Our Unsettled Ninth Amendment: An Essay on Unenumerated Rights and the Impossibility of Textualism

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The Ninth Amendment—our resident anarchic and sarcastic "constitutional jester"—mocks the effort of scholars and judges alike to tame and normalize constitutional law. The Amendment stubbornly resists control. It stands as a paradoxical, textual monument to the impossibility of textualism, an entrenched, settled instantiation of the inevitability of unsettlement. If it did not exist, constitutional skeptics would have had to invent it.

Part I of this essay presents a new originalist account of the Ninth Amendment. It argues that the Amendment deliberately leaves unsettled the status of unenumerated rights. Because of the Ninth Amendment, the Constitution does not "deny" or "disparage" these rights, but neither does it embrace or imply them. The Amendment puts off to another day a final reckoning of the extent to which we are bound by constitutional text.

Part II argues that the Ninth Amendment states a truth that we would have to deal with whether or not it was part of the original text: No matter how comprehensive, no text can control the force of ideas and commitments that lie outside the text. This simple truth leaves the status of liberal constitutionalism permanently and inevitably unsettled. The day of final reckoning will never arrive.

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INTRODUCTION

The Ninth Amendment—our resident anarchic and sarcastic "constitutional jester"1—mocks the effort of scholars and judges alike to tame and normalize constitutional law. It is not as if the stern disciplinarians haven't tried. We now have two generations worth of painstaking, erudite, and occasionally brilliant scholarship that attempts to rein it in.2 Yet the Amendment stubbornly resists control. It stands as a paradoxical, textual monument to the impossibility of textualism—an entrenched, settled instantiation of the inevitability of unsettlement. If it did not exist, constitutional skeptics would have had to invent it.

This Essay has two Parts. Part I presents a new and, I hope, persuasive, originalist account of the Ninth Amendment. My claim is that the Amendment deliberately leaves unsettled the status of unenumerated rights. Because of the Ninth Amendment, the Constitution does not "deny" or "disparage" these

rights, but neither does it embrace or imply them. The Amendment puts off to another day a final reckoning of the extent to which we are bound by constitutional text.

Although I use originalist methodology in Part I, I do not want to be understood as embracing originalism. Instead, this Part is an exercise in internal critique. As Part II explains, the Ninth Amendment states a truth that the American people would have to deal with whether or not the Amendment was part of the original text: no matter how comprehensive, no text can control the force of ideas and commitments that lie outside the text. This simple truth leaves the status of liberal constitutionalism permanently and inevitably unsettled. The day of final reckoning will never arrive.

I. A NONORIGINALIST’S ACCOUNT OF THE NINTH AMENDMENT’S ORIGINAL MEANING

The Ninth Amendment provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”3 In a recent article, Randy Barnett, our most insightful and persistent Ninth Amendment scholar, identifies five possible interpretations of this single sentence.4 At the risk of eliding some subtle distinctions and unfairly dismissing some approaches, the list can be reduced to two primary contenders: the federalism approach, associated primarily with the work of Kurt Lash,5 and the individual natural rights approach, that Barnett himself champions.6

It turns out there is less difference between the Lash and Barnett approaches than one might at first suppose,7 but there is enough difference in emphasis, and perhaps enough difference in substance, to merit separate treatment. True, both Lash and Barnett focus their attention on the words “others retained by the people” at the end of the sentence. But unlike Barnett, Lash emphasizes a meaning of these words that focuses on rights of self-government at the state level. On this reading, the Amendment guards against an expansive interpretation of federal power. Whereas the Tenth Amendment prohibits the exercise of unenumerated federal powers, the Ninth prohibits the broad interpretation of the enumerated powers.8

In contrast, Barnett does not dispute that the Ninth Amendment reinforces federalist constraints, but he tends to emphasize that the rights “retained by the

3. U.S. CONST. amend. IX.
4. Barnett, It Means What It Says, supra note 2, at 3. Barnett identifies the following approaches: (1) the state law rights model; (2) the residual rights model; (3) the individual natural rights model; (4) the collective rights model; and (5) the federalism model. Id. at 11–21.
5. See, e.g., Lash, Lost Original Meaning, supra note 2; Lash, Textual-Historical Theory, supra note 2.
7. See infra p. 116.
8. See, e.g., Lash, Lost Original Meaning, supra note 2, at 336.
people” also include individual natural rights. These rights, too numerous to list or even imagine, amount to a general presumption against government interference with an almost infinite range of private conduct that does not, in turn, interfere with the rights of others.9

Each approach has important strengths although, as we shall see, they also share important weaknesses. In particular, both approaches are so fixated on deciphering a meaning of “rights ... retained by the people” that they pay insufficient attention to what the Amendment actually prohibits—the denial or disparagement of those rights by means of the enumeration of textual rights. I will argue that focusing on this prohibition makes clear that the Amendment leaves the status of unenumerated rights unresolved. Although the enumeration of some rights should not be construed to “disparage” unenumerated rights, it does not follow that these unenumerated rights exist or merit constitutional protection. Barnett and Lash are too preoccupied with discussing the nature of putative unenumerated rights to notice the possibility that the rights do not exist in the first place.

A. The Background

Before getting to these broader claims, we need to understand the background from which the Ninth Amendment emerged. All accounts begin with essentially the same narrative. When the newly drafted Constitution arrived at the ratifying state conventions, it met with something less than universal acclaim. Antifederalists particularly criticized the draft for lack of a bill of rights.10 They claimed the Constitution was open to a reading that gave the federal government unlimited powers.11 Federalist defenders of the draft made three responses. First, they insisted the Constitution created a federal government of limited, delegated powers. Therefore, no bill of rights was necessary because Congress lacked the power to impinge on the rights that concerned the antifederalists in the first place.12 Second, they claimed a bill of rights would be dangerous because it might imply that such power existed. For example, an amendment that in some circumstances protected freedom of the press might imply a more general federal power to regulate newspapers in


11. See, e.g., id. at 134–35.

12. For example, James Wilson pointed out that all powers not granted to the federal government were reserved to the people and argued that “it would have been superfluous and absurd, to have stipulated with a federal body of our own creation, that we should enjoy those privileges, of which we are not divested either by the intention or the act, that has brought that body into existence.” James Wilson, State House Yard Speech (Oct. 6, 1787), reprinted in 1 COLLECTIVE WORKS OF JAMES WILSON 172 (Kermit L. Hall & Mark David Hall eds., 2007).
circumstances not covered by the amendment. Finally, they argued that any specification of rights would inevitably be incomplete and that by enumerating some rights, a bill of rights might imply that others were not worthy of protection.

Although the Constitution ultimately received the imprimatur of the state conventions, several states proposed amendments to the draft, and some supporters of the Constitution committed themselves to the prompt addition of a bill of rights. Several of the state proposals contained express declarations about the protection of natural rights. Other proposals made clear that the federal government could exercise only enumerated powers.

In the first Congress, Representative James Madison made good on the commitment to amend the Constitution by proposing a bill of rights. Three provisions are particularly relevant to our story. First, Madison responded to the antifederalist argument that the Constitution should protect natural rights.

13. Hamilton forcefully made the first two points in Federalist 84: Why . . . should it be said, that 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 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. THE FEDERALIST NO. 84, at 470 (Alexander Hamilton) (E. H. Scott ed., 1898). It is doubtful that Hamilton's argument had much effect on the ratification process, however. His essay went into print after most of the states had already ratified the Constitution. See Rutland, supra note 10, at 181–82.

14. For example, James Iredell argued that enumerating rights “would be implying, in the strongest manner, that every right not included in the exception might be impaired by the government without usurpation; and it would be impossible to enumerate every one.” 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 316 (Jonathan Elliot ed., 1863) [hereinafter “4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS”]; see also id. at 435–37 (speech by James Wilson).

15. See Rutland, supra note 10, at 171, 173.

16. North Carolina and Virginia both proposed a provision stating “there are certain natural rights of which men, when they form a social compact, cannot deprive or divest their posterity, among which are the enjoyment of life and liberty, with the means of acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.” THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 635–36 (Neil H. Cogan ed., 1997).

17. For example, New York proposed inclusion of a provision stating: every Power, Jurisdiction and right, which is not by the said Constitution clearly delegated to the Congress of the United States, or the Departments of the Government thereof, remains to the People of the several States, or to their respective State Governments to whom they may have granted the same; And that those Clauses in the said Constitution, which declare, that Congress shall not have or exercise certain powers, do not imply that Congress is entitled to any Powers not given by the said Constitution; but such Clauses are to be construed either as exceptions to certain specified Powers, or as inserted for greater Caution.

