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Founders' View of Retained Rights*

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On Federalism, Freedom and the Founders' View of Retained Rights

Kurt T. Lash

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

Professor Barnett's essay and this reply present only a snapshot of the larger historical debate between Barnett and myself regarding the original meaning of the Ninth Amendment. A more detailed look at the original sources which constitute the subject of this debate can be found in two articles I originally published in the *Texas Law Review* and in a forthcoming article in the *Iowa Law Review*, *The Inescapable Federalism of the Ninth Amendment*.² The Iowa piece contains an extensive analysis of the historical documents and issues which informed the drafting, ratification, and application of the Ninth Amendment and provides a point by point comparison of Barnett's reading of the evidence with my own. In this brief reply to Barnett's response essay, I want to clear up some terminological matters and focus on a few of his key historical claims.

I. Terminology

1. *Federalism and Majoritarianism*

I begin with some issues of terminology. In his current essay, Barnett characterizes my approach to the Ninth Amendment as "majoritarian" (hence the title of his essay). In prior work, however, Barnett described my approach to the Ninth as *federalist*.³ I think this latter term best captures my approach to the Ninth since it highlights one of the key differences between Barnett and myself in our reading of the historical record. For example, I agree with Barnett that the Ninth protects individual rights from federal abridgment. Where we differ involves the effect of the Ninth Amendment on the states. Barnett believes the retained rights of the Ninth are individual in nature and this limited set of rights is applied against the states by way of the Fourteenth Amendment's Privilege or Immunities Clause. I, on the other hand,

¹ See Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (2003).

² See Kurt T. Lash, *The Inescapable Federalism of the Ninth Amendment* (2007) (draft available on SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=953010).

³ Randy E. Barnett, Barnett, *The Ninth Amendment, It Means What it Says*, 85 *Tex. L. Rev.* 1, 19 (2006).

view the Ninth as protecting both individual and collective rights against federal abridgment.⁴ Although some individual rights originally left to state control were applied against the states through the adoption of the Fourteenth Amendment, many (indeed, most) remain under the collective control of the people in the states, free from undue federal interference (including interference from federal courts) even after the adoption of the Fourteenth. Aspects of the original federalist protections of the Ninth thus remain in effect.

2. *Individual v. Non-Individual Rights*

One of the issues which may give rise to some confusion regards how Professor Barnett and I define individual rights. As I use the term, individual rights are those which can be exercised by an individual alone. For example, a single individual may engage in the right to free speech by openly criticizing the government. Collective and majoritarian rights, on the other hand, can only be exercised by a defined group of individuals, for example the people in convention exercising their collective right to alter or abolish their form of government.⁵ The theory of popular sovereignty maintains that no one person can (legitimately) exercise this power alone, but only as a participant in a collective act. The same is true for any action that requires the assent of a majority. One can, of course, conceive of collective and majoritarian rights as “individual rights” in the sense that each member of the defined group has a right to participate in the group action (a “share” of the collective right, if you will). But this does not make the collective or majoritarian right “individualist” unless one is willing to destroy the distinction between individual and non-individual rights. The Founders certainly did not.⁶

3. *Collective and Majoritarian Rights*

Barnett believes that I have not properly distinguished between collective and majoritarian rights. Perhaps some clarification is in order, but Barnett is wrong to think the terms are completely independent. Collective rights *are* majoritarian rights. When meeting in their collective sovereign capacity (for example, in convention), a majority of “the people” have the right to determine their fundamental law.⁷ Rights and powers which the people leave to the ordinary political process are *also* controlled through majoritarian procedures (both in voting for representatives and in representative voting). Thus, although I agree with Barnett that a retained sovereign right is not the same thing as a right held by a governing majority, the majority of the collective people nevertheless have the right to determine which of their

⁴ Professor Barnett finds it significant that I employ terms that are not (or rarely) found in the original sources, such as “majoritarian” and “collective.” Of course, neither can one find Barnett’s preferred term “individual natural rights” in any original source discussing the Ninth Amendment. The reason Barnett and I use these terms in order to communicate our best reading of the original meaning of the Ninth Amendment in terms familiar to modern constitutionalists.

⁵ A single government act may violate *both* an individual and a collective right, such as occurred when Congress passed the Alien and Sedition Act. According to Madison, this Act violated both the individual right to free speech and the collective right of the states protected by the Tenth Amendment. See Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 *Stan. L. Rev.* at 117.

