



KURT LASH'S MAJORITARIAN DIFFICULTY
A RESPONSE TO A TEXTUAL-HISTORICAL
THEORY OF THE NINTH AMENDMENT

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Kurt Lash believes that, in addition to individual natural rights, the Ninth Amendment protects collective or majoritarian rights as well. In this essay I explain why his majoritarian vision is contrary to the antimajoritarianism of the man who devised the Ninth Amendment, James Madison, and those who wrote the Constitution. Not coincidentally, it is contrary to the individualism of the other amendments in the Bill of Rights, and to the public meaning of the Ninth Amendment as it was received during its ratification. It is also contrary to the individualist conception of popular sovereignty adopted in the text of the Constitution as interpreted by a four-to-one majority of the Supreme Court in its first major constitutional decision. And it is contrary to the individualist interpretation of the Ninth Amendment by the one source he cites who actually uses the word "collective": St. George Tucker. In sum, the collectivist interpretation of the phrase "others retained by the people" is anachronistic—a projection of contemporary majoritarianism onto a text that is and was most naturally read as referring to the natural rights retained by all individuals, and to these rights alone.

INTRODUCTION

When it comes to interpreting the Ninth Amendment, Kurt Lash and I agree about many important issues—indeed, too many to enumerate here. But Lash has an *idée fixe*: majoritarianism. In particular, he believes in a retained collective right of the people to majoritarian rule or a collective right of the majority to rule—or something like this; he is not clear. So powerful is his commitment to this idea that it sometimes bends his interpretation of the

* Carmack Waterhouse Professor of Legal Theory, Georgetown University Law Center. I thank Larry Solum for his comments on an earlier draft.

copious evidence he discusses to support his belief that the Ninth Amendment originally referred to “collective” majoritarian rights.

Consider this. By my count, the word “majoritarian” appears in Lash’s article twenty-four times. And the number of times the term appears in any of the authorities he cites? My count is zero. The term “majoritarian” is a modern term, not one found in the original sources,¹ but neither do any of his sources refer to the “majority” or “majority rule.” Likewise, Lash uses the term “collective” to describe rights thirty times, though it appears in his sources just once, in a quote from St. George Tucker.²

While there is no doubt that the Founders believed in majoritarian governance, this does not entail the belief that electoral majorities had a collective right to violate the retained rights of individuals. As will be explained below, James Madison and other Federalists came to believe that the violation of individual rights by majorities in the states under the Articles of Confederation had revealed majority rule to be a *problem* that needed to be solved by the Constitution and Bill of Rights, not a *right* to be affirmed by the Ninth Amendment.

Following Akhil Amar’s collectivist reading of the Bill of Rights as a whole,³ Lash reads the Ninth Amendment collectively as well. While Lash readily allows that the rights retained by the people include individual natural rights, all his writings to date emphasize the collective right of the majority to govern in the states. Some versions of his mantra include “the people’s collective right to regulate marriage,”⁴ “collective revolutionary rights,”⁵ “the people’s collective right to regulate speech on a state level,”⁶ “collective majoritarian rights,”⁷ and “retained collective or majoritarian rights.”⁸ The last formulation sounds a variation on the collectivist theme that he also employs repeatedly: majoritarian rights. Other such references include, “majoritarian

1. See THE OXFORD ENGLISH DICTIONARY 232 (2d ed. 1989) (reporting no usage before 1918); MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.m-w.com/dictionary/majoritarian> (providing an origin date of 1942).

2. See *infra* Part III.

3. See AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998). Amar’s descriptive thesis is also difficult to pin down exactly. Sometimes he reads rights themselves collectively; other times he merely claims that the rights in the Bill of Rights were intended to protect majorities in the states rather than minorities, an entirely different proposition. Compare *id.* at 26 (referring to a “collective right of We the People” protected by the First Amendment), with *id.* at 21 (referring to the First Amendment’s “historical and structural core” as “safeguard[ing] the rights of popular majorities”). Any serious attempt to sort this out would require a separate treatment. Suffice it to say that I have become increasingly skeptical of the accuracy of his collectivist account.

4. Kurt T. Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 906, 915 (2008).

5. *Id.* at 909.

6. *Id.* at 912.

7. *Id.* at 923.

8. *Id.* at 924.

democratic rights,"⁹ a "majoritarian right" to "regulate religion at a local level,"¹⁰ "state majoritarian rights,"¹¹ "individual and majoritarian rights,"¹² and "the majoritarian right to local self-government."¹³ How exactly a "collective" right of the people as a whole relates to "majoritarian" rights is left unexamined.

The nature and scope of this purported right or rights is not at all clear. A collective right belonging to the people as a group is not the same as a right of a majority to govern. The connection between the concepts of "collective" and "majority" is never explained. A power of states or majorities to control or regulate individual rights is not the same as a state or majority right to control individuals. The formulations of this purported right that I offered in the opening paragraph are mere guesses. Of course, if even a single one of his historical sources had named this right, it might have been easier to evaluate its content by examining the source. Instead, every one of the formulations quoted above is Lash's and he never clearly identifies or defines the right or rights he has in mind.

When he does, as I expect he will, he needs to explain how it differs from the Guarantee Clause of Article IV that reads: "The United States shall guarantee to every State in this Union a Republican form of Government."¹⁴ Notice that a republican form of government is not the same as a majoritarian government, at least as evidenced by the U.S. Constitution itself. And even before the Constitution was adopted, most states had begun adopting new constitutions that emulated its tripartite structure, making them much less majoritarian than they had previously been. Did this violate the Ninth Amendment, or did the fact these constitutions were adopted by a majority satisfy the Ninth Amendment? Without a clearer formulation of this alleged right, it is impossible to say.

But this is just the start of Kurt Lash's majoritarian difficulty. In my most recent writing on the Ninth Amendment, I examine five proposed models of the Amendment's original meaning. I showed how the most salient evidence strongly supports the individual rights and federalism models and directly refutes the state law and residual rights models, while seriously undermining the collective rights model to which Amar and Lash adhere.¹⁵ In this essay, I will add to this analysis by showing that Lash's collective and/or majoritarian vision of the Ninth Amendment as now described in *A Textual-Historical*

9. *Id.* at 909.

10. *Id.* at 911.

11. *Id.* at 917-18.

12. *Id.* at 919.

13. *Id.* at 923.

14. U.S. CONST. art. IV, § 4.

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

Theory of the Ninth Amendment is contrary to text, structure, and evidence of historical meaning.

Lash's majoritarian vision is contrary to the antimajoritarianism of the man who devised the Ninth Amendment, James Madison,¹⁶ and those who wrote the Constitution.¹⁷ Not coincidentally, it is contrary to the individualism of the other amendments constituting the Bill of Rights¹⁸ and the public meaning of the Ninth Amendment as it was received during its ratification.¹⁹ It is also contrary to the individualist conception of popular sovereignty adopted in the text of the Constitution as interpreted by a four-to-one majority of the Supreme Court in its first major constitutional decision.²⁰ And it is contrary to the individualist interpretation of the Ninth Amendment by the one source he cites who actually uses the word "collective": St. George Tucker.²¹ In sum and substance, the collectivist interpretation of the phrase "others retained by the people" is anachronistic—a projection of contemporary majoritarianism onto a text that is and was most naturally read as referring to the natural rights retained by all individuals, and to these rights alone.