Id. at 635.
with a proposal that “there be prefixed” to the Constitution a declaration that “[g]overnment is instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety.”

This express protection of natural rights raises problems for Barnett because it seems to overlap with his natural rights interpretation of the Ninth Amendment. Why would Madison propose two separate measures that accomplished the same thing?

Second, Madison responded to the antifederalist claim that the Constitution could be read as giving the federal government plenary power, and that a bill of rights might imply such general power, with proposed language that, with minor revision, ultimately became the Tenth Amendment: “The powers not delegated by the constitution, nor prohibited by it to the States, are reserved to the States respectively.” This express protection of federalism raises problems for Lash because it seems to overlap with his federalism interpretation of the Ninth Amendment. Again, why the duplication?

Finally, Madison responded to the federalist claim that a bill of rights would imply the absence of other natural rights with language that, after significant revision, became the Ninth Amendment:

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

In a famous statement in support of this provision, Madison noted:

[it] has been objected . . . 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 the 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.

Madison conceded that “[t]his was one of the most plausible arguments I have ever heard urged against the admission of a bill of rights” but observed that “it may be guarded against” by enactment of what became the Ninth Amendment.

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18. 1 ANNALS OF CONGRESS 451 (Joseph Gales ed., 1834).
19. 1 id. at 790.
20. 1 id. at 761.
21. 1 id. at 452.
22. 1 id. at 456.
23. 1 id.
Madison’s proposals were referred to a committee on which Madison himself served.²⁴ Serving with him was Roger Sherman. The committee apparently considered Sherman’s proposal, which would have guaranteed “natural rights which are retained by [the people] when they enter into Society.”²⁵ However, the committee rejected Sherman’s proposal as well as Madison’s natural rights language. The committee also changed the Ninth Amendment to its present form, eliminating the reference to the “just importance” of the rights retained by the people and the language about enlarging the powers of government.²⁶ The House then approved the current versions of the Ninth and Tenth Amendments and sent them to the Senate.²⁷

Because the Senate met in secret, we know very little about the views of the Senators concerning the proposed amendments. We do know, however, that the Senate considered and rejected a provision that would have provided that “there are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity; among which are the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property and pursuing and obtaining happiness and safety.”²⁸ The Senate then passed the House version of the Ninth Amendment, which was ultimately ratified by the states.²⁹

What, if anything, should we make of this history? In the Parts that follow, I explore three possible interpretations: Barnett’s natural rights theory, Lash’s federalism theory, and my own unsettlement theory. We cannot begin such an evaluation, however, before considering the standards by which these claims are to be judged. Accordingly, a brief discussion of originalist methodology follows.

### B. A Word About Originalism

A generation ago, originalists based their approach on the original intent of the Framers.³⁰ In response to sustained criticism, many originalists have now abandoned this view and purport to be guided instead by the “original public meaning” of the text. Barnett is unambiguously associated with the newly emergent “original public meaning” school.³¹ This leads him to focus on “how

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²⁶. 5 Documentary History of the Constitution of the United States of America: 1786-1870, at 188 (1905) [hereinafter “Documentary History”].
²⁷. See 1 Annals of Congress, supra note 18, at 809.
²⁸. See Senate Journal, 1st Cong., 8 Sept. 1789, at 73.
³⁰. The canonical text is Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1 (1971).
³¹. For a full explication of his theory, see Barnett, Restoring the Lost
a reasonable member of the public (including, but not limited to, the framers
and ratifiers) would have understood the words of the text (in context) at the
time of its enactment."32

Lash's position is more ambiguous. Lash calls himself a "popular
sovereignty" originalist because he grounds obligation to the Constitution on
the decision by "the people" to ratify it.33 Writing in the context of the Ninth
Amendment, Lash stated that this stance led him to give "special consider-
ation and weight to the concerns and understanding of those who debated and ratified
the text."34 He argued that Barnett's alternative approach "critically
undermine[d] [Barnett's] analysis of the historical evidence."35 This language
would seem to put Lash in the "original intent of the framers" school.

On the other hand, in his later work, Lash argues that "discovering the
likely original public understanding of the text . . . grounds the originalist
endeavor on the normative theory of popular sovereignty."36 Here, Lash seems
to align himself with the "original public meaning" school. In short, then, it is
simply unclear whether Lash's version of originalism specially privileges the
views of those who "debated and ratified" the text or whether it instead focuses
on a broader public understanding. Whatever his formal stance, though, as a
practical matter he no doubt pays a great deal of attention to the statements and
putative intent of the Ninth Amendment's Framers. He therefore must contend
with the problems that have long bedeviled the original intent approach.

The precise intent of the individual ratifiers of the Ninth Amendment is
frequently inconsistent, usually unknowable, and often nonexistent. To be sure,
we have statements made by some of the drafters and key players in the debate,
although even this evidence is sketchy. For example, there is no extant record
of the Senate's debate on the Amendment or of the House committee sessions
where the final version of the Amendment was actually drafted. It is anyone's
guess what the hundreds of other ratifiers thought, and there is no reason to
suppose that they shared the views of the Amendment's most vocal supporters.
From what we do know about how people behave in large legislative bodies,
most of the silent supporters likely did not have firm or sophisticated views of
any kind about the Amendment's precise meaning—especially since it was a
small and relatively unimportant part of a much bigger package of amendments
that demanded the legislators' attention. An approach that focuses on views that
did not exist or cannot be discovered is an unpromising way of answering the
specific questions about the scope of unenumerated rights that Lash and Barnett

34. Id.
35. Id.
Barnett's approach more unambiguously focuses on the broad public understanding. But this only makes the problems he faces even more daunting. As Barnett himself acknowledges, we cannot establish the public meaning of the Ninth Amendment by consulting eighteenth-century dictionaries in the way that we could establish the meaning of, say, "militia" or "commerce." The Ninth Amendment embodies a complex idea, not an object or a practice that made its way into everyday speech. The concept that the enumeration of rights should not deny or disparage rights retained by the people therefore does not have a "public meaning" in anything like the usual sense of this term.

Barnett meets this difficulty by focusing on the purpose for which the phrase was used, rather than on the public meaning of the individual words. At this point, however, Barnett runs into his own trenchant critique of original-intent originalism. As Barnett himself has pointed out, no one's intentions were enacted into law. The "law" consists of the specific words of the Ninth Amendment, rather than the private purposes of the people who voted for it.

Moreover, Barnett faces serious difficulties in implementing his approach. Recall that for Barnett the relevant inquiry is the purpose of the general public, or, at least, the informed public, rather than that of the ratifiers. But even if we focus on the small segment of the public that was reasonably well informed, it is far from clear how many of these people understood a specific purpose that the Ninth Amendment was designed to accomplish. To the extent that people did have views about the Amendment's purpose, they almost certainly had different and contradictory views. As we have already seen, the language of the Amendment is opaque at best, and modern interpreters have been unable to settle on a single meaning. It is therefore extremely unlikely that contemporary observers were in agreement. Since virtually none of these people left a historical record of their thinking, how could we possibly determine what the majority view was?

Barnett meets this problem by doing the very thing he claims to oppose—putting heavy weight on the often decidedly nonpublic meaning that drafters of the Amendment attached to it. He focuses in particular on James Madison. Barnett rummages through Madison's private correspondence and

37. These criticisms are hardly original with me. They are the staples of what has become a widely accepted critique of original intent methodology. See, e.g., Paul Brest, The Misperceived Quest for the Original Understanding, 60 B.U. L. Rev. 204, 214–15 (1980).
39. See id.
40. See BARNETT, RESTORING THE LOST CONSTITUTION, supra note 9, at 103. ("We rely on the public or objective meaning of . . . contractual terms because this is the meaning to which the parties have committed themselves. This, not any unexpressed intentions, is the meaning they wish to be preserved or 'locked in' in case of future disputes. The same is true of constitutions.").
41. See id.
42. Barnett, It Means What It Says, supra note 2, at 34.
even the notes Madison wrote to himself\(^43\) in order to uncover his intentions. Barnett justifies this emphasis on the ground that even if Madison’s private intent is irrelevant, his understanding of the purpose of the Amendment provides some evidence of how the Amendment was generally understood.\(^44\) But once we abandon the position that the intention of the Framers is entitled to special respect, the private musings of a single person are of very little probative value. This is especially so because as we shall see, Madison faced a particular political problem and developed an idiosyncratic, if brilliant, solution.\(^45\) There is no reason to believe that his intentions had anything to do with the broader aims of the ratifiers or with how the general public understood those aims.