⁶ At the time of the Founding, distinguishing between persons and the People was of critical importance. See Christian G. Fritz, *American Sovereigns: The People and America’s Constitutional Tradition Before the Civil War* 93 (2007) (discussing early struggles over how to define the difference between the acts of mere individuals (and individual factions) and the true sovereign acts of “the people in convention”).

⁷ For example, a number of states ratified the original Constitution by majority vote, despite the existence of state constitutional provisions seemingly requiring a supermajority vote. See Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside of Article V*, 55 *U. Chi. L. Rev.* 1043, 1049 (1988).

retained rights shall or shall not be delegated to a governing majority.⁸ Although Barnett may disagree with this on account of his libertarian theory of constitutional legitimacy, the Founders embraced a theory of government that Barnett affirmatively *rejects*: Popular Sovereignty.⁹

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

In past essays I have contrasted my federalist model with what I refer to as Barnett’s libertarian model—a characterization to which he has not previously objected. Here, Barnett seems to think I use the term disparagingly,¹¹ preferring instead to call his approach “individualist” or an “individual rights” model of the Ninth Amendment. I cannot agree with Barnett’s attempt to claim the rhetorical high ground as providing the “pro-individual rights” reading of the Ninth Amendment. Barnett’s approach to the Ninth Amendment is no more protective of individual rights than mine (a point he seems to recognize, however grudgingly¹²). Both of us believe that the Ninth Amendment protected individual rights against federal action and *did not* protect individual rights against state action. Barnett, however insists that the Ninth protected *only* individual rights and that this same set of rights is protected against state action by the Fourteenth Amendment. It is because his approach links the Ninth and Fourteenth Amendment and envisions a “presumption of liberty” against *any* government action that I label his approach libertarian.¹³

By embracing the term “federalist,” I bear the burden of overcoming the pejorative associations of the term with the dark historical legacy of “states’ rights” rhetoric. Today, it

⁸ Compare Barnett, Restoring the Lost Constitution, *supra* note __ at 11-14, with Gordon Wood, The Creation of the American Republic, *supra* note __ at 344-389. Although Barnett quixotically attempts to make sovereignty an individual right, outside of a monarchy sovereign power cannot be exercised by an individual. This is what distinguishes individual from non-individual rights.

⁹ See Barnett, Restoring the Lost Constitution, *supra* note __ at 11-31 (rejecting the legitimacy of popular sovereignty theory).

¹⁰ Barnett embraces a libertarian theory of rights which constrains the power of the people in the states to pass certain laws, even in the absence of any specific constitutional restriction. See generally, *id.* Whatever the merits of Barnett’s normative theory of liberty, at the time of the Founding, the people of the states *did* exercise control over individual liberty on a variety of subjects that we today would consider violations of fundamental rights, from the establishment of religion to the prohibition of speech defaming Jesus Christ. See Kurt T. Lash, Power and the Subject of Religion, 59 Ohio St. L. J. 1069 (1988).

¹¹ See Barnett, Lash’s Majoritarian Difficulty, *supra* note __ at 127.

¹² Barnett has never refuted my claim that my federalist reading of the Ninth also protects individual rights. See Barnett, Lash’s Majoritarian Difficulty, *supra* note __ at 102. His argument is that I am wrong to read the Ninth as *also* protecting collective majoritarian rights.

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

is common to view state majorities, and not the national government, as the more likely offender of individual freedoms. At the time of the Founding, however, the primary concern of those whose votes were critical to ratification was the potentially tyrannical federal government. This middle group broadly considered preserving the sovereign prerogatives of the people in the states to be the *best* way of preserving individual rights. As Samuel Adams (an eventual supporter of the Constitution) wrote to Richard Henry Lee:

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

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

4. *Democracy v. Majoritarianism*

Having labeled my approach “majoritarian,” Professor Barnett proceeds to try and show how the key players in the Founding were *antimajoritarian*. In his attempt to establish the antimajoritarian nature of the Philadelphia Convention, for example, Barnett quotes concerns about “democracy” and equates these with concerns about majoritarianism.¹⁶ The Founders concerns about “democracy,” however, referred to the failure of wisdom and virtue in the state legislatures, not the fundamental concept of majority rule.¹⁷ Many of the Founders (and all of the ones quoted by Barnett in this section) believed that the ruling class should be made up of a natural aristocracy, men of education and property who understood the long term needs of the community. The radically egalitarian nature of the Revolution, however, opened the doors to a much broader class of political representatives which diluted, in the minds of many Founders both the virtue and economic wisdom necessary for a properly functioning legislature.¹⁸ The men who met in Philadelphia were members of the aristocracy who had suffered through the consequences of this “leveling” of democratic rule.¹⁹ Madison shared the Founders’ general concerns about “leveled democracy,” and thus stressed the Republican

¹⁴ Letter from Samuel Adams to Richard Henry Lee (Aug. 24, 1789), in *Creating the Bill of Rights*, *supra* note __ at 286.

