be construed to deny or disparage the rights retained by the people; and having guaranteed the sovereignty and independence of each state, subject only to the powers delegated to the confederacy, [the people of the several states] recognized the relation of master and servant, secured the return of fugitives from servitude.<sup>201</sup>

Bartley thus adopts the Madisonian reading of the Ninth which prohibits the construction of federal power to the injury of the people's retained rights—rights which Bartley believed included the right to chattel slavery.

Although Bartley invoked the Ninth Amendment on behalf of slavery, state autonomy was a two-way street. In *Mitchell v. Wells*, the Supreme Court of Mississippi ruled that a former slave who had been freed in Ohio had no enforceable rights in Mississippi courts.<sup>202</sup> In his dissent, Judge Handy criticized the majority's refusal to recognize the rights of Ohio citizens and raised the Ninth and Tenth Amendments as establishing the reserved "rights and powers" of the people of the several states:

The 9th and 10th amendments to the Constitution of the United States reserve to the people of the several States the rights and powers not enumerated in that instrument, and delegated to the confederacy, nor prohibited to the States; and the right of an inhabitant or subject of any State, not enumerated, remains as a sovereign power reserved to the State, and to be exercised by those entitled to her protection according to the principles applicable to the relations of independent nations.<sup>203</sup>

Protecting state autonomy, however, inexorably led to the legal entrenchment of slavery. In *Willis v. Jolliffee*, a certain E.W. took one of his slaves, Amy, and her seven children to Ohio with the intention of setting them free.<sup>204</sup> His will dictated that his estate was to be executed in trust for Amy and her children.<sup>205</sup> Tragically, E.W. died the moment he arrived with Amy and her children at the wharf in Cincinnati.<sup>206</sup> Not having yet been freed, Amy remained a slave under South Carolina law and, according to the trial court, Amy could not inherit E.W.'s estate.<sup>207</sup> The opinion cited a

200. See *Anderson v. Poindexter*, 6 Ohio St. 622, 631 (1856).

201. *Id.* at 686 (Bartley, C.J., concurring) (emphasis omitted).

202. *Mitchell v. Wells*, 37 Miss. 235, 264 (1859).

203. *Id.* at 283–84.

204. *Willis v. Jolliffee*, 32 S.C. Eq. (11 Rich. Eq.) 447, 450–51 (1860).

205. *Id.* at 448.

206. *Id.* at 450.

207. *Id.* at 491.

number of constitutional provisions, including the Ninth and Tenth Amendments, in support of its conclusion that the Constitution anticipated state recognition of slavery as a “property” right.<sup>208</sup>

Supreme Court Justice John Campbell took a similar view in his concurring opinion in *Dred Scott v. Sandford*.<sup>209</sup> In *Dred Scott*, the Supreme Court struck down the Missouri Compromise on the ground that Congress had no authority to ban slavery from the territories. One of the issues in the case was the scope of power delegated by the provision permitting Congress “to dispose of and to make all needful rules and regulations respecting the territory or other property belonging to the United States.”<sup>210</sup> The Government argued that “all” meant *all* and that it “include[d] all subjects of legislation in the territory.”<sup>211</sup> Campbell’s response was that such a construction of congressional power would destroy the concept of limited enumerated power expressed by the Ninth and Tenth Amendments. According to Campbell:

The people were assured by their most trusted statesmen ‘that the jurisdiction of the Federal Government is limited to certain enumerated objects, which concern all members of the republic,’ and ‘that the local or municipal authorities form distinct portions of supremacy, no more subject within their respective spheres to the general authority, than the general authority is subject to them within its own sphere.’ Still, this did not content them. Under the lead of Hancock and Samuel Adams, of Patrick Henry and George Mason, they demanded an explicit declaration that no more power was to be exercised than they had delegated. And the ninth and tenth amendments to the Constitution were designed to include the *reserved rights of the States*, and the people, within all the sanctions of that instrument, and to bind the authorities, State and Federal, by the judicial oath it prescribes, to their recognition and observance. Is it probable, therefore, that the supreme and irresponsible power, which is now claimed for Congress over boundless territories, the use of which cannot fail to react upon the political system of the States, to its subversion, was ever within the contemplation of the statesmen who conducted the counsels of the people in the formation of this Constitution?<sup>212</sup>

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208. *Id.* at 477. The decision was reversed on appeal without a discussion of either the Ninth or Tenth Amendments. *Id.* at 517.

209. 60 U.S. (19 How.) 393 (1856).

210. *Id.* at 509.

211. *Id.* at 600.

212. *Id.* at 511 (Campbell, J. concurring). Although Chief Justice Taney’s lead opinion in *Dred Scott* discussed constitutional protection of unenumerated property rights protected under the Due Process Clause of the Fifth Amendment, Taney did not cite the Ninth Amendment in support of these unenumerated rights. *Id.* at 450. Only Justice Campbell raised the Ninth Amendment and did so only in regard to the scope of enumerated federal power.

*G. Summary: The Ninth Amendment from Founding to the Civil War*

The jurisprudence of the Ninth Amendment in the antebellum period is both plentiful and consistent. Following the approach of James Madison, courts at all levels read the Ninth Amendment as a rule of construction preserving the right to local self-government. Generally deployed in tandem, both the Ninth and Tenth Amendments were understood to express related principles of state autonomy. Although related, the amendments were not redundant; the Ninth played a unique role in limiting the construction of enumerated powers and rights. It was not a passive declaration of enumerated power, but an active substantive restriction on the interpretation of federal power.

Although bench and bar were in general agreement regarding the meaning of the Ninth Amendment, influential Justices such as John Marshall ignored the Ninth in major cases interpreting the scope of federal power. Marshall in particular discounted the idea that any provision in the Constitution suggested a substantive limit on the construction of enumerated federal authority. Marshall never articulated an alternate reading of the Ninth; he simply ignored it. Judicial opinions that did address the Ninth, however, read it in line with Justice Story's analysis in *Houston v. Moore*. As had Madison in his speech on the Bank of the United States, Justice Story in his *Houston* dissent applied the Ninth as a federalist rule of construction. Although Story later seemed to reduce the Ninth Amendment to a restatement of principles declared by the Tenth, this in itself is telling. The initial dispute over the Ninth Amendment was not between federalist and libertarian readings of the Clause, but between passive and active federalist rules of construction. The Madisonian view, shared by St. George Tucker, Justice Smith Thompson, and advocates like Thomas Emmet, read the Ninth as an active federalist constraint on the interpretation of federal power. Although initially sharing this view, Justice Story ultimately adopted the more nationalist views of James Kent and John Marshall and presented the Ninth in his Commentaries as a passive restatement of the federalist principle of enumerated power. Despite this disagreement, however, every court and every scholar who addressed the Ninth Amendment in the first great period of constitutional law read the Ninth in *pari materia* with the Tenth as one of the twin guardians of federalism. As the nineteenth century progressed, it would be the original Madisonian understanding of the Ninth and Tenth that would prevail, at least until the dawn of the New Deal.

III. Reconstruction and the Ninth Amendment

*A. The Ninth and Fourteenth Amendments*

The struggle over slavery and a bloody Civil War gave rise to a new birth of freedom, one that dramatically altered the original balance of power between the federal government and the states. Whereas the original Bill of

Rights applied only to the federal government, the Fourteenth Amendment introduced significant new restrictions on the states and bound them to respect the “privileges or immunities” of citizens of the United States.<sup>213</sup> Although the Supreme Court has interpreted the Due Process Clause to incorporate most of the provisions in the Bill of Rights,<sup>214</sup> contemporary constitutional historians suggest that the Privileges or Immunities Clause is more likely to have been the intended vehicle of incorporation.<sup>215</sup>

If, in fact, the framers of the Fourteenth Amendment intended to incorporate the Bill of Rights, this signaled a changed understanding of the nature of the Bill itself.<sup>216</sup> For example, the First Amendment’s Establishment Clause was originally intended not only to prevent federal religious establishment, but also to *protect* state religious establishments from federal interference.<sup>217</sup> If the Fourteenth Amendment was intended to

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213. See U.S. CONST. amend. XIV, § 1.

214. See *infra* notes 469–485 and accompanying text (discussing the Ninth Amendment and the doctrine of incorporation).

215. E.g., AMAR, *supra* note 160, at 181–214; MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 2 (1986). Earlier scholarship had generally been skeptical regarding any intent to incorporate the Bill of Rights. E.g., Raoul Berger, *Incorporation of the Bill of Rights: Akhil Amar’s Wishing Well*, 62 U. CIN. L. REV. 1 (1993); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, (1949); Lino A. Graglia, “*Interpreting the Constitution*”: *Posner on Bork*, 44 STAN. L. REV. 1019, 1033–34 (1992). Although my own work tends to support the conclusions of Curtis and Amar, see, e.g., Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085 (1995) [hereinafter Lash, *The Second Adoption of the Establishment Clause*]; Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106 (1994) [hereinafter Lash, *The Second Adoption of the Free Exercise Clause*], this Article does not address the merits of the incorporation argument. Instead, this Part focuses on the issue of whether the Ninth Amendment was understood in a manner that made it as likely to be considered a “privilege or immunity” of United States citizens as the rights listed in the first eight amendments.

A separate issue involves whether the Privileges or Immunities Clause was understood to protect unenumerated individual rights. A good argument can be made that it was intended to do so. See AMAR, *supra* note 160, at 280; Kurt T. Lash, *Two Movements of a Constitutional Symphony: Akhil Reed Amar’s The Bill of Rights*, 33 U. RICH. L. REV. 485, 492 (1999) [hereinafter Lash, *Two Movements of a Constitutional Symphony*]. If so, then an originalist interpretation of the Constitution must reconcile the Ninth and Fourteenth Amendments and determine the degree to which the Fourteenth altered the original protections of the Ninth. I can only partially address these issues; a complete analysis requires a separate article.

216. Professor Akhil Amar suggests the Bill of Rights underwent a process of “refined incorporation” through which some, but not all, of the liberties in the original Bill were absorbed into the Fourteenth, thereby changing their focus from protecting federalism to safeguarding individual liberty. See AMAR, *supra* note 160, at 215–30.

217. See Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1201 (1992) (suggesting that one of the original purposes of the Bill of Rights was to protect existing freedoms of the state as well as individuals, such as the freedom of the states to establish churches); Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1132 (1988) (claiming that at the time of the adoption of the First Amendment, six states continued to maintain or authorize established religions); Kurt T. Lash, *Power and the Subject of Religion*, 59 OHIO ST. L.J. 1069, 1099–1100 (1998) (“There is a general consensus among legal



incorporate the Establishment Clause against the states, this would mean that nonestablishment had come to be understood as a national freedom and not just a jurisdictional rule of federalism.<sup>218</sup>

Recently, a number of constitutional scholars have argued that similar transformations occurred in regard to a number of liberties listed in the Bill of Rights. Michael Kent Curtis, for example, has traced the growing calls for freedom of speech against state action that were triggered by widespread suppression of abolitionist speech.<sup>219</sup> Akhil Amar has examined how drafters of the Fourteenth Amendment believed, contrary to Supreme Court precedent, that the liberties listed in the first eight amendments as a matter of natural right should be protected against abridgment by the states.<sup>220</sup> In my own work, I have argued that, by the time of Reconstruction, certain principles of religious liberty came to be understood as privileges or immunities.<sup>221</sup>

It is possible that the Ninth Amendment similarly evolved during the antebellum period. Even if originally understood as limiting federal power in the service of state autonomy, by 1868 the common understanding of the Ninth could have changed. If the rule of construction of the Ninth Amendment was understood as a personal rights guarantee at the time of the adoption of the Fourteenth Amendment, then the new understanding of the Clause is as capable of being incorporated against the states as is freedom of speech or any other personal freedom listed in the Bill of Rights. In fact, at least two members of the Reconstruction Congress apparently read the Ninth in this manner.<sup>222</sup>

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historians that at least one of the purposes of the Establishment Clause was to protect state religious establishments from federal interference.” (footnote omitted).

218. See Lash, *The Second Adoption of the Establishment Clause*, *supra* note 215, at 1105. *But see generally* STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* (1995).

219. MICHAEL KENT CURTIS, *FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE,” STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 194–215* (2000); CURTIS, *supra* note 215, at 30–31.

220. See AMAR, *supra* note 160, at 181–87.

221. Lash, *The Second Adoption of the Establishment Clause*, *supra* note 215, at 1151–52; Lash, *The Second Adoption of the Free Exercise Clause*, *supra* note 215, at 1146–49.

222. In an 1866 speech, Senator James Nye noted:

In the enumeration of natural and personal rights to be protected, the framers of the Constitution apparently specified everything they could think of—“life,” “liberty,” “property,” “freedom of speech,” “freedom of the press,” “freedom in the exercise of religion,” “security of person,” &c.; and then, lest something essential in the specifications should have been overlooked, it was provided in the ninth amendment that “the enumeration in the Constitution of certain rights should not be construed to deny or disparage other rights not enumerated.” This amendment completed the document. It left no personal or natural right to be invaded or impaired by construction. All these rights are established by the fundamental law.

CONG. GLOBE, 39th Cong., 1st Sess. 1072 (1866). John Yoo quotes this passage and concludes that “[t]his statement shows that the Reconstruction Congress adopted the antebellum interpretation of the Ninth Amendment among the states as a guarantee of minority civil rights, not of majoritarian

Some Ninth Amendment scholars have made an argument along these lines. Professor John Yoo, for example, concedes the original federalist understanding of the Bill of Rights, including the Ninth Amendment. Between the Founding and the Civil War, however, a number of states adopted provisions in their state constitutions that mirror the language of the federal Ninth Amendment. Yoo argues that these state constitutional provisions, which limit the powers of the *state*, suggest a new understanding of the language and meaning of the Ninth Amendment.<sup>223</sup>

Although it is possible that the common understanding of the Ninth Amendment in 1868 rendered it an appropriate candidate for incorporation, the bulk of historical evidence makes it more likely that the Ninth Amendment, like the Tenth, was not understood to protect individual rights from state action. To begin with, even those historians who support incorporation in general do not believe that the Tenth Amendment was incorporated by the Fourteenth Amendment.<sup>224</sup> As a clause expressly protecting states' rights, incorporating the Tenth *against* the states is logically impossible. But, as the last Part has shown, the Ninth Amendment was read in *pari materia* with the Tenth consistently throughout the antebellum period. From the controversy over the Bank of the United States,

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political ones." Yoo, *supra* note 30, at 1026. As the last Part shows, however, the common antebellum understanding of the Ninth was as a federalism-based rule of construction. Moreover, if Nye's views represented those of the 39th Congress, then the framer of Section 1 of the Fourteenth Amendment, John Bingham, almost certainly would have included the Ninth on his list of privileges or immunities. He did not do so. This is not to deny that other members might have shared Nye's interpretation. See, for example, the 1872 speech by Senator Sherman that refers to the Ninth as a source of unenumerated rights in support of congressional power to pass the 1875 Civil Rights Act. CONG. GLOBE, 42d Cong., 2d Sess. 843 (1872). But, finding some interpretations along these lines is not surprising. Even in the antebellum period, some attempts were made to read the Ninth as a source of unenumerated rights. See *supra* note 17 and accompanying text. Alongside these sporadic attempts to read the Ninth in this manner, however, are far more numerous statements on (and applications of) the Ninth as a federalist rule of construction. In fact, other members of the Reconstruction Congress continued to follow the antebellum understanding of the Ninth and Tenth as twin guardians of state autonomy. See CONG. GLOBE, 39th Cong., 1st Sess. 2467 (1866) (recording a statement by Rep. Boyer, during the debates about a constitutional amendment to deny voting rights for those who aided the Confederacy, in which Boyer points to the Ninth and Tenth Amendments as prohibiting the Federal government from "tramp[ing] upon" the southern States by disenfranchising the large majority of their voting population). In sum, in the antebellum period the public may have come to read the first eight amendments as expressing individual, not collective, rights. There is no evidence such a transformation of public opinion occurred in regard to the federalist nature of the Ninth and Tenth Amendments. Although some members of the Reconstruction Congress may have read the Ninth to protect individual rights, the framers of the Fourteenth Amendment apparently did not. Nor is there any evidence that the public who ratified the Fourteenth Amendment broadly understood the Ninth to express libertarian rights applicable against the states.

223. Yoo, *supra* note 30, at 1009; see also AMAR, *supra* note 160, at 280 (describing the adoption of "baby Ninth Amendments" by several states before 1867 and suggesting that "[w]hat began as a federalism clause intertwined with the Tenth Amendment soon took on a substantive life of its own, as a free-floating affirmation of unenumerated rights").

224. E.g., AMAR, *supra* note 160, at 280; Amar, *supra* note 217, at 1197; Yoo, *supra* note 30, at 1023–24.

to the struggle over exclusive federal power, to Campbell's concurrence in *Dred Scott*, the Ninth and Tenth Amendments were understood as joint expressions of state autonomy. States' rights theorists like St. George Tucker and John Taylor had expressly linked the Ninth and Tenth Amendments as dual expressions of federalism.<sup>225</sup> William Rawle, in his *A View of the Constitution*, listed and discussed the first eight amendments as the Constitution's "Declaration of Rights,"<sup>226</sup> which Rawle believed were applicable to both federal and state governments.<sup>227</sup> Neither the Ninth nor the Tenth, however, made Rawle's list of rights.

In fact, by 1868, these two amendments were regularly distinguished from the first eight. The Confederate Constitution, for example, adopted the first eight amendments word for word, but placed the Ninth and Tenth in a separate section and reworded the Ninth to reflect the common understanding of the Clause: "The enumeration, in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people of the several States."<sup>228</sup> Nor was this a special construction of the southern states.<sup>229</sup> Abolitionists, for example, had long called for a reevaluation and a broadening of individual liberty,<sup>230</sup> but they ignored the Ninth Amendment as either a source of rights or as textual support for additional individual rights.<sup>231</sup> If the Ninth had been considered even indirect support for individual rights against the states, then its omission from abolitionist arguments is inexplicable. Of all people in antebellum America, abolitionists

225. *E.g.*, TAYLOR, *supra* note 74, at 46; TUCKER, BLACKSTONE'S COMMENTARIES, *supra* note 50, at app. 307–08; Lash, *The Lost Original Meaning*, *supra* note 8, at 396–99.

226. RAWLE, *supra* note 159, at 120.

227. *See id.* ("A declaration of rights, therefore, properly finds a place in the general Constitution, where it equalizes all and binds all.")

228. C.S.A. CONST. art. VI, § 5 (1861), *reprinted in* 3 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS: NATIONAL DOCUMENTS 1826–1900, at 125, 137 (Donald J. Musch & William F. Swindler eds., 1985). John Yoo believes that adding the language "of the several states" to the Ninth Amendment in the Confederate Constitution is indirect proof of an individual rights reading of the federal Ninth Amendment. *See* Yoo, *supra* note 30, at 1008. However, as the last Part showed, state courts had already read the federal Ninth in exactly the same way.

229. John Marshall himself used the same formulation when discussing the people's reserved powers. In *Sturges v. Crowninshield*, Marshall wrote:

When the American people created a national legislature, with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the states. These powers proceed, not from the people of America, but from the people of the several states; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument.

17 U.S. 122, 193 (1819). According to Marshall, the Tenth Amendment reserved nondelegated powers to the States or to "the people of the several states." *Id.* Presumably, the same reasoning would apply to the people's retained rights under the Ninth. Rights were retained not to the people of America, but to the people of the several states.

230. *See* AMAR, *supra* note 160, at 161 ("Beginning in the 1830's, abolitionist lawyers developed increasingly elaborate theories of natural rights, individual liberty, and higher law . . .").

231. *See* Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 CHI.-KENT L. REV. 131, 144 (1988) (noting that the Ninth Amendment was not cited as a restriction on state power by radical antislavery lawyers).

had the greatest incentive to use every possible constitutional argument available in the cause against slavery. In fact, abolitionists relied on the Declaration of Independence, natural law, biblical exegesis, common law, as well as a libertarian reading of most of the Bill of Rights;<sup>232</sup> they relied on almost everything *except* the Ninth Amendment.<sup>233</sup> Similarly, judicial decisions such as *Calder v. Bull*,<sup>234</sup> *Fletcher v. Peck*,<sup>235</sup> and *Terret v. Taylor*<sup>236</sup>—decisions that explored the existence of enforceable natural rights—never raised the Ninth Amendment as a potential source of unenumerated rights.<sup>237</sup> Instead, slave owners from the beginning saw the Ninth as protecting the states’ right to maintain slavery.<sup>238</sup> Even the drafter of Section 1 of the Fourteenth Amendment, John Bingham, distinguished the Ninth and Tenth from the first eight amendments in regard to privileges or immunities protected by the Fourteenth Amendment.<sup>239</sup> Other members of the 39th Congress also described the personal rights protected by the Fourteenth Amendment to be expressed in the first eight amendments.<sup>240</sup>

The Ninth and Tenth Amendments, on the other hand, were cited in support of the right of the states to secede from the Union. On December 31, 1860, only a few days after South Carolina voted to secede, Louisiana Senator and future Confederate Secretary of War, Judah P. Benjamin, rose to address the Senate.<sup>241</sup> Laying out the case for secession, Senator Benjamin recounted the debates over the ratification of the Constitution.<sup>242</sup> Benjamin reminded the Senate that proponents of ratification in states like New York and Virginia had “failed until they proposed to accompany their ratifications

232. See AMAR, *supra* note 160, at 161, 239 (pointing out that abolitionists developed elaborate, declaratory theories of natural rights, individual liberty, and higher law starting in the 1830s and that federalism and majoritarianism were replaced by libertarianism as the “dominant, unifying theme of the First Amendment’s freedoms” by the 1860s).

233. For examples of abolitionists citing only the first eight amendments, see WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848*, at 267 (1977) (quoting Gerrit Smith).

234. 3 U.S. (3 Dall.) 386 (1798).

235. 10 U.S. (6 Cranch) 87 (1810).

236. 13 U.S. (9 Cranch) 43 (1815).

237. See Levinson, *supra* note 231, at 144. Although these cases did not raise the Ninth as a source of unenumerated rights, Justice Chase’s opinion in *Calder* appears to adopt the rule of construction represented by the Ninth Amendment. See Lash, *The Lost Original Meaning*, *supra* note 8, at 403.

238. See Letter from William L. Smith to Edward Rutledge (Aug. 10, 1789), in *CREATING THE BILL OF RIGHTS*, *supra* note 195 (suggesting that if the Ninth and Tenth amendments were adopted, “[T]hey [would] go a great way in preventing Congress from interfering with our negroes after 20 years or prohibiting the importation of them”).

239. CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866) (statement of Rep. Bingham).

240. See CONG. GLOBE, 39th Cong., 1st Sess. 2467 (1866) (statement of Rep. Boyer); CONG. GLOB., 39th Cong., 1st Sess. 2765–66 (1866) (statement by Sen. Howard); see also AMAR, *supra* note 160, at 226 (“[B]oth Bingham and Howard seemed to redefine ‘the Bill of Rights’ as encompassing only the first eight rather than ten amendments . . .”).

241. CONG. GLOBE, 36th Cong., 2d Sess. 212 (1860) (statement of Rep. Benjamin).

242. *Id.* at 214.

with amendments that should prevent its meaning from being perverted, and prevent it from being falsely construed.”<sup>243</sup> The “false construction” to which Benjamin referred was one that consolidated the states into a single national government—an interpretation prevented by the adoption of the Ninth and Tenth Amendments:

So, sir, we find that not alone in these two conventions, but by the common action of the States, there was an important addition made to the Constitution by which it was expressly provided that it should not be construed to be a General Government over all the people, but that it was a Government of States, which delegated powers to the General Government. The language of the ninth and tenth amendments to the Constitution is susceptible of no other construction:

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

“The powers not delegated to the United States.[ . . .]”<sup>244</sup>

Right up until the adoption of the Fourteenth Amendment, the Ninth continued to be linked with the Tenth as one of the twin guardians of federalism. For example, in 1863, in the midst of a violent national struggle over fundamental rights, the Indiana Supreme Court cited the Ninth Amendment in an opinion rejecting a claim that the federal government had exclusive jurisdiction over navigable waters within a state:

In the case at bar, it may, for the sake of the argument, be conceded, that Congress not only possesses the power, but the exclusive right, to regulate commerce among the several States, including the pilotage of vessels engaged in said commerce; and still the facts, so far as the record shows them, do not make a case falling strictly within the principle of the points thus conceded, because not involved. And why? The ninth amendment to the Constitution is as follows: “The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people,” and tenth: “The powers not delegated to the *United States* by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>245</sup>

Even states whose constitutions were amended to add provisions mirroring the Ninth Amendment continued to read the federal Ninth in conjunction with the Tenth. In 1865, for example, the Supreme Court of Maryland declined to give an expansive reading to the federal Constitution’s ban on ex post facto laws, on the grounds that “prohibitions on the states, are

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243. *Id.* Benjamin continued, “[A]nd in two of the States especially—the States of Virginia and New York, the ratification was preceded by a statement of what their opinion of its true meaning was, and a statement that, on that construction, and under that impression, they ratified it.” *Id.*

244. *Id.*

245. *Barnaby v. State*, 21 Ind. 450, 452 (1863).

not to be enlarged by construction.”<sup>246</sup> This interpretive rule was required according to the “spirit and object of the 9th and 10th Amendments.”<sup>247</sup> Only a few years earlier, Maryland had added a provision to its Declaration of Rights which mirrored the federal Ninth Amendment.<sup>248</sup> However the Maryland state court might have interpreted its own version of the Ninth, it is clear that adding such a provision to the state constitution had no effect on the court’s understanding of the *federal* Ninth Amendment.