I am not a defender, of originalism, so it is not my burden to meet these challenges to originalist methodology. Moreover, since I oppose originalism generally, I need not choose between its various versions. In my originalist account that follows, I therefore do not distinguish sharply between the Lash and Barnett views, and I do not claim, as some supporters of originalism do, that my analysis produces a definitive answer. My argument is much more modest—that originalist scholars have overlooked a highly plausible meaning for the Amendment and that this account makes at least as much sense as rival accounts. If at least this much is true, then the meaning of the Ninth Amendment is unsettled, and, as we shall see, this unsettlement has the potential to destabilize the rest of the Constitution. Moreover, and more significantly, even if my interpretation of the Ninth Amendment is completely wrongheaded—indeed, even if the Ninth Amendment had never been written—my interpretation of the Amendment nonetheless identifies a problem for which standard constitutional theory has no answer.

C. The Federalism View

Kurt Lash and some others\(^46\) interpret the Amendment’s history as establishing that the Ninth Amendment was designed to prevent a broad interpretation of federal power that would deprive state citizens of the right to local self-government. On his reading, the “rights . . . retained by the people” were the rights of the people, collectively, to make their own laws at the state level.\(^47\) Thus, Lash concludes that the Ninth Amendment limits all federal powers, not just exercises of powers that infringe on rights.

Lash’s detailed and meticulous marshalling of the evidence for this proposition is too extensive to repeat in full. Lash bases much of his argument

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\(^43\) Id.
\(^44\) Id. at 37.
\(^45\) See infra Part I.E.
\(^46\) See, e.g., Caplan, History and Meaning, supra note 2; McAffee, Original Meaning, supra note 2.
\(^47\) See Lash, Inescapable Federalism, supra note 33, at 801.
upon proposed amendments from several of the state conventions that ratified the Constitution. He sees these proposed amendments as antecedents to the Ninth Amendment. Importantly, they spoke of limitations on federal power and prohibited broad interpretations of that power.  

In addition, Lash emphasizes Virginia's delay in ratifying the Bill of Rights, caused in part by concern that the Ninth Amendment no longer expressly referred to federal power. Hardin Burnley, a member of the Virginia House of Delegates, sent Madison a letter informing him of former Governor and future Attorney General Edmund Randolph's objections to the Ninth and Tenth Amendments:

His principal objection was pointed against the word retained in the [Ninth Amendment], and his argument if I understood it was applied in this manner, that as the rights declared in the [Bill of Rights sent to the states] were not all that a free people would require the exercise of; and that as there was no criterion by which it could be determined whether any other particular right was retained or not, it would be more safe, & more consistent with the spirit of the . . . amendments proposed by Virginia, that this reservation against constructive power, should operate rather as a provision against extending the powers of Congress by their own authority, than as a protection of rights reducible to no definitive certainty.  

Clearly worried about the delay, Madison wrote to Washington that:

The difficulty stated [against] the amendments is really unlucky, and the more to be regretted as it springs from a friend to the Constitution. It is still greater cause of regret, if the distinction be, as it appears to me, altogether fanciful. If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing whether the latter be secured by declaring that they shall not be abridged, or that the former not be extended.  

Lash interprets Randolph's concern as amounting to a fear that the Ninth Amendment inadequately addressed Virginia's desire to limit federal power to interfere with state self-governance. Madison's response, in turn, made clear that he viewed the preservation of rights and deprivation of power as

48. See id. at 821–23.
49. See Lash, Lost Original Meaning, supra note 2, at 331.
51. Letter from James Madison to George Washington, in 5 Documentary History, supra note 26, at 221–22. Although Madison referred to Randolph as a "friend to the Constitution," Randolph had refused to sign the original draft in Philadelphia. He objected in part to the vagueness of the power granted to Congress and in part to the absence of explicit protection for individual rights. He ultimately decided to support the Constitution at the Virginia state convention, but to seek immediate amendments. See Richard Labunski, James Madison and the Struggle for the Bill of Rights 7–8, 37 (2006) [hereinafter Labunski, Madison and the Struggle].
amounting to the same thing. Madison arguably made the same response publicly several months later when he gave a speech opposing legislation that would have established the Bank of the United States. Madison argued that the legislation was beyond Congress's powers and therefore violated the Ninth Amendment. As Madison then characterized the Ninth Amendment, it "guard[ed] against a latitude of interpretation." Only after this speech did the Virginia legislature ratify the Ninth Amendment. From all this, Lash infers that the Ninth Amendment is about federal powers, not individual rights.

What are we to make of Lash's argument? He no doubt identifies an important truth: because the Bill of Rights applied only to the federal government, it effectively left the areas it covered open to state regulation. In this sense, the entire Bill of Rights amounted to a limitation on federal power and, to that extent, guaranteed a right of state self-governance. The point is most obvious with respect to the Establishment Clause, which was apparently designed to protect state establishments from federal interference. But the point is also applicable more generally. For example, because the Free Speech Clause limited only federal power, it did not protect freedom of speech so much as the freedom of states to choose whether to regulate speech without federal interference.

Many Americans at the time of the founding were content with this arrangement because they saw state governments as a protector of, rather than a threat to, individual liberty. Only with the experience of secession and reconstruction, with the post Civil War constitutional amendments and the incorporation of the Bill of Rights, did people come to see the federal Constitution as a significant protection against state encroachment on individual rights.

But although Lash is surely correct about this point, the point also diminishes the significance of many of the contemporary comments on the Ninth Amendment upon which he relies. It would have been natural for members of the founding generation to refer to the Ninth Amendment—indeed to refer to the entire Bill of Rights—as protecting state power. In the absence of incorporation of the Bill of Rights against the states, this was the effect of any rights-protecting provision. It does not follow, though, that the Ninth Amendment was not a rights-protecting provision. Although its scope was limited to the federal government, its intention and effect were to protect individual rights within that scope. The framing generation trusted the states to protect individual rights, but that trust was in no way inconsistent with concern about federal incursions on these rights.

52. See Lash, Inescapable Federalism, supra note 33, at 838.
53. 2 ANNALS OF CONGRESS 1951 (Joseph Gales and William Seaton eds., 1791).
54. See Lash, Lost Original Meaning, supra note 2, at 394.
Lash faces a daunting task in explaining away the considerable evidence that the Ninth Amendment addresses only individual rights and not federal power more generally. This evidence begins with the language of the Amendment. It would have been easy enough to draft a provision that would have prevented broad interpretations of federal power outside the context of individual rights. For example, the Framers might simply have said that the powers granted to Congress shall not be broadly construed. Indeed, the House considered and rejected a proposal close to this. Representative Thomas Tucker of South Carolina moved to change the Tenth Amendment’s language so as to deprive the federal government of “powers not *expressly* delegated by this constitution.” Like the Ninth Amendment, this language embodies a rule of construction. But unlike the Ninth Amendment, that rule concerns powers rather than rights. Tucker’s change would have barred the same broad interpretations that, Lash insists, the Ninth Amendment was created to prevent. Importantly, however, Tucker’s proposal was defeated.

In contrast to Tucker’s proposal, the words of the Ninth Amendment neither limit Congress’s powers to those expressly delegated nor say that the powers should be narrowly construed. Instead, the Amendment seems to be directed at a narrower evil: the inference of a denial or disparagement of unenumerated rights *from the enumeration of constitutional rights*. The constitutional rights to which the Amendment refers include, most prominently, the Bill of Rights protections to which the Ninth Amendment was appended. To be sure, in a world without incorporation, the rights referred to in the Ninth Amendment, like the enumerated rights in the Bill of Rights, were in some sense no more than limits on federal power. But the important point is that if the Framers meant to preclude broad interpretations of federal power more generally, they would not have linked the Ninth Amendment to the specification of rights. Instead, they would have used language explicitly limiting federal power. The text of the Ninth Amendment prohibits the disparagement of “other[]” rights—a disparagement that was a possible, but incorrect, inference from the specification of named rights. A broad interpretation of federal powers that did not impinge on individual rights would not have implicated this evil.

The evolution of the Ninth Amendment’s language strongly supports this point. As initially drafted, the Amendment spoke to both the diminishment of rights and the enlargement of powers. By the time the amendment emerged from the House Committee, the enlargement of powers language had been removed and all that remained was a prohibition against the diminishment of

56. *1 Annals of Congress*, *supra* note 18, at 790 (emphasis added).
57. *See id.* Madison opposed the amendment on the ground that “it was impossible to confine a Government to the exercise of express powers; there must necessarily be admitted power by implication, unless the [C]onstitution descended to recount every minutia.” *Id.*
It seems strange, to say the least, that the Framers would have deliberately eliminated the “powers” language and included the “rights” language if the Amendment were directed at powers in addition to rights. Madison’s close involvement with the drafting of the Ninth Amendment helps explain why the Amendment that ultimately emerged focused on rights rather than powers. At least at this stage of his career, Madison was a strong nationalist. Despite his central role at the constitutional convention, he considered it a failure because Congress was not given the power to veto any state statute. When Representative Tucker, as noted above, tried to change the Tenth Amendment so as to limit Congress’s powers to those expressly delegated, Madison firmly and successfully objected on the ground that “it was impossible to confine a Government to the exercise of express powers.”