¹⁵ See James Madison, *The Virginia Resolutions Against the Alien and Sedition Acts (1798)*, in *Madison, Writings*, *supra* note __ at 589; James Madison, *Report on the Alien and Sedition Acts (1800)*, in *id.* at 608.

¹⁶ Barnett, *Lash’s Majoritarian Difficulty*, *supra* note __ at 105.

¹⁷ See Gordon Wood, *The Creation of the American Republic, 1776-1777*, 474-75.

¹⁸ *Id.*

¹⁹ Barnett insists that I explain how my view of the Ninth differs from the Republican Guarantee Clause. One obvious difference is that the Ninth limits federal power whereas the Guarantee Clause stands as a *grant* of federal authority to intervene in cases of local insurrection, a problem often attributed to an unduly “democratic” spirit. See, generally, Fritz, *American Sovereigns*, *supra* note __ at 80-116.

benefits of majoritarian elections held in an extended republic.²⁰ This process would both protect minorities (a group which included creditors) and help ensure that federal legislation would reflect the long term *collective* interests of the community thus avoiding many of the “democratic” problems plaguing the states. In short, concerns about “democracy” were not so much antimajoritarian as they were pro-Republican, a very different matter.²¹

State legislation, however, remained a problem which Madison unsuccessfully attempted to address through a proposed amendment which would have protected the individual right to religious and expressive freedom in the states.²² Madison’s failed amendment illustrates his commitment to individual rights, a fact that leads Barnett to insist that Madison must have drafted a Bill which *also* protected individual rights. I, of course, agree: Madison *did* draft a Bill protecting individual rights. What is at issue is whether these were the *only* rights protected by the Bill. Barnett’s purely individualist reading of the Ninth and Tenth Amendments leads him to take a purely individualist view of the concept of “the people.” Analyzing this claim requires us to back up a bit and consider the nature of popular sovereignty at the time of the Founding.

5. *Popular Sovereignty and the Federal Constitution*

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

²⁰ See The Federalist No. 10 (Madison), in *The Federalist Papers*, *supra* note __ at 82-84.

²¹ As Madison put it in Federalist No. 10, “[t]o secure the public good and private rights against the danger of such a faction, and *at the same time to preserve the spirit and form of popular government is then the great object to which our inquiries are directed.*” Federalist No. 10 (James Madison) in *The Federalist Papers* 82 (Clinton Rossiter, ed. 1961).

²² See 1 *Documentary History of the First Federal Congress of the United States of America: March 4, 1789-March 3, 1791*, *supra* note __, at 158.

²³ Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* 60 (1988).

²⁴ See Bruce Ackerman, *We The People: Foundations* 9 (1991) (discussing how under the English Parliamentary system, the government has the full sovereign authority to act in the name of “We the People.”).

²⁵ Gordon Wood, *The Creation of the American Republic*, *supra* note __ at 319-43.

²⁶ Christian Fritz, *American Sovereigns: The People and America’s Constitutional Tradition Before the Civil War* 5 (2007).

Prior to the adoption of the Constitution, “the people” existed as independent sovereigns in the “free and independent” states. When the people met in their state conventions to consider the proposed Constitution, one of the major issues became whether they would *remain* an independent sovereign people after ratifying the Constitution. The issue of potential “consolidation” kept many moderates on the fence in regard to the proposed Constitution. Federalists who supported the Constitution thus were at pains to assure these doubters that ratifying the constitution would not affect a “consolidation” of the states into one unified and undifferentiated mass.²⁷ As Alexander Hamilton wrote in Federalist No. 32, “state governments would clearly retain all the rights of sovereignty which they before had, and which were not by [the Constitution] exclusively delegated to the United States.”²⁸ Madison similarly insisted that the proposed Constitution was “neither a national nor a federal Constitution, but a composite of both,” which “leaves to the several states a residuary and inviolable sovereignty over all [non-delegated] objects.”²⁹ It was because the doubters were not altogether convinced by these promises that supporters of the Constitution ultimately were forced to produce a Bill of Rights *ensuring* limits on the power of the federal government. In short, had the Ninth and Tenth Amendments declared a unified national people, not only would they have been rejected by the states, this would have imperiled the Federalist effort to ratify and preserve the Federal Constitution.³⁰