Instead of modifying their readings of the Ninth Amendment in the direction of libertarian rights, judicial opinions in the 1860s emphasized the links between the Ninth and Tenth Amendments. In the 1864 case *Philadelphia & Railroad Co. v. Morrison*, a federal court considered a challenge to Congress’s power to issue notes as legal tender.<sup>249</sup> Although he withdrew from the case and left the judgment to circuit-riding Supreme Court Justice Grier,<sup>250</sup> Judge Cadwalader published an opinion in which he emphasized the federalism-based goal of the Ninth and Tenth Amendments:

In determining the application of the incidental power of legislation, the ninth and tenth amendments of the constitution must be considered. The ninth provides that the enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people; the tenth provides that the powers not delegated by the constitution, to the United States, nor prohibited by it to the states, are reserved to the states respectively or to the people. These two amendments, whether their words are to be understood as restrictive or declaratory, preclude everything like attribution of implied residuary powers of sovereignty, or ulterior inherent rights of nationality, to the government of the United States. Therefore the constitution confers no legislative powers except those directly granted, and those which may be appropriate as incidental means of executing them.

. . . .

. . . That the amendments were thus intended for security against usurpations of the national government only, and not against encroachments of the state governments, may be considered a truism.

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246. *Anderson v. Baker*, 23 Md. 531, 624 (1865). The case upheld the right of a state to alter its constitution to impose restrictions on the franchise (a test oath in this case) against a claim that this violated the ex post facto restriction in Article I, Section 10. *Id.* at 624–25.

247. *Id.*

248. “This enumeration of rights shall not be construed to impair or deny others retained by the people.” MD. CONST. DECL. OF RIGHTS art. 42 (1851). *But see* Yoo, *supra* note 30, at 1009 (arguing that Maryland’s adoption of such a provision suggests a different reading of the federal Ninth).

249. 19 F. Cas. 487 (C.C.E.D. Pa. 1864) (No. 11,089). The issue would not be resolved until the *Legal Tender Cases*. *See infra* notes 262–271 and accompanying text.

250. Justice Grier avoided the issue of congressional power by ruling that the Act authorizing the payment of particular debts in U.S. notes did not include the particular debt at issue. *Philadelphia & R.R.*, 19 F. Cas. at 492.

But recurrence to historical facts which explain constitutional truisms, cannot be too frequent, if they are in danger of being overlooked in calamitous times, or of being crowded out of memory by any succession of appalling events.<sup>251</sup>

Interpretation of the Ninth Amendment during Reconstruction tracks the same interpretation of the Ninth Amendment at the time of the Founding. Although there is some evidence that, by the 1860s, ~~that during the 1860s,~~ the first eight amendments came to be understood as representing privileges or immunities of United States citizens, when it comes to the Ninth Amendment, this evidence disappears. Instead, it seems that both the Ninth and Tenth Amendments fell outside the public's understanding of the personal freedoms expressed in the Fourteenth Amendment. On this matter, the drafters of the Confederate Constitution and John Bingham are in agreement.

On the other hand, there is evidence that the Privileges or Immunities Clause was understood to protect more than just the first eight amendments<sup>252</sup> and may have included unenumerated common law rights such as those listed by Justice Bushrod Washington in *Corfield v. Coryell*.<sup>253</sup> Akhil Amar,<sup>254</sup> Randy Barnett,<sup>255</sup> and others<sup>256</sup> argue that the Privileges or Immunities Clause may include much that unenumerated rights advocates believe is protected under the Ninth. If so, then perhaps whatever the original meaning of the Ninth, unenumerated personal rights are now protected against state action under the Fourteenth Amendment.<sup>257</sup>

Nevertheless, the Ninth Amendment's continued existence in the Constitution carries implications for any interpretation of the Fourteenth. As a rule of construction, the Ninth Amendment prohibits the enumeration of *any* rights from being construed in a manner that denies or disparages the retained rights of the people. In 1791, this applied not only to the enumerated Bill of rights, but also to the Ex Post Facto and Contract Clauses of Article I, Section 10. As a matter of popular sovereignty, any rights added by the people through the adoption of the Fourteenth Amendment would trump any state autonomy *originally* protected under the Ninth and Tenth

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251. *Id.* at 489–91. Cadwalader cites *Livingston* for the proposition that the Ninth Amendment, as well as the rest of the Bill of Rights, does not apply against the states. This is a correct citation to *Livingston's* holding that the “ninth article” or Seventh Amendment does not apply against the states. Contrary to some assertions, *Livingston* did not make a mistake; nor did Cadwalader in citing to it.

252. AMAR, *supra* note 160, at 174–80.

253. 6 F. Cas 546, 51–52 (C.C.E.D. Pa. 1823) (No. 3,230).

254. AMAR, *supra* note 160, at 280.

255. BARNETT, RESTORING THE LOST CONSTITUTION, *supra* note 2, at 66–68.

256. Trisha Olson, *The Natural Law Foundation of the Privileges or Immunities Clause of the Fourteenth Amendment*, 48 ARK. L. REV. 347, 421 (1995); Christopher J. Schmidt, *Revitalizing the Quiet Ninth Amendment: Determining Unenumerated Rights and Eliminating Substantive Due Process*, 32 U. BALT. L. REV. 169, 177–78 (2003).

257. See AMAR, *supra* note 160, at 281–82.

Amendments. However, there is no evidence that the Fourteenth Amendment either repealed or completely reconstructed the originally federalist Ninth and Tenth Amendments. The courts in the post-Civil War period therefore faced the task of reconciling or synthesizing the older restrictions of the Ninth and Tenth Amendments with the newly adopted rights contained in the Fourteenth.<sup>258</sup>

*B. The Rule of (Re)Construction*

The Ninth Amendment declared a rule of construction that the Founders believed was inherent in the very character of a nation comprised of both national and state governments. Were the states organized around a single government, this might suggest a different approach to constitutional interpretation. As Attorney General Edmund Randolph explained in the controversy over the Bank of the United States, constitutions generally should receive a more liberal interpretation than statutes, for “[t]he one comprises a summary of matter, for the detail of which numberless laws will be necessary; the other is the very detail.”<sup>259</sup> The United States, however, was comprised of two kinds of governments, each with its own constitution. Under this kind of system, the presumption of liberal construction had to be modified: [W]hen we compare the modes of construing a state and the federal constitution, we are admonished to be stricter with regard to the latter, because there is a greater danger of error in defining partial than general powers.<sup>260</sup>

Similarly, James Madison believed that latitudinarian constructions of federal power threatened to overwhelm the balance of power between the federal government and the states:

It is of great importance as well as of indispensable obligation, that the constitutional boundary between them should be impartially maintained. Every deviation from it in practice detracts from the superiority of a Chartered over a traditional Govt. and mars the experiment which is to determine the interesting Problem whether the organization of the Political system of the U.S. establishes a just equilibrium; or tends to a preponderance of the National or the local powers.<sup>261</sup>

The evil of slavery and a catastrophic Civil War, however, threw into question the “just equilibrium” that obtained prior to 1868. The Thirteenth, Fourteenth, and Fifteenth Amendments each imposed significant new

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258. Bruce Ackerman refers to this as an act of “intergenerational synthesis.” See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 113 (1991).

259. Edmund Randolph, *The Constitutionality of the Bank Bill* (Feb. 12, 1791), reprinted in H. JEFFERSON POWELL, *THE CONSTITUTION AND THE ATTORNEYS GENERAL* 4 (1999).

260. *Id.* at 5.

261. Letter from James Madison to Spencer Roane (May 6, 1821), in *WRITINGS*, *supra* note 11, at 773.



restrictions on the autonomy of the states. The question for the courts following the adoption of the Reconstruction Amendments was whether the character of the nation had changed so much as to remove the presumptions underlying the Founding rule of construction. The answer to this question would determine the fate of the Ninth and Tenth Amendments.

In two critical sets of cases, both decided within four years of the adoption of the Fourteenth Amendment, the Supreme Court considered competing visions of federal power. In the first of these, the *Legal Tender Cases*, the Court came close to abandoning the principle of limited enumerated powers. However, in *The Slaughterhouse Cases*, the Court returned to its pre-Civil War rule of construction and limited the reach of both Congress and the federal courts. In doing so, the Supreme Court signaled that the principles underlying the Ninth and Tenth Amendments had not been repealed. Reconstruction had to be reconciled with the Founding.

1. *The Legal Tender Cases*.—A recurring controversy throughout the nineteenth century was whether the federal government had power to issue paper money. Although states were forbidden from issuing legal tender,<sup>262</sup> it was not clear whether issuing paper money was a power delegated to the federal government. In almost back-to-back opinions, the Supreme Court swung from invalidating to upholding federal power in this area. In the first case to reach the Supreme Court, *Hepburn v. Griswold*, Chief Justice Salmon P. Chase narrowly construed federal power and invalidated Congress's attempt to issue paper money.<sup>263</sup> In the *Legal Tender Cases*, a new majority of the Court led by Justice Strong reversed *Hepburn*.<sup>264</sup> Relying on Marshall's broad articulation of federal power in *McCulloch*, Strong echoed Marshall's construction of federal power and maintained that Congress had

262. See U.S. CONST. art. I, § 10, cl. 1.

263. 75 U.S. (8 Wall.) 603, 614 (1870). Justice Chase held that the Tenth Amendment was intended "to restrain the limited government established under the Constitution from the exercise of powers not clearly delegated or derived by just inference from powers so delegated." *Id.* Stretching federal power to conduct war to include the power to issue legal tender, wrote Chase, "proves too much":

It carries the doctrine of implied powers very far beyond any extent hitherto given to it. It asserts that whatever in any degree promotes an end within the scope of a general power, whether, in the correct sense of the word, appropriate or not, may be done in the exercise of an implied power.

*Id.* at 617. Chase further rejected the idea that the Constitution leaves it to Congress to determine whether a particular action is sufficiently related to an enumerated end. According to Chase:

[This] would convert the government, which the people ordained as a government of limited powers, into a government of unlimited powers. It would confuse the boundaries which separate the executive and judicial from the legislative authority. It would obliterate every criterion which this court, speaking through the venerated Chief Justice in the case already cited, established for the determination of the question whether legislative acts are constitutional or unconstitutional.

*Id.* at 618.

264. 79 U.S. (12 Wall.) 457, 457 (1870).

“the right to employ freely every means, not prohibited, necessary for its preservation, and for the fulfillment of its acknowledged duties.”<sup>265</sup>

Strong went even further than Marshall, however, and argued that Congress had power beyond those expressly or even impliedly authorized by the text of the Constitution. Remarkably, Strong based his argument in part on the implications arising from the addition of the Bill of Rights. Strong’s reasoning on this point is presented in full, as it is perhaps the strongest “reverse-Ninth Amendment” analysis ever produced by the Supreme Court:

And here it is to be observed it is not indispensable to the existence of any power claimed for the Federal government that it can be found specified in the words of the Constitution, or clearly and directly traceable to some one of the specified powers. Its existence may be deduced fairly from more than one of the substantive powers expressly defined, or from them all combined. It is allowable to group together any number of them and infer from them all that the power claimed has been conferred. Such a treatment of the Constitution is recognized by its own provisions. This is well illustrated in its language respecting the writ of habeas corpus. The power to suspend the privilege of that writ is not expressly given, nor can it be deduced from any one of the particularized grants of power. Yet it is provided that the privileges of the writ shall not be suspended except in certain defined contingencies. This is no express grant of power. It is a restriction. But it shows irresistibly that somewhere in the Constitution power to suspend the privilege of the writ was granted, either by some one or more of the specifications of power, or by them all combined. *And, that important powers were understood by the people who adopted the Constitution to have been created by it, powers not enumerated, and not included incidentally in any one of those enumerated, is shown by the amendments.* The first ten of these were suggested in the conventions of the States, and proposed at the first session of the first Congress, before any complaint was made of a disposition to assume doubtful powers. The preamble to the resolution submitting them for adoption recited that the “conventions of a number of the States had, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and *restrictive* clauses should be added.” *This was the origin of the amendments, and they are significant. They tend plainly to show that, in the judgment of those who adopted the Constitution, there were powers created by it, neither expressly specified nor deducible from any one specified power, or ancillary to it alone, but which grew out of the aggregate of powers conferred upon the government, or out of the sovereignty instituted.* Most of these amendments are denials of power which had not been expressly granted, and which cannot be said to have been

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265. *Id.* at 533–34.

necessary and proper for carrying into execution any other powers. Such, for example, is the prohibition of any laws respecting the establishment of religion, prohibiting the free exercise thereof, or abridging the freedom of speech or of the press.<sup>266</sup>

The passage is a clear example of what the letter and spirit of the Ninth Amendment were designed to prevent—construing the addition of the Bill of Rights to imply the existence of unenumerated federal power.<sup>267</sup> Marshall, of course, had used a similar argument in *McCulloch*<sup>268</sup> and, like Marshall in that case, Justice Strong remains silent about the Ninth Amendment. Instead, by flipping the rule of construction represented by the Ninth on its head, Strong articulated a principle irreconcilable with both the Ninth and Tenth Amendments.

Calvin Massey has used the *Legal Tender Cases* to refute a federalist reading of the Ninth Amendment: If the Ninth was understood to prevent this kind of implied extension of federal power, someone surely would have raised Ninth Amendment objections to Strong's opinion. Yet, according to Massey, "[N]either Justice Strong nor any of his cohorts even alludes to the Ninth Amendment."<sup>269</sup> But Massey is not correct. One of Strong's cohorts, Justice Stephen Field argued that Strong's approach violated the rule of construction demanded by the state ratification conventions and expressed by the Ninth Amendment. Field's reference to the Ninth has gone unnoticed before now due to the fact that Field refers the reader to Joseph Story's description of the Ninth Amendment in his Commentaries. Although lawyers and courts at the time would have understood Justice Field's reference to § 1861 of Story's Commentaries, the significance of this reference has escaped contemporary scholars.

Because Justice Field's opinion is yet another lost Supreme Court opinion discussing the Ninth Amendment, this section of his opinion is presented in its full context:

The position that Congress possesses some undefined power to do anything which it may deem expedient, as a resulting power from the general purposes of the government, which is advanced in the opinion of the majority, would of course settle the question under consideration without difficulty, for it would end all controversy by changing our government from one of enumerated powers to one resting in the unrestrained will of Congress.

"The government of the United States," says Mr. Chief Justice Marshall, speaking for the court in *Martin v. Hunter's Lessee*, "can claim no powers which are not granted to it by the Constitution, and

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266. *Id.* at 534–35 (first and third emphasis added).

267. See MCAFEE, *supra* note 185, at 170–72 (noting that the Ninth Amendment should prevent this kind of argument).

268. See Lash, *The Lost Original Meaning*, *supra* note 8, at 414–17.

269. *E.g.*, MASSEY, SILENT RIGHTS, *supra* note 2, at 86.

the powers actually granted must be such as are expressly given or given by necessary implication." This implication, it is true, may follow from the grant of several express powers as well as from one alone, but the power implied must, in all cases, be subsidiary to the execution of the powers expressed. The language of the Constitution respecting the writ of habeas corpus, declaring that it shall not be suspended unless, when in cases of rebellion or invasion, the public safety may require it, is cited as showing that the power to suspend such writ exists somewhere in the Constitution; and the adoption of the amendments is mentioned as evidence that important powers were understood by the people who adopted the Constitution to have been created by it, which are not enumerated, and are not included incidentally in any of those enumerated.

The answer to this position is found in the nature of the Constitution, as one of granted powers, as stated by Mr. Chief Justice Marshall. The inhibition upon the exercise of a specified power does not warrant the implication that, but for such inhibition, the power might have been exercised. In the Convention which framed the Constitution a proposition to appoint a committee to prepare a bill of rights was unanimously rejected, and it has been always understood that its rejection was upon the ground that such a bill would contain various exceptions to powers not granted, and on this very account would afford a pretext for asserting more than was granted. [Citing "Journal of the Convention, 369; Story on the Constitution, §§ 1861, 1862, and note."] In the discussions before the people, when the adoption of the Constitution was pending, no objection was urged with greater effect than this absence of a bill of rights, and in one of the numbers of the *Federalist*, Mr. Hamilton endeavored to combat the objection. After stating several reasons why such a bill was not necessary, he said: "I go further and affirm that bills of rights, in the sense and to the extent they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted, and on this very account would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power, but it is evident that it would furnish to men disposed to usurp a plausible pretence for claiming that power. They might urge, with a semblance of reason, that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication that a right to prescribe proper regulations concerning it was intended to be vested in the National government. This may serve as a specimen of the numerous handles which would be given to the

doctrine of constructive powers by the indulgence of an injudicious zeal for bills of right.”

When the amendments were presented to the States for adoption they were preceded by a preamble stating that the conventions of a number of the States had, at the time of their adopting the Constitution, expressed a desire “in order to prevent *misconception or abuse* of its powers, that further declaratory and restrictive clauses should be added.”

Now, will any one pretend that Congress could have made a law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or the right of the people to assemble and petition the government for a redress of grievances, had not prohibitions upon the exercise of any such legislative power been embodied in an amendment?

How truly did Hamilton say that had a bill of rights been inserted in the Constitution, it would have given a handle to the doctrine of constructive powers. We have this day an illustration in the opinion of the majority of the very claim of constructive power which he apprehended, and it is the first instance, I believe, in the history of this court, when the possession by Congress of such constructive power has been asserted.<sup>270</sup>

Justice Field’s reference to “§§ 1861, 1862, and note” from Story’s *Commentaries* refers to Story’s description of the Ninth Amendment and its role in preventing the enumeration of certain constitutional rights from being construed to suggest otherwise unlimited federal power. Justice Strong relied on just such a construction, and Justice Field reminds the reader that this is forbidden by the Ninth Amendment, as Story himself explains in his *Commentaries*. Field also reconstructs the story of the Bill of Rights presented in the first of these two articles: the Ninth Amendment arose in response to calls from the state conventions that amendments be added preventing “misconception or abuse” of federal power. Justice Field’s reference to Story’s description of the Ninth Amendment is important not only because it presents yet another Supreme Court Justice who viewed the Ninth as limiting the scope of federal power, but it also indicates that the Ninth continued to be read as a federalist rule of construction in the period immediately following the adoption of the Fourteenth Amendment.<sup>271</sup>

2. *The Slaughterhouse Cases: Preserving the Rule of Construction.*—If the holding of *Hepburn* was short lived,<sup>272</sup> so too was the broad rule of

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270. *Legal Tender Cases*, 79 U.S. at 664–66 (Field, J., dissenting).

271. This section of Field’s opinion refers only to the “constructive powers” doctrine and its conflict with the expectations of the state conventions. It does not involve any discussion of individual rights. *Id.*

272. See *supra* notes 262–265 and accompanying text.

construction announced by Justice Strong in the *Legal Tender Cases*. Only two years later, in the *Slaughterhouse Cases*,<sup>273</sup> the Supreme Court returned to the rule of construction reflected in pre-Civil War discussions of the Ninth and Tenth Amendments.

Perhaps emboldened by the Court's broad reading of federal power in the *Legal Tender Cases*, the plaintiffs in the *Slaughterhouse Cases* declared that the Fourteenth Amendment had "obliterated" the "confederate features of the government" and had "consolidated the several 'integers' into a consistent whole."<sup>274</sup> The purpose of the Fourteenth, they argued, was "to establish through the whole jurisdiction of the United States ONE PEOPLE, and that every member of the empire shall understand and appreciate the fact that his privileges and immunities cannot be abridged by State authority."<sup>275</sup> It was "an act of Union, an act to determine the reciprocal relations of the millions of population within the bounds of the United States—the numerous State governments and the entire United States administered by a common government."<sup>276</sup>

Justice Samuel Miller, however, rejected the idea that the Fourteenth Amendment had consolidated the several states into a single common government in which all privileges and immunities were controlled at the national level.<sup>277</sup> According to Justice Miller, the Reconstruction Amendments' core purpose was to establish the freedom of former slaves and their scope should be interpreted with that in mind.<sup>278</sup> If the Court were to adopt the plaintiffs' position, then under Section 5 of the Fourteenth Amendment, Congress "may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects."<sup>279</sup> This would "fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character."<sup>280</sup> According to Justice Miller, the Court should not interpret any constitutional provision in a manner that "radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people . . . in the absence of language which expresses such a purpose too clearly to admit of doubt."<sup>281</sup>

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273. 83 U.S. (16 Wall.) 36 (1872).

274. *Id.* at 52–53.

275. *Id.* at 53.

276. *Id.*

277. *Id.* at 78.

278. *Id.* at 71–72.

279. *Id.* at 78.

280. *Id.*

281. *Id.* Justice Miller concludes: "We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them." *Id.*

Justice Miller's rule for interpreting the Constitution echoes the antebellum theory of federal and state relations—a theory originally expressed in the Ninth and Tenth Amendments. But the United States had just endured a Civil War, a war in which the claims of state autonomy were decidedly rejected by the victors. According to the plaintiffs in the *Slaughterhouse Cases*, however appropriate a state-protective rule of construction might have been prior to the Civil War, we were now a wholly national people and the Reconstruction Amendments should be construed accordingly. Justice Miller recognized the force of this argument, but nevertheless maintained that the Reconstruction Amendments had not completely erased the constitutional principle of federalism:

The adoption of the first eleven amendments to the Constitution so soon after the original instrument was accepted, shows a prevailing sense of danger at that time from the Federal power. And it cannot be denied that such a jealousy continued to exist with many patriotic men until the breaking out of the late civil war. It was then discovered that the true danger to the perpetuity of the Union was in the capacity of the State organizations to combine and concentrate all the powers of the State, and of contiguous States, for a determined resistance to the General Government.

Unquestionably this has given great force to the argument, and added largely to the number of those who believe in the necessity of a strong National government.

But, however pervading this sentiment, and however it may have contributed to the adoption of the amendments we have been considering, we do not see in those amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the State with powers for domestic and local government, including the regulation of civil rights—the rights of person and of property—was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States, and to confer additional power on that of the Nation.

But whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court, so far as its functions required, has always held with a steady and an even hand the balance between State and Federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution, or of any of its parts.<sup>282</sup>

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282. *Id.* at 82.

Justice Miller believed that federalism had survived the Civil War and, echoing Madison,<sup>283</sup> he believed that it was the Court's duty to preserve a balance between state and federal power through the application of a rule of construction that limited the scope of federal authority. In this case, it meant limiting the scope of the Reconstruction Amendments. The *Slaughterhouse Cases* are an example of the Court refusing to construe enumerated rights so broadly as to transfer to the national government power to control general matters of local self-government. In the absence of clear language requiring such a construction, Justice Miller believed that the Court must limit its interpretation of constitutional rights as well as unenumerated powers. Although the *Slaughterhouse Cases* did not expressly mention the Ninth Amendment, its reasoning clearly adopts the pre-Civil War understanding of the Ninth Amendment's rule of construction, as later courts would recognize.<sup>284</sup>

Justice Miller's opinion in the *Slaughterhouse Cases* has been criticized in contemporary scholarship for failing to identify and enforce the intended meaning of the Privileges or Immunities Clause, reducing that Clause instead to a redundant statement of pre-existing national rights.<sup>285</sup> In fact, there is significant evidence that the Privilege or Immunities Clause was intended to embrace at the very least the freedoms listed in the first eight amendments to the Constitution and perhaps fundamental common law rights as well.<sup>286</sup> Justice Miller's attempt to read "privileges *and* immunities" as wholly unrelated to "privileges *or* immunities" is at best weak. But Miller's attempt to synthesize the Founding Amendments with those of Reconstruction deserves to be taken seriously.<sup>287</sup> Federalism was not merely an idea animating the Founding era, to be shrugged off with the adoption of the Reconstruction Amendments. Federalism was textually enshrined in the Constitution through the adoption of the Ninth and Tenth Amendments (and, Miller appears to suggest, through the adoption of the Eleventh Amendment as well). Absent an express repeal of these constitutional provisions, it was the Court's duty to synthesize the document as a whole, preserving what remained of the past while giving meaning to the people's new articulation of fundamental law. Justice Miller may have given short shrift to the desires of the framers of the Fourteenth Amendment, but his effort to reconcile the Founding and Reconstruction is an endeavor—however flawed—to interpret the document as a whole.