But although Madison was wary of efforts to limit federal power, he was deeply concerned about minority rights, even when they were infringed by the states. For example, if Madison had had his way, state governments would have been prohibited from violating the equal rights of conscience, the freedom of the press, and the trial by jury in criminal cases. Indeed, Madison embraced federal power and wanted to limit state power precisely because he favored minority rights. As he famously argued in Federalist 10, a small republic was vulnerable to factions that might run roughshod over individual rights, whereas in a large republic “you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens.”

It is hardly surprising, then, that Madison would favor a Ninth Amendment that focused on the enlargement of individual rights rather than on the restriction of federal power. Moreover, Madison’s authorship of the Amendment places the proposed state amendments, on which Lash relies, in a

58. See supra notes 24–27 and accompanying text.
59. Lash insists that the “powers” language was removed because it was thought to be redundant with the rest of the Ninth Amendment. See Lash, Lost Original Meaning, supra note 2, at 369. This explanation seems quite improbable given the fact that the rest of the Ninth Amendment spoke of rights, rather than powers. The more probable explanation, therefore, is that it was thought to overlap with the power-restricting provisions in the Tenth Amendment. On Lash’s claim that Madison himself thought that the Ninth Amendment restricted powers, see infra text accompanying notes 69–70.
61. See supra note 57.
62. During the debate over ratification of the Constitution, Madison, in a letter to Jefferson, sharply distinguished between friends of the Constitution, who “wish [for new amendments] to be carried no farther than to supply additional guards for liberty” and opponents who would “[abridge] the sum of power transferred from the States to the general Government.” 11 The Papers of James Madison 382–83 (Robert A. Rutland et al. eds., 1984).
63. For Madison’s draft language instantiating these prohibitions, see The Roots of the Bill of Rights 1027 (Bernard Schwartz ed., 1980).
64. The Federalist No. 10, at 83 (James Madison) (E. H. Scott ed., 1898).
very different light. These amendments were, indeed, concerned primarily with federal power. But the state amendments, at least in their strong form, were not the ones that Madison introduced. Instead, he championed, as his personal project, the Ninth Amendment, which no state had proposed.

As Lash reports, members of the Virginia legislature were understandably upset when they saw what had happened to their proposals. They had asked their representative to write an amendment that dealt with federal power, but they got instead an amendment that spoke to individual rights. It is hard to see how this disappointment supports Lash’s view that the Amendment was, in fact, about federal power.

Madison’s letter to Washington in response to the Virginia difficulties is another matter. Barnett’s argument to the contrary notwithstanding, it does seem to support the view that Madison thought rights and powers bore a reciprocal relationship. If this were true, then the Ninth Amendment’s reference to “rights” would implicitly include a reference to a broader limitation on federal powers, and not merely a reference to individual freedoms.

Similarly, Madison’s Bank speech seems to support Lash’s position. Perhaps, as Barnett claims, Madison was worried that the Bank would violate some sort of individual right against monopoly, but the more natural reading of his speech is that he believed the Ninth Amendment forbade broad interpretations of federal power whether or not those exercises interfered with individual rights.

65. See Rutland, supra note 10, at 194–95 ("'Amendments' to Madison meant a bill of rights. To [antifederalists] Clinton and Henry the word 'amendments' also connoted a weakening of the federal system in favor of the states.").

66. See Lash, Lost Original Meaning, supra note 2, at 331.

67. Consider, for example, a letter from William Grayson, the antifederalist Senator from Virginia, to Patrick Henry, the leading antifederalist in Virginia, written after Madison had introduced his packet of amendments. Grayson complained that it was “out of [his] power to hold out to you any flattering expectations on the score of amendments.” His concern was that the House was prepared to sacrifice changes in the power of the federal government in order to achieve measures that would “affect personal liberty alone.” 16 Documentary History of the First Federal Congress: 1789–1791, at 759 (Charlene Bangs Bickford et al. eds., 1992). Henry, in turn, complained of the “impediments [that are] cast in the way of those who wish to retrench the exorbitancy of power granted away by the constitution from the people.” Letter from Patrick Henry to Richard Henry Lee (Aug. 28, 1789), in 3 Patrick Henry: Life, Correspondence and Speeches 398 (William Wirt Henry ed., 1891). When Grayson and Richard Henry Lee, Virginia’s other Senator, transmitted the amendments to the General Assembly, they wrote that the Amendments were “far short of the wishes of our Country” and that they had been unsuccessful in bringing[ing] to view the Amendments Proposed by our Convention and approved by the Legislature.” 5 The Roots of the Bill of Rights 1186 (Bernard Schwartz ed., 1980).

68. Barnett argues that the letter can be read as making clear that the Ninth Amendment was designed to achieve a single end—the securing of rights—but that there were two means to this end: an express declaration of rights and a limitation on federal powers. He reads Madison as saying that the two means to the end amount to the same thing. Barnett, It Means What It Says, supra note 2, at 54.

69. See supra note 53 and accompanying text.

It is not clear how much weight we should attach to these statements. To the extent we are concerned with public meaning, the reactions to the Ninth Amendment of Edmund Randolph, reported in the Burnley letter\textsuperscript{71} and of various antifederalists\textsuperscript{72} seem more probative. They reflected widespread and authentic anger and disappointment that the Amendment dealt with rights rather than powers. In contrast, Madison's letter to Washington came at a time when Virginia's ratification of the Amendment was in doubt precisely because of an understanding that it did not restrict federal powers. It would have been natural for Madison to have minimized the difference between the amendment he wrote and the amendment members of the Virginia legislature favored. Similarly, Madison's bank speech was designed to achieve a particular purpose. It is certainly not unheard of for an advocate in Madison's position to advance an argument (for example, that the Ninth Amendment broadly limited federal powers) to achieve his goals, even if the advocate might himself reject the argument in another context.

The key point, however, is this: at most, Lash's argument establishes that Madison and others thought the Ninth Amendment limited federal powers even when those powers did not run up against individual rights. There is nothing in his argument suggesting those powers were somehow unlimited when they did run up against rights. It would seem, then, that Lash's position does not really contradict the individual rights view; rather it subsumes and broadens it. Since Barnett, in turn, thinks the Ninth Amendment was also designed to protect the values of federalism, it is not clear what the difference between them amounts to. Both views seem to accept what the unsettlement view denies—that the Ninth Amendment was meant to settle the status of unenumerated individual rights. As the next Section demonstrates, however, this view is difficult to reconcile with both the text and the legislative history of the Amendment.

**D. The Individual Rights View**

There is, to be sure, very strong evidence that the "rights" mentioned in the Ninth Amendment included individual rights. There is much less evidence, however, that the Framers meant to claim that these rights existed or, if they existed, that they were constitutionally protected.

Barnett's position, like Lash's, overlooks the Framers' ability to provide direct constitutional protection for these rights if they wanted to do so. Indeed, we do not have to speculate on the language they might have used to achieve this goal. Many state constitutions at that time had express declarations of natural rights. For example, the Pennsylvania constitution provided that "all men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and

\textsuperscript{71} See supra note 50.

\textsuperscript{72} See supra note 67.
liberty, of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness."\textsuperscript{73}

Similarly, when states submitted proposed amendments to the new Constitution, some of them suggested natural rights provisions. A proposed amendment from North Carolina was typical: "there are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity, among which are the enjoyment of life, and liberty, with the means of acquiring, possession and protecting property, and pursuing and obtaining happiness and safety."\textsuperscript{74}

We have already seen that Madison and Sherman also proposed natural-rights amendments, and that a similar provision was proposed in the Senate.\textsuperscript{75} Yet Congress adopted none of the state provisions, and the Madison, Sherman, and Senate proposals were all defeated. Nor is that the end of the matter. Madison’s initial draft of the Ninth Amendment praised the “just importance” of unenumerated rights.\textsuperscript{76} Yet when the Amendment emerged from the House committee, even this indirect endorsement of natural rights had been removed.

To summarize, then: on five separate occasions, Congress was presented with provisions that would have expressly accomplished what Barnett claims the Ninth Amendment achieved by implication. It failed to adopt any of these measures. Remarkably, to my knowledge, no commentator on the Ninth Amendment has emphasized this fact.