I. THE ANTIMAJORITARIANISM OF THE FOUNDERS

A. *The Antimajoritarianism of James Madison*

Reading a right of state majoritarian rule into the Ninth Amendment is particularly odd given that this provision was conceived and formulated, as all acknowledge, by one of the more antimajoritarian figures of the day: James Madison.²² Indeed, in a variety of fora, Madison consistently expressed his view that popular majorities, especially those at the state level, were the principal threat to "private" or individual rights. As Madison wrote in a letter to Thomas Jefferson in the period between the drafting of the Constitution and the Bill of Rights:

Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the *majority* of the community, and the invasion of *private rights* is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents.²³

16. See *infra* Part I.A.

17. See *infra* Part I.B.

18. See *infra* Part I.C.

19. See *infra* Part I.D.

20. See *infra* Part II.

21. See *infra* Part III.

22. See Barnett, *supra* note 15, at 7-10 (describing Madison's undisputed role as the originator of the Ninth Amendment).

23. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 1 LETTERS

This concern for the violation of private individual rights by majorities was reflected in Madison's theory of faction. "By a faction," he famously wrote in *Federalist No. 10*, "I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to *the rights of other citizens*, or to the permanent and aggregate interests of the community."²⁴

Madison had previously made a similar point to the Constitutional Convention itself in words that foretold the argument of *Federalist No. 10*. "In all cases where a majority are united by a common interest or passion, the *rights of the minority* are in danger."²⁵ He then applies this insight to state governments:

We have seen the mere distinction of colour made in the most enlightened period of time, a ground of the most oppressive dominion ever exercised by man over man. What has been the source of those unjust laws complained of among ourselves? Has it not been the real or supposed interest of the major number? Debtors have defrauded their creditors. The landed interest has borne hard on the mercantile interest. The holders of one species of property have thrown a disproportion of taxes on the holders of another species. The lesson we are to draw from the whole is that where a majority are united by a common sentiment, and have an opportunity, *the rights of the minor party* become insecure.²⁶

Indeed, Madison called for a constitutional convention to revise the Articles of Confederation, in part, to address the vice of "the injustice of state laws"²⁷ that resulted from majoritarian rule in the states:

If the multiplicity and mutability of laws prove a want of wisdom, their injustice betrays a defect still more alarming: more alarming not merely because it is a greater evil in itself, but because it brings more into question the fundamental principle of republican Government, that the majority who rule in such Governments, are the safest Guardians both of public Good and of private rights.²⁸

Madison's explanation of why popular majorities are not to be trusted with the rights of the minority is worth considering in full:

Place three individuals in a situation wherein the interest of each depends on the voice of the others, and give to two of them an interest opposed to the

AND OTHER WRITINGS OF JAMES MADISON, FOURTH PRESIDENT OF THE UNITED STATES 425 (Phila., J.B. Lippincott & Co. 1867) (first and second emphases added).

24. THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961) (emphases added).

25. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 76 (Adrienne Koch ed., Ohio Univ. Press 1984) (1840) (statement of James Madison) (emphases added).

26. *Id.* at 77 (emphases added); see also James Madison, Speech in Congress Proposing Constitutional Amendments, June 8, 1789, in WRITINGS 437, 448-49 (Jack N. Rakove ed., 1999).

27. Madison, *supra* note 26.

28. *Id.*

rights of the third? Will the latter be secure? The prudence of every man would shun the danger. The rules & forms of justice suppose & guard against it. Will two thousand in a like situation be less likely to encroach on the rights of one thousand? The contrary is witnessed by the notorious factions & oppressions which take place in corporate towns limited as the opportunities are, and in little republics when uncontroled by apprehensions of external danger. If an enlargement of the sphere is found to lessen the insecurity of private rights, it is not because the impulse of a common interest or passion is less predominant in this case with the majority; but because a common interest or passion is less apt to be felt and the requisite combinations less easy to be formed by a great than by a small number. The Society becomes broken into a greater variety of interests, of pursuits, of passions, which check each other, whilst those who may feel a common sentiment have less opportunity of communication and concert. It may be inferred that the inconveniences of popular States contrary to the prevailing Theory, are in proportion not to the extent, but to the narrowness of their limits.²⁹

Madison also made his skepticism of majoritarianism plain to the Virginia ratification convention. There he observed that “on a candid examination of history, we shall find that turbulence, violence, and abuse of power, by *the majority* trampling on *the rights of the minority*, have produced factions and commotions, which, in republics, have, more frequently than any other cause, produced despotism.”³⁰

From his private letters, to his call for altering the Articles of Confederation, to his speeches at the Constitutional Convention and the Virginia ratification convention, to *The Federalist Papers*, Madison consistently and clearly differentiates between, on the one hand, the power of the majority and, on the other, the private rights of individuals, as well as the aggregate interests of the people as a whole. Yet Lash’s majoritarianism requires him to think that James Madison chose wording for a constitutional amendment the public meaning of which protected a *right* of a majority in the states to govern over the minority. That’s a problem.

B. *The Antimajoritarianism of the Constitutional Convention*

Madison’s antimajoritarianism is so patent and undeniable that, to advance his collective rights reading of the Bill of Rights, Akhil Amar needs to dismiss him as “a man ahead of his time.”³¹ But Madison was far from alone in his

29. *Id.*

30. 3 JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 87 (1876) (statement of James Madison on June 16, 1788).

31. See AMAR, *supra* note 3, at 159-60 (“Madison . . . was a man ahead of his time.”); *id.* at 291 (“James Madison did believe in strong individual rights; in many ways, however, he was ahead of his time . . .”). Of course, insofar as he is referring to Madison’s unsuccessful efforts to extend additional federal protections of abuses of individual rights by state governments beyond those already contained in Article I, section 10, Amar is entirely

skepticism of majoritarianism. Opposition to majoritarianism, also derisively called “democracy” in this period, in the form of legislative supremacy was repeatedly voiced at the Constitutional Convention. As Elbridge Gerry, deputy from Massachusetts stated: “The evils we experience flow from the excess of democracy.”³² After listing a number of abuses, he admitted that he “was still however republican, but had been taught by experience the danger of the levelling spirit.”³³ “Experience,” he claimed, “had shewn [sic] that the State legislatures drawn immediately from the people did not always possess their confidence.”³⁴

Roger Sherman, of Connecticut—who later came to serve on the congressional committee that drafted the Bill of Rights—contended that the people “immediately should have as little to do as may be about the Government.”³⁵ Virginian and future Attorney General Edmond Randolph observed that “the general object was to provide a cure for the evils under which the U.S. laboured.”³⁶ And “that in tracing these evils to their origin every man had found it in the turbulence and follies of democracy.”³⁷ Gouverneur Morris, deputy from Pennsylvania, noted that “[e]very man of observation had seen in the democratic branches of the State Legislatures, precipitation—in Congress changeableness, in every department excesses against personal liberty private property & personal safety.”³⁸ The only tepid defense of majoritarianism at the Convention came from Virginia’s George Mason who “admitted that we had been too democratic” in forming state governments but said he “was afraid we should incautiously run into the opposite extreme.”³⁹

In place of the legislative supremacy incorporated in state constitutions that led to majoritarian factionalism, the Founders struggled to devise what they still called a “republican” form of government in which the people would not rule, but would check by various mechanisms their agents in government who do. They designed a constitutional structure based on “the policy of refining the

correct. But insofar as he implies that Madison was alone in his commitment to protecting individual rights from abuses by the national government, and that the Ninth Amendment for which Madison was principally responsible should be read accordingly, Amar exaggerates.

32. MADISON, *supra* note 25, at 39 (statement of Elbridge Gerry).

33. *Id.*

34. *Id.* at 41.

35. *Id.* at 39 (statement of Roger Sherman) (advocating that House members be chosen by state legislatures).

36. *Id.* at 42 (statement of Edmund Randolph).

37. *Id.*

38. *Id.* at 233 (statement of Gouverneur Morris).