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283. Letter from James Madison to Spencer Roane (May 6, 1821), in WRITINGS, *supra* note 11, at 773 (discussing the need to maintain a "just equilibrium" between federal and state power).

284. *E.g.*, *United States v. Moore*, 129 F. 630 (C.C.N.D. Ala 1904); *see also infra* notes 353–357 and accompanying text.

285. *E.g.*, LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1303–11 (3rd ed. 2000).

286. *See generally* Lash, *Two Movements of a Constitutional Symphony*, *supra* note 215, at 485.

287. *See* ACKERMAN, *supra* note 258, at 113.



The Court remained solidly in the camp of James Madison and not Justice William Strong (or John Marshall), for the remainder of the nineteenth century and into the twentieth. Had the Supreme Court continued to follow Strong's reasoning in the *Legal Tender Cases*, the Ninth and Tenth Amendments most likely would have withered on the vine. Instead, by embracing the same rule of strict construction advocated by James Madison, St. George Tucker, and Joseph Story in *Houston v. Moore*, the next several decades proved quite hospitable to the twin guardians of federalism.<sup>288</sup>

3. *Hans v. Louisiana*.—According to Justice Miller, “The adoption of the *first eleven amendments* to the Constitution so soon after the original instrument was accepted, shows a prevailing sense of danger at that time from the Federal power.”<sup>289</sup> In fact, the Ninth and Eleventh Amendments share language unique among any other provisions in the federal Constitution. Consider the language of the Eleventh: “The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.”<sup>290</sup>

Both the Ninth and Eleventh Amendments declare a rule for construing the Constitution. Under the contemporary assumption that the Ninth has to do with individual rights, while the Eleventh seems to deal with states rights, the similarity of language between the Ninth and Eleventh appears to be no more than a coincidence. Once one understands the Ninth as expressing a principle of state autonomy, the Ninth and Eleventh Amendments seem closely related. For example, notice that the Eleventh Amendment does not remove a power originally granted. Instead, the Eleventh announces that the previous grant of judicial power in Article III shall not be construed in a particular way. The Eleventh was adopted in response to the Supreme

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288. See, e.g., *The Civil Rights Cases*, 109 U.S. 3, 14–15 (1883) (linking a limiting rule of construction to the Tenth Amendment).

289. *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 82 (1873) (emphasis added). Miller was not the first to group the Eleventh with the original Bill of Rights. Madison himself linked the Ninth, Tenth, and Eleventh Amendment to the same rule of construction prohibiting latitudinous constructions of federal power. Writing to Spencer Roane in regard to the Supreme Court's decision in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), Madison lamented the Court's failure to consider the Constitution's own directions regarding the construction of federal judicial power:

On the question relating to involuntary submissions of the States to the Tribunal of the Supreme Court, the Court seems not to have adverted at all to the expository language when the Constitution was adopted; nor to that of the Eleventh Amendment, which may as well import that it was declaratory, as that it was restrictive of the meaning of the original text.

Letter from James Madison to Spencer Roane (May 6, 1821), in *WRITINGS*, *supra* note 11, at 776. The “expository language” Madison referred to was that of the Ninth and Tenth Amendments. See Lash, *The Lost Original Meaning*, *supra* note 8, at 428–29.

290. U.S. CONST. amend. XI.

Court's decision in *Chisolm v. Georgia*<sup>291</sup> amidst a public outcry against allowing out-of-state citizens to haul states into federal court for the payment of debts. If, as it now appears, the purpose of the Ninth was to prevent latitudinarian constructions of federal power to the injury of the states, then the purpose of the Eleventh was to declare erroneous one such perceived latitudinarian construction. It is almost as if the Eleventh Amendment could be placed immediately after the Ninth with the prefatory words "for example" added to the beginning of the Clause. If this sounds far fetched, consider the Court's 1890 decision in *Hans v. Louisiana*.<sup>292</sup>

In *Hans*, the Supreme Court ruled that states could not be sued in federal court by their own citizens without the consent of the state.<sup>293</sup> Long considered an important Eleventh Amendment case, Justice Joseph Bradley's opinion actually addresses the proper construction of the federal courts' enumerated powers under Article III. Justice Bradley begins by noting that the Eleventh Amendment by its terms does not apply to the case.<sup>294</sup> However, Bradley then points out that the context in which the Eleventh was adopted is important because it shows that the country agreed with Justice Iredell's dissent in *Chisolm*,<sup>295</sup> a dissent Bradley believed reflected the proper construction of the Constitution.<sup>296</sup> Turning to the issue before the Court in *Hans*—whether a state may be sued in federal court by one of its own citizens without its consent—Bradley concluded that allowing such a suit would repeat *Chisolm*'s erroneous construction of Article III:

The letter [of Article III] is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a state. The reason against it is as strong in this case as it was in that. It is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of.<sup>297</sup>

Prior to the Eleventh Amendment, of course, there was only one provision in the Constitution prohibiting expansive judicial constructions of federal power: the Ninth Amendment. The people's response to *Chisolm*, as Bradley saw it, was to add a provision expressly adopting the strict construction of Article III that was supposed to apply in the first place. Is it really a coincidence, then, that the language in the Eleventh echoes the language in the Ninth? Exploring the full relationship between the Ninth and Eleventh Amendments requires separate treatment.<sup>298</sup> For now, it is worth

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291. 2 U.S. (2 Dall.) 419 (1793) (holding that an action of assumpsit will lie against a state even when it is brought by a citizen of a different state).

292. 134 U.S. 1 (1890).

293. *Id.* at 17, 20.

294. *Id.* at 10.

295. *Id.* at 12.

296. *Id.*

297. *Id.* at 15.

298. A treatment I hope to provide in an upcoming article.

pointing out that the rule of construction deployed in *Hans* echoes the rule of construction used in the *Slaughterhouse Cases*. The rule may have been erroneously applied in both situations. It suggests, nevertheless, a relationship between the Ninth, Tenth, and Eleventh Amendments that until now has been insufficiently explored.<sup>299</sup>

C. *Congressional Power, Individual Rights, and the Ninth Amendment, 1868–1930.*

Surely one of the most important and significant of all those powers reserved was the right of each state to determine for itself its own political machinery and its own domestic policies.<sup>300</sup>

1. *The General Structure of Ninth Amendment Claims in the Progressive Era.*—Federalism having survived Reconstruction, both the Ninth and Tenth Amendments flourished in the period prior to the New Deal. Cited repeatedly by individuals and states, the Ninth Amendment continued to be applied in tandem with the Tenth as an expression of limited federal power and retained local autonomy.<sup>301</sup> Challenges based on the Ninth and Tenth Amendments were brought against federal regulation of prostitution,<sup>302</sup> drugs,<sup>303</sup> unfair trade practices,<sup>304</sup> and bribery.<sup>305</sup> Some plaintiffs went so far

299. Some scholars have noted the relationship between these amendments. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1483 n.234 (1987) (arguing that a “neo-Federalist reading” of the Ninth Amendment “clarifies important connections . . . among the Ninth, Tenth, and Eleventh Amendments”). Professor Amar’s account of the Ninth Amendment focuses on the popular sovereignty aspects of the clause and does not address the application of the Ninth as a federalist rule of construction.

300. *Hawke v. Smith*, 126 N.E. 400, 403 (Ohio 1919).

301. For example, in *United States v. Fergar*, 256 F. 388 (S.D. Ohio 1918), the court declared:

The principle that our federal government is one of enumerated powers is universally admitted. The powers possessed by the national government are only such as have been delegated to it. The states have all powers but such as they have surrendered, which is but stating what the Constitution declares in article 9:

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

And in article 10:

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”

The states have not surrendered, and therefore retain, their power to enact laws to prevent and punish such acts as these defendants are charged with, and have not delegated to the Congress the power to pass laws to prevent and punish acts, however immoral, which have no relation whatever to the subjects-matter included within any of the powers delegated. “In the American constitutional system, the power to establish the ordinary regulations of police has been left with the individual states, and cannot be assumed by the national government,” says Judge Cooley.

*Id.* at 390–91 (citations omitted).

302. *Hoke v. United States*, 227 U.S. 308, 319–20 (1913).

303. *United States v. Charter*, 227 F. 331, 332 (N.D. Ohio 1915).

304. *T.C. Hurst & Son v. FTC*, 268 F. 874, 875–86 (E.D. Va. 1920).

as to claim the Ninth and Tenth Amendments invalidated the ratification of national prohibition under the Eighteenth Amendment.<sup>306</sup> Although these cases held in favor of federal power, no court disputed the reading of the Ninth and Tenth Amendments as mutual declarations of limited federal power and retained state autonomy.<sup>307</sup>

More successfully, states used the Ninth and Tenth Amendments to limit federal preemption of state law<sup>308</sup> and to narrow the construction of enumerated restrictions placed upon the states in Article I, Section 10. For example, Iowa courts concluded that both the federal and the state impairment of contract clauses should receive a limited construction in light of the Ninth and Tenth Amendments' preservation of the state police power to respond to economic emergencies.<sup>309</sup> In *Oregon R. & Navigation Co. v.*

305. *Dropps v. United States*, 34 F.2d 15 (8th Cir. 1929).

306. *See, e.g., United States v. Sprague*, 44 F.2d 967, 984 (D.N.J. 1930); *United States v. Panos*, 45 F.2d 888, 890 (N.D. Ill. 1930) (describing such arguments as "absurd").

307. *See, e.g., State v. C.C. Taft Co.*, 167 N.W. 467, 468 (Iowa 1918) (involving an argument by the state that the Ninth and Tenth Amendments reserve to the states the right to regulate goods not traveling in interstate commerce); *McCabe's Adm'x v. Maysville & B.S.R. Co.*, 124 S.W. 892, 893 (Ky. Ct. App. 1910) (involving a claim that a federal removal statute violated the Ninth and Tenth Amendment, which the court rejected without discussing the Amendments); *Dickson v. United States*, 125 Mass. 311 (1878) (rejecting a claim that the Ninth and Tenth Amendments required a strict construction of federal power to the extent that the federal government could not take land granted to it in a will, but not disputing the general principle).

308. *See, e.g., In re Estate of Hansen*, 155 Misc. 712 (N.Y. Sup. Ct. 1935) (concluding that federal treaties should be construed in conformance with the Ninth and Tenth Amendments to preserve state authority to appoint legal representatives for the minor children of foreign nationals). According to the court:

When the State of New York concurred in creating the power "to make Treaties" (U. S. Const. art. II, § 2), it ceded to the President, acting with the advice and consent of two-thirds of the Senate, only so much of its presumably unbounded sovereignty as was thought necessary for the welfare of the Union in respect of interstate and international matters; and under the Ninth and Tenth Amendments, as the recipient of that treaty-making power took in the right of another, the delegated power is deemed not to extend any further than the general terms of that grant fairly imply in view of the object to be thereby attained.

*Id.* at 713.

309. *See Des Moines Joint Stock Land Bank v. Nordholm*, 253 N.W. 701 (Iowa 1934). In *Nordholm*, the state of Iowa had extended the time for redeeming foreclosed upon property. *Id.* at 703. This was challenged as a violation of, among other things, the federal impairment of contracts clause and its state analogue. *Id.* According to the court:

Regardless of the declaration in the Constitution of the United States that the state shall pass no law impairing the obligation of contracts, there nevertheless is reserved to the states their police power and the power to sustain their sovereignty and government and their existence as states. Such police power "is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals."

. . . .

What power, then, is reserved under the contract clause of the state Constitution? The Ninth Amendment to the Constitution of the United States provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." And Amendment 10 to the Constitution of the United States continues with the following reservation: "The powers not delegated to the United

*Campbell*, Oregon's railroad rate regulations were challenged as an unconstitutional interference with interstate commerce and as violations of equal protection and due process of law.<sup>310</sup> Federal District Judge Wolverton dismissed the equal protection and due process claims, concluding that the rates were reasonable.<sup>311</sup> Determining whether the enumerated commerce power precluded state rate regulation required a return to first principles:

By the ninth article of amendment to the Constitution it is declared that:

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

And by the tenth article:

“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.”

Thus is indicated, as strongly as could be, that the Constitution of the United States is but a delegation of powers, which powers, together with the implied powers that attend those that are express, necessary to a practical and efficient exercise thereof, constitute all that the general government has, or can presume to exercise. All primarily to the people, as they are the repository of all power, political and civil. The whole lawmaking power out of this repository of power is committed to the several state Legislatures, except such as has been delegated to the federal government or is withheld by express or implied reservation in the state Constitutions.<sup>312</sup>

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States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Section 25, article 1, of the state Constitution declares: “This enumeration of rights shall not be construed to impair or deny others, retained by the people.”

*Id.* at 705–10 (citations omitted). Interestingly, it appears that the court believed the Ninth and Tenth Amendments suggested a limited reading of rights provisions in both the federal and state constitutions. This would be an example of reading the rule of construction into judicial interpretation of enumerated state constitutional powers and rights.

310. 173 F. 957, 966 (C.C.D. Or. 1909).

311. *Id.* at 991.

312. *Id.* at 978–79. The court concluded that, under the Ninth and Tenth Amendments, the state retained the power to set rates for intrastate commerce. *Id.* at 979. Similarly, in *Shealy v. Southern Railway Co.*, 120 S.E. 561, 563 (S.C. 1924), the South Carolina Supreme Court held that federal transportation laws did not preempt the ability of the state to require railroads to erect “passenger sheds” at stops serving both in state and out-of-state passengers. In his concurrence, Judge Memminger wrote:

Also we should bear in mind the general rule of construction, that where an act permits of two constructions, one of which will lead to constitutional difficulties, and the other will render the act valid, the court should adopt the latter.

Article 9 of the Amendments of the United States Constitution provides that the renunciation in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people. And article 10 of the Amendments provides

Questions involving the balance of power between the states and the federal government in regulating railroads occurred repeatedly during this period. Determining the scope of federal commerce power in this area—and whether federal statutes preempted state authority—raised issues addressed by the Ninth and Tenth Amendments. In *People v. Long Island Railroad*, the court issued an injunction preventing the railroad from raising its rates for intrastate travel beyond rates authorized by state law.<sup>313</sup> The railroad argued that its rates were authorized by the federal Interstate Commerce Commission, and that any state regulation to the contrary was preempted by federal law.<sup>314</sup> According to Judge Benedict, allowing federal regulation of intrastate travel would unconstitutionally intrude upon powers reserved to the states under the Ninth and Tenth Amendments:

Article 10 of these amendments reads as follows:

“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.”

Article 9 provides that:

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

If the original form of our government had been other than it was, the need of these provisions would not have arisen. . . .

Under this Constitution, the powers of government over all the states were vested in the general or federal government, and at the same time the powers of government over each state, in so far as they were not delegated either expressly or by necessary implication to the federal government were reserved to the states themselves.<sup>315</sup>

According to Benedict, if the federal government can regulate such matters of local concern, “what becomes of state sovereignty?”<sup>316</sup>

2. *The Rule of Construction and Defining the Retained Rights of the People.*—In his speech discussing the origins and meaning of the Ninth Amendment, James Madison referred to the states’ presumptively retained

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that the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states.

*Id.* at 568.

313. 185 N.Y.S. 594, 611 (N.Y. Spec. Term 1920). The case was reversed by the state appellate court on the basis that the lower court lacked jurisdiction. *People v. Long Island R.R.*, 186 N.Y.S. 589 (N.Y. App. Div. 1921). The court’s reversal was announced orally “[w]ithout passing on the merits of any question presented.” *Id.*

314. *Long Island R.R.*, 185 N.Y.S. at 599.

315. *Id.* at 609.

316. *Id.* at 610.

rights to regulate agriculture, manufacture, and commerce.<sup>317</sup> As the industrial age exponentially increased the nature and scope of the national economy, the Court conceded that these presumptively local activities occasionally raised legitimate federal concerns, but, once again, limited construction of federal power to activities that directly or substantially affected interstate commerce.<sup>318</sup>

In *Hammer v. Dagenhart*, for example, the Court invalidated the Keating-Owen Child Labor Act, which barred goods made by children from interstate commerce.<sup>319</sup> Writing for the Court, Justice Day noted that delegated federal power “was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution.”<sup>320</sup> Justice Day then quoted Marshall’s opinion in *Dartmouth College*, which forbade construing the Constitution in a manner that would “restrain the states in the regulation of their civil institutions, adopted for internal government.”<sup>321</sup> According to Justice Day, preserving the reserved powers of the states limited the Court’s interpretation of enumerated federal power:

The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the Nation by the Federal Constitution.

In interpreting the Constitution it must never be forgotten that the Nation is made up of States to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved. The power of the states to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general government. [citing *New York v. Miln*; *The Slaughterhouse Cases*] . . . To sustain this statute would not be in our judgment a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction an invasion by the federal power of the control of a matter purely local in its

317. See James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791), reprinted in WRITINGS, *supra* note 11, at 485.

318. See, e.g., *Houston, E. & W. Tex. Ry. v. United States*, 234 U.S. 342, 355 (1914) (allowing Congress to regulate “in all matters having such a close and substantial relation to interstate commerce that it is necessary or appropriate to exercise the control for the effective government of that commerce”); *Champion v. Ames*, 188 U.S. 321, 360 (1903) (permitting Congressional limits on private contracts “which directly and substantially” impact interstate commerce”); *United States v. E.C. Knight Co.*, 156 U.S. 1, 33 (1895) (allowing regulation of activity that “affects, not incidentally, but directly, the people of all the States”).

319. 247 U.S. 251, 276 (1918).

320. *Id.* at 274. The Court cited, among other sources, “Cooley’s Constitutional Limitations (7th Ed.) p. 11.” *Id.*

321. *Id.* at 274–75 (quoting *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 629 (1819)) (citations omitted).

character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the States.<sup>322</sup>

Although Justice Day's opinion in *Hammer* focused on the Tenth Amendment, other courts cited *Dartmouth College* and *Hammer* as expressing principles embraced by the Ninth and Tenth Amendments. In *George v. Bailey*, for example, a federal court considered whether Congress could enact essentially the same law invalidated in *Hammer*, this time justified as an exercise of Congress's enumerated power to tax.<sup>323</sup> After beginning its analysis of the Child Labor Tax by repeating the interpretive rules of both *Hammer v. Dagenhart* and *Dartmouth College*,<sup>324</sup> District Judge Boyd rejected the government's argument that the Court should defer to Congress's power to tax and spend, pointing, for support, to the Ninth and Tenth Amendments:

The position taken by the counsel for the defendant does not appeal to the court here as being based upon sound reason or intelligent construction. The Tenth Amendment to the Constitution reads as follows:

"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."

From time to time the courts have been called on to construe the meaning of this amendment, and almost without exception it has been held that the powers of the national government are limited to those delegated. This construction is fortified by the Ninth Amendment, which reads as follows:

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

This amendment must be construed to mean that, in framing the Constitution, the sovereign people of the several states ceded to the general government certain designated powers, leaving all other rights and powers, such as are necessary to maintain our dual system of government, to the states respectively and to the people.<sup>325</sup>

To allow the commerce power to reach any matter affecting commerce would, from a Madisonian perspective, destroy the concept of enumerated power and alter the character of our constitutional government.<sup>326</sup> The

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322. *Id.* at 275–76.

323. 274 F. 639, 640–41 (W.D.N.C. 1921).

324. *Id.* at 640–41 (citations omitted).

325. *Id.* at 644. Although the Supreme Court reversed the decision in *Bailey* on standing grounds, see *Bailey v. George*, 259 U.S. 16, 19–20 (1922), it later invalidated the Child Labor Tax at issue in *Bailey* on the grounds that it exceeded federal power under *Hammer v. Dagenhart*. See *Child Labor Tax Case*, 259 U.S. 20, 44 (1922).

326. See James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791), reprinted in *WRITINGS*, *supra* note 11, at 485.



purpose of the Ninth Amendment was to prevent expansive interpretations of federal power in a manner that disparaged the people's retained right to manage certain affairs free from federal interference. For all the criticism nineteenth century courts have received for failing to recognize the true nature of commerce, the critics have failed to recognize the constitutional mandate that drove the need to maintain a distinction between national and local matters.

3. *Mistaking the Tenth Amendment for the Ninth.*—The ubiquitous pairing of the Ninth and Tenth Amendments suggests a kind of “collapsing” in the common understanding of the Clauses. Almost always cited as paired expressions of limited enumerated federal power, it often was not clear whether the Ninth and Tenth played separate roles or whether both supported the rule of construction. At the Founding, of course, a limited construction of federal power was considered an inherent aspect of a government of enumerated powers.<sup>327</sup> State conventions such as those in North Carolina and Virginia insisted on adding an express rule of construction only “for greater caution.”<sup>328</sup> If this rule of construction was an inherent constitutional norm, then the rule could be applied independently<sup>329</sup> or in conjunction with either the Ninth or Tenth Amendments.<sup>330</sup>

But tandem citations to the Ninth and Tenth Amendments in cases applying the rule of construction effectively masked the rule's particular link to the Ninth Amendment.<sup>331</sup> In his speech on the Bank of the United States, Madison clearly distinguished the separate roles of the Ninth and Tenth Amendments.<sup>332</sup> But it was Madison's Tenth Amendment-based report on the Alien and Sedition Act which became famous,<sup>333</sup> not his speech on the Bank of the United States and its increasingly obscure references to the

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327. See Letter from James Madison to Spencer Roane (Sept. 2, 1819), in WRITINGS, *supra* note 11, at 734; Edmund Randolph, The Constitutionality of the Bank Bill (Feb. 12, 1791), reprinted in THE CONSTITUTION AND THE ATTORNEYS GENERAL 7–9 (1999); TUCKER, BLACKSTONE'S COMMENTARIES, *supra* note 50, at 142–43.

328. See, e.g., Amendments Proposed by the Virginia Convention (June 27, 1788), reprinted in CREATING THE BILL OF RIGHTS, *supra* note 195, at 21 (concerning Virginia's seventeenth proposed amendment); see also Lash, *The Lost Original Meaning*, *supra* note 8, at 357.

329. In *Dartmouth College*, the rule was applied independently. Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 627–28 (1819).

330. In *Hammer*, the rule was cited in conjunction with the Tenth Amendment. *Hammer v. Dagenhart*, 247 U.S. 251, 275–76 (1918). In *George v. Bailey*, the rule was cited in conjunction with both the Ninth and Tenth Amendments. *George v. Bailey*, 274 F. 639, 644 (W.D.N.C. 1921).

331. This same masking occurs if the Ninth and Tenth are presented as representing the principle of enumerated power. See, e.g., *Henry Bickel Co. v. Wright's Adm'x*, 202 S.W. 672, 674 (Ky. Ct. App. 1918) (“[T]he ninth and tenth amendments reserve to the states all powers not expressly delegated.”).

332. James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791), reprinted in WRITINGS, *supra* note 11, at 480.

333. See Lash, *The Lost Original Meaning*, *supra* note 8, at 410–13; see also Lash, Madison's Celebrated Report, *supra* note 181.