Of course, sometimes language is left out of a document to avoid redundancy. If the Ninth Amendment clearly mandated protection for natural rights, this might provide an explanation for the rejection of other natural-rights language. But at very best, the Ninth Amendment protects natural rights by implication. Those who favor the individual rights model bear the burden of explaining why Congress would pass a measure that, at most, indirectly did precisely what it repeatedly refused to do directly.

Moreover, a careful examination of the text of the Ninth Amendment makes clear that it does not even protect natural rights indirectly.\textsuperscript{77} Consider first whether the Amendment makes natural rights a part of the Constitution. True, the word “rights” as used in the Amendment was clearly intended to refer to constitutional rights. They are the rights “enumerated in the Constitution.” If we had no other contextual clues, it would be fair to assume that when the word

\textsuperscript{73} Quoted in \textit{The Complete Bill of Rights}, \textit{supra} note 16, at 639.

\textsuperscript{74} \textit{4 The Debates in the Several State Conventions}, \textit{supra} note 14, at 243.

\textsuperscript{75} \textit{See supra} notes 24–27 and accompanying text.

\textsuperscript{76} \textit{See supra} notes 21 & 24–27.

\textsuperscript{77} It is deeply ironic that some defenders of the individual rights view emphasize careful reading of the text. \textit{See, e.g.}, \textsc{Daniel A. Farber}, \textsc{Retained by the People: The “Silent” Ninth Amendment and the Constitutional Rights Americans Don’t Know They Have} 4 (2007) (emphasizing the plain meaning of the Ninth Amendment and insisting that “[a]ll we have to do is look fully at what [the Amendment] says”). As explained below, the “plain meaning” of the text neither embraces nor implies the existence of unenumerated rights.
“others” is used later in the same sentence, it was intended to refer to other rights and that these rights, too, would be of constitutional stature.

But here there are very strong contextual clues to the contrary. The second category of rights the Amendment refers to are “others”—that is to say, other than the rights enumerated in the Constitution. Thus, the Amendment tells us how to interpret the rights that are part of the Constitution. It says that these constitutional rights should not be construed to deny or disparage unenumerated rights. But the unenumerated rights nonetheless remain “unenumerated.” They are other than—different from—constitutional rights.

In his recent scholarship, Barnett himself has retreated from the position that the Ninth Amendment makes the rights constitutional. Rather, he now claims that the Amendment implies the existence of such rights. This concession papers over an important ambiguity. If Barnett really means to say that the implied rights are not “constitutional,” then on standard, modern accounts of constitutional interpretation, such rights have no legal force.

Indeed, Barnett himself is firmly identified with those who claim that we must look to the public meaning of constitutional text when deciding upon legal enforcement. On this approach, nontextual Ninth Amendment rights are on a par with, for example, a putative right to health care. There may indeed be such a right in the abstract sense, but at least on standard accounts, a court would exceed its authority if it enforced the right. Similarly, political actors who failed to enact health care legislation might violate rights in some sense, but they should not be subject to the criticism that they acted unconstitutionally.

But Barnett seems to think that Ninth Amendment rights are enforceable. Perhaps, then, he means to say that the rights are indeed constitutional, but that their constitutional status is only implied rather than directly mandated. It is, of course, possible for the Constitution to imply rights, just as it might imply powers. For example the Constitution, as currently interpreted, contains an implied congressional power to fund an air force, just


79. To be clear, my skepticism on this score is limited to claims that these rights have legal force on standard accounts. Those accounts assume that legal obligation is exhausted by the requirements of positive law. I offer a nonstandard account below. See infra note 108-110 and accompanying text.

80. I am assuming here that there is, in fact, not a constitutional right to health care. Of course, there may be such a constitutional right, and, if there is, legislators can be legitimately criticized for acting unconstitutionally if they fail to recognize it, even in circumstances where the right is not judicially enforced. I am simply making the obvious point that if a right is not constitutionally grounded, then those who ignore it cannot be criticized for acting unconstitutionally.

81. At one point, Barnett says that the evidence he offers is not “direct proof that [Ninth Amendment] rights . . . merit judicial protection.” Barnett, It Means What It Says, supra note 2, at 76. But two pages later, he claims that to provide less judicial protection for Ninth Amendment rights than for other rights “would be to ‘disparage’ if not to ‘deny’ them, in violation of the Ninth Amendment.” Id. at 78.
as it also contains an implied individual right to an abortion. There is, therefore, nothing anomalous about a court enforcing implied rights or about criticizing a legislator as acting unconstitutionally if she violates them.

But the text of the Ninth Amendment does not contain such an implication. An amendment that recognized the "just importance" of such rights would imply that these rights are constitutional, but, although Madison initially proposed this language, this is not the Amendment that Congress enacted and that the states ratified. The actual Amendment says only that the enumeration of rights should not be read as denying or disparaging other rights, not that these other rights necessarily exist. At most, the Amendment implies that these rights might exist or that some people might think that they exist, not that they actually exist.

A supporter of the implication theory would no doubt rely on the seeming clarity of the words "rights . . . retained by the people." After all, the Amendment specifically refers to these rights, rather than to "rights that might or might not be retained by the people"—language we might expect to see if the Framers meant to keep the question open. But this focus on the words "retained by the people" distracts attention from what the Amendment actually prohibits. The Amendment refers specifically to retained rights, but it says only that these rights should not be denied or disparaged on the ground of the enumeration of other rights. It does not say that it is wrong to deny or disparage the rights on some other ground—for example, on the ground that natural rights are simply "nonsense on stilts." Thus, one might easily accept the proposition that enumeration of some rights does nothing to change the status of putative unenumerated rights, but still insist that these rights do not exist or should not be constitutionally enforced.

We can see this point if we inject similar language into a modern setting. Suppose, for example, that there were a dispute, under existing labor law, about whether undocumented workers have a right to form labor unions. Suppose further that Congress is considering a law that expressly grants unionization rights to other groups—say, managerial employees or graduate teaching fellows. Members of Congress who favored this legislation but did not want the law to be construed so as to preclude the claim of undocumented workers might add a provision stating that "nothing in this legislation shall be construed to deny or disparage the right of undocumented workers to join unions." Opponents of unions for undocumented workers who nonetheless favored union rights for the other groups might vote for this legislation as part of a compromise because the provision would leave intact their position that undocumented workers had no union rights in the first place. If the legislation passed, it would hardly follow that Congress had mandated or even implied that undocumented workers had such rights. So, too, people who voted for the

82. See supra note 33 and accompanying text.
Ninth Amendment were not conceding that there were unenumerated rights. The Amendment means only that the existence *vel non* of such rights is not changed by the enumeration of other rights.

I do not mean to dispute that some or all of the Framers in fact believed that natural rights existed. The belief in natural rights was quite widespread at the time of the framing. But it is one thing to believe that such rights exist, and another to constitutionalize this belief. As discussed in the next Part, there are substantial reasons for thinking that Madison failed to assemble a supermajority for constitutional protection of natural rights.

**E. The Unsettlement View**

If the Ninth Amendment neither embodies nor implies the existence of either individual natural rights or federalism rights, then what does it do? Is the Amendment superfluous or meaningless? In fact, it is neither, but to understand its function and meaning, one must first understand the difficult and delicate political task that Madison faced. Although Madison, himself, was unquestionably a proponent of minority rights, the House was, at best, indifferent to his proposed bill of rights and, at worst, completely hostile. Many members thought that the country had more important business to attend to, and many others saw no reason to revisit the only recently ratified constitutional text.

For Madison and his allies, this opposition was no small matter. He and other federalists had made a commitment to consider a bill of rights. At the time the House debated his proposals, two states remained outside the Union, and other states plausibly threatened to convene a new constitutional convention if no action were taken. It was therefore urgent that Congress act

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83. See *supra* note 62 and accompanying text.

84. Many congressmen, including Jackson, Sherman, White, Vining, Goodhue, and Livermore, objected to discussing the Bill of Rights proposals until Congress passed a collections bill and established a judicial system. See 1 *ANNALS OF CONGRESS*, *supra* note 18, at 439–65; The American Republic: Primary Sources 446–51 (Bruce Frohnen ed., 2002).

85. Representatives Jackson, Sherman, and Gerry expressed this view. See 1 *ANNALS OF CONGRESS*, *supra* note 18, at 439–465.

86. While campaigning for his seat in Congress against James Monroe, Madison made a firm commitment that he would sponsor a bill of rights. Labunski, Madison and the Struggle, *supra* note 51, at 159. For the position of other Federalists during the ratification struggle, see Rutland, *supra* note 10, at 189 ("[A]doption of a federal bill of rights [was] conceded by all but the most hardened Federalists . . . ").