39. *Id.* at 39 (statement of George Mason) (advocating popular elections of Representatives to the House). Later he amplified his support for democracy: “Notwithstanding the oppressions & injustice experienced among us from democracy; the genius of the people is in favor of it, and the genius of the people must be consulted.” *Id.* at 64. Recall, however, that Mason eventually refused to sign the Constitution and opposed its ratification in the Virginia ratification convention.

popular appointments by successive filtrations” (though this filtration principle should not be “pushed too far”).⁴⁰ For this reason, Madison favored a popularly-elected House so that “the people would [not] be lost sight of altogether; and the necessary sympathy between them and their rulers and officers, [would not be] too little felt.”⁴¹

Given that the popularly-elected House was designed to be the most democratic branch, the desire by Convention delegates to cabin democratic majoritarianism was revealed most clearly during their discussion of the manner by which the President and, especially, the Senate were to be chosen. As Edmund Randolph summarized the problem: “The democratic licentiousness of the State Legislatures proved the necessity of a firm Senate. The object of this 2d branch is to controul [sic] the democratic branch of the National Legislature.”⁴² Gouverneur Morris agreed, observing that the object of the Senate was “to check the precipitation, changeableness, and excesses of” the House.⁴³ “The use of the Senate,” said Madison, “is to consist in its proceeding with more coolness, with more system, & with more wisdom, than the popular branch.”⁴⁴

Lash would have us believe that, immediately after this counter-majoritarian Constitution was adopted, the Federalist-dominated Congress would propose adding language to the Constitution the public meaning of which protected a constitutional *right* of majorities to rule in the states, the very sort of right they denied majorities at the national level. Not very likely.

C. *The Antimajoritarianism of the Bill of Rights*

Now it may well be true that opponents of the Constitution were more majoritarian than were the framers and the Federalists. And it is certainly true that the Bill of Rights was promised and proposed to mollify these Antifederalist opponents, though more importantly it was meant to assuage those in the middle who were moved by the Antifederalists’ objection that the Constitution lacked a bill of rights and who were persuaded to support the Constitution after the Federalists promised to adopt a bill of rights.

But the original proposed amendments were drafted by antimajoritarian James Madison and approved by an antimajoritarian Federalist-dominated Congress. So it is not at all surprising that the Bill of Rights took on a decidedly individualist cast. Providing express protections of individual rights would deliver on the Federalists’ promise while avoiding, to the degree

40. *Id.* at 40 (statement of James Madison).

41. *Id.*

42. *Id.* at 110 (statement of Edmund Randolph) (advocating seven year terms for Senators).

43. *Id.* at 233 (statement of Gouverneur Morris).

44. *Id.* at 83 (statement of James Madison).

possible, undermining their fledgling counter-majoritarian national government by the more majoritarian states.

However, as the Federalists had previously argued, the enumeration in the Constitution of some individual rights would be dangerous to other individual rights not enumerated. Why? As Madison explained to Congress in his Bill of Rights speech, enumerating certain rights could later be taken as implying "that those rights which were not singled out, were intended to be assigned into the hands of the general government, and were consequently insecure."⁴⁵ Now that some individual rights were being protected, some solution to this danger was needed.

Although Madison consulted the numerous amendments proposed by state ratification conventions, none of these proposals addressed this specific Federalist concern. All the similarly worded recommendations by the states concerned construing the *powers* defined in the unamended Constitution; they did not address the problem of construing the *rights* retained by the people in light of the enumeration of some of these rights that the state ratification conventions were proposing.⁴⁶

As Madison explained to Congress, the Ninth Amendment was his solution to the Federalist objection to adding any bill of rights to the Constitution.

This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that may be guarded against. I have attempted it, as gentleman may see by turning to the last clause of the 4th resolution [the precursor of the Ninth Amendment].⁴⁷

This makes the Ninth Amendment *sui generis* in the Bill of Rights insofar as it was specifically designed by James Madison to respond, not to Antifederalist concerns about the absence of a bill of rights, but to Federalist concerns about including one. For this reason, reading the Ninth Amendment in light of Antifederalist concerns or state proposals protecting states rights is a serious error.

Therefore, when it came to drafting a bill of rights, choosing language protecting individual private rights would satisfy the public's concerns about the absence of a bill of rights, reinforcing the national character of "the people" to which the Preamble referred, without threatening the new national government's power to reign in abusive state governments. Of course, the fact that a protection of individual rights would guard not only the rights of a minority against abuses by majority factions but also the rights of the majority against abuses by minority factions is a feature rather than a bug of protecting individual rights.

45. Madison, *supra* note 26, at 448-49.

46. See Barnett, *supra* note 15, at 40-46 (discussing amendments proposed by state ratification conventions).

47. See Madison, *supra* note 26, at 449.

Given the purposes of Madison and the other Federalists in Congress, we would expect the public meaning of the language of the Bill of Rights to be individualist, and it is. Insofar as it protects the rights of the people, “the people” is used as a mass noun to refer to the plural of persons who constitute the body politic (as distinct from other persons who are not a part of this polity). It explicitly distinguishes between “the people” and “the states” and, where it protects the rights of states in a federal system, it does not use the terms “the people” or “right” at all; it uses the terms “power” and “states.”

The meaning of “the people” in the Ninth Amendment is illuminated by comparison with the use of that phrase elsewhere in the Bill of Rights and the original Constitution. Let us start with the language of the Fourth Amendment:

The right of *the people* to be secure in *their persons, houses, papers, and effects*, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and *the persons or things* to be seized.⁴⁸

There is no question that the rights of “the people” to which the Fourth Amendment refers, though possessed by members of a polity, are entirely individual. Individuals own their own bodies (“their persons”), and their own “houses, papers and effects.” The individual rights or mass noun reading of “the people” in the Fourth Amendment is reinforced by the wholly individualist language of the Third Amendment that precedes it and is connected to it by its coverage of the people’s houses: “No Soldier shall, in time of peace be quartered in any *house*, without the consent of *the Owner*, nor in time of war, but in a manner to be prescribed by law.”⁴⁹

The drafting choice between the Third and Fourth Amendments is revealing. The Third Amendment could not have been written in the plural because requiring the consent of “the people” before quartering soldiers in houses might have implied that the right was limited to houses owned by more than one person. But there is no such potential confusion when referring to the individual rights that all “the people” share in common, such as their right to be secure in their persons. So there is no comparable barrier to drafting this provision in the plural. In other words, all the persons comprising “the people” can possess individual rights in common. Saying that the individual rights possessed by persons comprising a polity belong to “the people” in no way implies the existence of a different kind of collective or majoritarian rights or powers possessed by the people acting as a polity.

Connected to the Fourth Amendment by its reference to “house,” the Third Amendment clearly protects the individual right of “the owner.” Similarly, the Fifth and Sixth Amendment are all worded in the singular:

[Amendment V:] *No person* shall be held to answer for a capital, or otherwise

48. U.S. CONST. amend. IV (emphases added).

49. U.S. CONST. amend. III (emphases added).

infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall *any person* be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against *himself*; nor be deprived of life, liberty, or property, without due process of law; nor shall *private property* be taken for public use, without just compensation.⁵⁰

[Amendment VI:] In all criminal prosecutions, *the accused* shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against *him*; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for *his* defense.⁵¹

As with the Third, there was good reason here to switch to the singular tense from the plural to focus on the particular persons who may assert these rights when singled out for prosecution. And, though it refers neither to “the people” nor to persons, the Seventh Amendment’s right to a jury trial in civil cases cannot possibly be conceived as a collective or majoritarian right.⁵² For that matter, neither can the Eighth Amendment’s prohibitions on cruel and unusual punishments and excessive fines.⁵³ All these rights are, and can only be, individual in their nature.