“eleventh” and “twelfth” amendments. Therefore, it is not surprising that some Supreme Court Justices linked Madisonian arguments regarding latitudinarian construction to the Tenth Amendment in cases involving the construction of enumerated federal power. In *Lambert v. Yellowley*, for example, the Supreme Court narrowly upheld a provision in the National Prohibition Act against a claim that it exceeded Congress’s powers under the Eighteenth Amendment.<sup>334</sup> In dissent, Justice George Sutherland opened his opinion by declaring a rule of construction that he believed was established by the Tenth Amendment:

The general design of the federal Constitution is to give to the federal government control over national and international matters, leaving to the several states the control of local affairs. Prior to the adoption of the Eighteenth Amendment, accordingly, the direct control of the manufacture, sale and use of intoxicating liquors for all purposes was exclusively under the police powers of the states; and there it still remains, save insofar as it has been taken away by the words of the Amendment. These words are perfectly plain and cannot be extended beyond their import without violating the fundamental rule that the government of the United States is one of delegated powers only and that “the powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states “respectively, or to the people.”<sup>335</sup>

To Justice Sutherland, the Eighteenth Amendment was an exception to the general power of the states and should therefore be read in a limited manner. He rooted this rule of construction in the Court’s prior decision in *Hammer* and in James Madison’s 1800 Report on the Virginia Resolutions:

Congressional legislation directly prohibiting intoxicating liquor for concededly medical purposes . . . does not consist with the letter and spirit of the Constitution, and viewed as a means of carrying into effect the granted power is in fraud of that instrument, and especially of the Tenth Amendment. The words of Mr. Madison are pertinent: “Nor can it ever be granted that a power to act on a case when it actually occurs, includes a power over all the means that may tend to prevent the occurrence of the case. Such a latitude of construction would render unavailing every practical definition of particular and limited powers.”<sup>336</sup>

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334. 272 U.S. 581, 595 (1926).

335. *Id.* at 597 (Sutherland, J., dissenting) (citations omitted) (emphasis removed).

336. *Id.* at 603–04 (Sutherland, J., dissenting) (quoting Madison’s 1800 Report) (emphasis deleted). Sutherland continues:

The effect of upholding the legislation is to deprive the states of the exclusive power, which the Eighteenth Amendment has not destroyed, of controlling medical practice and transfer it in part to Congress. It goes further, for if Congress can prohibit the prescription of liquor for necessary medical purposes as a means of preventing the furnishing of it for beverage purposes, that body, by a parity of reasoning, may prohibit the manufacture and sale for industrial or sacramental purposes, or, indeed, as the most

To Justice Sutherland, Madison's rule against latitudinarian constructions of federal power was derived from the Tenth Amendment. Other Supreme Court Justices agreed. In a dissenting opinion joined by Oliver Wendell Holmes, (soon to be Chief) Justice Edward Douglass White objected to latitudinarian constructions of the commerce clause as violating the principles of the Tenth Amendment.<sup>337</sup> In fact, Madison did believe the Tenth worked along with the Ninth in limiting federal authority. Since Madison's 1800 Report, however, states' rights advocates tended to focus on the Tenth Amendment as the *primary*, though not exclusive, provision limiting the construction of enumerated federal power.

Ninth Amendment scholars often dismiss tandem references to the Ninth and Tenth Amendments as irrelevant to understanding the historical application of the Ninth under the assumption that such references are really about the Tenth Amendment.<sup>338</sup> Given the pattern of citing the Ninth and Tenth Amendments as expressing a single principle of limited power, and given the numerous opinions applying Madison's rule of construction in conjunction with the Tenth Amendment, this assumption is understandable. As a matter of original understanding and constitutional text, however, it is the Ninth, not the Tenth, that deals with constructions of enumerated

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effective possible means of preventing the traffic in it for beverage purposes, may prohibit such manufacture and sale altogether, with the result that, under the pretense of adopting appropriate means, a carefully and definitely limited power will have been expanded into a general and unlimited power. "The purposes intended must be attained consistently with constitutional limitations and not by an invasion of the powers of the states. This court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, federal and state, to the end that each may continue to discharge, harmoniously with the other, the duties entrusted to it by the Constitution."

*Id.* at 604 (quoting *Hammer v. Dagenhart*, 247 U.S. 251 (1918)).

337. *N. Sec. Co. v. United States*, 193 U.S. 197, 364–411 (1904) (White, J., dissenting). According to Justice White:

I think the ownership of stock in a state corporation cannot be said to be in any sense traffic between the states or intercourse between them. The definition continues: "It describes the commercial intercourse between nations and parts of nations." Can the ownership of stock in a state corporation, by the most latitudinarian construction, be embraced by the words "commercial intercourse between nations and parts of nations?" . . . .

But if the question be looked at with reference to the powers of the Federal and state governments,—the general nature of the one and the local character of the other, which it was the purpose of the Constitution to create and perpetuate, it seems to me evident that the contention that the authority of the National Government under the commerce clause gives the right to Congress to regulate the ownership of stock in railroads chartered by state authority is absolutely destructive of the Tenth Amendment to the Constitution, which provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people."

*Id.* at 369–70 (White, J., dissenting).

338. *See, e.g., PATTERSON, supra* note 2, at 32 (noting that a number of cases briefly mention both the Ninth and Tenth Amendments but only discuss the Tenth).

power.<sup>339</sup> As a textual matter, cases deploying an interpretive rule against latitudinarian construction of enumerated federal power are really discussing Ninth Amendment principles. Thus, an irony: Tandem references to the Ninth and Tenth, which scholars have dismissed as mistaking the Ninth Amendment for the Tenth, appear to have correctly cited the Ninth in support of the federalism-based rule of construction. On the other hand, cases that cite the Tenth Amendment alone as a rule of construction limiting the interpretation of enumerated federal power have cited the Tenth for principles textually expressed by the Ninth. Justice Sutherland's citing of Madison's Tenth Amendment-based arguments in a case involving enumerated federal power is one example of this "Ninth Amendment reading" of the Tenth. Another is Judge Felch's rewriting of Justice Story's opinion in *Houston v. Moore* in which he replaces Story's reference to the Ninth with a misquoted reference to the Tenth.<sup>340</sup> Having recovered the historical roots of the Ninth and Tenth Amendments, it appears that the common reading of tandem citations to these two amendments is incorrect. To the extent that these cases involve limited construction of enumerated federal power, they are really about the *Ninth*, not the Tenth Amendment.

4. *Distinguishing the Ninth from the First Eight Amendments.*—Not only was the Ninth Amendment consistently linked to the Tenth, but both of these Amendments often were omitted from general discussions regarding the rest of the Bill of Rights.<sup>341</sup> In *Brown v. Walker*, Justice Henry Brown wrote that "the object of the first eight amendments to the constitution was to incorporate into the fundamental law of the land certain principles of natural justice which had become permanently fixed in the jurisprudence of the mother country."<sup>342</sup> When the Supreme Court first began to construe the Due

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339. The fact that the Tenth does not by its terms control the construction of federal power was occasionally pointed out by the Supreme Court itself. See *Missouri v. Holland*, 252 U.S. 416, 433–34 (1920) ("The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment.").

340. See *supra* notes 182–184 and accompanying text.

341. For example, in his *Treatise on the Limitations of Police Power in the United States*, Christopher G. Tiedeman wrote:

The principle constitutional limitations, which are designed to protect private rights against the arbitrary exercise of governmental power, and which therefore operate to limit and restrain the exercise of police power, are the following:—[Amendments 1–8, 14, and 15] . . . Here are given only the provisions of the Federal constitution, but they either control the action of the States, as well as of the United States, or similar provisions have been incorporated into the bills of rights of the different State constitutions, so that the foregoing may be considered to be the chief limitations in the United States upon legislative interference with natural rights.

CHRISTOPHER G. TIEDEMAN, *TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES* 13–15 (1886).

342. 161 U.S. 591, 648 (1885); see also *Holden v. Hardy*, 169 U.S. 366, 382 (1898) ("[T]he first eight amendments to the Constitution were obligatory only upon congress."); *Maxwell v. Dow*, 176 U.S. 581, 607–08 (1900) (Harlan, J. dissenting) (referring to the first ten amendments as the

Process Clause of the Fourteenth Amendment to include certain freedoms listed in the Bill of Rights, the discussion generally, and sometimes expressly, involved only the first eight amendments.<sup>343</sup> On a number of occasions, the Supreme Court described the Bill of Rights as including only the first eight amendments.<sup>344</sup> In *Palko v. Connecticut*, for example, Justice Benjamin Cardozo characterized arguments in favor of total incorporation of the Bill of Rights as applying only to the first eight amendments.<sup>345</sup> This distinction between the first eight amendments and the Ninth and Tenth echoes the same distinction made by Fourteenth Amendment framers such as John Bingham.<sup>346</sup> The distinction would become even more apparent in opinions citing the Ninth and Tenth Amendments in support of arguments opposing the full incorporation of the first eight amendments.<sup>347</sup>

5. *The Ninth Amendment and Individual Rights.*—Between the Civil War and the New Deal, a few cases discussed the Ninth Amendment as a source of unenumerated rights.<sup>348</sup> In *Roman Catholic Archbishop v. Baker*,

Bill of Rights, but quoting only the first eight amendments, which he characterized as “privileges and immunities enumerated in these amendments belong[ing] to every citizen of the United States”).

343. For example, in the Supreme Court case, *Eilenbecker v. District Court of Plymouth County*, 134 U.S. 31 (1890), Justice Miller noted:

The first three of these assignments of error, as we have stated them, being the first and second and fourth of the assignments as numbered in the brief of the plaintiffs in error, are disposed of at once by the principle often decided by this court, that the *first eight articles of the amendments* to the Constitution have reference to powers exercised by the government of the United States, and not to those of the states.

*Id.* at 34 (emphasis added); see also *Ohio ex rel. Lloyd v. Dollison*, 194 U.S. 445, 447 (1904) (quoting the above statement from *Eilenbecker*).

344. See, e.g., *Bolln v. Nebraska*, 176 U.S. 83, 87 (1900) (“The argument of the plaintiff in error in this connection is that, by these acts, the people of Nebraska adopted the Constitution of the United States, and thereby the first eight amendments containing the bill of rights became incorporated in the constitution of the State.”).

345. 302 U.S. 319, 323 (1937). According to Justice Cardozo:

We have said that in appellant’s view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments I to VIII) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule.

*Id.*; see also HORACE EDGAR FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 94 (1908) (concluding that the “Congress, the House and the Senate, had the following objects and motives in view for submitting the first section of the Fourteenth Amendment to the States for ratification: 1. To make the Bill of Rights (the first eight amendments) binding upon, or applicable to, the States”).

346. See *supra* note 239 and accompanying text.

347. See *infra* notes 469–485 and accompanying text; see also Felix Frankfurter, *Memorandum on “Incorporation” of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746, 746 (1965) (limiting his discussion to cases involving the first eight amendments).

348. I have found five state cases involving attempts to read the Ninth Amendment as a source of independent rights. This compares to no state cases in the antebellum period. In federal court during this same period there was only one such claim. This compares with two such claims in federal court during the antebellum period. The state cases might suggest a growing sense of the

the Oregon Supreme Court invalidated a local ordinance prohibiting the building of a school in a residential district.<sup>349</sup> In doing so, the Oregon court declared that the “right to own property is an inherent right”<sup>350</sup> and suggested that this was one of the other rights referred to in the Ninth Amendment.<sup>351</sup> *Baker*, however, was the exception. Instead, just as before the Civil War, courts generally dismissed arguments that the Ninth Amendment was a source of unenumerated rights.<sup>352</sup>

More frequently, courts relied on the Ninth in decisions *limiting* the construction of enumerated federal rights. In *United States v. Moore*, for example, the federal court dismissed a federal indictment for conspiring to interfere with a citizen’s right to establish a miners’ union on the grounds that the indictment exceeded federal power.<sup>353</sup> The federal government

Ninth as a plausible source of individual rights at the state level. As this section points out, however, every court but one that considered the matter dismissed the Ninth Amendment claim.

349. 15 P.2d 391, 393, 396 (Ore. 1932).

350. *Id.* at 395.

351. According to the court:

It may be assumed that the adoption of the first ten amendments of the Constitution of the United States, commonly called the Bill of Rights, specifically mentions only such rights as to which there might have been a doubt, and so that the people should not be misled, at the same time there was adopted, as a part of the Constitution, Amendment 9, which says: “The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people.”

*Id.*

352. See *Fithian v. Centanni*, 106 So. 321 (La. 1925) (ignoring a Ninth Amendment claim); *Cont’l Life Ins. & Inv. Co. v. Hattabaugh*, 121 P. 81 (Idaho 1912) (ignoring a Ninth Amendment claim); *King v. State*, 71 S.E. 1093 (Ga. 1911) (rejecting a Ninth Amendment rights claim in a prosecution for usury); *State ex rel. Labauve v. Michel*, 46 So. 430 (La. 1908) (rejecting a claim that the Ninth Amendment establishes a right to change votes in a state primary); see also *Clay v. City of Eustis*, 7 F.2d 141 (S.D. Fla. 1925). According to the court in *Eustis*:

Section 24 of the Bill of Rights of the state Constitution and Amendment 9 of the federal Constitution, which provides that the enumeration of certain rights shall not be construed to deny others retained by the people, and the complainants claim that the right to have a voice in local self-government and to be represented in taxation is one of these rights reserved, and which has been violated by the two sections of the special act. This position is not tenable under the decisions of the courts.

*Id.* at 142–43. In *McLendon v. State*, 60 So. 392 (Ala. 1912), the court ruled that a state law providing a tax exemption for ex-confederate soldiers violated the equal protection clause of the Fourteenth Amendment. Dissenting from the part of the majority opinion which ruled that the tax exemption did not violate the state constitution, Judge Mayfield appears to adopt an unenumerated rights reading of the Ninth Amendment:

Article 9 of the federal Constitution reads as follows: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” The equal right, with other citizens, to practice a noble and worthy profession, or to pursue an honorable, lawful, and remunerative avocation, is certainly one of the citizen’s inalienable rights, as much so as those of life, liberty, or property, which are specially enumerated.

*Id.* at 397. Finally, in 1932, a judge of the Territory of Hawaii appeared to seriously consider the Ninth as a source of unenumerated rights, but ultimately declined to recognize an “inalienable” right of estranged fathers to the custody of their children. See *In re Guardianship of Thompson*, 32 Haw. 479, 485–86 (1932).

353. 129 F. 630, 634–36 (C.C.N.D. Ala. 1904).

claimed that it had power to prohibit such conspiracies as part of its power to protect privileges or immunities under Section 5 of the Fourteenth Amendment.<sup>354</sup> The district court rejected this reading of the Fourteenth Amendment on the grounds that, as declared in the Ninth and Tenth Amendments, states retain the exclusive power to protect individuals from private violence:

The last two of the ten amendments thus proposed provided that “the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people,” and that “the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people.” It is quite apparent, therefore, that the protection of certain rights of the citizen of a state, although he is by recent amendments made a citizen of the United States and of the state in which he resides, depends wholly upon laws of the state, and that as to a great number of matters he must still look to the states to protect him in the enjoyment of life, liberty, property, and the pursuit of happiness.<sup>355</sup>

According to the district court, the Ninth and Tenth Amendments counseled a limited reading of congressional power under the Fourteenth Amendment. Whatever effect the Fourteenth Amendment had on state power, when it came to private conspiracies, “recent amendments to the Constitution have made no change in the power or duty of the general government.”<sup>356</sup> *Moore* is an example of how courts increasingly deployed the Ninth and Tenth Amendments in cases involving the construction of asserted federal rights against state action. Although there are examples of this prior to 1868,<sup>357</sup> the adoption of the Fourteenth Amendment significantly expanded the catalogue of constitutional rights that were protected against

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354. *Id.* at 635.

355. *Id.* at 632. The court continues:

The Constitution of the United States, as we repeat, left the power and duty to protect life, liberty, property, the pursuit of happiness, freedom of speech, the press, and religious liberty, and the right to order persons and things within their borders, for the protection of the health, lives, limbs, morals, and peace of citizens, save as the original power of the states over them might be disturbed or destroyed by the specific grants of power to the general government, where the Constitution found them— in the exclusive keeping and power of the state— and denied the general government any responsibility for or power over them. Rights like these do not arise from the Constitution of the United States, and are in no wise dependent upon it. Provisions of the Constitution which refer to rights like these are merely in recognition of rights which existed before the government of the United States was formed, in abdication of power in the general government to interfere with or invade them, and in some instances intended as a breakwater against their invasion by state power.

*Id.* at 634–35.

356. *Id.* at 635.

357. See *Anderson v. Baker*, 23 Md. 531 (1865) (using the Ninth and Tenth Amendments in a case limiting the construction of Article I, Section 10).

state action. Just as the Ninth and Tenth Amendments previously expressed a rule for construing the scope of enumerated powers, they now also guided the courts in interpreting the scope of enumerated rights. In *State v. Gibson*, for example, the Indiana Supreme Court upheld a state antimiscegenation law against a challenge under the Fourteenth Amendment and the Civil Rights Act of 1866.<sup>358</sup> In doing so, the court noted that the Founders intended that powers not delegated to the federal government be retained by the states, and that the Ninth and Tenth Amendments were adopted expressly for this purpose:

The powers conferred on the general government are of a general and national character, and none of them authorize or permit any interference with, or control over, the local and internal affairs of the state. The general government is one of limited and enumerated powers, and it can exercise no power that is not expressly, or by implication, granted. The people being the inherent possessors of all governmental authority, it necessarily and logically resulted that all powers not granted to the general government, or prohibited to the state governments, were retained by the states and the people, but the great, wise, and illustrious men who framed our matchless form of government were so jealous of the right of local self-government that they were unwilling to leave the question of the reserved powers to implication and construction. Hence, within two years after the adoption of the federal constitution, twelve amendments thereto were submitted by Congress to the states for ratification, which were ratified. The ninth and tenth amendments read as follows [quoting the amendments in full].<sup>359</sup>

States now used the Ninth and Tenth Amendments to maintain racial segregation, just as southern states had previously used both amendments to maintain local control of slavery.<sup>360</sup>

As a textual matter, the Ninth's rule of construction applies to any provision in the Constitution that can be expanded into areas retained by the people as aspects of local self-government. For example, in *State ex rel*

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358. 36 Ind. 389, 405 (1871).

359. *Id.* at 396–97.

360. *See* Bd. of Educ. of Ottawa v. Tinnon, 26 Kan. 1 (1881). In *Tinnon*, the plaintiffs claimed a decision by a local school board to segregate public schools violated the Fourteenth Amendment. In defense, the city argued that the rule of construction represented by the Ninth and Tenth Amendments should limit the court's reading of the Fourteenth:

And viewing the apparent scope of the first section of the fourteenth amendment, it is singular that any necessity existed for the adoption of the fifteenth amendment, as the unlearned can scarcely conceive a broader and more comprehensive statement of equal rights. But the jealousy of the people as against the possible encroachment of federal power, had given birth to the ninth and tenth amendments, and to such salutary rule of construction by the judiciary, that the adoption of the fifteenth amendment was vitally necessary to remedy the evil still then existing; and in this amendment, for the first time the term "color" appears in the federal constitution.

*Id.* at 12.



*Mullen v. Howell*, the Washington state legislature adopted a joint resolution ratifying the proposed Eighteenth Amendment and submitted the issue to state referendum, which voted in support of ratification.<sup>361</sup> The use of a referendum for ratifying a proposed constitutional amendment was challenged as violating the ratification structure set out in Article V of the Constitution.<sup>362</sup> Writing for the Washington Supreme Court, Chief Justice Chadwick rejected the argument on the ground that although Article V speaks of ratifications by state *legislatures*, this provision should not be read so broadly as to interfere with the people's right to referendum—a right reserved to the states under the Ninth and Tenth Amendments:

[T]he tenth amendment to the Constitution, [which states] that “the powers not delegated to the United States . . . are reserved to the states respectively, or to the people,” . . . is a declaration that the people of the several states may function their legislative power in their own way, especially so when the Ninth Amendment, “The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people,” is regarded—for the right to legislate directly or by representative bodies is a right assuredly retained, and, being retained, may be exercised in the form and manner provided by the people of a state. . . .”<sup>363</sup>

Other courts echoed this collective political rights reading of the Ninth and Tenth Amendments. In *Hawke v. Smith*,<sup>364</sup> the Ohio Supreme Court was faced with the same issue presented in *Howell*. According to the per curiam opinion, Article V's use of the term “legislature” included situations in which the people of the state act in a “legislative capacity,” and public referenda were such instances.<sup>365</sup> In his concurrence, Justice Wanamaker noted that “each state was presumed to deal with its own domestic affairs—that is, state affairs—in the manner best calculated to promote the safety and happiness of the people of that state, according to the judgment of the people of that state.”<sup>366</sup> Responding to the contention that this would “elevate the state above the nation,”<sup>367</sup> Wanamaker replied:

It must be remembered that we had state Constitutions before we had a national Constitution, and that only by acting as states, through representatives and delegates, was the national Constitution adopted, first by the convention, and second by the states, and then it would not have been adopted by the states but for the overwhelming assurance that as soon as Congress would meet there should be proposed and

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361. 181 P. 920, 921 (Wash. 1919).

362. *Id.* at 922.

363. *Id.* at 925–26.

364. 126 N.E. 400 (Ohio 1919).

365. *Id.* at 402.

366. *Id.* at 403 (Wanamaker, J., concurring).

367. *Id.*

adopted, at the earliest practicable moment, a Bill of Rights safeguarding the rights of the states and the people. In this behalf it is significant to note articles 9 and 10:

Article 9: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

Article 10: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”

It must be remembered that in the early history of the nation, especially at the time of the making of the national Constitution, the doctrine of state’s rights was in the ascendancy—that is, the states were exceedingly jealous of their rights and powers as states and were loath to surrender them—and therefore the imperative demand for the reservation of all powers not delegated by the Constitution. Surely one of the most important and significant of all those powers reserved was the right of each state to determine for itself its own political machinery and its own domestic policies, and it can scarcely be claimed that it is within the power of any court to nullify or in any wise alter the political machinery of a state, especially that which the state has designed and designated as its lawmaking machinery.<sup>368</sup>

To Justice Wanamaker, the Founders adopted the Ninth and Tenth Amendments in order to reserve the “right of each state to determine for itself its own political machinery and its own domestic policies.”<sup>369</sup> This being a retained right, it was not to be disparaged by an overly restrictive reading of Article V.

The idea that the Ninth and Tenth Amendments preserved the retained right of local self-government echoed throughout the cases decided between Reconstruction and the New Deal. The rule of construction preserving this right sometimes was deployed on its own, sometimes in association with the Tenth Amendment, and sometimes in conjunction with both the Ninth and Tenth Amendments. In a legal culture in which state autonomy was presumed, perhaps it was not necessary to link the rule to the specific textual mandate of the Ninth Amendment. The time would come, however, when that legal culture would change.

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368. *Id.*

369. *Id.*

#### IV. The New Deal Transformation of the Ninth Amendment

##### A. *The Rule in Transition*

###### 1. *The New Deal and the Ninth Amendment Prior to 1937.*—

The only controversy that is here is between the humble citizen who asserts his right to carry on his little business in a purely local commodity and in a purely local fashion, without being arrested and punished for a mythical, indirect effect upon interstate commerce.<sup>370</sup>

Following President Franklin Delano Roosevelt's election in 1932, state and federal courts were obligated to struggle with the constitutionality of the New Deal. Because the issue often involved construing the scope of federal power, the Ninth Amendment was often called into play. In 1935, for example, a New York court struck down provisions in the National Industrial Recovery Act ("NIRA") because it violated the nondelegation doctrine.<sup>371</sup> Concurring in the opinion, Judge Rhodes declared the Act exceeded federal power as constructed under the Ninth and Tenth Amendments:

The Ninth Amendment to the Constitution of the United States provides as follows: "*Reserved rights of people.* The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The Tenth Amendment to said Constitution is as follows: "*Powers not delegated, reserved to States and people respectively.* The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The several states were separate and independent sovereignties at the time of the adoption of the Federal Constitution, and thus they remain, except in so far as certain powers have been delegated to the United States by that Constitution. No state may lawfully be deprived of such reserved powers except in the manner specified in such Constitution. In no other way may the sovereignty of any state be impaired, except by surrender from within or usurpation from without.<sup>372</sup>

With a single exception,<sup>373</sup> federal court opinions discussing the Ninth Amendment in the period from 1930 to 1936 focused on the constitutionality of the New Deal. In *Amazon Petroleum Corp. v. Railroad Commission*, the plaintiff alleged that the National Industrial Recovery Act exceeded federal power under the Tenth Amendment, violated "natural and inherent rights contrary to the Ninth Amendment to the national Constitution," and

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370. *United States v. Lieto*, 6 F. Supp. 32, 36 (N.D. Tex. 1934).

371. *Darweger v. Staats*, 278 N.Y.S. 87, 89 (N.Y. App. Div. 1935).