87. See *id.* at 203 (noting that North Carolina and Rhode Island having not yet ratified the Constitution affected debate about the Bill of Rights because "Congress was anxious to complete the ratification process").

88. At the Constitutional Convention itself, Edmund Randolph moved that there be a second convention, and no less a luminary than Benjamin Franklin seconded his motion. Labunski, Madison and the Struggle, *supra* note 51, at 11. On Madison's fears about a second convention, see *id.* at 52–53. Before Madison introduced his proposed amendments in the House, two representatives presented resolutions from New York and Virginia demanding a new convention. *Id.* at 190.
quickly.

In this environment, it was important to minimize opposition to the proposals. Madison repeatedly emphasized the necessity of avoiding anything that would provoke further controversy. For example, he wrote to his friend Edmund Pendleton that his proposed amendments were "restrained to points on which least difficulty was apprehended. Nothing of a controvertible nature ought to be hazarded by those who are sincere in wishing for the approbation of 2/3 of each House, and 3/4 of the State Legislatures." Similarly, he told his colleagues on the floor that "if we confine ourselves to an enumeration of simple, acknowledged principles, the ratification will meet with but little difficulty. Amendments of a doubtful nature will have a tendency to prejudice the whole system." 

Madison faced opposition from two sources. First, some members of Congress thought that a bill of rights was unnecessary or unduly constricting. For example, Representative James Jackson of Georgia argued that a bill of rights, "if not dangerous or improper, . . . is at least unnecessary. . . . What reason [is there] for the suspicions which are to be removed by this measure? Who are Congress, that such apprehensions should be entertained of them? Do we not belong to the mass of the people? Is there a single right that, if infringed, will not affect us and our connexions as much as any other person? . . . View for a moment the situation of Rhode Island, and say whether the people's rights are more safe under State Legislatures than under a Government of limited powers? Their liberty is changed to licentiousness.

Members of Congress were especially suspicious of measures that had an indefinite scope. John Vining of Delaware complained of the "uncertainty with which we must decide on questions of amendment, founded merely on speculative theory." Samuel Livermore of New Hampshire objected to the Eighth Amendment because "it seems to have no meaning in it. . . . What is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines? . . . [W]e ought not to be restrained from

89. Letter from James Madison to Edmund Pendleton (June 21, 1789), in 5 THE WRITINGS OF JAMES MADISON, COMPRISING His PUBLIC PAPERS AND His PRIVATE CORRESPONDENCE, INCLUDING His NUMEROUS LETTERS AND DOCUMENTS NOW FOR THE FIRST TIME PRINTED 405 (Gaillard Hunt ed., 1904).
90. 1 ANNALS OF CONGRESS, supra note 18, at 766; see also LABUNSKI, MADISON AND THE STRUGGLE, supra note 51, at 212 (letter to Samuel Johnston noting that Madison wanted to avoid "all . . . alternations as would either displease the adverse side, or endanger the success of the measure"); id. (letter to Thomas Jefferson stating that "everything . . . that might endanger the concurrence of two-thirds of each House and three-fourths of the States was studiously avoided").
91. See RUTLAND, supra note 10, at 206 (noting that Madison played two factions off against each other and that his task "called for political tight-rope walking").
92. 1 ANNALS OF CONG., supra note 18, at 459–60.
93. Id. at 447.
making necessary laws by any declaration of this kind." And Representative Jackson referred to the entire exercise of approving the amendments as "treading air."

Given this sort of opposition, it is not surprising that Madison and his colleagues backed away from provisions expressly protecting nebulous and unspecified natural rights. It was difficult enough to persuade two thirds of the House that the enactment of relatively specific rights did not involve "treading air." The effort to constitutionalize an amorphous set of "natural rights of man" must have seemed truly daunting, especially given the risk that the entire enterprise might unravel.

But Madison also faced opposition from another quarter. Some members of Congress, probably including Madison himself, favored constitutional protection for natural rights. One might think that these members, even with their disappointment in not getting specific protection for these rights, would still support the rest of the package that at least provided protection for enumerated rights. But that disappointment might turn into opposition if they thought that the enactment of some rights would actually worsen matters by prejudicing the protection of others. Hence, Madison's worry that

by enumerating particular exceptions to the grant of power, [a bill of rights] 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.

Confronted by resistance on both sides, Madison did what great politicians always do: he kicked the can down the road. The Ninth Amendment, in effect, leaves the argument about natural rights where it was before the Bill of Rights was adopted. It tells proponents of natural rights that a vote for the Bill of Rights would not jeopardize their position. Passage of the measure would not "disparage" or "deny" the existence of such rights. But opponents of constitutionalizing nebulous rights could also be satisfied. They had successfully beaten back efforts to include any express guarantee of the rights. From their perspective, the Ninth Amendment did no more than leave natural rights supporters with an argument that they would have had even if there had been no Bill of Rights—viz., that there were enforceable rights that existed outside the constitutional text.

The upshot, then, is that both Lash and Barnett, and, indeed, all other scholars who have studied the Ninth Amendment, have been misled by

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94.  Id. at 782–83.
95.  Id. at 442.
96.  Id. at 456.
focusing on the wrong question. Because they have tried to determine the content of the other rights to which the Ninth Amendment refers, they have neglected to ask whether the rights exist in the first place. Perhaps paradoxically, it turns out that the central purpose of the Amendment was to avoid answering this question. The Framers were able to satisfy both sides and secure passage of a set of enumerated rights by putting off to another day resolution of the contentious question of unenumerated rights. That decision, in turn, leaves it up to us, today, to decide how to resolve the question that they deliberately left unresolved.

II.

THE UNSETTLED NINTH AMENDMENT

Figuring out how to resolve the question of unenumerated rights is well beyond the scope of this Essay. The existence of the Ninth Amendment nonetheless has some important implications for the project of constitutional interpretation—implications that I explore in this Part. Oddly, the implications hold true whether or not the understanding of the Ninth Amendment that I have offered is correct.

A. What If the Argument Is Correct?

If my interpretation of the Ninth Amendment is correct, then it is up to us rather than the Framers to decide whether there are unenumerated rights and, if there are such rights, whether they should be judicially enforced. Although the Ninth Amendment does not tell us what our decision should be, it emphasizes that constitutional text provides no excuse for avoiding a decision.

My position should not, therefore, be confused with Robert Bork's famous "inkblot" theory. In testimony before the Senate Judiciary Committee, Bork analogized the Amendment to a provision hidden under an inkblot. He argued that with no way to know what the provision said, judges should simply ignore it.

98. The only statement in the literature that I have found that comes close to this position is a cryptic remark in Justice Scalia's dissenting opinion in *Troxel v. Granville*, 530 U.S. 57 (2000). Scalia writes that "the Constitution's refusal to 'deny or disparage' other rights is far removed from affirming any one of them." *Id.* at 91 (Scalia, J., dissenting). This is correct as far as it goes. It does not acknowledge, however, that the Ninth Amendment also fails to *disaffirm* these rights. The Amendment would have no purpose at all if it did not leave open the possibility that such rights existed and could be enforced.

99. See *Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 249 (1987) (testimony of Robert Bork) ("[I]f you had an amendment that says 'Congress shall make no' and then there is an ink blot and you cannot read the rest of it and that is the only copy you have, I do not think the court can make up what might be under the ink blot if you cannot read it."). Judge Bork has made a similar argument, and used the same analogy, with respect to the Privileges or Immunities Clause of the Fourteenth Amendment. See *Robert H. Bork, The Tempting of America: The Political Seduction of the Law* 166 (1990).
Bork is correct when he argues that the Ninth Amendment tells us nothing about which natural rights, if any, exist and should be enforced, but he is incorrect when he claims that the Amendment can therefore be ignored. Suppose that we take Bork literally, and imagine that a part of the Constitution was in fact covered by an inkblot. True, we would then not know what the provision said, but we would know one thing that it certainly did not say: it did not deny or disparage unenumerated rights. The Ninth Amendment tells us that ambiguities in the constitutional text are simply no excuse for the failure to come to grips with the arguments of supporters of these rights.

The Amendment therefore presents us with a paradox that, years ago, Jefferson Powell explored on the interpretive level. During the heyday of original-intent originalism, Powell argued that this brand of originalism was contradictory because it was not the original intent of the Framers to have their words read according to their original intent. The Ninth Amendment presents a similar paradox on the substantive level. On standard theories of constitutional interpretation, judges and others are supposed to stay within the four corners of the constitutional text when deciding or opining on a constitutional issue. But the text of the Ninth Amendment prohibits us from staying within the four corners of the text.