When the Bill of Rights uses the term “the people,” it consistently refers to individuals and not political collectives or electoral majorities, and all the enumerated rights it protects belong to individuals and not collectives or majorities. So proponents of a collective rights or majoritarian reading of “the people” in the Ninth and Tenth Amendments must claim that its meaning shifts in these provisions. Although this claim is sometimes also made about “the right of the people to keep and bear Arms” in the Second Amendment,⁵⁴ the evidence that this language referenced an individual right is so overwhelming that, in recent years, the argument against protecting an individual right to bear arms has shifted. Most who reject the applicability of the Second Amendment to modern gun laws now claim that the reference in its preface to “[a] well-regulated militia, being necessary to the security of a free state,”⁵⁵ impliedly qualifies what would be the natural individual rights reading of what follows.

50. U.S. CONST. amend. V (emphases added).

51. U.S. CONST. amend. VI (emphases added).

52. See U.S. CONST. amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the *right* of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.” (emphasis added)).

53. See U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

54. U.S. CONST. amend. II.

55. *Id.*

Indeed, they now claim that the Second Amendment does indeed protect an individual right, albeit an individual right that applies only in the context of militia service, however awkward and incongruous this interpretation may be.⁵⁶

Apart from the Ninth and Tenth Amendments, the original meaning of which we are ascertaining, this leaves just the First Amendment's reference to "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances"⁵⁷ as possible collective or group rights. Although Akhil Amar has claimed these rights to be collective,⁵⁸ the mere fact that it takes more than one person to "assemble" does not make it a collective right of the people as a whole, and certainly it does not even imply it is a right possessed by a majority of the people *qua* majority. Individuals could and did petition the government for redress of grievances.

We are rightly accustomed to conceiving of the rights of free exercise of religion, freedom of speech and freedom of the press as all belonging to individuals, though of course each can sometimes be exercised in and by groups of individuals. Madison's initial proposal made this clearer: "*The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.*"⁵⁹ Does a collective body of the people have, write, and publish "their sentiments"? Does a majority? Notwithstanding Madison's use of the mass noun "the people" in his proposal, these are all individual rights.

There is a single possible exception to the exclusively individual rights character of the first eight amendments: "Congress shall make no law respecting an establishment of religion."⁶⁰ The Establishment Clause denies to Congress the power of establishing religion and at the same time also seems to

56. See, e.g., H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* (2002) (arguing that the original meaning of the Second Amendment protected an individual right solely in the context of service in an organized militia). *But cf.* Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 *TEX. L. REV.* 237 (2004) (contesting Uviller & Merkel's thesis).

57. U.S. CONST. amend. I.

58. See, e.g., AMAR, *supra* note 3, at 26 ("The right of the people to assemble does not simply protect the ability of self-selected clusters of individuals to meet together; it is also an express reservation of the collective right of We the People to assemble in a future convention and exercise our sovereign right to alter or abolish our government."); see also *id.* at xii ("The genius of the Bill was not to downplay organizational structure but to deploy it, not to impede popular majorities but to empower them."). Amar is simply too conceptually fuzzy in his references to "collective rights" be sure of what exactly he means by these terms. Of course, the fact that purely individual rights protect the rights of the majority and minorities alike, as they do, does not establish the proposition that they protect a "collective right" of a majority *qua* majority as Lash sometimes seems to claim.

59. Madison, *supra* note 26, at 442 (emphases added).

60. U.S. CONST. amend. I.

protect the rights of states,⁶¹ and the majorities therein, to maintain their establishments of religions. Given the collective rights thesis of Akhil Amar and Kurt Lash, it is striking that the only state-protective provision in the Bill of Rights refers neither to the rights of the people nor to the rights of states, but is written entirely as a limitation of federal power. There was an obvious way to express this limitation on federal power as a collective right—"The right of the people/states to establish a religion shall not be infringed"—but for unknown reasons this formulation was avoided. So where the Federalist framers of the Bill of Rights were willing to protect a power of a state or majority therein, they avoided the language of rights altogether.⁶²

It is telling that no unambiguously collective use of "the people" is included anywhere in the original Constitution. There were originally just two references in the Constitution to "the people." The Preamble famously declares that

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.⁶³

But if "the People" to which the Preamble refers is a collective entity, would it not instead have read "secure the Blessings of Liberty to *itself*" or to "ourself," which corresponds to the royal "we" rather than the plural "ourselves"? Akhil Amar's collective reading of "We the People" notwithstanding, "ourselves" implies that "the people" of the Preamble is an aggregate of individuals who comprise a particular polity.

Apart from the Preamble, the only other reference to "the people" in the original Constitution is in Article I, Section 2: "The House of Representatives shall be composed of Members chosen every second Year by *the People* of the several States"⁶⁴ There is nothing inconsistent between this usage and an individualist meaning of "the people" as a group of individuals who constitute

61. Although it does contain the expressed limitation on federal power, the original wording of Madison's proposal lacked this state protective implication: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." 1 ANNALS OF CONG. 451 (June 8, 1789). (Joseph Gales ed., 1834) (statement of James Madison). Indeed, the change of wording is part of what justifies a state establishment protective meaning of the Establishment Clause.

62. Of course, in the original proposed amendments, the Establishment Clause would not have been the only amendment that did not protect an individual right. The first two amendments proposed by Congress concerned the allocation of representatives by population and restrictions on the power of Congress to enact pay increases, the last of which became the Twenty-Seventh Amendment. *See* U.S. CONST. amend. XXVII ("No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.").

63. U.S. CONST. pmbl.

64. U.S. CONST. art. I, § 2 (emphasis added).

the body politic. And this reference to “the people” is expressly contrasted with that of “the legislature” that selected senators.⁶⁵ As used here, “the people” and “the legislature” are distinct concepts and terms. Popular sovereignty, such as it was thought to be, is certainly not here equated with legislative supremacy. Moreover, as we shall see momentarily, it is potentially significant that Article I refers to “the people *of the several states*,” in sharp contrast with the Ninth and Tenth Amendments, where this language was omitted over the objections of Antifederalist Senators.

D. The Original Public Meaning of the Ninth and Tenth Amendments

Language matters. That the language chosen for the Bill of Rights by Madison and the other Federalists in Congress had a decidedly individualist public meaning is shown by the reception of the Ninth and Tenth Amendments in the Virginia legislature when it deliberated over whether to ratify these and the other amendments proposed by Congress. To appreciate the significance of this debate, one must first examine two amendments that had been proposed to Congress by the Virginia ratification convention when it ratified the Constitution:

First, That each State in the Union shall respectively retain every power, jurisdiction and right which is not by this Constitution delegated to the Congress of the United States or to the departments of the Foederal [sic] Government. . . .

Seventeenth, 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.⁶⁶

There is nothing in these proposals about the rights *of the people*, collective or otherwise. They speak entirely in the language of the retained powers, jurisdictions and rights *of states*, which is the language one would choose to protect a right of state governance. Nor is there anything in Virginia’s proposals that deals with the problem for which the Ninth Amendment was Madison’s solution: how to avoid the danger to unenumerated rights when some subset of rights are expressly singled out for protection in a bill of rights. Instead of dealing with the dangers of enumerating rights, these proposals solely concern the problems of limiting federal power and protecting the rights of states. With respect to these issues, the Virginians said exactly what they meant.

65. See U.S. CONST. art. I, § 3 (“The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof . . .”).

66. Amendments Proposed by the Virginia Convention (June 27, 1788), in *THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES AND ORIGINS* 675 (Neil H. Cogan ed., 1997) [hereinafter *THE COMPLETE BILL OF RIGHTS*].