372. *Id.* at 92 (Rhodes, J., concurring).

373. *See In re Guardianship of Thompson*, 32 Haw. 479 (1932).

contravened nondelegation principles and various aspects of the Fourth, Fifth, and Eighth Amendments.<sup>374</sup> It is unclear whether the plaintiff's Ninth Amendment claim involved the right to local government or instead referred to unenumerated individual rights. To the federal district judge, however, the rights at issue were those of the states. According to Judge Bryant, the Secretary of the Interior had exceeded his power "to the prejudice of the rights of the state over matters of purely local concern."<sup>375</sup> Bryant continued, "In interpreting the Constitution it must never be forgotten that the nation is made up of states to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the national government are reserved."<sup>376</sup>

In *Hart Coal Corp. v. Sparks*, a federal district court invalidated wage and hours regulations issued by the National Administrator under the NIRA.<sup>377</sup> According to District Judge Dawson, the Ninth and Tenth Amendments expressed principles that limited the construction of federal power:

In considering this question, we must never forget that the national government is one of delegated powers, and that Congress possesses only such legislative powers as are expressly or by implication conferred upon it by the people in the Constitution. Even though the Ninth and Tenth Amendments to the Constitution had never been adopted, it would be difficult, in the light of the history of the Constitution, of its source, and of the objects sought to be accomplished by it, to reach any other conclusion than that there is reserved to the states or to the people all the powers and rights not expressly or impliedly conferred upon the national government. But the Ninth Amendment, which declares, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or to disparage others retained by the people," and the Tenth Amendment, providing that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," put this matter beyond all question. Therefore Congress does not have all legislative power. It possesses only such legislative power as has been expressly or impliedly conferred upon it.<sup>378</sup>

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374. 5 F. Supp. 639, 644 (E.D. Tex. 1934).

375. *Id.* at 649–50.

376. *Id.* at 645. The Supreme Court, ultimately, would agree that the Act violated the Constitution, but under the nondelegation doctrine, not the Ninth and Tenth Amendments. *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 392 (1935).

377. 7 F. Supp. 16, 28 (W.D. Ky. 1934).

378. *Id.* at 21. The case would be reversed on appeal to the Sixth Circuit on grounds of standing, with no discussion of, or disagreement with, the district court's analysis of the Ninth and Tenth Amendments. *Sparks v. Hart Coal Corp.*, 74 F.2d 697 (6th Cir. 1934); *see also* *United States v. Gearhart*, 7 F. Supp. 712, 716 (D. Colo. 1934) (dismissing a prosecution under the NIRA for selling coal below a minimum price set by the federal government relying in part on the Ninth and

References to the right to local self-government occur in a number of opinions in the years leading up to the New Deal. For example, in *United States v. Lieto*, the district court dismissed a prosecution for violations of maximum hour and minimum wage provisions set under the Code of Fair Competition issued pursuant to the NIRA.<sup>379</sup> The defendant claimed that the prosecution violated the Fifth, Tenth, and Ninth Amendments. Without expressly mentioning any of these amendments, Judge Atwell focused on the individual's right to operate a local business free from federal interference: "The only controversy that is here is between the humble citizen who asserts his right to carry on his little business in a purely local commodity and in a purely local fashion, without being arrested and punished for a mythical, indirect effect upon interstate commerce."<sup>380</sup>

As they had from the beginning, courts preserved this right to local self-government through the application of a rule of construction generally, and sometimes expressly, associated with the Ninth Amendment. In *Acme, Inc. v. Besson*, the federal district court of New Jersey invalidated the wage and hour provisions promulgated under the NIRA.<sup>381</sup> In coming to his conclusion, Judge Fake interpreted "commerce" to exclude local manufacturing.<sup>382</sup> His conclusion was based in part on Supreme Court precedent and in part on the interpretive rules of the Ninth Amendment:

There is still another source to which we may refer in sustaining the foregoing definition, and that is the well-known historic fact that the people of the original states were extremely reluctant in granting powers to the federal government and *expressly laid down a rule of constitutional construction in the Ninth Amendment*, wherein our forefathers said: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." And then, further, in the Tenth Amendment, we find this express limitation upon the federal government: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." In view of the foregoing, we have labored in vain to conclude that it was the intent of the Constitution to pass to the Congress regulatory authority over those local, intimate, and close relationships of persons and property which arise in the processes of manufacture, even though they may, in the broader sense, affect interstate commerce.<sup>383</sup>

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Tenth Amendments.); *Koch v. Zuieback*, 194 F. Supp. 651, 656 (S.D. Cal. 1961) ("The Ninth and Tenth Amendments, pertaining, respectively, to enumerated powers and powers reserved to the states, contain no provisions relevant to the case at bar, and could not conceivably be construed to authorize a suit for damages against an individual or federal official.").

379. 6 F. Supp. 32, 36 (N.D. Tex. 1934).

380. *Id.* at 36.

381. 10 F. Supp. 1, 6-7 (D.N.J. 1935).

382. *Id.* at 6.

383. *Id.* (emphasis added).

Again, the rule represented by the Ninth preserves the principle declared by the Tenth. Reserving nondelegated power to the people of the several states seems an empty promise if federal power can be so broadly interpreted as to swallow the primary concerns of local government. As they had done for more than a century, judges during the early years of the New Deal cited the Ninth's rule of construction to preserve the principle of limited enumerated federal power. In *United States v. Neuendorf*, an Iowa district court invalidated an attempt to regulate purely intrastate commerce under the Agricultural Adjustment Act.<sup>384</sup> In coming to its conclusion, the court cited both the Ninth and Tenth Amendments<sup>385</sup> and concluded that allowing the federal government to regulate purely intrastate commerce would “emasculate the intent of the Tenth Amendment to retain in and for the states all powers not delegated to the national government.”<sup>386</sup> To the court, the rule of construction prevented overbroad constructions of federal power in order to protect rights or powers reserved to the states under the Tenth—in particular, the right to local self-government.

Even as the Supreme Court began to reconsider its resistance to the New Deal, the Ninth and Tenth Amendments continued to be cited as independent constraints on the interpretation of federal power. In the 1936 case, *Ashwander v. Tennessee Valley Authority*, the Supreme Court upheld

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384. 8 F. Supp. 403, 406–07 (S.D. Iowa 1934).

385. According to the court:

The government of the United States is one of limited powers. The Tenth Amendment to the Constitution expressly so declares: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

And Amendment 9 provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

*Id.* at 405.

386. *Id.* at 406. As Judge Watkins expressed it in the 1935 case, *Duke Power Co. v. Greenwood County*, 10 F. Supp. 854 (D.C. S.C. 1935):

That the legislation in question does not come within the powers of Congress under the commerce clause seems too well settled to require argument. If there could have existed any doubt under the Constitution as originally adopted, that was effectually removed by the subsequent and almost immediate adoption of the first ten amendments, each in turn being a restriction upon federal power, and each *specifically prohibiting the enactment of laws regarding matters affecting individual rights and local self-government*, . . . the Ninth Amendment, declaring that “the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people,” and the Tenth Amendment, especially reserving to the states, respectively, or to the people, all powers not delegated—and, I may add, not specifically delegated—to the United States by the Constitution, nor prohibited by it to the states.

*Id.* at 866 (emphasis added). In *Duke Power*, the court invalidated an attempt by the Public Works Administrator to finance public works projects under the NIRA as beyond Congress's commerce powers. *Id.* at 868. The decision ultimately was vacated and remanded for a new trial by the Supreme Court on grounds of mootness. *Duke Power Co. v. Greenwood County*, 299 U.S. 259, 866 (1936).

congressional authority to sell electricity generated by the Wilson Dam.<sup>387</sup> According to Chief Justice Hughes, Congress had express authority under Article IV, Section 3 to dispose of property acquired by the United States, including electrical energy.<sup>388</sup> Hughes then addressed the Ninth and Tenth Amendment claims:

To the extent that the power of disposition is thus expressly conferred, it is manifest that the Tenth Amendment is not applicable. And the Ninth Amendment (which petitioners also invoke) in insuring the maintenance of the rights retained by the people, does not withdraw the rights which are expressly granted to the Federal Government.

The question is as to the scope of the grant and whether there are inherent limitations which render invalid the disposition of property with which we are now concerned.<sup>389</sup>

According to Hughes, the Tenth Amendment claim failed once it was established that Congress was exercising an enumerated power. A separate inquiry was then required for the Ninth Amendment claim, which Hughes described as involving the scope of enumerated power and whether there were inherent limitations on that power that would prevent the sale of electricity to a local market. This reading of the Ninth Amendment distinguishes it from the Tenth and echoes the description of the Ninth provided by James Madison a century and a half before the New Deal. The interpreted scope of federal power cannot extend up to the enumerated restrictions in the Bill. Federal power is limited in itself and must not be construed to deny or disparage the retained rights of the people. The *Ashwander* court assumed that the rights retained by the people under the Ninth Amendment involve the collective right to local regulation of electricity, but contrasted that regulatory right with the regulatory rights of the federal government. Hughes's opinion in *Ashwander* presents one of the clearest examples of Ninth Amendment rights being read to refer to the collective rights of local self-government.

2. *The New Deal and the Tenth Amendment Prior to 1937.*—By the time of the New Deal, a substantial body of law limited congressional power to regulate local commercial activities.<sup>390</sup> As an alternative source of power, proponents of progressive legislation made claims of federal authority beyond those expressly enumerated in the Constitution. According to this alternate view, it was the federal government's duty to promote the general welfare, and this duty included broad authority to respond to the economic emergency of the Great Depression. This was not so much an interpretation

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387. 297 U.S. 288, 338 (1936).

388. *Id.* at 330.

389. *Id.* at 330–31.

390. *See generally* notes 317–326 and accompanying text.

of an enumerated power—which would raise Ninth Amendment concerns; rather, it was an assertion of inherent federal power to act in times of emergency—which raised issues under the Tenth.

In *A.L.A. Schechter Poultry Corp. v. United States*, the government argued that its authority to regulate local labor conditions under the Live Poultry Act “must be viewed in the light of the grave national crisis with which Congress was confronted.”<sup>391</sup> Writing for the Court, Chief Justice Hughes rejected this claim to unenumerated “emergency powers” as conflicting with the Tenth Amendment:

Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary. Such assertions of extra-constitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment—“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>392</sup>

Having concluded that the unenumerated power claim violated the Tenth Amendment, Hughes proceeded to consider whether any enumerated federal power gave Congress the authority to regulate purely intrastate commerce. The discussion at this point did not rely on the Tenth Amendment, but instead deployed a rule of constitutional interpretation that mandated the preservation of state regulatory autonomy:

In determining how far the federal government may go in controlling intrastate transactions upon the ground that they “affect” interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. . . . If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government. . . .

The distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional

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391. 295 U.S. 495, 528 (1935).

392. *Id.* at 528–29. Hughes was not completely consistent on this point. See *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 442–44 (1934) (arguing that the Constitution should be interpreted in light of public need); see also Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 *FORDHAM L. REV.* 459, 479–80 (2001) [hereinafter Lash, *The Original Meaning of the New Jurisprudential Deal*] (discussing Hughes’s interpretation of the Constitution in *Blaisdell*).



system. Otherwise, as we have said, there would be virtually no limit to the federal power, and for all practical purposes we should have a completely centralized government. We must consider the provisions here in question in the light of this distinction.<sup>393</sup>

In *Carter v. Carter Coal Co.*,<sup>394</sup> the government similarly argued in favor of unenumerated power to regulate for the common good. Once again, the Court rejected the argument on the basis of the Tenth Amendment:

Replying directly to the suggestion advanced by counsel . . . to the effect that necessary powers national in their scope must be found vested in Congress, though not expressly granted or essentially implied, this court said:

“But the proposition that there are legislative powers affecting the Nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the Tenth Amendment. This amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the National government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if in the future further powers seemed necessary they should be granted by the people in the manner they had provided for amending that act.”<sup>395</sup>

In *Carter Coal*, when the Court turned to the interpretation of the Commerce Clause, it was not the Tenth Amendment that was applied, but instead the rule of construction from *Schechter*:

[T]he [*Schechter*] opinion, . . . after calling attention to the fact that if the commerce clause could be construed to reach transactions having an indirect effect upon interstate commerce the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government, we said: “Indeed, on such a

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393. *Schechter Poultry*, 295 U.S. at 546–48; see also James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791), reprinted in *WRITINGS*, *supra* note 11, at 486 (referring to the “delicate doctrine of implication”).

394. 298 U.S. 238 (1936).

395. *Id.* at 293–94.

theory, even the development of the state's commercial facilities would be subject to federal control."<sup>396</sup>

Although this left control of certain local matters to the states, the purpose was not to protect the rights of states, but to preserve the separation of power between state and federal governments. State regulatory autonomy was not the states' to give away:

The determination of the Framers Convention and the ratifying conventions to preserve complete and unimpaired state self-government in all matters not committed to the general government is one of the plainest facts which emerge from the history of their deliberations. And adherence to that determination is incumbent equally upon the federal government and the states. State powers can neither be appropriated on the one hand nor abdicated on the other.<sup>397</sup>

Finally, in *United States v. Butler*, the Supreme Court interpreted the Tax and Spending Clause to authorize nonregulatory programs furthering the general welfare.<sup>398</sup> Attempts to convert this authority into an unlimited power to *regulate* for the general welfare, however, violated the Tenth Amendment:

We are not now required to ascertain the scope of the phrase "general welfare of the United States" or to determine whether an appropriation in aid of agriculture falls within it. Wholly apart from that question, another principle embedded in our Constitution prohibits the enforcement of the Agricultural Adjustment Act. The act invades the reserved rights of the states. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government. The tax, the appropriation of the funds raised, and the direction for their disbursement, are but parts of the plan. They are but means to an unconstitutional end.

From the accepted doctrine that the United States is a government of delegated powers, it follows that those not expressly granted, or reasonably to be implied from such as are conferred, are reserved to the states or to the people. To forestall any suggestion to the contrary, the Tenth Amendment was adopted. The same proposition, otherwise stated, is that powers not granted are prohibited. None to regulate agricultural production is given, and therefore legislation by Congress for that purpose is forbidden.<sup>399</sup>

Any attempt to go beyond enumerated powers, even in an emergency, triggered the protections of the Tenth Amendment. When interpreting the

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396. *Id.* at 309.

397. *Id.* at 295. One can hear echoes of James Madison's veto of the latitudinarian Internal Improvements Bill: "the assent of the states . . . cannot confer the power." See James Madison, Veto Message to Congress (Mar. 3, 1817), reprinted in WRITINGS, *supra* note 11, at 720.

398. 297 U.S. 1, 64–66 (1936).

399. *Id.* at 68.

scope of enumerated power, the Court followed what it believed was an interpretive imperative: Drawing a line between federal and state autonomy was required both by the term “interstate commerce” and by the Tenth Amendment’s reservation of the power to regulate *intrastate* commerce to the states.<sup>400</sup> Although unlike lower federal courts, the Supreme Court did not directly address the Ninth Amendment,<sup>401</sup> it implicitly acknowledged that preserving the principles of the Tenth required an additional rule of construction. When the New Deal Court abandoned that rule, they also abandoned the Ninth and Tenth Amendments as substantive limits on federal power.

### B. *The Rule Abandoned*

In the constitutional upheaval known as the New Deal Revolution of 1937,<sup>402</sup> the doctrinal underpinnings which had informed judicial understanding of the Ninth and Tenth Amendments for a century and a half were swept away. A few months after his 1936 landslide election to a second term of office, President Roosevelt announced his “Court Packing Plan.”<sup>403</sup> Whether in response to this threat to the Court’s independence, or simply due to a change of mind, Justice Roberts abruptly did an about face and voted to

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400. Courts continued to follow this approach even as the Supreme Court was dismantling *Lochner*’s legacy. See *State v. Packard-Bamberger & Co.*, 2 A.2d 599 (N.J.D.C. 1938). Here the New Jersey court limits Supreme Court precedents, such as *Nebbia v. New York*, 291 U.S. 502 (1934), to apply only to statutes temporarily regulating prices and strikes down a state price control statute as violating the common law property right to set your own price, citing the Ninth Amendment in support of its decision. *Packard-Bamberger*, 2 A.2d at 602–03. This limited reading of *Nebbia* was rejected by the Supreme Court a few years later in *Olsen v. Nebraska ex rel. Western Reference Bond Ass’n*, 313 U.S. 236 (1941). More frequently, claims were made that the expansion of federal power violated the Ninth and Tenth Amendment’s principle of limited enumerated power—claims that initially received sympathetic treatment by the courts. In *Duke Power Co. v. Greenwood County*, 19 F. Supp. 932, 945 (W.D.S.C. 1937), plaintiffs challenged the building of a power plant financed by a federal loan under the National Industrial Recovery Act in part because it “amounted in substance to an invasion of the powers reserved to the states and to the people under the Ninth and Tenth Amendments to the Federal Constitution.” According to the court:

It is our view that it would be a violation of the Tenth Amendment to accomplish federal regulation of the local intrastate transactions to a substantial degree and thus displace state regulation even if this result was brought about through a loan and grant agreement resulting in the building and operation of a municipally owned and federally aided power plant. . . . There must be some limit to this power of expenditure. Without enumerating them all, the most important limitation on this power immediately suggests itself to us. The general welfare power may not be exercised to disturb the balance between the states and the federal government which exists under our constitutional system.

*Id.* at 950–52.

401. See, e.g., *George v. Bailey*, 274 F. 639, 644 (W.D.N.C. 1921).

402. See BRUCE ACKERMAN, 2 *WE THE PEOPLE: TRANSFORMATIONS* 257 (1998); Lash, *The Original Meaning of the New Jurisprudential Deal*, *supra* note 392, at 461.

403. Franklin D. Roosevelt, Reorganizing the Federal Judiciary, Radio Address (Mar. 9, 1937), in *S. Rep. No. 75-711*, App. D, at 41 (1937).

uphold laws he had previously opposed as beyond federal power.<sup>404</sup> His “switch in time” signaled the beginning of the New Deal Revolution.<sup>405</sup> In a rapid succession of cases, the Supreme Court altered its interpretation of liberty of contract,<sup>406</sup> rejected the authority of federal courts to construe state common law,<sup>407</sup> abandoned nondelegation doctrine,<sup>408</sup> and began to construct a new framework for protecting the individual rights listed in the first eight amendments.<sup>409</sup> The last two provisions of the Bill of Rights, however, were abandoned.<sup>410</sup> For the next thirty years, not a single invocation of either the Ninth or Tenth Amendments would be successfully brought in any federal court.

*1. Rejecting the Individual Right to Local Self-Government.*—After the Supreme Court’s decision in *Butler*, which prohibited coercive exercises of the federal power to tax and spend,<sup>411</sup> a number of claims were brought challenging New Deal legislation as coercive and in violation of the Ninth and Tenth Amendments. As of 1936, these claims were dismissed without

404. Compare *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936), with *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

405. For a magisterial look at the New Deal and its constitutional implications, see ACKERMAN, *supra* note 258; ACKERMAN, *supra* note 402. The restructuring of constitutional doctrine that occurred around the time of the New Deal has spawned an enormous body of scholarly writing. See generally Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002).

406. *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

407. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

408. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *Yakus v. United States*, 321 U.S. 414 (1944).

409. *Carolene Prods.*, 304 U.S. at 152–53 n.4.

410. Harbingers of a new approach to the Ninth Amendment and the rule of construction first arose in lower federal courts in 1936. In *Precision Castings Co. v. Boland*, 13 F. Supp. 877 (W.D.N.Y. 1936), Roosevelt appointee, Judge Harlan Rippey, upheld a facial challenge to the Labor Relations Act. The case involved Fourth, Fifth, and Seventh Amendment challenges by plaintiffs targeted for investigation by the Labor Relations Board. *Id.* at 879–80. The plaintiffs also raised claims under “the Ninth and Tenth Amendments, in that Congress has attempted to legislate with reference to powers expressly reserved to the states.” *Id.* at 880. Rejecting a facial challenge to the Act, Judge Rippey noted that the Board had a statutory duty to establish a connection between the unfair labor practices and interference with interstate commerce. It was premature to conclude they would fail to do so, and the court had a duty to resolve all constitutional doubts in favor of the government. *Id.* at 881–82. Missing from the Court’s analysis was the Supreme Court’s decision in *Schechter*, which presumed that Congress’s commerce powers did not authorize regulation of local labor conditions. Also missing was any mention of the Ninth or Tenth Amendments. Similarly, in *S. Buchsbaum & Co. v. Beman*, 14 F.Supp. 444 (N.D. Ill. 1936), a federal district court rejected a claim that the enforcement of the National Labor Relations Act was an unconstitutional regulation of local labor conditions under the Fifth, Ninth, and Tenth Amendments. According to District Judge Wilkerson, although it may be possible to interpret the Act as exceeding congressional power, “Every possible presumption is in favor of the validity of the statute, and this continues until the contrary is shown beyond a reasonable doubt.” *Id.* at 447. Once again, there was no discussion of *Schechter* or the Ninth or Tenth Amendments as limits on the construction of federal power.

411. See *supra* notes 398–401 and accompanying text.

discussion of either Amendment.<sup>412</sup> By the Spring of 1937, it was clear the Supreme Court had abandoned its earlier limited interpretation of federal power. In *NLRB v. Jones & Laughlin Steel Corp.*, Justice Roberts switched sides in the dispute over the constitutionality of the New Deal and voted to uphold the federal Labor Relations Act and its protection of the right to local collective bargaining.<sup>413</sup> Prior cases had held that local commercial activities generally had no more than an indirect effect on interstate commerce.<sup>414</sup> In *Jones & Laughlin*, however, the Court abandoned that distinction, even while claiming to remain faithful to the idea that the interpretation of enumerated federal power must preserve the distinction between national and local control.<sup>415</sup>

One month after *Jones & Laughlin*, the Supreme Court upheld the Social Security Act against a challenge that, among other things, the Act “[coerced] the States in contravention of the Tenth Amendment or of restrictions implicit in our federal form of government.”<sup>416</sup> Although Ninth Amendment claims were raised in the lower court,<sup>417</sup> Justice Cardozo’s opinion in *Steward Machine Co. v. Davis* did not mention the Ninth.<sup>418</sup> Instead, Justice Cardozo rejected the claim that the Act coerced the states in violation of the Tenth Amendment in part because the state had not objected to the Act.<sup>419</sup> Cardozo thus abandoned the reasoning in *Carter Coal*—and

412. See *Reconstruction Fin. Corp. v. Cent. Republic Trust Co.*, 17 F. Supp. 263, 290 (N.D. Ill. 1936) (stating that the creation of the Reconstruction Finance Corporation fell within Congress’s enumerated powers and that the assertion that its creation violated the Ninth and Tenth Amendments “place[d] restrictions on the power of the national government which are not sustained by either reason or authority”); *Steward Mach. Co. v. Davis*, 89 F.2d 207, 210 (5th Cir. 1937) (upholding provisions of the Social Security Act and noting that although unemployment relief is primarily a state matter, the federal treasury is also involved and that reasonable protection of the treasury is “part of the general welfare in a constitutional sense”).

413. 301 U.S. 1, 30 (1937).

414. See *supra* notes 317–326 and accompanying text.

415. According to the Court:

Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. The question is necessarily one of degree.

*Jones & Laughlin*, 301 U.S. at 37 (citations omitted).

416. *Id.* at 548.

417. See *Chas. C. Steward Mach. Co. v. Davis*, 89 F.2d 207, 208 (5th Cir. 1937).

418. Cardozo may have obliquely referenced the Ninth Amendment claim when he characterized the plaintiff’s claim as involving “restrictions implicit in our federal form of government.” *Steward Mach. Co.*, 301 U.S. at 585. This characterization echoes the *Ashwander* Court’s description of the Ninth Amendment as placing inherent limitations in our federal form of government. See *supra* note 389 and accompanying text.