In this sense the Ninth Amendment is crucially different from other provisions in the Constitution that are open ended. For example, the Fourth Amendment requires that searches and seizures should be “reasonable.” Without a constitutional definition of “reasonableness,” the Amendment has meaning only if one goes beyond the bare words of the text. Still, the open texture of the Fourth Amendment does not make text irrelevant. Depending on the version of textualism one adheres to, one might look to constitutional structure or to other provisions of text to give the reasonableness requirement meaning. One might also claim that the textual term “reasonable” means what an average American living in the latter part of the eighteenth century thought it meant, or what the people who wrote the language intended it to mean, or


101. For example, Senator Jeff Sessions, the ranking minority member of the Senate Judiciary Committee, recently stated that judges should confine themselves to “what the Founders meant and the plain meaning of its words.” JEFF SESSIONS: U.S. SENATOR FOR ALABAMA, Sessions Speaks on Judge Thomas Vanaskie, (Apr. 21, 2010), http://sessions.senate.gov/public/index.cfm?FuseAction=LegislativeResources.FloorStatements&ContentRecord_id=3f76f78fe136-35a1-076d-2b5f19f43504. Sessions’s website boasts that he “has worked to promptly confirm principled, non-activist judges who adhere to the rule of law, prompting the Conservative Leaders Alliance to describe him as ‘a leading advocate of confirming federal judges who follow the law and do not legislate legislation from the bench.’” JEFF SESSIONS: U.S. SENATOR FOR ALABAMA, Judiciary: Ensuring Courts are Fair, and Judges are Neutral Umpires of the Law, http://sessions.senate.gov/public/index.cfm?FuseAction=IssueStatements.View&Issue_id=eca7068-9f22-0909-73d6-ca29cc5d2533. During Justice Sonia Sotomayor’s Supreme Court confirmation hearings, he argued “forcefully that judges should rule on the merits of the case and resist the temptation to set policy from the bench.” Id.
what people today think it means, or even what alternative meaning comports
with the best moral theory. To be sure, the text may provide the interpreter with
discretion, but the text also bounds discretion.

The Ninth Amendment is different because it seems to discredit text. It
tells us that the status of putative unenumerated rights should not be determined
by reference to text, whether the meaning of that text is derived from structure,
intertextuality, ordinary usage, original intent, or moral philosophy. The Ninth
Amendment therefore forces textualism to swallow its own tail. Although it
neither embraces nor rejects natural rights, the text of the Amendment provides
that text should not be read as settling the controversy over natural rights. A
faithful textualist must therefore look outside the text to decide whether we
should recognize natural rights and, if so, what those rights should be.

This paradox, in turn, goes a long way toward discrediting the various
arguments for textualism. These arguments are, in any event, always vulnerable
because they necessarily rest on nontextualist premises. Unless we are to accept
textualism as no more than an article of faith, textualists will always have to
advance some argument outside the text and its original meaning for why we
should be bound by the text and its original meaning. For example, textualists
sometimes claim that the text, taken as a whole, should be respected because it
promotes freedom and prosperity, or because it constrains the discretion of
judges, or because it provides a highly useful focal point that avoids needless
conflict. These arguments may be right or wrong, but a judge who accepted
them would be relying upon contestable assertions, both empirical and
normative, that are not grounded in the text—the very thing that textualists are
not supposed to do.

If this were the only problem with textualism, perhaps we could live with
the difficulty. After all, every system of thought that purports to be
exclusionary depends on the truth of the propositions that the system purports
to exclude. For example, as Richard Brandt has taught us, even a believer in
God’s law must provide an argument for why it is that God’s law should be
obeyed. That argument must rest on something other than the law of God.

But the Ninth Amendment creates a problem for textualists different from
that faced by theists: the Constitution actually denies its own truth. The Ninth
Amendment tells us that we must, as a matter of constitutional obligation,
consider the validity of rights claims that are not grounded in the Constitution.

102. See, e.g., Barnett, Restoring the Lost Constitution, supra note 9, at 48–51.
103. See, e.g., Antonin Scalia, A Matter of Interpretation: Federal Courts and
the Law 44 (1997); Aileen Kavanagh, Original Intention, Enacted Text, and
104. See, e.g., David A. Strauss, Common Law, Common Ground, and Jefferson’s
105. See Richard B. Brandt, Ethical Theory: The Problems of Normative and
Critical Ethics 61–82 (1959); Richard B. Brandt, The Morality and Rationality of Suicide, in A
Because the rights are not grounded in the Constitution, it follows that their validity will necessarily depend on arguments that are also outside the Constitution. In this way, the text denies its own authority.

Importantly, this problem is different from and deeper than the problem created when the Constitution incorporates another body of law by reference. For example, on some readings, the text of the Declare War Clause incorporates nontextual standards drawn from the international law of war.106 Similarly, positivists like Jules Coleman have recognized that while the moral status of an enactment is irrelevant to its status as law, a law like the Constitution might nonetheless incorporate external moral standards.107 Provisions like these pose no problem for textualism because it is the authority of the text itself that establishes the binding authority of norms that are outside the text. The Ninth Amendment would be similar if it had consisted of one of the natural rights measures that Congress considered but defeated. Such a provision would amount to a textual directive to consider extratextual sources. The actual Ninth Amendment, in contrast, deprives the text of authority by telling us not to consult the text when deciding on the legal status of extratextual norms.

For just this reason, the conventional view that rights standing outside the Constitution have no legal status108 does not hold in the Ninth Amendment context. As noted above, we often use rights language to describe claims that are extra-constitutional, like the putative right to health care. In most contexts, use of this language does not imply that judges should enforce the right. Justice Scalia has suggested that the Ninth Amendment should be understood in the same way.109 But this view runs up against the Ninth Amendment’s explicit command that we not rely upon text to determine the status of these extra-constitutional rights. If these rights exist, then it would surely “disparage” them to deny them judicial enforcement, and whatever else we do, we cannot rely on text to ground such disparagement.

Of course, there may, nonetheless, be strong non-textual reasons to disparage these rights by leaving them unenforced. Nothing that I have said defeats arguments for respecting the text so long as the arguments are not themselves grounded in text. Without relying on the authority of text, one might still insist that text provides a necessary focal point, or is an essential

108. See supra note 79.
109. “[T]he Constitution’s refusal to ‘deny or disparage’ other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges’ list against laws duly enacted by the people.” Troxel v. Granville, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting).
constraint on the power of judges, or an important check on untrammeled political conflict. The many historical cases where text has been ignored without serious adverse consequences throw some doubt on these claims, but they surely remain available. For present purposes, it is enough to insist that the mere existence of the text does not take the question of obedience off the table.

Indeed, if my interpretation of the Ninth Amendment is correct, then the requirement of obedience actually faces in the opposite direction. On my interpretation, the people who are willing to go outside the text are the ones who are obeying constitutional commands; it is the textualists who are flouting the text.

For example, if this reading of the Ninth Amendment is correct, then Justice White had it backwards when he argued in *Bowers v. Hardwick* that "[t]he Court . . . comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language . . . of the Constitution." It is the *Bowers* Court itself that acted illegitimately when it did just what the Ninth Amendment prohibits by inferring the absence of nontexual rights from constitutional text.

110. My current favorite example is the flagrant and longstanding violation of Article I, Section 3, Clause 1 and Section 1 of the Eighteenth Amendment concerning the terms of Senators. Both provisions require that Senators shall have six-year terms. To be sure, Article I, Section 3, Clause 2 contains an exception to this general rule for the first group of Senators, who were to be divided into three groups to serve two, four, and six years respectively. But the Framers made no exception for Senators chosen after the first election. Yet ever since Vermont joined the United States as the first new state in 1791, the provision has been ignored. One new Senator from a new state has always been assigned a term of less than six years to provide for staggered senatorial elections. For summaries, see *Classification of Senators*, in George P. Furber, *Precedents Relating to the Privileges of the Senate of the United States*, S. Doc No. 52-68, at 191–203 (2d Sess. 1893); Henry H. Gilfry, *Proceedings of the Senate Relating to the Classification of the United States Senators*, S. Doc No. 62-334 (2d Sess. 1912); Floyd M. Riddick, *The Classification of United States Senators*, S. Doc. No. 89-103 (2d Sess. 1966).

So far as I can determine, this procedure has been questioned only once. During the debate about selection of Senators from the new state of Alaska, Senator Butler complained that the "Constitution of the United States provides . . . that the Senate . . . shall be composed of Senators chosen for 6 years. Any attempt to elect a Senator for what is called a short term is clearly in direct violation of the Constitution." 104 Cong. Rec. 12317 (1958) (statement of Sen. Butler). But Butler's primary concern seems to have been that Alaska, rather than the U.S. Senate, was attempting to determine the terms of Senators. See *id.* In any event, Senator Eastland quickly responded that the "rule [of classification] has been applied as long as there has been a United States," id. at 12319 (statement of Sen. Eastland), and the Senate proceeded to allocate Senate terms to Alaska's Senators in the traditional manner. See Riddick, supra, at 30. For all that appears, the country's peace and prosperity has not been put at risk by this egregious and, apparently, deliberate constitutional violation.