Precisely because the Federalists in Congress proposed amendments with different wording and having a different public meaning, Virginia's General Assembly initially rejected the Ninth and Tenth Amendments (then the eleventh and twelfth proposed "articles of amendments" respectively).⁶⁷ In the Virginia senate, to which the amendments were then referred, a majority bemoaned the Ninth Amendment because it so greatly deviated from their state's proposals for amendments, or from the proposals of any other state, as to be unrecognizable:

We do not find that the 11th article is asked for by Virginia or any other State; we therefore conceive that the people of Virginia should be consulted with respect to it, even if we did not doubt the propriety of adopting it; but it appears to us to be highly exceptionable.⁶⁸

That the public meaning of the Ninth Amendment completely differed from the language previously proposed by Virginia is further reflected in this objection: "If it is meant to guard against the extension of the powers of Congress by implication, it is greatly defective, and does by no means comprehend the idea expressed in the 17th article of amendments proposed by Virginia"⁶⁹

The Virginians read the Ninth Amendment as attempting to protect individual or personal rights, not collective or majoritarian rights, though in an ineffective and dangerous manner:

[A]s it respects *personal rights*, [it] might be dangerous, because, should *the rights of the people* be invaded or called into question, they might be required to shew by the constitution what rights they have *retained*; and such as could not from that instrument be proved to be retained by them, they might be denied to possess. Of this there is ground to be apprehensive, when Congress are already seen denying certain rights of the people, heretofore deemed clear and unquestionable.⁷⁰

Given that they found no protection of states' rights in the wording of the Ninth Amendment, the Virginians then read "the rights of the people" as referring solely to "personal rights," however inadequately they thought it protected them.⁷¹ Sadly, their judgment of the effectiveness of the Ninth

67. See Letter from Hardin Burnley to James Madison (Nov. 28, 1789), in 5 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786-1870, at 219 (1905) [hereinafter DOCUMENTARY HISTORY OF THE CONSTITUTION]. The legislative history of the eventual ratification of the amendments by Virginia is convoluted and not worth detailing here, except to note that the Virginia senate not only initially rejected the Ninth and Tenth Amendments, but the First and Sixth Amendments as well. See Letter of James Madison to George Washington (Jan. 4, 1790), in DOCUMENTARY HISTORY OF THE CONSTITUTION, *supra*, at 231 (reporting the rejection of the third and eighth proposed amendments).

68. Saturday, December 12, 1789, in JOURNAL OF THE SENATE OF THE COMMONWEALTH OF VIRGINIA 63 (Richmond, Thomas W. White 1828).

69. *Id.*

70. *Id.* at 63-64 (first and second emphases added).

71. The reaction to the Ninth Amendment in Virginia is important evidence that its

Amendment proved to be prescient. This last quotation succinctly summarizes how the Ninth Amendment has largely failed to achieve its purpose.

Equally inhospitable to a collective rights reading of “the people” in the Ninth Amendment was the Virginia majority’s objection to the wording of the Tenth Amendment (then the twelfth proposed article of amendment). This they rejected because the words “or to the people” had been added to their proposal thereby changing its meaning to undercut rather than protect states rights:

We conceive that the 12th article would come up to the 1st article of the Virginia amendments, were it not for the words “or to the people.” It is not declared to be the people *of the respective States*; but *the expression applies to the people generally as citizens of the United States, and leaves it doubtful what powers are reserved to the State Legislatures*. Unrestrained by the constitution or these amendments, Congress might, as the supreme rule of the people, assume those powers which properly belong to the respective States, and thus gradually effect an entire consolidation.⁷²

This objection echoed that of Virginia’s U.S. Senator, Richard Henry Lee:

By comparing the Senate amendments with [those] from below by carefully attending to the m[atter] the former will appear well calculated to enfeeble [and] produce ambiguity—for instance—Rights res[erved] to the States or the *People*—The people here is evidently designed fo[r the] People of the *United States*, not of the Individual States [page torn] the former is the Constitutional idea of the people—We *the People* &c. . . . [T]his mode of expressing was evidently *calculated* to give the Residuum to the people of the U. States, which was the Constitutional language, and to deny it to the people of the Indiv. State—At least that it left room for cavil & false construction—They would not insert after people therof—altho it was moved.⁷³

original meaning differed completely from the state-protective amendment Virginia had proposed to Congress. It seems that rather than tout, as he once did, the central importance of Virginia’s proposal and its deliberations over the Ninth Amendment, in his Stanford essay Lash now emphasizes the differently worded amendment proposed by New York. Compare Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331, 333 (2004) (dramatically highlighting the Virginia debates in the opening two paragraphs), with Lash, *supra* note 4, at 909-10, 915-16 (discussing the proposal of the New York ratification convention and omitting any mention of Virginia’s proposals). As I noted in my critique of Lash’s earlier efforts, New York’s proposal bears a somewhat closer resemblance to the Ninth Amendment in that, unlike Virginia’s, it at least mentions “the people.” See Barnett, *supra* note 15, at 44 (“New York’s proposal distinguishes between ‘the People’ and ‘State Governments’ and reserves rights to the people, as opposed to Virginia’s which refers only to reserving rights to the states.”). Nevertheless, like Virginia’s proposal, New York’s proposed amendments had nothing whatsoever to do with the problem to which the Ninth Amendment is addressed: the danger of adding a bill of rights. And the Virginians, at least, did not see the Ninth Amendment as resembling the proposals of any other state, including New York.

72. Saturday, December 12, 1789, *supra* note 68, at 64 (emphasis added).

73. Letter of Richard Henry Lee to Patrick Henry (Sept. 14, 1789), in *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS* 295, 296 (Helen E. Veit, et al. eds., 1991) [hereinafter *CREATING THE BILL OF RIGHTS*] (ellipsis added). Although “or to the people” was indeed added by the Senate to the wording proposed by the House for what became the Tenth Amendment, my perusal of the Senate Journal does not

And both of Virginia's United States Senators accompanied their joint report to the Governor of Virginia with their affirmation that the amendments proposed by Congress did not comport with those recommended by Virginia.

[I]t is with grief that we now send forward propositions inadequate to the purpose of real and substantial Amendments, and so far short of the wishes of our Country. By perusing the Journal of the Senate, your Excellency will see, that we did, in vain, bring to view the Amendments proposed by our Convention, and approved by the Legislature.⁷⁴

So far as Lee and the majority in the Virginia senate were concerned, the public meaning of "the people" in the Tenth Amendment was not a reference to the majoritarian or collective right of the people in the states to govern free of interference of the federal government. To the contrary, they read it as protecting the powers reserved to the people "as citizens of the United States." The very language they desired to protect states rights was, however, eventually incorporated into another constitution.

The Constitution of the Confederate States of America contained two provisions that corresponded to the Ninth and Tenth Amendments but with significant additional language (in italics):

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

6. The powers not delegated to the Confederate States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people *thereof*.⁷⁵

Had the original public meaning of the Ninth and Tenth Amendments been as collectivist and/or majoritarian as Lash claims, there would have been no need to alter their wording in this way to achieve a state-protective result, especially if Lash is correct about how subsequent courts interpreted the Ninth

reveal any motion to add "thereof" to this provision.

74. Letter of Richard Henry Lee & William Grayson to the Governor of Virginia (Sept. 28, 1789), in 5 DOCUMENTARY HISTORY OF THE CONSTITUTION, *supra* note 67, at 216. Their private criticisms of the proposed amendments in their correspondence with Patrick Henry were even more vociferous. In the words of Senator William Grayson, "[T]hey are so mutilated & gutted that in fact they are good for nothing, & I believe as many others do, that they will do more harm than benefit: The Virginia amendments were all brought into view, and regularly rejected." Letter of William Grayson to Patrick Henry (Sept. 29, 1789), in CREATING THE BILL OF RIGHTS, *supra* note 73, at 300. And Senator Lee explained: "As they came from the H. of R. they were very short of the wishes of our Convention, but as they are returned by the Senate they are certainly much weakened. You may be assured that nothing on my part was left undone to prevent this, and every possible effort was used to give success to all the Amendments proposed by our Country—We might as well have tried to move Mount Atlas upon our shoulders." Letter of Richard Henry Lee to Patrick Henry (Sept. 14, 1789), in CREATING THE BILL OF RIGHTS, *supra* note 73, at 295.