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

All power, jurisdiction, and rights of sovereignty, not granted by the people by that instrument, or relinquished, are still retained by them in their several states, and in their respective state legislatures, according to their forms of government.³²

Having clarified some of the critical terms in this debate, before moving to the history it is worth pausing a moment to clarify Professor Barnett and my claims about the Ninth Amendment. I claim that the Founders understood the “other rights” of the Ninth Amendment to include all manner of retained rights, individual and otherwise.³³ The Ninth

²⁷ See Gordon Wood, *The Creation of the American Republic*, *supra* note __ at 524-32 (discussing Federalist assurances that the proposed Constitution would not result in the consolidation of the states into a single national mass).

²⁸ Federalist No. 32 (Hamilton), *in* *The Federalist Papers* (Clinton Rossiter, ed.) at 198.

²⁹ Federalist No. 39 (Madison), *in* *The Federalist Papers*, *supra* note __ at 246, 245.

³⁰ See James Madison to George Washington ____.

³¹ See Chris Fritz, *American Sovereigns*, *supra* note __ at 205-06 (“Madison—like many other Americans—viewed the people as a collective sovereign—made up of the people of the several states.”)

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

³³ It is important to bear in mind that rights at the time of the Founding included all of these categories. See Richard A. Primus, *The American Language of Rights* 125 (Cambridge, 1999) (“[Rights at the time of the

established a rule of strict construction which reserved ultimate authority over all these rights to the collective sovereign people in the several states. Professor Barnett insists, on the other hand, that the “other rights” of the Ninth include *only* individual rights. This critical assumption leads to a cascade of ever more startling assertions. Barnett insists, for example, that *every* time “the people” is used in the Bill of Rights it is in reference to individual rights.³⁴ This means that both the Ninth *and* Tenth (!) Amendments protected only individual rights.³⁵ Finally, this means that the only state protective provision in the Bill of Rights was the *Establishment Clause*.³⁶ In light of the history surrounding the Bill of Rights in general, and the Ninth Amendment in particular, Barnett has chosen a burden too heavy to carry.

II. History

1. *The Ninth Amendment as Madison’s “Sui Generis” Contribution to the Bill of Rights*

Professor Barnett insists that Madison drafted an Amendment which reflected the *Federalists’* worries about how adding a Bill might affect individual rights, and that none of the proposals emanating from the state conventions responded to the Federalist concern that adding a Bill of Rights might imply that there were no other restrictions on federal power.³⁷ A quick look at the state proposals contradicts his assertion. Consider, for example, Virginia’s 17th proposed amendment:

That those clauses which declare that Congress shall not exercise certain powers be not interpreted in any manner whatsoever to extend the powers of Congress. But that they may be construed either as making exceptions to the specified powers where this shall be the case, or otherwise as inserted merely for greater caution.³⁸

This is a straightforward attempt to avoid reading a list of enumerated rights as implying otherwise unlimited federal power. This is the very concern that Barnett claims the state proposals did not address. Other states proposed similar amendments.³⁹ Although these proposals use the language of denied powers rather than “enumerated right,” the meaning was the same to the Founders. As Madison wrote the same year he drafted the Ninth Amendment, limiting federal power amounted to the “same thing” as securing a right.⁴⁰ Madison’s original version of the Ninth echoed the same concern raised by Virginia and other states:

The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights

Founding] were predicated sometimes of individuals, sometimes of government institutions, sometimes of “the people” as a collective, sometimes of abstractions like colonies or countries.”).

³⁴ Barnett, Lash’s Majoritarian Difficulty, *supra* note __ at 110.

³⁵ *Id.* at 116.

³⁶ *Id.* at 111.

³⁷ *Id.* at 108.

³⁸ Amendments Proposed by the Virginia Convention (June 27, 1788), *in* The Complete Bill of Rights, *supra* note __, at 675. North Carolina submitted the same proposal as Virginia. James Madison was a member of the committee that drafted the Virginia proposal, and he expressly noted the role the Virginia proposals played in his proposed draft of the Bill of Rights. Letter from James Madison to George Washington (Nov. 20, 1789), *in* 2 The Bill of Rights: A Documentary History 1185 (Bernard Schwartz ed., 1971).