419. *Steward Mach. Co.*, 301 U.S. at 596.

that of James Madison—that the people have a right to decide certain matters at a local level and that this right was not the state’s to give away.<sup>420</sup> Not only did Cardozo implicitly reject the right of local self-government, he also suggested that federal legislation in this case was justified because the states had failed to respond to a national emergency.<sup>421</sup>

Other New Deal decisions expressly rejected a local self-government reading of the Ninth and Tenth Amendments. In *Tennessee Electric Power Co. v. Tennessee Valley Authority*, private power companies sued to invalidate a federally financed dam project that resulted in the creation of several hydroelectric plants.<sup>422</sup> They claimed that the federal government’s sale of electricity in a local market violated the Ninth and Tenth Amendments on the grounds that it would “result in federal regulation of the internal affairs of the states, and will deprive the people of the states of their guaranteed liberty to earn a livelihood and to acquire and use property subject only to state regulation.”<sup>423</sup> Writing for the Court, Justice Roberts concluded that mere federal participation in a local electricity market was not an exercise of regulatory power and therefore could not constitute “federal regulation of purely local matters reserved to the states or the people by the Tenth Amendment.”<sup>424</sup> More broadly, Justice Roberts declared that even if the Act did exceed federal authority under the Ninth and Tenth Amendments, individuals had no standing to raise claims involving the rights of the states:

The sale of government property in competition with others is not a violation of the Tenth Amendment. As we have seen there is no objection to the Authority’s operations by the states, and, if this were not so, the appellants, absent the states or their officers, have no standing in this suit to raise any question under the amendment. These considerations also answer the argument that the appellants have a cause of action for alleged infractions of the Ninth Amendment.<sup>425</sup>

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420. See James Madison, Veto Message to Congress (Mar. 3, 1817), reprinted in WRITINGS, *supra* note 11, at 720 (stating that the consent of the states cannot confer power on the federal government).

421. According to the Court:

The other [consequence of state failure to enact social security programs] was that in so far as there was failure by the states to contribute relief according to the measure of their capacity, a disproportionate burden, and a mountainous one, was laid upon the resources of the Government of the nation.

The Social Security Act is an attempt to find a method by which all these public agencies may work together to a common end. Every dollar of the new taxes will continue in all likelihood to be used and needed by the nation as long as states are unwilling, whether through timidity or for other motives, to do what can be done at home.

*Steward Mach. Co.*, 301 U.S. at 588–89.

422. 306 U.S. 118, 119 (1939).

423. *Id.* at 136.

424. *Id.* at 142.

425. *Id.* at 144.

To Justice Roberts, concluding that the plaintiffs lacked standing to raise Tenth Amendment claims necessarily resolved the issue of standing under the Ninth Amendment. Both Amendments involved the rights of the states, not of individuals. Thus, neither amendment involved an enforceable individual right to limited federal power—even in cases in which the federal government had overstepped its authority.

States would fare no better in cases in which standing was granted. To the New Deal Court, the Ninth and Tenth Amendments had no effect on the construction of federal power. In *United States v. Darby*, the Court declared that it would uphold federal regulation of purely intrastate commerce if Congress reasonably concluded that the activity in question affected interstate commerce.<sup>426</sup> According to Justice Harlan Stone:

Our conclusion is unaffected by the Tenth Amendment which provides: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers. From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end.<sup>427</sup>

Although Justice Stone downplayed pre-1937 cases that suggested a very different interpretation of federal power, his description of the Tenth Amendment is literally correct. It was not the text of the Tenth Amendment that limits federal construction of enumerated powers. It is the rule of construction represented by the *Ninth* Amendment that limits the interpreted scope of federal power. Without such a limiting rule of construction, the Tenth remains in place, but represents an ever diminishing set of reserved state power as federal power expands. Justice Stone, however, did not address the Ninth Amendment or the vast number of cases citing it in support of a limiting rule of construction. Instead, he simply announced the restoration of John Marshall’s original vision of federal authority.<sup>428</sup>

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426. 312 U.S. 100, 119 (1941).

427. *Id.* at 123–24.

428. *Id.* at 119. Bruce Ackerman refers to the New Deal Court’s attempt to ground their expansion of federal power in the “original meaning” of the Constitution as the “myth of rediscovery.” ACKERMAN, *supra* note 258, at 43.

2. *The Triumph of Marshall's Opinion on the Bank of the United States.*—By the time the Supreme Court decided *Wickard v. Filburn* in 1941,<sup>429</sup> not even the Tenth Amendment warranted discussion. Instead, Justice Jackson followed the lead of *Darby* and assumed the correctness of Chief Justice Marshall's interpretation of federal power, noting without any sense of irony that Marshall had “described the Federal commerce power with a breadth never yet exceeded.”<sup>430</sup> Conceding that a number of cases since Marshall's time had limited the scope of federal power, Jackson pointed to more modern cases that had acknowledged the economic effects of local activities:

The Court's recognition of the relevance of the economic effects in the application of the Commerce Clause, exemplified by this statement, has made the mechanical application of legal formulas no longer feasible. Once an economic measure of the reach of the power granted to Congress in the Commerce Clause is accepted, questions of federal power cannot be decided simply by finding the activity in question to be ‘production’ nor can consideration of its economic effects be foreclosed by calling them ‘indirect.’<sup>431</sup>

Once the Court accepted economic effects as the measure of federal power, the fact that the regulated activity is local is irrelevant. Implicit in Jackson's approach is the assumption that there is no independent constitutional norm limiting federal power in cases involving an activity that has the requisite economic effects. This was Marshall's approach, and the Court quotes his statement in *Gibbons* that “[t]he power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.”<sup>432</sup>

According to Justice Jackson, federal power extends to all activities except those with enumerated limitations prescribed in the Constitution. In effect, the only rights retained by the people are those expressly enumerated in the Constitution—precisely the result Madison and other founders believed they had prevented by adopting the Ninth Amendment.<sup>433</sup> Following the lead of John Marshall in *McCulloch* and *Gibbons*, this was accomplished not by reinterpreting the Ninth Amendment, but by ignoring it.

3. *Principles Without a Rule of Construction: United Federal Workers of America (CIO) v. Mitchell.*—Despite the dramatic reconfiguring of federal power, courts throughout this period continued to read both the Ninth and Tenth Amendments as federalism-based constraints on the scope of federal

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429. 317 U.S. 111 (1942).

430. *Id.* at 120.

431. *Id.* at 123–24.

432. *Id.* at 124.

433. See generally Lash, *The Lost Original Meaning*, *supra* note 8, at 360–62.



power.<sup>434</sup> For example, in *Woods v. Cloyd W. Miller Co.*, the Supreme Court upheld the Housing and Rent Act of 1947 under Congress's war powers.<sup>435</sup> In doing so, however, the Supreme Court acknowledged that an overly broad reading of federal war powers, even if kept within the limits of the rest of the Bill of Rights, might nevertheless threaten the Ninth and Tenth Amendments:

We recognize the force of the argument that the effects of war under modern conditions may be felt in the economy for years and years, and that if the war power can be used in days of peace to treat all the wounds which war inflicts on our society, it may not only swallow up all other powers of Congress but largely obliterate the Ninth and the Tenth Amendments as well. There are no such implications in today's decision.<sup>436</sup>

The Court did not say such a reading would obliterate the Bill of Rights. In fact, after disposing of the Ninth and Tenth Amendment argument, the Court then went on to independently analyze whether the Act violated the substantive protections of the Fifth Amendment.<sup>437</sup> The implication was that

434. In 1939, the Supreme Court of Michigan used the Ninth and Tenth Amendments to distinguish the enumerated powers of the federal government from the general police powers of the state. *In re Brewster Street Housing Site in Detroit*, 289 N.W. 493 (Mich. 1939). According to the court:

Although it seems clear that all legislative powers not delegated through the Constitution to the congress of the United States are reserved to the people, by reason of the peculiar character of the government created by the Constitution it was thought wise to establish and declare definite rules for the construction of that instrument, (1) "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people" (Art. 9); and (2) "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people" (Art. 10). The legislative power of the several States stands upon a different footing. . . . There is a broad distinction, therefore, between the rules which govern in construing the Constitution of the United States and the Constitution of the State.

*Id.* at 500; see also *Lovett v. United States*, 66 F. Supp. 142, 149 (Ct. Cl. 1945) (Jones, J., concurring) ("The national government is one of delegated powers in all its branches. [According to the Ninth and Tenth Amendments,] [a]ll powers not delegated remain with the states or with the people."); *United States v. W. Va. Power Co.*, 39 F. Supp. 540, 543-44 (S.D. W. Va. 1941) (discussing plaintiff's Fifth, Ninth, and Tenth Amendment claims against a taking of property for building a dam and deciding on Fifth Amendment grounds); *Aponaug Mfg. Co. v. Fly*, 17 F. Supp. 944, 945 (S.D. Miss. 1937) (discussing the plaintiff's argument that the Social Security Tax violates, among other provisions, the Fifth, Ninth, and Tenth Amendments and dismissing on other grounds); *In re Idaho Fed'n of Labor*, 272 P.2d 707, 713-14 (Idaho 1954) (Taylor, J., dissenting) (contrasting the state "Ninth Amendment" with the federal Ninth and Tenth and distinguishing the roles of a federal and state constitution); *Manning v. Davis*, 201 P.2d 113, 115 (Kan. 1948) ("It is well settled that under our theory of government all governmental power is vested in the people. Normally, our Federal Constitution is looked upon as a grant of power, though it contains some limitations upon the powers of the states. But it specifically provides: [for the Ninth and Tenth Amendments.]; *Harrington v. Indus. Comm'n of Utah*, 88 P.2d 548, 554 (Utah 1939) (balancing Congress's interstate commerce power against the Ninth and Tenth Amendments in upholding a state worker's compensation statute).

435. 333 U.S. 138, 141 (1948).

436. *Id.* at 143-44.

437. *Id.* at 145 (analyzing an equal protection claim under the federal Due Process Clause).

exercising war powers in times of peace theoretically threatened the principle of limited enumerated powers, with the Ninth and Tenth Amendments read as particular guardians of that principle. The concern, however, was merely theoretical.<sup>438</sup> Without a rule of interpretation limiting the actual construction of federal power, the expansion of federal power remained without constitutional restraint beyond specific restrictions such as those contained in the first eight amendments.<sup>439</sup>

Prior to the New Deal, the Ninth and Tenth Amendments generally were read in conjunction with a rule of construction limiting the interpretation of federal power. This rule ensured that enumerated power was interpreted in light of the people's retained right to local self-government. Areas such as local commercial activity were presumptively a matter reserved to the states, and the construction of federal power was limited accordingly. After the New Deal, particularly after decisions such as *Darby* and *Wickard*, determining the scope of federal power was uncoupled from any consideration of the retained rights of the states. Once a court established a reasonable link between a legislative act and an enumerated power, Ninth and Tenth Amendment claims necessarily failed.

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438. One of the few cases applying the Ninth and Tenth Amendments with bite in this period involved the lower court opinion of what ultimately would become a major separation of powers decision by the Supreme Court. In *Youngstown Sheet & Tube Co. v. Sawyer*, District Judge Pine struck down Truman's executive order seizing the steel mills based on principles of enumerated power as declared by the Ninth and Tenth Amendments. 103 F. Supp. 569, 573 (D.D.C. 1952). According to Judge Pine:

This contention requires a discussion of basic fundamental principles of constitutional government, which I have always understood are immutable, absent a change in the framework of the Constitution itself in the manner provided therein. The Government of the United States was created by the ratification of the Constitution. It derives its authority wholly from the powers granted to it by the Constitution, which is the only source of power authorizing action by any branch of Government. It is a government of limited, enumerated, and delegated powers. The office of President of the United States is a branch of the Government, namely, that branch where the executive power is vested, and his powers are limited along with the powers of the two other great branches or departments of Government, namely, the legislative and the judicial. [citing the Ninth and Tenth Amendments]

*Id.* The Supreme Court affirmed without mentioning the Ninth or Tenth Amendments, but Justice Black's majority opinion did track the reasoning of Judge Pine. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) ("It is clear that if the President had authority to issue the order he did, it must be found in some provision of the Constitution.").

439. See DUMBAULD, *supra* note 2, at 63–65 (speaking of the Ninth and Tenth in 1957 as mere truisms).

Already implicit in lower federal court decisions,<sup>440</sup> the Supreme Court expressly adopted this toothless reading of the Ninth and Tenth Amendments in *United Public Workers of America (C.I.O.) v. Mitchell*.<sup>441</sup> In *Mitchell*, a group of federal employees challenged provisions of the Hatch Act that prohibited government workers from engaging in certain political activities. In addition to First and Fifth Amendment claims, the employees claimed the Act was a “deprivation of the fundamental right of the people of the United States to engage in political activity, reserved to the people of the United States by the Ninth and Tenth Amendments.”<sup>442</sup> Writing for the Court, Justice Reed ruled that the Ninth and Tenth Amendment claims required no analysis of an independent right, but involved only questions of enumerated federal power:

The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people. Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail.<sup>443</sup>

In some ways, Reed’s approach tracks that of James Madison. Once enumerated power is found, there can no longer be a claim under either the Ninth or Tenth Amendments. What is missing from his account, however, is the role of the Ninth Amendment in determining whether the federal government had in fact been granted a particular power. Absent the application of such a rule of construction, the only limits to federal power were those rights or restrictions enumerated in the Constitution. Reed thus echoes John Marshall’s rejection of any independent restrictive rule of construction.<sup>444</sup>

Ninth Amendment scholars have criticized Justice Reed’s treatment of the Ninth Amendment in *Mitchell*. Calvin Massey, for example, argues that

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440. As the Third Circuit put it in *Commonwealth & Southern Corporation v. Securities and Exchange Commission*, 134 F.2d 747 (3rd Cir. 1943), “In view of our conclusion that the order here complained of is within the commerce power Commonwealth’s contention that the order violates the Fifth, Ninth and Tenth amendments necessarily fails.” *Id.* at 753 (emphasis added). The scope of federal power is determined independently of the Ninth and Tenth Amendments and, once found, negates any Ninth or Tenth Amendment claim. See *United States v. City of Chester*, 144 F.2d 415, 419 (3d Cir. 1944) (noting the plaintiffs’ Ninth and Tenth Amendment claims, but upholding federal action as falling within Congress’s war powers without any further mention of the Ninth or Tenth Amendments).

441. 330 U.S. 75 (1947)

442. *Id.* at 83 n.12.

443. *Id.* at 95–96. The Court went on to uphold the Act, triggering a dissent by Justice Black who believed the plaintiff’s First and Fifth Amendment rights had been violated. *Id.* at 105, 109 (Black, J., dissenting). Black made no mention of either the Ninth or Tenth Amendment.

444. See *supra* note 125 and accompanying text.

Reed's opinion rendered the Ninth "a mere declaration of a constitutional truism, devoid of any independent content, effectively rendered its substance nugatory and assigned to its framers an historically untenable intention to engage in a purely moot exercise."<sup>445</sup> Massey is correct, but his statement is ironic. Reed's opinion does the same thing to the Tenth Amendment, without triggering any objection from Massey or any other Ninth Amendment critic of *Mitchell*.<sup>446</sup>

What these criticisms miss is the clue embedded in *Mitchell* regarding the traditional meaning of the Ninth Amendment. Although criticized for pairing the Ninth Amendment with the Tenth and confusing them both, Reed's opinion in fact represents a modern example of a very old tradition that read both clauses as twin guardians of the people's retained rights. Justice Reed simply adopts a post-New Deal reading of the Tenth Amendment. This itself is a clue that his reading of the Ninth Amendment may also have been a creature of the New Deal Revolution.<sup>447</sup> It is an example of the diminished reading of both the Ninth and Tenth Amendments that occurred in the constitutional upheaval of 1937.

4. *The Ninth Amendment as a "Truism".*—*Mitchell's* reduction of the Ninth Amendment to mere truism became the rule in later cases. In *United States v. Painters Local Union No. 481*,<sup>448</sup> a federal district court rejected a "boilerplate" claim that included Ninth and Tenth Amendment claims, noting:

[T]he contention that the Act violates the Ninth and Tenth Amendments in that it invades rights reserved to the States is left wholly without substance if, as I have held above, the grant of powers to the Union under the Constitution includes either expressly or by implication the power which the Congress has exercised in this enactment. As was said in [*Mitchell*]:

"When objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those

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445. MASSEY, SILENT RIGHTS, *supra* note 2, at 91.

446. See Randy E. Barnett, *Introduction: James Madison's Ninth Amendment*, in 1 THE RIGHTS RETAINED BY THE PEOPLE, *supra* note 2, at 6–7 (criticizing Justice Reed's opinion for adopting the "erroneous" rights-powers conception of the Ninth Amendment).

447. But see Thomas B. McAfee, *A Critical Guide to the Ninth Amendment*, 69 TEMP. L. REV. 61, 64 n.14 (1996) (characterizing *Mitchell* as presenting the "traditional understanding" of the Ninth Amendment).

448. 79 F. Supp. 516 (D. Conn. 1948).

rights, reserved by the Ninth and Tenth Amendments, must fail.<sup>449</sup>

Following the same approach in *Roth v. United States*, the Supreme Court dismissed First, Ninth, and Tenth Amendment claims that Congress had no power to ban obscene materials from the United States mail.<sup>450</sup> According to the Court, having concluded that obscene materials were not protected under the First Amendment, the issue became one of federal power to regulate the mail. Concluding that such power existed was enough to do away with the Ninth and Tenth Amendment claims without further discussion.<sup>451</sup>

A final example of the *Mitchell* reading of the Ninth Amendment occurred only one year before *Griswold v. Connecticut*. In *Heart of Atlanta Motel, Inc. v. United States*, the Supreme Court upheld the federal Civil Rights Act of 1964, which banned private discrimination in places of public accommodation.<sup>452</sup> The Act had been challenged as exceeding Congress's power under the Commerce Clause and as a violation of the Fifth and Thirteenth Amendments.<sup>453</sup> There was no claim regarding the Ninth or Tenth Amendments. The Supreme Court upheld the Act as a reasonable regulation of commerce, citing, among other cases, *Gibbons*, *Darby*, and *Jones & Laughlin*.<sup>454</sup> In his concurrence, Justice Black quoted Marshall in *Gibbons*:

449. *Id.* at 527; see also *City of Detroit v. Div. 26 of Amalgamated Ass'n*, 51 N.W.2d 228, 233 (Mich. 1952) (citing *Mitchell* in rejecting a boilerplate Ninth and Tenth Amendment human rights claim).

450. 354 U.S. 476, 479–94 (1957).

451. *Id.* at 492–93. According to Justice William Brennan:

Roth's argument that the federal obscenity statute unconstitutionally encroaches upon the powers reserved by the Ninth and Tenth Amendments to the States and to the people to punish speech and press where offensive to decency and morality is hinged upon his contention that obscenity is expression not excepted from the sweep of the provision of the First Amendment that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." (Emphasis added.) That argument falls in light of our holding that obscenity is not expression protected by the First Amendment. We therefore hold that the federal obscenity statute punishing the use of the mails for obscene material is a proper exercise of the postal power delegated to Congress by Art I, § 8, cl. 7. In [*Mitchell*] this Court said:

" . . . The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people. Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail . . . ."

*Id.* (alteration in original) (footnotes omitted); see also *Sunshine Book Co. v. Summerfield*, 249 F.2d 114, 117–18 (D.C. Cir. 1957) (following the Supreme Court's decision in *Roth*, the court upheld federal power to ban obscene material from the mails against a Ninth and Tenth challenge).

452. 379 U.S. 241, 261–62 (1964).

453. *Id.* at 243–44.

454. *Id.* at 254–57.

At least since [*Gibbons*], decided in 1824 in an opinion by Chief Justice John Marshall, it has been uniformly accepted that the power of Congress to regulate commerce among the States is plenary, “complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.”<sup>455</sup>

In a companion case handed down the same day, *Katzenbach v. McClung*, the Court dismissed a similar challenge to the Civil Rights Act, only this time the claim included alleged violations of the Ninth and Tenth Amendments.<sup>456</sup> According to Justice Clark, the decision in *Heart of Atlanta* “disposes of the challenges that the appellees base on the Fifth, Ninth, Tenth, and Thirteenth Amendments.”<sup>457</sup> *Heart of Atlanta*, as mentioned, did not contain any Ninth or Tenth Amendment claims.<sup>458</sup> If the Ninth Amendment protects individual rights, the Court’s dismissal seems, at the very least, unexplained. On the other hand, under the *Mitchell* reading of the Ninth and Tenth Amendments, *Katzenbach*’s dismissal makes perfect sense. Under *Mitchell*, once power is conceded, any claim under the Ninth and Tenth Amendments automatically disappears. In *Heart of Atlanta*, the Court had established federal commerce power and thus answered any Ninth or Tenth Amendment claim raised in *Katzenbach*. The very brevity of the analysis in *Katzenbach* suggests the potency of the *Mitchell* rule.

As the scope of the New Deal became clear, lower courts acquiesced to the Supreme Court’s rulings, but objected to the Court’s abandonment of limited federal power. In *Henry Broderick, Inc. v. Riley*, the Washington State Supreme Court dismissed a challenge to administrative decision making under the Unemployment Compensation Act.<sup>459</sup> In his concurrence, Justice Millard conceded that recent precedents controlled the outcome, but nevertheless quoted the “following apt challenging statements”<sup>460</sup> from a recent speech by Senator Pat McCarran lamenting the waning influence of the Ninth and Tenth Amendments:

“The last two items in the Bill of Rights are of tremendous importance. They are sentinels against overcentralization of government, monuments to the wisdom of the constitutional framers who realized that for the stable preservation of our form of government, it is essential that local governmental functions be locally performed.

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455. *Id.* at 271 (Black, J., concurring).

456. 379 U.S. 294, 298 n.1 (1964).

457. *Id.*

458. *Heart of Atlanta* did, on the other hand, involve Fifth and Thirteenth Amendment claims. *Heart of Atlanta*, 379 U.S. at 244.

459. 157 P.2d 954, 963 (Wash. 1945)

460. *Id.* at 964 (Millard, J., concurring).

The ninth amendment to the Constitution provides that ‘The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.’

The tenth amendment to the Constitution provides that: ‘The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people’.

Many signs today seem to indicate that the wisdom of the philosophy which guided the framing of these amendments is being forgotten.<sup>461</sup>

461. *Id.* at 966 (Millard, J., concurring) (quoting an address entitled *Our American Constitutional Commonwealth—Is It Passing?*, delivered by Honorable Pat McCarran, Senior United States Senator from Nevada, at the commencement exercises of Georgetown University, Washington, D.C., on Sept. 12, 1943). McCarran’s lament was echoed by other courts. *See Walker v. Gilman*, 171 P.2d 797 (Wash. 1946). *Walker* involved a challenge to damages awarded under the federal Price Control Act. Despite misgivings about the constitutionality of the law, the Washington court wrote that it was compelled to bow to the judgment of the Supreme Court that the Act was constitutional. *Id.* at 806. In his dissent, Justice Simpson quotes “the decision of the superior court of Yakima county in the case of *Kenyon v. Blackburn*, written by Honorable N. K. Buck, judge of the superior court of Yakima county.” *Id.* at 808 (Simpson, J., dissenting). In that opinion, Judge Buck declared that judges do not take an oath to follow the decision of other courts. *Id.* Judge Buck then cited the reservation of powers in the Ninth and Tenth Amendments:

It should be kept in mind that the first thing that the people did after adopting their fundamental law was to insist upon making certain restrictions upon the power of Congress so clear that no man could misunderstand. They intended that all general power should remain with the people, and to that end adopted Articles IX and X of the Amendments.

Article X has been quoted above. That language is so clear that no layman can misunderstand it; but sometimes, by judicial interpretation, the inclusion of certain powers or duties is construed to exclude all others. In order to avoid any such possible curtailment of the rights of the people, the framers and adopters of the amendments provided further in Article IX of those amendments: ‘The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.’