112. Of course, *Bowers* concerned the constitutionality of a state statute. I wish to bracket the question whether the Ninth Amendment is incorporated against the states by the Fourteenth Amendment. Although written in the context of a state statute, Justice White's argument made no distinction between state and federal law.
But if Justice White is wrong, then so too are his critics, or at least those critics who claim that the Ninth Amendment mandates gay rights.113 Although the Amendment means that we must come to grips with natural rights arguments, it does not follow that we must accept them. On the contrary, the Ninth Amendment leaves it up to us to decide whether the case for nontextual, natural rights has been made out. Although the text does not “deny” or “disparage” them, there are powerful nontextual arguments available to us today for why these rights should nonetheless be rejected. Of course, there are also powerful nontextual arguments available to us today for why these rights should be accepted. In other words, the Ninth Amendment leaves the status of these rights unsettled.

B. What If the Argument Is Wrong?

Suppose, though, that my interpretation of the Ninth Amendment is mistaken. As noted above, my skepticism about originalism leads me to make only very modest claims. I want to insist that there is some basis for my interpretation and that there is at least as much evidence supporting it as evidence that supports its rivals. I do not want to claim, however, that text and history provide definitive answers to this and other constitutional puzzles.

For someone who is convinced of these modest claims, the Ninth Amendment serves the same function that it would if my reading were unambiguously correct. Modern political actors would then confront a choice between interpretations and, in the absence of good evidence to support one claim over the other, would need some external standard. They would therefore have to make their own judgment about the appropriateness of using unenumerated natural rights to decide constitutional questions.

What if even my modest claims fail and readers, completely unconvinced by my account, believe that Lash, or Barnett, or some other scholar has it right? Even if my claims about the Ninth Amendment’s meaning are completely wrongheaded—indeed, even if there had never been a Ninth Amendment—some of what the Amendment asserts on my reading would still be true.

Suppose, first, that there had been no Ninth Amendment. A textualist would then be free to read the Constitution as denying or disparaging the existence of nontextual rights. We would therefore no longer face the paradox of a text that denies its own validity. But if a text cannot deny its own truth, neither can it establish its own authoritativeness. Even without a Ninth Amendment, believers in natural rights could claim that those rights trumped, or at least supplemented, the constitutional text. We do not have to speculate

113. See, e.g., Daniel A. Farber, Retained by the People: The “Silent” Ninth Amendment and the Constitutional Rights Americans Don’t Know They Have 131 (2007) (recognition of constitutional rights for gay people “is an important vindication of the notion of fundamental rights that underlies the Ninth Amendment”).
about this possibility. This is the very claim people made before the Ninth Amendment was written. As we have seen, Madison wrote the Ninth Amendment to avoid the inference, which he himself seems to have rejected, that a written constitution precluded the existence of nontextual rights. In 1789, with no Ninth Amendment on the books, others were free to accept the inference and to read the Constitution as denying or disparaging nontextual rights. Yet the defenders of these rights, including Madison himself, nonetheless vociferously insisted that they existed and should be enforced.

Justice Samuel Chase famously took the same position seven years after the Ninth Amendment was adopted. In *Calder v. Bull*, Chase confronted a claim that the Connecticut legislature had impaired vested rights. Because everyone assumed that the Ninth Amendment did not apply to the states, the enumeration of some rights in the Constitution might be read as denying and disparaging the rights claimed by the plaintiff. Chase nonetheless thought that these rights should be enforced because “[a]n act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact[,] cannot be considered a rightful exercise of legislative authority.” Chase therefore seems to have agreed with Madison that even without a Ninth Amendment, the enumeration of some rights did not preclude the enforcement of other, unenumerated rights.

If this was a claim that Madison and Chase could make in the eighteenth century, then it is also a claim that is available to us today. Perhaps the modern Constitution denies or disparages an important claim of justice, just as the Constitution without a Ninth Amendment was thought to deny or disparage unenumerated rights. For example, one might conclude that the Constitution, read in good faith, precludes Congress from providing voting rights to residents of the District of Columbia. As Madison and Chase remind us, this is not the end of the argument. There is always an antecedent question that must be asked before text can bind us: Why should I obey this?

The same question confronts us if my interpretation of the Ninth Amendment is wrong and Lash or Barnett is correct. On their reading, the Ninth Amendment establishes the existence of natural rights. But which rights? The case for any proposed natural right must still be made out, and the argument for it will necessarily be grounded in something other than constitutional text. Moreover, it is at least possible that none of the arguments will be successful, leaving us with a null set. If those who embrace natural rights can insist upon them in the absence of constitutional text—as Madison and his allies did before the enactment of the Bill of Rights—then those who deny them can also insist upon their position. Just as eighteenth century citizens read the Constitution against background assumptions about the appropriate

114. 3 U.S. (3 Dall.) 386 (1798).
115. *Id.* at 388.
spheres of federal and state government, so too can we employ our own background assumptions. On all accounts, including Barnett's and Lash's, the Ninth Amendment was written because its authors recognized that no text can capture all the concerns that we need to consider when we try to do justice. But this limitation on text also applies to the Ninth Amendment itself and would be present, and we would have to respond to it, no matter what the Ninth Amendment said.

The Eleventh Amendment, which also speaks about constitutional construction, and which is almost contemporaneous with the Ninth, provides a useful analogy. The Eleventh Amendment provides: “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.” By its terms, the Amendment applies only to suits in federal court between a state and noncitizens of that state. Despite this language, however, the Supreme Court has held that federal suits between states and their own citizens and federally mandated suits against states in state courts are also barred. The Court has conceded that this sovereign immunity “neither derives from, nor is limited by, the terms of the Eleventh Amendment.” Instead, the reason for the bar is a set of background assumptions about the nature of federal judicial power—assumptions that would exist whether or not there were an Eleventh Amendment. In other words, the construction of the Constitution, which the Eleventh Amendment commands, is available and applies in cases not covered by the Eleventh Amendment. So, too, it is open to some people to claim there are background assumptions about individual rights that would exist whether or not there were a Ninth Amendment.

CONCLUSION

The Ninth Amendment is a “constitutional jester” alright, but the joke has a punch line that is pretty serious. As James Fleming wrote, the Amendment is a Shakespearean jester who tells a truth that no one else dares utter. Properly understood, it tells us that constitutional obligation is a myth and that liberal constitutionalism can therefore never fully realize its central ambition of providing fixed rules of the road that avoid devastating social conflict.

116. U.S. CONST. amend XI.
119. Id. at 713.
120. JAMES E. FLEMING, SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY 33 (2006) (footnote omitted) ("[T]he Ninth Amendment indeed may play the role of constitutional jester, but it is the jester as truth-teller in Shakespearean drama. Like the fool in King Lear, who is free to speak the truth notwithstanding the king’s authority, the Ninth Amendment scoffs at any presumption of the sovereign’s omnipotence and omniscience in enumerating specific constitutional rights.")
It hardly follows that there are no fixed rules or that full-scale civil war is on the horizon. We can be fairly certain that President Obama will not soon shut down Fox News or declare that his term of office should extend to five years. For all of their bluster, Tea Party members and "birthers" are not about to take on the U.S. Marines. But these are sociological facts that relate to contingent distributions of power, not moral truths that flow inexorably from obligation to constitutional text.

Of course, sometimes moral myths influence sociological facts. Whether justified or not, felt obligation to constitutional text might contribute to stability. But the contribution, such as it is, rests on very vulnerable foundations. As the Ninth Amendment demonstrates, no text can fully succeed in eliminating subversive questions about the text's own completeness and correctness. It is a supreme irony that James Madison, who contributed more than anyone else to our constitutional text, understood this basic fact about his own creation. The very Amendment that he championed seems to deliberately rub our noses in questions that the text cannot resolve.

Today, the American people are far more risk-averse, more frightened of contestation, and more acquiescent before claims of authority than people in Madison's time, who were, after all, willing to mount a bloody revolution against an established government. So it is no wonder that the Ninth Amendment has become the Constitution's orphaned provision, that Judge Bork treats it as an inkblot, and that the most plausible interpretation of its language has been ignored. A true understanding of the Ninth Amendment dispels the rhetoric of false necessity that pervades modern constitutional thought. And we couldn't have that, could we?