75. CONFEDERATE CONST. art. VI, §§ 5, 6 (1861) (emphases added). The addition of "thereof" to the Tenth Amendment is reminiscent of Richard Henry Lee's objection to the Tenth Amendment discussed in text accompanying *supra* note 74.

Amendment in the early Nineteenth Century.⁷⁶ The Confederate constitution teaches what language might have expressly protected collectivist or states rights, and it was not the language used in the Ninth and Tenth Amendments.

II. THE INDIVIDUALIST CONCEPTION OF POPULAR SOVEREIGNTY

Can an individualist reading of the rights and powers of the people protected by the Ninth and Tenth Amendments respectively be reconciled with the concept of popular sovereignty that was held at the Founding? Is not the very notion of popular sovereignty an inherently collectivist or majoritarian one?⁷⁷ I think not. While I am not prepared to claim that no one in the Founding period held a collectivist conception of popular sovereignty, there is good reason to doubt that the Constitution incorporated such a view. As Exhibit A for this claim, I offer the first great constitutional decision of the Supreme Court in which a majority of the Court assumed a highly individualist conception of popular sovereignty.

In 1792, Alexander Chisholm, a citizen of South Carolina and executor of the estate of Robert Farquhar, brought suit for breach of contract against the State of Georgia in the Supreme Court of the United States. Chisholm alleged that Georgia had failed to pay Farquhar for goods that Farquhar had supplied Georgia during the Revolutionary War. Attorney General Edmund Randolph appeared to argue the case for the plaintiff before the Court. Georgia refused to appear, claiming that as a “sovereign” state, it could not be sued without its consent.

In *Chisholm v. Georgia*,⁷⁸ by a vote of four to one, the Supreme Court rejected Georgia’s claim of sovereign immunity and affirmed the individual contract right of the plaintiff. The opinions in the case illuminate one conception of popular sovereignty in existence when the Constitution was adopted some three years before. All Justices delivered separate opinions seriatim. In rejecting Georgia’s claim, only Justice Blair relied solely on the text of the Constitution. The other three relied also on “the principles of general jurisprudence.”⁷⁹

To evaluate Georgia’s claimed immunity, the Justices were compelled to examine the concept of sovereignty and its relationship with the individual right being asserted by Chisholm. As Justice Cushing observed:

The rights of individuals and the justice due to them, are as dear and precious

76. See Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L. REV. 597, 609 (2005).

77. See, e.g., Lash, *supra* note 4, at 935 (“To the extent that one’s constitutional theory is based on the concept of popular sovereignty, both the text and historical record suggest that the people insisted on preserving areas of community life beyond the reach of the federal government.”).

78. 2 U.S. (2 Dall.) 419 (1793).

79. *Id.* at 453 (Wilson, J.).

as those of States. Indeed the latter are founded upon the former; and the great end and object of them must be to secure and support the rights of individuals, or else vain is Government.⁸⁰

Chief Justice John Jay—former president of the Continental Congress, former ambassador to Spain and France, and one of the original co-authors of *The Federalist Papers*—expounded on the nature of sovereignty:

[T]he sovereignty of the nation is in the people of the nation, and the residuary sovereignty of each State in the people of each State

[A]t the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects (unless the African slaves among us may be so called) and have none to govern but themselves; the citizens of America are equal as fellow citizens, and as joint tenants in the sovereignty. . . .

Sovereignty is the right to govern; a nation or State-sovereign is the person or persons in whom that resides. In Europe the sovereignty is generally ascribed to the Prince; here it rests with the people; there, the sovereign actually administers the Government; here, never in a single instance; our Governors are the agents of the people, and at most stand in the same relation to their sovereign, in which regents in Europe stand to their sovereigns.⁸¹

In other words, here the people themselves do not rule. Rather, their agents in government rule on their behalf and subject to their ultimate control. But the people nevertheless remain sovereign, not the government.

Jay denied that when individuals band together to form a government, whether a state or municipality, they acquire some sort of collective rights they did not possess singly as individuals. Indeed, Jay maintained that, as with citizens constituting a municipality, a claim of immunity by individual citizens constituting a state would violate popular sovereignty.

In this land of equal liberty, shall forty odd thousand in one place be compellable to do justice, and yet fifty odd thousand in another place be privileged to do justice only as they may think proper? Such objections would not correspond with the equal rights we claim; with the equality we profess to admire and maintain, and with that *popular sovereignty in which every citizen partakes*.⁸²

So too would it violate equal justice for the aggregate of the sovereign individuals comprising a state to be able to bring suit against a single individual while denying the individual as a “joint and equal sovereign[]” the power of bringing suit against the majority.⁸³

Chief Justice Jay expressly rejected any privileged majoritarian rights as inconsistent with his individualist conception of popular sovereignty:

The exception contended for, would contradict and do violence to the great and leading principles of a free and equal national government, one of the

Comment [REB1]: I repositioned the ellipses to look better. Let me know if there is some reason why this is not all right.

80. *Id.* at 468 (Cushing, J.).

81. *Id.* at 471-72 (Jay, C.J.).

82. *Id.* at 472-73 (emphasis added).

83. *Id.* at 477.

great objects of which is, to ensure justice to all: *To the few against the many, as well as to the many against the few.* It would be strange, indeed, that *the joint and equal sovereigns of this country*, should, in the very Constitution by which they professed to establish justice, so far deviate from the plain path of equality and impartiality, as to give to the collective citizens of one State, a right of suing individual citizens of another State, and yet deny to those citizens a right of suing them.⁸⁴

For Jay, claims of right do not turn on numbers.

[J]ustice is the same whether due from one man or a million, or from a million to one man; because it teaches and greatly appreciates the value of our free republican national Government, which places all our citizens on an equal footing, and enables *each and every of them* to obtain justice without any danger of being overborne by *the weight and number of their opponents*; and, because it brings into action, and enforces this great and glorious principle, that *the people are the sovereign* of this country, and consequently that *fellow citizens and joint sovereigns* cannot be degraded by appearing with each other in their own Courts to have their controversies determined.⁸⁵

Justice Wilson's lengthy analysis of popular sovereignty was, if anything, even more individualist than Chief Justice Jay's. Wilson began by disdaining the very term "sovereignty."

To the Constitution of the United States the term SOVEREIGN, is totally unknown. There is but one place where it could have been used with propriety. But, even in that place it would not, perhaps, have comported with the delicacy of those, who ordained and established that Constitution. They might have announced themselves "SOVEREIGN" people of the United States: But serenely conscious of the fact, they avoided the ostentatious declaration.⁸⁶

When it came to word choices, Wilson should have known. As a delegate to the Constitutional Convention from Pennsylvania, Wilson, along with Edmund Randolph (but not James Madison), was a member of the Committee of Detail that produced the first draft of the Constitution. Perhaps our most neglected Founder, Wilson spoke more often at the Convention than anyone but Gouverneur Morris and his remarks dominate the report of the Pennsylvania ratification convention. He was also the first professor of law at the University of Pennsylvania.⁸⁷

84. *Id.* at 477 (emphases added). This passage seriously undermines Akhil Amar's dismissal of Madison's concern with minority rights as being ahead of its time. See AMAR, *supra* note 3. Clearly, Madison's concern was shared by Chief Justice Jay.

85. *Id.* at 479 (emphases added).

86. *Id.* at 454 (Wilson, J.).