*Id.* at 809 (Simpson, J., dissenting); *see also* *Looper v. Georgia, S. & Fla. Ry.*, 99 S.E.2d 101 (Ga. 1957). In *Looper*, the Supreme Court of Georgia, in a unanimous opinion, strongly remonstrated against recent Supreme Court rulings upholding forced payment of union dues by nonunion members. *Id.* at 103. Arguing that these decisions conflicted with the principles of the Ninth and Tenth Amendments, the Georgia court limited the reach of the Supreme Court’s decisions and ruled that forced contribution to the ideological activities of the union violated the First and Fifth Amendments:

Anyone familiar with the experiences of the thirteen original colonies under the dictatorial powers of the King as expressed in the Declaration of Independence, the reluctance of the States to surrender or delegate any powers to a general government as evidenced by the Articles of Confederation, and the demonstrated need for more powers in the area where jurisdiction was given the general government, will have no difficulty in clearly understanding the meaning of the Constitution when it defines those powers and by the Ninth and Tenth Amendment removes all doubt but that powers not expressly conferred were retained by the States. . . . But claiming authority under [the Commerce Clause] the Congress, with the sanction of the Supreme Court, has projected the jurisdiction of the general government into every precinct of the States and assumed Federal jurisdiction over countless matters, including the right to work, which are remotely, if at all, related to interstate commerce. By this unilateral determination of its own powers the general government has at the same time and in

Absent the interpretive restraint of a rule of construction, just as the state conventions feared at the time of the Founding, federal power expanded to the edge of specific restrictions.<sup>462</sup> As Justice Stewart later would write, expanding upon a quote from *Darby*, “The Ninth Amendment, like its companion the Tenth, . . . ‘states but a truism.’”<sup>463</sup>

### C. *The Last Days of the Historic Ninth Amendment*

1. *The Post-New Deal Ninth Amendment and Individual Rights.*—The New Deal Revolution left unchanged the traditional rejection of the Ninth Amendment as a source of independent personal rights.<sup>464</sup> Although there

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the same manner deprived its creators, the States, of powers they thought and now believe they retained. But State courts, irrespective of contrary opinions held by their own judges which by law are required to have had experience as practicing attorneys before they can become judges of the law, must obey and accept the decisions of the Supreme Court of the United States pertaining to interstate commerce.

*Id.* at 104.

462. It is no surprise that the Court’s broadest development of the Dormant Commerce Clause occurred at the same time it abandoned the Ninth and Tenth Amendments as substantive guardians of the concurrent powers of the states. *E.g.*, *S.C. State Highway Dep’t v. Barnwell Bros., Inc.* 303 U.S. 177 (1938); *see also* Paul G. Kauper, *State Regulation of Interstate Motor Carriers*, 31 MICH. L. REV. 920, 925 (1933).

463. *Griswold v. Connecticut*, 381 U.S. 479, 529 (1965) (Stewart, J., dissenting).

464. *See* *Gernatt v. Huie*, 16 S.E.2d 587, 588 (Ga. 1941) (rejecting application of the Ninth Amendment against the state with a citation, perhaps in error, to *Livingston v. Moore*, 32 U.S. 469 (1833)); *Twin Falls County v. Hulbert*, 156 P.2d 319, 322 (Idaho 1945) (noting the plaintiff’s argument that application of the federal Price Control Act “is unconstitutional as an invasion of state sovereignty, violative of the 9th and 10th Federal Amendments of the Federal Constitution” but deciding the case on other grounds); *Kape v. Home Bank & Trust Co.*, 18 N.E.2d 170, 171 (Ill. 1938) (rejecting the plaintiff’s attempt to make the Ninth and Tenth Amendment argument in favor of limited construction of bankruptcy law); *State ex rel. O’Riordan v. State Dep’t of Corrections*, 209 N.E.2d 267 (Ind. App. 1965) (rejecting individual rights claim for lack of jurisdiction); *Williams v. City of Wichita*, 374 P.2d 578 (Kan. 1962) (making no mention of the Ninth Amendment in holding that Kansas’s 1945 Water Appropriation Act is constitutional other than noting that the point was raised); *Johnson v. Bd. of Comm’rs of Reno County*, 75 P.2d 849, 857 (Kan. 1938) (rejecting, without discussion, an attempt to use the Ninth as a source of individual rights against liquor regulation); *People ex rel. Hampartzoon Choolokian v. Mission of the Immaculate Virgin*, 90 N.E.2d 486 (N.Y. 1949) (rejecting the appellant’s contention that the Ninth Amendment gave him an absolute right to take his children with him to Soviet Armenia); *Allen v. S. Ry.*, 107 S.E.2d 125, 134 (N.C. 1959) (rejecting a Ninth amendment claim against forced payment of union dues); *In re Templeton*, 159 A.2d 725, 730 (Pa. 1960) (ignoring argument by dissent that people have the inherent right to collectively protect themselves from violence); *Kirschke v. City of Houston*, 330 S.W.2d 629, 634 (Tex. Civ. App. 1960) (rejecting individual rights argument against takings claim); *see also* *Royal Standard Ins. Co. v. McNamara*, 344 F.2d 240, 242 (8th Cir. 1965) (rejecting individual rights Ninth and Tenth claims regarding an insurer opposing a military directive establishing insurance requirements for autos on a military base); *Ryan v. Tennessee*, 257 F.2d 63, 64 (6th Cir. 1958) (rejecting an obscure Ninth Amendment claim); *Whelchel v. McDonald*, 176 F.2d 260, 261 (5th Cir. 1949) (rejecting a Ninth Amendment challenge to the make up of a military tribunal); *Joint Anti-Fascist Refugee Comm. v. Clark*, 177 F.2d 79, 82 (D.C. Cir. 1949) (holding that § 9(a) of the Hatch Act, which required the attorney general to designate subversive organizations and provide a list of these organizations to the Loyalty Review Board, was not rendered unconstitutional by the First, Fifth, Ninth, and Tenth Amendments); *Zemel*



does appear to be a marked increase in Ninth Amendment individual rights claims in the period between 1937 and 1965, most of these claims cite the Ninth and Tenth Amendments alongside a number of other constitutional claims in a boilerplate fashion.<sup>465</sup> In general, these claims appear to cite the

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v. Rusk, 228 F. Supp. 65, 66 (D. Conn. 1964) (rejecting individual rights Ninth and Tenth claim); Kirk v. State Bd. of Ed., 236 F. Supp. 1020, 1021 (D.C. Pa. 1964) (rejecting individual rights Ninth claim); Suggs v. Bhd. of Locomotive Firemen and Engineers, 219 F. Supp. 770 (M.D. Ga. 1960) (remanding a case that included an allegation that mandatory union dues violated the First, Fifth, Ninth, and Tenth Amendments for lack of a federal question); United States v. Int'l Union United Auto. Aircraft and Agric. Implement Workers of Am., 138 F. Supp. 53, 55 (E.D. Mich. 1956) (raising a Ninth Amendment claim, but deciding the case on other grounds); *Ex parte* Orr, 110 F. Supp. 153 (E.D. S.C. 1952) (denying writ of habeas corpus where appellant contended that his civil rights under the Fifth, Sixth, Seventh, Eighth, and Ninth Amendments had been violated); *Ex parte* Sentner, 94 F. Supp. 77 (E.D. Mo. 1950) (declining to determine whether deportation proceeding provisions of the Subversive Activities Control Board of 1950 violated the First, Fifth, Sixth, and Ninth Amendments); United States v. Foster, 80 F. Supp. 479, 483 (S.D.N.Y. 1948) (holding that the Smith Act did not violate the First, Fifth, Ninth, and Tenth Amendments); *Ex parte* Kurth, 28 F. Supp. 258, 263 (S.D. Cal. 1939) (rejecting the attempt to use the Ninth Amendment to establish an international right of asylum).

465. See *Singer v. United States*, 380 U.S. 24, 26 (1965) (rejecting the claim that the Fifth, Sixth, Ninth, and Tenth Amendments are violated by placing conditions on the ability to waive trial by jury, with no discussion of the Ninth Amendment); *United States v. Congress of Indus. Orgs.*, 355 U.S. 106, 109 (1948) (involving First, Ninth, and Tenth claims, decided on statutory grounds); *United States v. Painters Local Union No. 481*, 172 F.2d 854, 856 (2d Cir. 1949) (raising Ninth and Tenth claims but deciding on statutory grounds); *United States v. Gates*, 176 F.2d 78, 79 (2d Cir. 1949) (raising Ninth and Tenth claims, but deciding on other grounds); *Inland Steel Co. v. NLRB*, 170 F.2d 247, 255–56 (7th Cir. 1948) (discussing appellant's assertion that § 9(h) of the National Labor Relations Act was a "violation of the First, Ninth and Tenth Amendments"); *United States ex rel. Birch v. Fay*, 190 F. Supp. 105, 106 (S.D.N.Y. 1961) (rejecting individual rights claim and treating it as "in essence" a Fourteenth Amendment due process claim); *Nukk v. Shaughnessy*, 125 F. Supp. 498, 502 (S.D.N.Y. 1954) (rejecting individual rights claim based on the Ninth and Tenth); *United States v. Candela*, 131 F. Supp. 249, 250 (S.D.N.Y. 1954) (rejecting individual rights claim based on the Ninth and Tenth); *United States v. Fujimoto*, 102 F. Supp. 890, 898 (D. Haw. 1952) (rejecting claims based on First, Fifth, Sixth, Ninth, and Tenth Amendments); *United States v. Constr. & Gen. Laborers Local Union*, 101 F. Supp. 869, 870 (W.D. Mo. 1951) (raising, but not addressing, the Ninth and Tenth); *Int'l Ass'n of Machinists v. Street*, 108 S.E.2d 796, 804 (Ga. 1959) (rejecting claims based on the First, Fifth, Ninth, and Tenth Amendments); *Int'l Ass'n of Machinists v. Sandsberry*, 277 S.W.2d 776, 780 (Tex. Civ. App. 1954) (dismissing First, Fifth, Ninth, and Tenth challenges against a federally authorized strike by the union on grounds that there is no state action).

A number of these boilerplate claims were made in the context of challenges to anti-Communism era regulations. See, e.g., *Slagle v. State of Ohio*, 366 U.S. 259, 261–62 n.4, 264 (1961) (rejecting boiler plate First, Ninth, and Tenth claims regarding the refusal to answer Communist questions but granting the claim on other grounds); *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 745 n.3 (1961) (involving First, Fifth, Ninth, and Tenth Amendment claims against the expenditure of union dues for political activity); *Hartman v. United States*, 290 F.2d 460, 462, 470 (9th Cir. 1961) (rejecting boiler plate First, Ninth, and Tenth claims regarding the refusal to answer Communist questions); *Wilkinson v. United States*, 272 F.2d 783, 787 (5th Cir. 1960) (rejecting boiler plate First, Ninth, and Tenth claims regarding the refusal to answer Communist questions); *Barenblatt v. United States*, 252 F.2d 129, 134–36 (D.C. Cir. 1958) (rejecting boiler plate First, Ninth, and Tenth claims regarding the refusal to answer Communist questions); *Briehl v. Dulles*, 248 F.2d 561, 566 (D.C. Cir. 1957) (rejecting boiler plate Ninth and Tenth claims regarding the refusal to grant a passport due to failure to respond to allegation of communist association); *United States v. Kamin*, 136 F. Supp. 791, 793, 804 (D. Mass. 1956) (refusing to answer questions regarding Communist associations and raising a Ninth Amendment claim, with the case decided on other grounds); *United*

Ninth and Tenth Amendments as general limitations on federal power.<sup>466</sup> In any event, prior to the 1960s, all but one of these claims failed.<sup>467</sup> Not only did courts reject Ninth Amendment individual rights claims, they also cited the Ninth Amendment in support of decisions limiting expanded interpretation of federal rights.<sup>468</sup>

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*States v. Stein*, 140 F. Supp. 761, 767, 769 (S.D.N.Y. 1956) (rejecting individual rights and state power challenge to federal Smith Act); *Nat'l Mar. Union of Am. v. Herzog*, 78 F. Supp. 146, 163–77 (D.D.C. 1948) (upholding against First, Fifth, and Ninth Amendment challenges a provision in the Labor Management Act denying to a labor union the privilege of being recognized as an exclusive bargaining agent unless the officers thereof have filed affidavits denying membership in or affiliation with the Communist Party); *Sheiner v. State*, 82 So.2d 657, 667–68 (Fla. 1955) (rejecting a claim that disbarment for refusing to answer whether he was member of communist party violates due process after the attorney invoked his rights under the “first, fourth, fifth, sixth, eighth, ninth and tenth amendments to the constitution of the United States of America.”); *Thompson v. Wallin*, 93 N.Y.S.2d 274, 285 (N.Y. Sup. 1950) (ignoring Ninth and Tenth Amendment challenges, but ruling in favor of teachers fired for being members of the Communist Party); *In re Patterson*, 302 P.2d 227, 228, 235 (Or. 1956) (denying the application of admission to the bar of a person who was member of the Communist Party and who had refused to answer questions before House Committee on grounds it violated the “First, Fourth, Fifth, Ninth and Tenth Amendments of the Constitution of the United States.”); *Browning v. Slenderella Sys.*, 341 P.2d 859, 868 (Wash. 1959) (Mallery, J., dissenting) (arguing that the Ninth Amendment suggests an individual right to exclude people from a private business accommodations on the basis of race); *State v. James*, 221 P.2d 482, 488–501 (Wash. 1950) (rejecting a Ninth Amendment defense for refusal to answer whether a member of communist party before a state legislative committee).

466. Some scholars at the time experimented with the idea that both the Ninth and Tenth Amendments protected unenumerated personal rights. See Redlich, *supra* note 2, at 808 (noting “the strong historical argument that [the Ninth and Tenth Amendments] were intended to apply in a situation where the asserted right appears to the Court as fundamental to a free society but is, nevertheless, not specified in the Bill of Rights”).

467. See *Colorado Anti-Discrimination Comm'n v. Case*, 380 P.2d 34 (Colo. 1963) (upholding the state’s Fair Housing Act and citing the federal Ninth Amendment for the proposition that there are inherent rights beyond those listed in the Constitution). The court notes that “[a] proper construction of this single sentence [of the Ninth Amendment] entitles that provision to far greater consideration in the definition of and the protection afforded to ‘inherent rights’ than has heretofore been recognized.” *Id.* at 40.

468. See, e.g., *State v. Sprague*, 200 A.2d 206, 209 (N.H. 1964) (rejecting a Ninth Amendment property right claim against the application of state law forbidding racial discrimination in public accommodations, and instead citing the Ninth in support of state police powers); In *State ex rel. Hawkins v. Board of Control*, 93 So.2d 354 (Fla. 1957), the Florida Supreme Court observed:

In what appears to be a progressive disappearance of State sovereignty, it is interesting to read certain decisions (among others) which the United States Supreme Court has handed down in recent months. . . .

It is a “consummation devoutly to be wished” that the concept of “states’ rights” will not come to be of interest only to writers and students of history.

*Id.* at 357. In his concurrence, Chief Justice Terrell mocked the Supreme Court’s recent equal protection decisions and wrote sympathetically of state resistance to integration:

[States resisting integration] contend that since the Supreme Court has tortured the Constitution, particularly the welfare clause, the interstate commerce clause, the Ninth and Tenth Amendments, the provisions relating to separation of state and federal powers, and the powers not specifically granted to the Federal government being reserved to states, they have a right to torture the court’s decision. Whatever substance there may be to this contention, it is certain that forced integration is not the answer to the question.

*Id.* at 361.

2. *The Last Stand of the Traditional Ninth Amendment: Bute v. Illinois and the Doctrine of Incorporation.*—The *Lochner* Court had interpreted the Due Process Clause of the Fourteenth Amendment to include some of the liberties listed in the Bill of Rights, such as freedom of speech,<sup>469</sup> press,<sup>470</sup> and the right to counsel,<sup>471</sup> but resisted wholesale absorption of the Bill of Rights into the Fourteenth Amendment.<sup>472</sup> The New Deal Court not only abandoned the nontextual Lochnarian liberty of contract,<sup>473</sup> for a brief time it considered abandoning Lochnarian textual rights such as freedom of speech as well.<sup>474</sup> For some years following the New Deal, courts cited the Ninth and Tenth Amendments in support of their continued resistance to total incorporation. In *Payne v. Smith*, for example, the Washington Supreme Court refused to incorporate the Fifth Amendment's right to indictment by grand jury for infamous crimes.<sup>475</sup> In doing so, the court invoked the Ninth and Tenth Amendment's preservation of local rule regarding state court procedures:

This clause in the Fourteenth Amendment leaves room for much of the freedom which, under the Constitution of the United States and in accordance with its purposes, was originally reserved to the states for their exercise of their own police powers and for their control over the procedure to be followed in criminal trials in their respective courts.

... The compromise between state rights and those of a central government was fully considered in securing the ratification of the Constitution in 1787 and 1788. It was emphasized in the 'Bill of Rights,' ratified in 1791. In the ten Amendments constituting such Bill, additional restrictions were placed upon the Federal Government and particularly upon procedure in the federal courts. None were placed upon the states. On the contrary, the reserved powers of the states and of the people were emphasized in the Ninth and Tenth Amendments. The Constitution . . . sought to keep the control over individual rights close to the people through their states.<sup>476</sup>

Resisting the expansion of incorporation doctrine on the basis of the Ninth and Tenth Amendments was no anomaly. In *Payne*, the Washington Supreme Court was simply echoing the views of the Supreme Court of the United States. In *Bute v. Illinois*, the Supreme Court considered whether

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469. *Gitlow v. New York*, 268 U.S. 652 (1925).

470. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

471. *Powell v. Alabama*, 287 U.S. 45 (1932).

472. *Palko v. Connecticut*, 302 U.S. 319 (1937).

473. *United States v. Carolene Prods.*, 304 U.S. 144 (1938).

474. See *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 594 (1940) (upholding compelled flag salutes in public schools), *rev'd*, *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). For a general discussion of the New Deal Court and the doctrine of incorporation, see Lash, *The Original Meaning of the New Jurisprudential Deal*, *supra* note 392.

475. 192 P.2d 964, 966 (Wash. 1948).

476. *Id.* at 967.

allowing a defendant in a noncapital criminal prosecution to represent himself without inquiring into whether he desired or could afford an attorney violated his rights under the Fourteenth Amendment.<sup>477</sup> Because the Sixth Amendment required such inquiry in federal court, the issue was whether this rule was incorporated against the states. In a five–four decision, Justice Harold Burton rejected the claim and provided an extended analysis of the Ninth and Tenth Amendments and their role in interpreting the scope of the Fourteenth Amendment’s Due Process Clause.<sup>478</sup> Because of the depth of his analysis, and also because this case has not been discussed in any previous Ninth Amendment scholarship,<sup>479</sup> Justice Burton is quoted at length:

One of the major contributions to the science of government that was made by the Constitution of the United States was its division of powers between the states and the Federal Government. The compromise between state rights and those of a central government was fully considered in securing the ratification of the Constitution in 1787 and 1788. It was emphasized in the “Bill of Rights,” ratified in 1791. In the ten Amendments constituting such Bill, additional restrictions were placed upon the Federal Government and particularly upon procedure in the federal courts. None were placed upon the states. On the contrary, the reserved powers of the states and of the people were emphasized in the Ninth and Tenth Amendments. [quoting both amendments] The Constitution was conceived in large part in the spirit of the Declaration of Independence which declared that to secure such “unalienable Rights” as those of “Life, Liberty and the pursuit of Happiness. . . . Governments are instituted among Men, deriving their just powers from the consent of the governed, . . . .” It sought to keep the control over individual rights close to the people through their states. While there have been modifications made by the States, the Congress and the courts in some of the relations between the Federal Government and the people, there has been no change that has taken from the states their underlying control over their local police powers and state court procedures. They retained this control from the beginning and, in some states, local control of these matters long antedated the Constitution. The states and the people still are the repositories of the “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, . . . .” The underlying control over the procedure in any state court, dealing with distinctly local offenses such as those here involved, consequently remains in the state. The differing needs and customs of the respective states and

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477. 333 U.S. 640, 644 (1948).

478. *Id.* at 650–53.

479. Despite its being among the most extended discussions of the Ninth and Tenth Amendments by the Supreme Court, I have found only a single cite to *Bute* in a discussion of the Ninth amendment—an offhand mention in a footnote in a student note. See Stephen Hampton, Note, *Sleeping Giant: The Ninth Amendment and Criminal Law*, 20 SW. U. L. REV. 349, 349 n.3 (1991).

even of the respective communities within each state emphasize the principle that familiarity with, and complete understanding of, local characteristics, customs and standards are foundation stones of successful self-government. Local processes of law are an essential part of any government conducted by the people. No national authority, however benevolent, that governs over 130,000,000 people in 48 states, can be as closely in touch with those who are governed as can the local authorities in the several states and their subdivisions. The principle of “Home Rule” was an axiom among the authors of the Constitution. After all, the vital test of self-government is not so much its satisfactoriness weighed in the scales of outsiders as it is its satisfactoriness weighed in the scales of “the governed.” While, under the Constitution of the United States, the Federal Government, as well as each state government, is at bottom a government by the people, nevertheless, the federal sphere of government has been largely limited to certain delegated powers. The burden of establishing a delegation of power to the United States or the prohibition of power to the states is upon those making the claim. This point of view is material in the instant cases in interpreting the limitation which the Fourteenth Amendment places upon the processes of law that may be practiced by the several states, including Illinois. In our opinion this limitation is descriptive of a broad regulatory power over each state and not of a major transfer by the states to the United States of the primary and pre-existing power of the states over court procedures in state criminal cases.<sup>480</sup>

In *Bute*, Justice Burton links the Ninth and Tenth Amendments with the division of powers between the states and the federal government, and the need to keep control over individual rights close to the people through their states. Together, the Ninth and Tenth preserved the retained rights and powers of the states and of the people. One of those retained rights was the right to “Home Rule,” or, as earlier courts had phrased it, the right of a state “to determine for itself its own political machinery and its own domestic policies.”<sup>481</sup> Preserving that right required a rule of construction. The Court in *Bute* applies such a rule, noting that the principles underlying the Ninth and Tenth Amendment are “material in the instant cases in *interpreting* the limitation which the Fourteenth Amendment places upon the processes of law that may be practiced by the several states.”<sup>482</sup>

Even if the Supreme Court in a post-New Deal world no longer deployed the Ninth and Tenth as substantive restrictions on Congress, under *Bute* these Amendments continued to have a role in guiding the Court’s

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480. *Bute*, 333 U.S. at 650–53 (alteration in original) (citations omitted).

481. *Hawke v. Smith*, 126 N.E. 400, 403 (Ohio 1919).

482. *Bute*, 333 U.S. at 653 (emphasis added).

construction of enumerated rights.<sup>483</sup> This, then, was the final synthesis of the Founding, Reconstruction, and the New Deal: Although no longer expressing substantive limits on the enumerated powers of Congress, the Ninth and Tenth Amendments nevertheless limited Court's own expansion of enumerated rights. Or, as the Ninth Amendment might put it: The enumeration in this Constitution of certain rights, like those in the Fourteenth Amendment, shall not be construed to deny or disparage other rights retained by the people, such as the general right to local control of criminal procedure. As the Supreme Court gradually incorporated almost all of the Bill of Rights, including the criminal procedure provisions,<sup>484</sup> this last remnant of the historic reading of the Ninth Amendment faded from view.

Writing in the midst of the Warren Court's incorporation of criminal procedure rights, a judge on the Ohio Court of Common Pleas wrote:

I believe that a majority of the justices of the Supreme Court of the United States have, in recent years, erred grievously in finding, after more than a century and a half, that their present concepts of the provisions of the Bill of Rights of the Constitution of the United States, in nearly every conceivable detail, are applicable to the States. . . .

To me it seems that our history irrefutably establishes the fact that our forefathers clearly understood that the States were to chiefly control our daily affairs and that the national government was to be one of delegated powers—not omnipotence. The grand design was to preclude a tyrannical national government—not to create completely impotent State governments. . . .

Yet time and again, in recent years, I perceive a majority of our Supreme Court justices to have found some pretext for invalidating state action, in the face of overwhelming proof of criminal acts, by ignoring the 9th and 10th Amendments.<sup>485</sup>

More than just ignored, the Ninth Amendment and its history had been lost.

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483. Limiting the impact of Supreme Court interference with the political process, state or federal, was a theme running through much of the Supreme Court's New Deal Revolution jurisprudence. See Lash, *The Original Meaning of the New Jurisprudential Deal*, *supra* note 392, at 462–64.

484. See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961) (incorporating the Fourth Amendment); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (incorporating the right to counsel contained in the Sixth Amendment).

485. *State v. Puckett*, 201 N.E.2d 86, 89 (Ohio Ct. Com. Pl. 1964).

## V. Griswold and the Birth of the Modern View of the Ninth Amendment

### A. Bennett Patterson's Book

There has been no direct judicial construction of the Ninth Amendment by the Supreme Court of the United States of America.<sup>486</sup>

Although Bennett Patterson's book, *The Forgotten Ninth Amendment*, was not the first twentieth century work to focus on the Ninth,<sup>487</sup> it has been the most influential. Containing a rather cautionary prologue by the retired Dean of Harvard Law School, Rosco Pound,<sup>488</sup> Patterson's book was cited by courts even prior to *Griswold v. Connecticut*<sup>489</sup> and has been cited by almost every significant work on the Ninth Amendment since 1965.<sup>490</sup>

In words that would go on to shape the debate over the Ninth Amendment for years to come, Patterson announced that "[t]here has been no direct judicial construction of the Ninth Amendment by the Supreme Court of the United States of America" and that "[t]here are very few cases in the inferior courts in which any attempt has been made to use the Ninth

486. PATTERSON, *supra* note 2, at 27.

487. The first was an article by Knowlton H. Kelsey entitled *The Ninth Amendment of the Federal Constitution*. Kelsey, *supra* note 2. Kelsey argued that the Ninth Amendment supported judicial enforcement of Lochnerian property rights. *See id.* at 313.