³⁹ See Lash, The Inescapable Federalism of the Ninth Amendment, *supra* note __ at notes 49-54 and accompanying text.

⁴⁰ See Letter from James Madison to George Washington (Dec. 5, 1789), *in* 5 Documentary History, *supra* note __, at 221–22.

retained by the people; or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.⁴¹

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

2. *The Virginia Debates*

Ignoring what Madison actually *said* about the final language of the Ninth Amendment,⁴² Barnett embraces a reading of the Ninth that Madison expressly *rejected*—the exaggerated claims of the antifederalist majority in the Virginia Senate. This is puzzling for a number of reasons, not the least of which is the fact that, if their reading of the proposed Bill of Rights reflected any kind of widespread understanding, the Ninth (and probably the entire Bill) would have been rejected.⁴³ This was, after all, the antifederalists' goal.⁴⁴ In other works, I have emphasized the importance of the dispute over the Ninth Amendment in the Virginia Assembly.⁴⁵ Not because I think the antifederalists had the correct understanding of the Ninth, but because the Virginia debate in its entirety sheds important light on letters Madison and others wrote *in response* to that debate. Again, interested readers can find my full analysis of the Virginia Debates in another article.⁴⁶ For now, it is enough to say that Barnett's reliance on the unsuccessful politically driven views of the Virginia antifederalists

⁴¹ Madison, Writings, *supra* note __ at 443.

⁴² Both in his letter to Washington and in his speech against the proposed Bank of the United States. See *infra* note __ and accompanying text.

⁴³ The Senate majority's claims about the Tenth Amendment, for example, were an obvious effort to make the Tenth as objectionable as possible by claiming that it referred to the consolidated people of the United States, rather than the people in the several states. The Tenth Amendment would never have been ratified under such a reading given the widespread fears (and Federalist denials) that the proposed Constitution would consolidate the states into a single undifferentiated national people. For an historical study of the true, and rather surprising, purpose behind the addition of "or to the people" to the Tenth Amendment, see Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty and "Expressly" Delegated Power* (2007) (draft paper available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1000087).

⁴⁴ See Leonard Levy, *Origins of the Bill of Rights*, *supra* note __ at 42 (discussing how the Antifederalists in Virginia wished to "sabotage the Bill of Rights").

⁴⁵ Barnett gently chides me for seeming to have abandoned claims made in earlier pieces regarding the significance of the Virginia debates regarding the Ninth Amendment. See Barnett, *Lash's Majoritarian Difficulty*, *supra* note __ at n.65. Once again, this essay focuses on the text of the Ninth Amendment and discusses history only as it supports the apparent meaning of the text. For an in depth study of Virginia Debates and their significance in terms of the original meaning of the Ninth Amendment, see Lash, *The Inescapable Federalism of the Ninth Amendment*, *supra* note __ at notes 103-33 and accompanying text.

⁴⁶ *Id.*

is a rather curious choice for representing the true original meaning of the Ninth and Tenth Amendments.⁴⁷ I'll stick with Madison.

3. *St. George Tucker*

“[The federal Constitution] is a compact freely, voluntarily, and solemnly entered into by the several states, and ratified by the people thereof, respectively.”

St. George Tucker, *Blackstone's Commentaries*, Vol. 1, Appendix D at 155.

Historians familiar with Tucker's work and its place in early constitutional theory know that Tucker presented a sophisticated and influential *federalist* reading of the Constitution as a compact between the people of the individual states. A strong advocate of the retained sovereignty of the people in the states, Tucker believed that the original Articles of Confederation remained operative even after the adoption of the federal Constitution unless expressly overruled.⁴⁸ This meant that Tucker believed states continued to retain all powers, jurisdictions and rights not expressly delegated to the United States, including the “right of withdrawing itself from the confederacy without the consent of the rest.”⁴⁹ Not surprisingly, Tucker's states' rights view of the Constitution came under heavy fire in Joseph Story's *nationalist* 1833 *Commentaries on the Constitution*.