87. See *James Wilson (1742-1798)*, in JOSEPH C. MORTON, SHAPERS OF THE GREAT DEBATE AT THE CONSTITUTIONAL CONVENTION OF 1787, at 301, 304-07, 307 n.1 (2006) (describing Wilson's contributions to and influence at the Constitutional Convention); Julian P. Boyd, *James Wilson*, in DICTIONARY OF AMERICAN BIOGRAPHY 326, 329 (Dumas Malone ed., 1936) (describing Wilson's contributions to and influence at the Pennsylvania ratification convention).

In his lengthy opinion in *Chisholm*, Justice Wilson considered three conceptions of sovereignty that were inappropriate when applied to the Constitution. First, he repudiated the conception of sovereign as opposed to “subject” as wholly inapplicable in the United States. The Constitution, he noted, speaks only of “citizens” and “persons.”⁸⁸ As Wilson observed, “[t]he term, subject, occurs, indeed, once in the instrument; but to mark the contrast strongly, the epithet ‘foreign’ is prefixed.”⁸⁹ Second, he rejected the notion of sovereign as one that governs independent of any other power. Given that a republican government is subject to the control of the people, Wilson denied that the people of Georgia ceded sovereignty in this sense to their state.⁹⁰

Finally, Wilson vehemently rejected the feudal conception of sovereignty adopted in England and advocated by William Blackstone:

Into England this system was introduced by the conqueror: and to this era we may, probably, refer the English maxim, that the King or sovereign is the fountain of Justice. But, in the case of the King, the sovereignty had a double operation. While it vested him with jurisdiction over others, it excluded all others from jurisdiction over him. With regard to him, there was no superior power; and, consequently, on feudal principles, no right of jurisdiction.⁹¹

Wilson characterized this as “only a branch of a much more extensive principle, on which a plan of systematic despotism has been lately formed in England, and prosecuted with unwearied assiduity and care. Of this plan the author of the Commentaries was, if not the introducer, at least the great supporter.”⁹² Wilson read Blackstone as contending that “sovereignty is possessed by the Parliament: In the Parliament, therefore, the supreme and absolute authority is vested: In the Parliament resides that uncontrollable and despotic power, which, in all Governments, must reside somewhere.”⁹³ If “[t]he Parliament form the great body politic of England,” Wilson asked, “[w]hat, then, or where, are the People? Nothing! No where! . . . From legal

88. See 2 U.S. (2 Dall.) at 456 (Wilson, J.) (“In one sense, the term sovereign has for its correlative, subject, In [sic] this sense, the term can receive no application; for it has no object in the Constitution of the United States. Under that Constitution there are citizens, but no subjects. ‘Citizen of the United States.’ ‘Citizens of another State.’ ‘Citizens of different States.’ ‘A State or citizen thereof.’” (footnotes omitted)).

89. *Id.*; see also U.S. CONST. art. III, § 2 (referring to “foreign States, Citizens or Subjects”).

90. 2 U.S. (2 Dall.) at 457 (Wilson, J.) (“As a citizen, I know the Government of that State to be republican; and my short definition of such a Government is, one constructed on this principle, that the Supreme Power resides in the body of the people. As a Judge of this Court, I know, and can decide upon the knowledge, that the citizens of Georgia, when they acted upon the large scale of the Union, as a part of the ‘People of the United States,’ did not surrender the Supreme or Sovereign Power to that State; but, as to the purposes of the Union, retained it to themselves. As to the purposes of the Union, therefore, Georgia is NOT a sovereign State.”).

91. *Id.* at 458.

92. *Id.*

93. *Id.* at 462 (footnote omitted).

contemplation they totally disappear! Am I not warranted in saying, that, if this is a just description; a Government, so and justly so described, is a despotic Government?"⁹⁴

The "despotic" principle to which Wilson was referring was "that all human law must be prescribed by a superior."⁹⁵ To the contrary, for Wilson, "another principle, very different in its nature and operations, forms, in my judgment, the basis of sound and genuine jurisprudence; laws derived from the pure source of equality and justice must be founded on the CONSENT of those, whose obedience they require. The sovereign, when traced to his source, must be found in the man."⁹⁶

Wilson proceeded to characterize the individual free man as an original sovereign and states as mere aggregations of individuals, a collection of original sovereigns:

The only reason, I believe, why a free man is bound by human laws, is, that he binds himself. Upon the same principles, upon which he becomes bound by the laws, he becomes amenable to the Courts of Justice, which are formed and authorised by those laws. If *one free man, an original sovereign*, may do all this; why may not an aggregate of free men, *a collection of original sovereigns*, do this likewise? If the dignity of each singly is undiminished; the dignity of all jointly must be unimpaired.⁹⁷

Finally, Wilson ends his lengthy analysis by briefly turning to the text of Article III. According to the express terms of the Constitution, he concludes, the people of Georgia had consented to the jurisdiction of the Supreme Court when the state of Georgia was sued by a citizen of another state.⁹⁸

In *Chisholm*, no Justice, including Justice Iredell in dissent,⁹⁹ alludes to any right of a majority to govern. To the contrary, for Chief Justice Jay, sovereignty resided in the individual, and the "collective citizens of one State"¹⁰⁰ or "the many"¹⁰¹ have no special power or right to violate the rights of even a single person. Such was the equality of rights. Indeed, "one of the great objects" of the national government was "to ensure justice to all: To the few against the many, as well as to the many against the few."¹⁰² For Justice Wilson, a state was nothing more than "an aggregate of free men, a collection

94. *Id.*

95. *Id.* at 458.

96. *Id.*

97. *Id.* at 456 (emphases added).

98. *See id.* at 464-66.

99. Justice Iredell rested his dissent mainly on the claim that the Court had not been granted jurisdiction over these suits by Congress as was necessary, and only secondarily on his acceptance of the principle of sovereign immunity akin to that formerly possessed by the King of England, though he did accept this principle. *See id.* at 429-50 (Iredell, J., dissenting).

100. *Id.* at 477 (Jay, C.J.).

101. *Id.*

102. *Id.*

of original sovereigns:"¹⁰³ sovereignty resides in the individual. For Justice Cushing, "The rights of individuals and the justice due to them, are as dear and precious as those of States. Indeed the latter are founded upon the former . . ." ¹⁰⁴ Thus was Georgia, a state "so respectable, and whose claim soars so high"¹⁰⁵ held to be amenable to the jurisdiction of the Supreme Court when sued for violating the individual contract rights of single citizen.

As we all know, the Court's decision in *Chisholm* was effectively reversed by the adoption of the Eleventh Amendment. Indeed, since the post-Reconstruction 1890 case of *Hans v. Louisiana*,¹⁰⁶ a majority of the Supreme Court has taken the view that the ratification of the Eleventh Amendment represents the repudiation of the principles enunciated by a majority of the Court in *Chisholm*, that *Chisholm* was wrongly decided, and that the Eleventh Amendment merely restored the status quo ante. In *Seminole Tribe of Florida v. Florida*,¹⁰⁷ Chief Justice Rehnquist summarized this stance by quoting *Hans*:

Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, "we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms." That presupposition, first observed over a century ago in *Hans v. Louisiana* (1890), has two parts: first, that each State is a sovereign entity in our federal system; and second, that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent."¹⁰⁸

Elsewhere I have explained why it is wrong to claim that the Eleventh Amendment restored an original meaning that had been distorted by four Justices of the Supreme Court in their first great constitutional case. Instead, the Eleventh Amendment revised or *changed* the original meaning of the Constitution because that meaning had led to an unpopular result.¹⁰⁹ What I did not realize then is that Chief Justice John Marshall reaffirmed the original correctness of *Chisholm* even after its holding was reversed by the Eleventh Amendment.