488. Pound's introduction comes close to contradicting everything that follows. Against Bennett's vision of broad judicial enforcement of unenumerated rights, Pound notes that "the states have the attributes and powers of sovereignty so far as they have not been committed to the federal government by the Constitution. So far as inherent rights are not committed to the federal government, defining and securing them is left to the states or to be taken over by the people of the United States by constitutional amendment." Roscoe Pound, *Introduction* to PATTERSON, *supra* note 2, at vi.

489. *See* Colorado Anti-Discrimination Comm'n v. Case, 380 P.2d 34, 40 (Colo. 1962) (upholding the state's Fair Housing Act and citing the federal Ninth Amendment and Patterson's book for the proposition that there are inherent rights beyond those listed in the constitution). *But see* Terry v. City of Toledo, 194 N.E.2d 877, 881-83 (Ohio App. 1963) (noting the Colorado court's decision in *Case* and its citation of Patterson's book, but, in canvassing similar claims against housing acts around the country, concluding that "the cases are in complete confusion").

490. BARNETT, RESTORING THE LOST CONSTITUTION, *supra* note 2, at 234 n.43; DUMBAULD, *supra* note 2, at 63 n.10, 64 n.11; PROCESSES OF CONSTITUTIONAL DECISIONMAKING, *supra* note 2, at 113; 1 RIGHTS RETAINED BY THE PEOPLE, *supra* note 2, at 2 n.5; Raoul Berger, *The Ninth Amendment, as Perceived By Randy Barnett*, 88 NW. U. L. REV. 1508, 1516 n.58 (1994); Caplan, *supra* note 2, at 223 n.6; James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 51 n.300 (1995); Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 908 n.3 (1993); Robert M. Hardaway et al., *The Right to Die and the Ninth Amendment: Compassion and Dying after Glucksberg and Vacco*, 7 GEO. MASON L. REV. 313, 348 n.314 (1999); JoEllen Lind, *Liberty, Community, and the Ninth Amendment*, 54 OHIO ST. L.J. 1259, 1269 n.9 (1993); Thomas B. McAfee, *The Constitution as Based on the Consent of the Governed—Or, Should We Have an Unwritten Constitution*, 80 OR. L. REV. 1245, 1267 n.101 (2001); Simeon C.R. McIntosh, *On Reading the Ninth Amendment: A Reply to Raoul Berger*, 28 HOW. L.J. 913, 933 n.66 (1985); Lawrence E. Mitchell, *The Ninth Amendment and the "Jurisprudence of Original Intent"*, 74 GEO. L.J. 1719, 1720 n.7 (1986); Michael J. Perry, Brown, Bolling & Originalism: *Why Ackerman and Posner (Among Others) Are Wrong*, 20 S. ILL. U. L.J. 53, 73 n.85 (1995); Redlich, *supra* note 2, at 805 n.7.

Amendment as the assertion of a right.”<sup>491</sup> Ultimately, Patterson identified and briefly discussed five Supreme Court decisions and a few cases from lower state and federal courts.<sup>492</sup> Conceding that “[t]here are a number of cases which briefly mention the Ninth Amendment by grouping it with the Tenth Amendment,” Patterson nevertheless decided that “these decisions do not actually discuss the Ninth Amendment, but actually discuss the Tenth Amendment.”<sup>493</sup> According to Patterson, these cases must have really been about the Tenth and not the Ninth because they involved the construction of federal power, not the protection of individual rights.<sup>494</sup> Accordingly, he neither discussed, nor even cited, any of these earlier decisions.

What it lacked in analysis, Patterson’s book made up for in timing. The first work to present the Ninth Amendment in a light acceptable to a post-New Deal world,<sup>495</sup> Patterson’s book influenced discussion of the Ninth Amendment for decades to come. Scholars and judges of every stripe accepted Patterson’s claim regarding a paucity of case law, as well as his suggestion that past judicial opinions that cite both the Ninth and Tenth Amendment are really about the Tenth and have nothing relevant to say about the Ninth.

#### B. *Griswold v. Connecticut*

By the 1960s, the Supreme Court had shed its *Bute*-era resistance to broad incorporation of the Bill of Rights.<sup>496</sup> Thus, when the Court decided *Griswold*, it had already abandoned the last application of the Ninth Amendment as a rule for limiting the interpretation of the Constitution.<sup>497</sup> Still, even if no longer a substantive restriction on the Court’s interpretation of enumerated federal powers and rights, there remained one hundred and fifty years of jurisprudence linking the purpose of the Ninth with the principles of the Tenth. This link had been assumed by the Supreme Court itself only a year prior to *Griswold* in the Court’s rejection of Ninth and Tenth Amendment claims in *Katzenbach*.<sup>498</sup>

In a concurring opinion that would trigger the modern debate over the Ninth Amendment, Justice Arthur Goldberg simply asserted that this jurisprudence did not exist. Writing only a month before the end of his short

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491. PATTERSON, *supra* note 2, at 27.

492. Patterson cites and briefly discusses the Supreme Court decisions in *Mitchell*, *Whelchel*, *Woods*, *Tennessee v. TVA*, and “*Aschwander*.” *Id.* at 29–30.

493. *Id.* at 32.

494. *Id.*

495. Knowlton Kelsey’s work was the first in the twentieth century to focus on the Ninth, but it did so in a manner supporting the decisions of the *Lochner* Court.

496. *See supra* note 484 and accompanying text.

497. Between the time that Patterson published his book and 1965 when the Court decided *Griswold*, some courts noted the relevance of his work to the issue of judicial enforcement of unenumerated rights. *See, e.g., supra* note 489.

498. *See supra* notes 448–456 and accompanying text.



tenure on the Supreme Court, Goldberg mused that the “Court has had little occasion to interpret the Ninth Amendment.”<sup>499</sup> Citing the work of Bennett Patterson,<sup>500</sup> who himself had found at least five Supreme Court cases mentioning the Ninth Amendment, Goldberg declared that “[a]s far as I am aware, until today this Court has referred to the Ninth Amendment only in [three cases:] *United Public Workers v. Mitchell*, *Tennessee Electric Power Co. v. TVA*, and *Ashwander v. TVA*.”<sup>501</sup> Not only did Justice Goldberg fail to mention the Court’s reference to the Ninth Amendment only a year previous or the substantial discussion of the Ninth and Tenth in *Bute*, he also failed to cite all the Supreme Court cases actually listed in Patterson’s book.<sup>502</sup>

Building on Justice Douglas’s brief citation to the Ninth Amendment in his lead opinion,<sup>503</sup> Justice Goldberg argued that the Ninth Amendment supported the idea that the liberty protected against state action by the Fourteenth Amendment “is not restricted to rights specifically mentioned in the first eight amendments.”<sup>504</sup> In support of this reading, Goldberg relied on his understanding of history, particularly the works of James Madison and Joseph Story.<sup>505</sup> According to Goldberg, “The Amendment is almost entirely the work of James Madison. It was introduced in Congress by him and passed the House and Senate with little or no debate and virtually no change in language.”<sup>506</sup> While it is understandable that Goldberg might miss historical references to the “eleventh amendment” in Madison’s bank speech and Story’s opinion in *Houston*, it is inexplicable how Goldberg could describe the passage of the Ninth Amendment as involving “virtually no change in language.” Literally half of the Amendment was erased by the Select Committee, and this dramatic change in language from Madison’s original draft led Virginia to hold up ratification for two years.<sup>507</sup>

Nevertheless, confident of his grasp of the Amendment’s history, Goldberg argued that refusing to strike down a state law banning the distribution of contraceptives to married couples because the claimed right was not expressly mentioned in the Constitution would be “to ignore the Ninth Amendment and to give it no effect whatsoever.”<sup>508</sup> Denying that he was turning the Amendment on its head by applying it against the states, Goldberg argued that his reading of the Ninth merely supported an

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499. *Griswold v. Connecticut*, 381 U.S. 479, 490 (1965) (Goldberg, J., concurring).

500. *Id.* at 490–91 n.6 (Goldberg, J., concurring) (citations omitted).

501. *Id.*

502. Goldberg does cite *Mitchell*, but, like Patterson, he does not cite the *Mitchell* Court’s express construction of the Ninth and Tenth Amendments. *Id.*

503. *Id.* at 484.

504. *Id.* at 493 (Goldberg, J., concurring).

505. *Id.* at 488–90 (Goldberg, J., concurring).

506. *Id.* at 488 (Goldberg, J., concurring).

507. See Lash, *The Lost Original Meaning*, *supra* note 8, at 371–75 (discussing the contentious Virginia ratification process).

508. *Griswold*, 381 U.S. at 491 (Goldberg, J., concurring).

interpretation of the Fourteenth as protecting more rights than just those listed in the Constitution.<sup>509</sup>

In dissent, Justice Potter Stewart argued that the majority was wrong to suggest the Ninth was more than a truism:

The Ninth Amendment, like its companion the Tenth, which this Court held “states but a truism that all is retained which has not been surrendered,” was framed by James Madison and adopted by the States simply to make clear that the adoption of the Bill of Rights did not alter the plan that the *Federal* Government was to be a government of express and limited powers, and that all rights and powers not delegated to it were retained by the people and the individual States. Until today no member of this Court has ever suggested that the Ninth Amendment meant anything else, and the idea that a federal court could ever use the Ninth Amendment to annul a law passed by the elected representatives of the people of the State of Connecticut would have caused James Madison no little wonder.<sup>510</sup>

This is the New Deal vision of the Ninth Amendment. To Justice Stewart, the Ninth and Tenth Amendment were unenforceable statements of principle. This had been the general approach to both the Ninth and Tenth Amendments since *Darby* was decided in 1941. Although it was not true that no other Justice had ever suggested a different meaning for the Ninth, Stewart was correct to suggest that Madison would have been surprised by Douglas’s and Goldberg’s use of the Ninth. But Madison also would have been surprised by Stewart’s preference that the Ninth not be used at all.

In his dissent, Justice Hugo Black derided Goldberg’s “recent discovery” of the Ninth Amendment, thus implicitly agreeing with Goldberg that there had been little previous judicial construction of the Clause.<sup>511</sup> Accusing the majority of returning to the discredited jurisprudence of the *Lochner* Court,<sup>512</sup> Black argued that “every student of history knows” the purpose of the Ninth Amendment was “to assure the people that the Constitution in all its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication.”<sup>513</sup> Black then noted the irony of using the Ninth to interfere with the right to local self-government:

[F]or a period of a century and a half no serious suggestion was ever made that the Ninth Amendment, enacted to protect state powers against federal invasion, could be used as a weapon of federal power

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509. *Id.* at 493 (Goldberg, J., concurring).

510. *Id.* at 529–30 (Stewart, J., dissenting) (citations omitted).

511. *Id.* at 518 (Black, J., dissenting). Black had joined Douglas’s dissent in *Bute*, probably on the grounds of his long-stated advocacy of total incorporation.

512. *Id.* at 522 (Black, J., dissenting).

513. *Id.* at 520 (Black, J., dissenting).

to prevent state legislatures from passing laws they consider appropriate to govern local affairs.<sup>514</sup>

A number of scholars have criticized Justice Black's dissent.<sup>515</sup> According to John Hart Ely, "Black's response to the Ninth Amendment was essentially to ignore it," and he accused Black of being inconsistent in his refusal to follow "original understanding" even if "[he] didn't like where it led."<sup>516</sup> In light of evidence regarding the original meaning of the Ninth Amendment discussed in the first of the two articles, and buttressed by one hundred and fifty years of jurisprudence, it is clear that, of all the opinions in *Griswold*, Justice Black's came the closest to the original meaning of the Ninth. It is literally true that the Ninth Amendment was enacted to "protect state powers against federal invasion."<sup>517</sup> And the federalist structure of the Ninth was not modified by the Fourteenth Amendment, whose framers eschewed the Ninth Amendment as any kind of privilege or immunity. This does not mean that the Court was wrong to discover and enforce a general right to privacy. It does mean that of all the provisions in the Constitution to draft in support of an expansive interpretation of the Fourteenth Amendment's Due Process Clause, there could not be a less appropriate choice than the Ninth Amendment.

Despite their disagreement over the outcome of the case, Justices Goldberg and Stewart agreed on one critical matter regarding the Ninth Amendment: Neither Justice wished to enforce the Clause. Justice Stewart read the Ninth as no more than a truism.<sup>518</sup> Justice Goldberg, despite his belief that the Court had authority to enforce unenumerated rights,<sup>519</sup> nevertheless declined to read the Ninth as a source of such rights.<sup>520</sup> Even

514. *Id.*

515. See Rodney J. Blackman, *Spinning, Squirreling, Shelling, Stiletting, and Other Stratagems of the Supremes*, 35 ARIZ. L. REV. 503, 513 (1993) ("[M]uch of Black's dissent appears to be soaked in acid and blood."); Fleming, *supra* note 490, at 52 ("Justice Black wrote that the Ninth Amendment was adopted not to protect 'unenumerated' rights but, 'as every student of history knows, to assure the people that the Constitution in all its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication.' The common rejoinder is that every student of history knows that the *Tenth* Amendment, not the *Ninth*, was adopted for that purpose.") (quoting *Griswold*, 381 U.S. at 520 (Black, J., dissenting)); Schmidt, *supra* note 256, at 180 ("Justice Black refurbished, if not created, the textually inaccurate traditional approach to Ninth Amendment jurisprudence. . . . [He] ignored the text of the Ninth Amendment.").

516. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 38 (1980).

517. *Griswold*, 381 U.S. at 520 (Black, J., dissenting).

518. *Id.* at 530 (Stewart, J., dissenting).

519. See *id.* at 492 (Goldberg, J., dissenting) ("[T]he concept of liberty [in the Due Process Clause] . . . embraces the right of marital privacy though that right is not mentioned explicitly in the Constitution.").

520. See *id.* ("Nor do I mean to state that the Ninth Amendment constitutes an independent source of rights protected from infringement by either the States or the Federal Government."). In fact, even the strongest present day proponents of an unenumerated rights position shy away from calling for judicial enforcement of the Ninth Amendment. See, e.g., Brief of the Institute for Justice

though the Supreme Court has identified and enforced unenumerated rights, it has never done so based on its reading of the Ninth Amendment.<sup>521</sup> In terms of its express application by the Supreme Court, the Ninth Amendment has never recovered from the New Deal.

#### VI. Conclusion: Retaining the Space Between National Powers and National Rights

The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold.<sup>522</sup>

The degree of local political autonomy depends on the amount of “space” between national powers and national rights. As a rule of interpretation limiting the constructive enlargement of federal authority, the Ninth Amendment held back the encroaching tide of federal jurisdiction and, along with the Tenth, maintained areas of local self-government. Without this interpretive restraint, federal power threatened to expand right up to the threshold of federal rights, thus leaving the Tenth Amendment no more than a truism preserving a null set of “reserved” powers. From its adoption, the Ninth Amendment was intended to prevent such an expansion of federal power, and this is how the Ninth was applied for more than one hundred and fifty years.

In two articles, *The Lost Original Meaning* and *The Lost Jurisprudence*, we have followed the history of the Ninth Amendment from its inception to its seeming demise at the hands of the New Deal Court. Rooted in calls from state conventions for a rule of construction limiting the interpretation of delegated authority, Madison’s draft of the Ninth Amendment expressly prohibited the constructive enlargement of federal power. In his speech on the constitutionality of the Bank of the United States, Madison explained how the Ninth was adopted to address the concerns of the state conventions, and he linked its purpose to that of the Tenth Amendment. The Tenth limited the government to enumerated powers, and the Ninth prohibited latitudinarian interpretation of those powers to the injury of the states. The Madisonian reading of the Ninth Amendment was echoed by Justice Story in *Houston v. Moore*, the first Supreme Court discussion of the Ninth Amendment. Story’s reading of the Ninth Amendment as a rule of

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an Amicus Curiae in Support of the Petitioners at \*4 n.3, *Lawrence v. Texas*, 123 S.Ct. 2472 (2003) (No. 02-102), at 2003 WL 164140. (“Our police power analysis does not require the Court to directly apply the Ninth Amendment.”). This reluctance is ironic, given that one of the main criticisms of a federalism-based reading of the Ninth Amendment is that it renders the Ninth without effect.

521. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *Troxel v. Granville*, 530 U.S. 57, 66 (2000); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (all citing the Due Process Clause).

522. *Griswold*, 381 U.S. at 491 (Goldberg, J., concurring).

construction preserving the retained rights of the states initiated a jurisprudence that would last more than a century. It was only in the aftermath of the New Deal restructuring of federal power that this jurisprudence came to an end, rendering both the Ninth and the Tenth but truisms.

The New Deal, however, is not the end of the story. John Ely once described the Ninth Amendment as “that old constitutional jester.”<sup>523</sup> Perhaps so, for as much as we have been tricked into missing its history, we may also have been tricked into missing its current use. Even if their source has been forgotten, the principles enshrined by the Ninth Amendment continue to inform the Supreme Court’s construction of the Constitution. Consider, for example, Chief Justice Rehnquist’s opinion in *United States v. Lopez*.<sup>524</sup> Reviving the tradition of limiting the expansion of federal commerce power into areas traditionally under state control, Rehnquist wrote: “To uphold the Government’s contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.”<sup>525</sup> Compare this to Madison’s Ninth Amendment-based argument against the Bank of the United States:

If implications, thus remote and thus multiplied, can be linked together, a chain may be formed that will reach every object of legislation, every object within the whole compass of political economy.

The latitude of interpretation required by the bill is condemned by the rule furnished by the constitution itself.<sup>526</sup>

In *Alden v. Maine*, the Supreme Court ruled that Congress’s powers under Article I could not be construed so broadly as to allow Congress to subject nonconsenting states to private suits for damages in state courts.<sup>527</sup> Although generally read as an Eleventh Amendment case, Justice Kennedy’s opinion was based upon his reading of the retained rights of the states:

[A]s the Constitution’s structure, its history, and the authoritative interpretations by this Court make clear, the States’ immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and *which they retain today* (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered

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523. ELY, *supra* note 516, at 33.

524. 514 U.S. 549 (1995)

525. *Id.* at 567.

526. James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791), *reprinted in* WRITINGS, *supra* note 11, at 486.

527. 527 U.S. 706, 712 (1999).

by the plan of the Convention or certain constitutional Amendments.<sup>528</sup>

This concept of limiting the construction of federal power (in *Alden*, federal judicial power) in order to preserve the retained rights of the states echoes every Ninth Amendment case from Justice Story's opinion in *Houston v. Moore* to Justice Burton's opinion in *Bute v. Illinois*. All of these opinions deploy a rule of construction in order to preserve the retained rights and powers of the states. Although a number of scholars have criticized the contemporary Court's federalism jurisprudence as unsupported by either text or history,<sup>529</sup> an appreciation of the original meaning and historic application of the Ninth Amendment raises the possibility that it is grounded in both.<sup>530</sup>

The federalism jurisprudence of the current Supreme Court is generally understood as based on the Tenth Amendment. This is reasonable, given that the Court itself has linked its rule of construction to the Tenth.<sup>531</sup> But in many ways, ascribing the rule of construction in these cases to the Tenth Amendment seems no different than Judge Felch rewriting Story's opinion in *Houston* to make it refer to the Tenth rather than the Ninth Amendment. It is

528. *Id.* at 713 (emphasis added).

529. See Ashutosh Bhagwat, *Affirmative Action and Compelling Interests: Equal Protection Jurisprudence at the Crossroads*, 4 U. PA. J. CONST. L. 260, 261 (2002) (describing the Rehnquist Court's "nontextual federalism-jurisprudence" as an example of "judicial activism"); Peter M. Shane, *Federalism's "Old Deal": What's Right and Wrong with Conservative Judicial Activism*, 45 VILL. L. REV. 201, 209–10 (2000) (criticizing the federalism jurisprudence of the Rehnquist Court on textual and historical grounds); Larry D. Kramer, *No Surprise. It's an Activist Court*, N.Y. TIMES, Dec. 12, 2000, at A33 (arguing that "conservative judicial activism is the order of the day"); Cass R. Sunstein, *Tilting the Scales Rightward*, N.Y. TIMES, Apr. 26, 2001, at A23 (noting that "we are now in the midst of a remarkable period of right-wing judicial activism"). See generally STEPHEN E. GOTTLIEB, *MORALITY IMPOSED: THE REHNQUIST COURT AND LIBERTY IN AMERICA* xi (2000) (arguing that the Rehnquist Court represents a "major revolution" in American judicial thought); Herman Schwartz, *Introduction to THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT* 19 (Herman Schwartz ed., 2002) (calling the Rehnquist Court's federalism doctrine "an astonishing display of judicial activism not seen since the 1930's"); TINSLEY E. YARBROUGH, *THE REHNQUIST COURT AND THE CONSTITUTION* (2000) (chronicling the doctrinal trends of constitutional decision making at the Rehnquist Court).

530. Linking federalism jurisprudence to the Ninth Amendment not only grounds these cases in constitutional text, it also suggests potential applications of the doctrine in a number of areas not generally associated with only one side of the political aisle. For example, determining whether the federal government may regulate intrastate noncommercial use of marijuana for medicinal purposes seems particularly well suited to Ninth Amendment analysis because it involves the retained right of the people to regulate medicine on a local level. See *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003) (holding that the Controlled Substances Act as applied to medicinal marijuana users exceeded Congress's commerce power). The plaintiffs in *Raich* raised individual rights claims based on the Ninth Amendment. *Id.* at 1227. Ironically, the court declined to reach these claims and based its ruling instead on a limited construction of federal power as suggested by cases like *Lopez* and *Morrison*. *Id.* at 1229. The irony, of course, is that this *is* a holding based upon the traditional principles of the Ninth Amendment.

531. See *Alden*, 527 U.S. at 713–14 ("Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of national power."); see also *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring); *United States v. Morrison*, 529 U.S. 598, 648 (2000) (Souter, J., dissenting).

the Ninth, not the Tenth, that literally provides a rule of interpretation limiting the construction of enumerated federal power in order to protect the retained right of the people to local self-government.<sup>532</sup> The idea that contemporary courts would cite the Ninth Amendment in support of federalism may seem farfetched. Nevertheless, should they choose to do so, there is a substantial body of case law upon which they could rely.

My purpose in writing this Article and its companion has been to recover history, not establish contemporary meaning. Even if these articles have established the original meaning of the Ninth Amendment, there remains the difficult issue of reconciling the original understanding of the Ninth with the Fourteenth Amendment and the dramatic New Deal expansion of federal power. It is possible, for example, that both the Ninth and Tenth Amendments ceased to have any operative effect after the reconfiguration of federal and state power that occurred in 1868 or, perhaps, in 1937. Perhaps the Ninth *is* but a truism. But before we too quickly consign the Ninth Amendment to the dustbin of history, we would do well to recall the prescient words of Justice Goldberg who reminded us that “since 1791 [the Ninth] has been a basic part of the Constitution which we are sworn to uphold.”<sup>533</sup> His words were truer than he knew, as we now can see in the recovered jurisprudence of the Ninth Amendment.

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532. The fact that these cases are related to the Tenth Amendment, but not actually based on its text, has been noted by both Justices favoring and opposing the modern Court’s federalism jurisprudence. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 585 (1985) (O’Connor, J., dissenting) (“The *spirit* of the Tenth Amendment, of course, is that the States will retain their integrity in a system in which the laws of the United States are nevertheless supreme.”); *New York v. United States*, 505 U.S. 144, 156–57 (1992) (O’Connor, J.) (“The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself. . . . Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States.”); *Morrison*, 529 U.S. at 648 n.18 (2000) (Souter, J., dissenting) (pointing out that the majority’s “special solicitude for ‘areas of traditional state regulation’” was “founded not on the text of the Constitution but on what has been termed the *spirit* of the Tenth Amendment.” (quoting Justice O’Connor’s dissent in *Garcia*)).

533. *Griswold v. Connecticut*, 381 U.S. 479, 491 (1965) (Goldberg, J., concurring).