In a number of articles, Barnett has insisted that Tucker embraced an individual rights reading of the Ninth Amendment. If by this Barnett meant that the rights protected by the Ninth *included* individual rights, I would agree. Barnett, however, insists that Tucker had a purely individualist reading of the people in both the Ninth and Tenth Amendments. This simply is not true. For example, Tucker's first reference to the Ninth and Tenth Amendment presents them as protecting collective rights, in particular the collective right of the people to alter or abolish an abusive government.⁵⁰ Even in those places where Tucker speaks of the people's retained personal individual rights, he clearly follows the federalist model I present in my

⁴⁷ If one accepts the Senate Report as an accurate representation of the public meaning of the proposed amendments, then presumably one accepts the Senate's claim that the Free Exercise Clause “does not prohibit the rights of conscience from being violated or infringed” and the Establishment Clause allows Congress “to levy taxes, to any amount, for the support of religion or its preachers, or any particular denomination of Christians might be so favored and supported by the general government.” See Entry of Dec. 12, 1789, *Journal of the Senate of the Commonwealth of Virginia* 63 (Richmond 1828).

⁴⁸ See *Woodson v. Randolph* (Va. Gen. Ct. 1799) (Tucker, J.) (unpublished opinion on file at the Huntington Research Library, Randolph-Tucker Family Papers, Part I, mssBR Box 6 (26 b)). The opinion explains: “The Articles of Confederation have never been rescinded by the United States; they have been amended, by enlarging the powers of the federal Government, and by changing its structure; but they have not been rescinded or annulled. Everything therein contained, which is not altered by the subsequent Act of the States, therefore remains in full force.” *Id.*

⁴⁹ Tucker, Vol. 1, Appendix at 75.

⁵⁰ According to Tucker:

It must be owned that Mr. Locke, and other theoretical writers, have held, that “there remains still inherent in the people a supreme power to remove or alter the legislative when they find the legislative act contrary to the trust reposed in them; for, when such trust is abused, it is thereby forfeited, and devolves to those who gave it.” *Fn*: This principle is expressly recognized in our government, Amendments to the C.U.S. Art. 11, 12.[the Ninth and Tenth Amendments]

See 2 *Blackstone's Commentaries* (Book the First. Part Second) at 161.

article regarding the dual nature of retained individual rights. According to Tucker, the reason *why* federal power must be strictly construed when impinging upon personal rights is because the individual remains under a *prior* obligation to the collective people of his particular state.⁵¹

The entire thrust of Tucker's work was to construct a federalist theory of state autonomy. This is certainly how his treatise was received at the time. For example one of Tucker's contemporaries, Judge John Overton, a member of the second North Carolina Ratifying Convention that ratified the Ninth Amendment cites the exact same passage Tucker reads as establishing an "individualist" account of the Ninth, but in support of a clearly federalist reading of the Ninth and Tenth Amendments.⁵² In the end, whatever else one makes of Tucker, one cannot understand his work as conflicting in any way with his fundamental theory of the retained sovereignty of the people in the several states. Doing so contradicts a mountain of historical scholarship, the understanding of his contemporaries, and the testimony of Tucker himself.

4. *The Tenth Amendment*

One of the more surprising aspects of Barnett's essay is his attempt to characterize the people as a solely "individualist" expression throughout the Bill of Rights. I do not dispute that the term could be used in conjunction with individual as well as collective rights, but Barnett insists "when the Bill of Rights uses the term "the people" it consistently refers to individuals and not political collectives or electoral majorities, and all the enumerated rights it protects belong to individuals not collective or majorities."⁵³ Rather startlingly, Barnett insists that the "people" refers only to individual rights in both the Ninth *and* Tenth Amendments. His only evidence in support of this rather unprecedented claim about the Tenth is Report of the Virginia Senate and the fact that "people" is used in reference to individual rights elsewhere in the Bill and in statements made by the majority in *Chisholm v. Georgia*.

To begin with, I disagree with his reading of the Virginia Senate and the *Chisholm* majority. These were not attempts to establish an individualist reading of "the people." Instead, both examples involve attempts to establish a *national* reading of "the People" (though for very different reasons). Nevertheless, I do not deny that rights of the people were understood to include individual as well as collective rights. All such rights, however, were retained under the sovereign control of the collective people in the states. Thus, when Congress passed the Sedition Act, Madison maintained that it had violated the individual right to free speech, and trespassed on a matter reserved to the collective people in the states under the Tenth

⁵¹ 1 Blackstone's Commentaries (Appendix), *supra* note __ at 151 ("as a social compact it ought likewise to receive the same strict construction, whenever 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.").

⁵² The footnote in full reads: "See vat. B. 2 c, 17, §§ 305, 308; Amendment to Con. U. S. arts 11, 12; 1 T. Bl. app. to part 1, 307. 308: Ib. 412; Vat. B. 1, c., § 10; 2Dall. 384; 1 T. Bl. app. to part 1, 269; 4 Johns., 163." Barnett rests his reading of Tucker on the same passage cited in support of federalist reading by Judge Overton. See Barnett at 124.

⁵³ Barnett at 110.

Amendment.⁵⁴ Tucker also referred to powers reserved to the people under the Tenth Amendment as including individual rights—but only those prohibited to both the federal and state governments by the federal *and state constitutions*. Reserving powers to the people, and not their state governments, in other words, required a collective act of the sovereign people in the states.⁵⁵

On the other hand, Barnett is right to point out that Tucker read both the Ninth and Tenth Amendments as calling for a strict construction of federal power, and that this differs from statements I've made in the past that only the Ninth, and not the Tenth, represented a rule of construction. As far as Tucker's reading of the Tenth as a rule of construction is concerned, I believe that he was deeply influenced by James Madison's 1800 Report on the Virginia Resolutions, a Report that focused on Tenth Amendment objections to the Alien and Sedition Acts.⁵⁶ However, as my research on the Ninth and Tenth has progressed, I have come to believe that although the primary semantic meaning of the Tenth simply declares the principle of reserved non-delegated power, it is possible to derive a secondary implied meaning which calls for a narrow construction of federal power. I will develop this secondary meaning in a forthcoming article.⁵⁷ Barnett may believe that conceding this secondary meaning of the Tenth somehow undermines my claims about the Ninth. I think not. I have simply become more and more convinced that the Amendments were often understood as working in combination, thus the remarkably consistent pattern of joint citation in support of the retained sovereignty of the people in the several states.⁵⁸ Nevertheless, I remain convinced that Madison presented the *best* original semantic understanding of the Amendments in his speech, where he presented the Ninth as controlling a latitude of construction and the Tenth as limiting the federal government to delegated powers. If the Tenth was read in a similar manner, that simply underscores the broad embrace of federalism in the early Republic.

5. *The Relevance of the Eleventh Amendment*

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

⁵⁴ See James Madison, Report on the Alien and Sedition Acts, *supra* note __ at 610.

⁵⁵ Tucker cites, in this regard, the rights protected from federal or state action in Article I, sections 9 and 10. See Tucker, Vol. 1 Append. at 308-09. These restrictions on state power, of course, did not go into effect until after being ratified by the people in their separate state conventions. As Chris Fritz has recently put it, these state ratifying conventions simultaneously ratified the federal constitution and amended their own state constitution to the degree necessary to accommodate the federal text. See Chris Fritz, American Sovereigns: The People and America's Constitutional Tradition Before the Civil War, *supra* note __ at 140.

⁵⁶ See Kurt T. Lash, Madison's Celebrated Report of 1800: The Transformation of the Tenth Amendment, 74 Geo. Wash. L. Rev. 165, 182-83, 183 n.141 (2006). In my upcoming Iowa piece, The Inescapable Federalism of the Ninth Amendment, *supra* note __, I explain *why* Madison focused on the Tenth Amendment, and not the Ninth in his criticism of the Alien and Sedition Acts. See *id.* at nn. 229-249 and accompanying text.

⁵⁷ See Lash, The Original Meaning of an Omission, *supra* note __.

⁵⁸ Full a comprehensive account of the post-adoption jurisprudence of the Ninth and Tenth Amendments, see Kurt T. Lash, The Lost Jurisprudence of the Ninth Amendment, 83 Tex. L. Rev. 597 (2005).

To begin with, notice the text of the Eleventh Amendment:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Why add the seemingly superfluous phrase “shall not be construed” instead of simply stating that “the judicial power of the United States shall not extend . . .”? The phrase would not be superfluous, of course, if it was meant to signal the *Chisholm* majority had wrongly construed the judicial power of the United States. An original version of the Eleventh, in fact, did not include the “construed” language—it was rejected. We also know that those who led the movement to add the amendment knew they had three choices: Accept the court’s decision (and prepare to be sued), reject the Court’s reasoning and add an amendment clarifying the original understanding, or accept the Court’s reasoning as correct, but nevertheless add an amendment because the results now seemed inexpedient. The second view, that the Court had misconstrued the Constitution, was repeated throughout the states that called for a response to *Chisholm*. Again, the text also appears to coincide with the second choice. Finally, had the amendment been drafted as an exception from otherwise preexisting power, this would have called into play the rule of construction, where an exception to a rule strengthens the otherwise applicable rule. This is Manning’s view of the Eleventh, a view Barnett expressly shares.⁵⁹ But the Eleventh was drafted in precisely the opposite manner: It is not an exception to a rule, instead it appears to *clarify the proper application of a rule*. Put another way, Manning reads the Eleventh as expressing the very opposite rule of the Ninth. Instead of “the enumeration of some rights shall not be construed to deny others” (the rule of the Ninth), Manning and Barnett read the Eleventh to mean “the enumeration of one immunity *shall be construed* to deny other immunities. This approach seems in conflict with both the text and the views of those who called for the amendment.

But these are just clues. They require historical investigation and support. Certainly I have not done enough here to adequately challenge Barnett’s reading of the Eleventh. Instead, I’ll close this section with the statement of a theorist who views Barnett respects: St. George Tucker. Here is Tucker’s statement on the Eleventh Amendment:

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

⁵⁹ See Randy E. Barnett, *The People or the State?: Chisholm v. Georgia and Popular Sovereignty*, 93 Va. L. rev. 1729, 1743-48 (2007).

constitution, declaring that the judicial power of the United States shall not be construed to extend to any suit brought by an individual against a state.

Tucker cites *Chisholm* as “an act of usurpation” or the “exercise of powers not warranted by the constitution.” Secondly, the proper remedy for usurpations that “affect an individual” involve (individual) “recourse to the judiciary.” The proper remedy for usurpations affecting the state, involve the state legislatures “sound[ing] the alarm *to the people*” of the state, who can then either use the majoritarian process to remove the offending representative, or exercise their sovereign right to seek “declaratory and restrictive” amendments. An example of this collective act of the people in response to an exercise of power not warranted by the Constitution was the addition of the Eleventh Amendment.

Tucker believed that the *Chisholm* majority erroneously construed the Constitution. But all they did was to allow an out of state citizen to sue a state in federal court. Article III granted federal courts jurisdiction to hear cases involving a state and a citizen from another state. The only way the *Chisholm* majority could have been wrong would be if they should have strictly construed these delegated powers to include only those suits where an individual is party defendant, not a party plaintiff, thus preserving the immunity of the state as party plaintiff to a suit brought by an individual. This was, of course, the argument of Justice Iredell in his dissent. But where in the Constitution can we find such a rule of strict construction of federal power in order to preserve state autonomy? Madison, we know, would have an answer to that question.

Conclusion

If I’m right about the Ninth and Tenth Amendments, why then did the Confederate States feel compelled to add the words “in the several states” to their version of these clauses? Barnett’s analysis has already hinted at an answer to this question. Although the *Chisholm* majority was rebuked by the adoption of the Eleventh Amendment, the same strongly nationalist reading of federal power embraced by the *Chisholm* Majority was restored by John Marshall, first in dicta (*Fletcher v. Peck*) and later as a matter of law in cases like *McCulloch v. Maryland* and *Gibbons v. Ogden*. The latter two of cases triggered vociferous objections,⁶⁰ with Madison in particular objecting to Marshall’s suggestion in *McCulloch* that the people had only a national and not an independent sovereign existence in the several states.⁶¹ Madison feared that unduly nationalist opinions like Marshall’s threatened the delicate balance between federal government and the states. We know, of course, that the center did not hold. Accordingly, when the Confederate states drafted their own constitution, they restored language which reflected what they (and Madison) believed was the original understanding. For his part, Madison rejected the secessionist ideas of Calhoun and the Nullifiers. But he likewise rejected the wholly nationalist ideas of men like Hamilton and Marshall. The story of the original Ninth Amendment is the story of “Madison’s Middle” and a nation neither wholly national nor wholly federal.

⁶⁰ See G. Edward White, *The Marshall Court and Cultural Change*, 1815-35, pp. 541-80, in *III-IV The History of the Supreme Court of the United States* (1988).

⁶¹ See Madison, *Detached Memoranda*, in *Writings*, *supra*, note __ at 756 (criticizing Marshall’s “expounding the power of Congs—as if no other Sovereignty existed in the states supplemental to the enumerated power of Congs”).