In *Fletcher v. Peck*,¹¹⁰ Marshall made the following observation:

103. *Id.* at 456 (Wilson, J.).

104. *Id.* at 468 (Cushing, J.).

105. *Id.* at 453 (Wilson, J.).

106. 134 U.S. 1 (1890).

107. 517 U.S. 44 (1996).

108. *Id.* at 54 (quoting *Hans*, 134 U.S. at 13) (citations and internal quotation marks omitted).

109. See Randy E. Barnett, *The People or the State?: Chisholm v. Georgia and Popular Sovereignty*, 93 VA. L. REV. 1729, 1741-55 (2007). In addition, I add my voice to the chorus of scholars who maintain that the Eleventh Amendment should be interpreted according to its terms rather than according to the underlying "presupposition" for which it allegedly stands. See *id.* at 1745-55.

110. 10 U.S. (6 Cranch.) 87 (1810).

The constitution, *as passed*, gave the courts of the United States jurisdiction in suits brought against individual states. A state, then, which violated its own contract was suable in the courts of the United States for that violation. Would it have been a defence in such a suit to say that the state had passed a law absolving itself from the contract? It is scarcely to be conceived that such a defence could be set up. And yet, if a state is neither restrained by the general principles of our political institutions nor by the words of the constitution from impairing the obligation of its own contracts, such a defence would be a valid one. *This feature is no longer found in the constitution, but it aids in the construction of those clauses with which it was originally associated.*¹¹¹

In other words, according to Chief John Marshall and contrary to Chief Justice Rehnquist, some twenty years after the Eleventh Amendment was ratified, *Chisholm* was still considered a faithful interpretation of the original meaning of the Constitution at the time it was decided and remained a correct reading of the general principles of our political institutions.

III. ST. GEORGE TUCKER'S READING OF THE NINTH AND TENTH AMENDMENTS

As was mentioned in the Introduction, Lash offers a single source who actually refers to collective rights: St. George Tucker's statement that "the powers delegated to the federal government, are, in all cases, to receive the most strict construction that the instrument will bear, where the rights of a state or of the people, either collectively, or individually, may be drawn in question."¹¹² Given that it is the only reference to "collective rights" among his Founding-era sources, Lash uses it not once but twice.¹¹³

Tucker's views of the Ninth and Tenth Amendment respectively are indeed worth close consideration, which I have given them elsewhere.¹¹⁴ Tucker was professor of law at the College of William and Mary, one of the leading judges of the General Court in Virginia, and the American editor of Blackstone's Commentaries, the most influential and authoritative legal work of the period. In the 1803 edition of the Commentaries, he attached an appendix entitled *Notes of Reference to the Constitution and Laws of the Federal Government of the United States; and of the Commonwealth of Virginia*, in which he provides the first scholarly gloss on the meaning of the Constitution. Though published after 1800, Tucker's treatise was based on notes of his lectures given throughout the 1790's and was contemporaneous with the earliest years of the Constitution.¹¹⁵

111. *Id.* at 28 (emphases added).

112. See Lash, *supra* note 4, at 919 (quoting St. George Tucker, *A View of the Constitution of the United States*, in 1 BLACKSTONE'S COMMENTARIES app. 154 (St. George Tucker, ed., Phila., William Young Birch & Abraham Small 1803)).

113. See *id.* at 919, 936.

114. See Barnett, *supra* note 15, at 69-75.

115. THE VIRGINIA LAW REPORTERS BEFORE 1880, at 101-02 (W. Hamilton Bryson ed. 1977).

Tucker's treatment of both the Ninth and Tenth Amendments is completely at odds with Lash's collectivist reading of the Ninth. In the beginning of his *Notes*, Tucker states that: "The state governments . . . retain every power, jurisdiction, and right not delegated to the United States, by the constitution, nor prohibited by it to the states."¹¹⁶ This states' rights proposition is followed by a footnote citation to the Tenth Amendment, not the Ninth.¹¹⁷ Tucker then says the construction "that in the new government, as in the old, the general powers are limited, and that the states, in all unenumerated cases, are left in the enjoyment of their sovereign and independent jurisdictions . . . has since been fully confirmed by the *twelfth* article of amendments . . ."¹¹⁸ In other words, where he is considering the powers and rights of states, Tucker consistently references the Tenth Amendment and not the Ninth.

Later in his *Notes*, Tucker differentiates the Ninth Amendment from the Tenth in a section considering them both jointly. According to Tucker, the Ninth and Tenth Amendments together justify a narrow construction of federal powers when the rights and powers of individuals are at issue; the Tenth Amendment by itself justifies a narrow construction of federal powers when the rights and powers of the states are implicated. To distinguish these two rules of construction I have inserted the numbers in brackets.

All the powers of the federal government being either expressly enumerated, or necessary and proper to the execution of some enumerated power; and it being one of the rules of construction which sound reason has adopted; that, as exception strengthens the force of a law in cases not excepted, so enumeration weakens it, in cases not enumerated; it follows, as a regular consequence, that [1] *every power which concerns the right of the citizen*, must be construed strictly, where it may operate to infringe or impair his liberty; and liberally, and for his benefit, where it may operate to his security and happiness, the avowed object of the constitution: and, in like manner, [2] *every power which has been carved out of the states*, who, at the time of entering into the confederacy, were in full possession of all the rights of sovereignty, is *in like manner* to be construed strictly, wherever a different construction might derogate from the *rights and powers, which by the latter of these articles*, are expressly acknowledged to be reserved to them respectively.¹¹⁹

Given that the section in which this passage appears is discussing the Ninth and Tenth Amendment together, both amendments support a rule of construction when the individual liberty or "right of the citizen" are at stake. Notice the singular tense: *his* liberty, *his* benefit, *his* security and happiness. In

116. Tucker, *supra* note 112, at app. 141. This proposition, which tracks Virginia's 17th proposed amendment, originated in the Articles of Confederation. See ARTICLES OF CONFEDERATION art. II ("Each state retains . . . every power, jurisdiction, and right, which is not . . . expressly delegated . . .").

117. *Id.* In Tucker's *Notes*, the Ninth and Tenth Amendments are still referred to as the eleventh and twelfth articles of amendments respectively.

118. *Id.* at 142-43 (emphasis added).

119. *Id.* at 307-08 (emphases and numbers in brackets added).

contrast, the Tenth Amendment (“the latter of these two articles”) is singled out as justifying a strict construction of federal powers when a broader construction might derogate from the rights and powers of states.

Tucker’s account is fundamentally incompatible with Lash’s neat division between the Ninth and Tenth Amendments. In the passage just quoted, Tucker clearly advocates two rules of construction depending on whether the rights of individuals or states are implicated by the exercise of federal power. The rule of construction protecting individual liberty is supported by the Ninth and Tenth Amendments; the rule of construction protecting the rights, powers and jurisdiction of states is supported by the Tenth Amendment alone. Lash’s account is different. According to him:

The Tenth limits the government to enumerated ends, while the Ninth Amendment limits the scope of Congress’ implied means to advance those enumerated ends. In particular, the Ninth prohibits the federal government from claiming that the only limit to its “necessary and proper powers” are those expressly enumerated in the Constitution. The people have *other* rights that *also* constrain the scope of enumerated federal power.¹²⁰

He makes this move to show that the “other” rights to which the Ninth Amendment refers include the majoritarian rights of states along with those of individuals. But while Lash claims that only the Ninth Amendment supports a narrowing rule of construction, his account is at odds with Tucker’s, which contends that the Tenth Amendment also justifies a strict construction of federal power when the rights and powers of states are threatened: “*As federal it is to be construed strictly, in all cases where the antecedent rights of a state may be drawn in question . . .*”¹²¹ This sentence is followed by a footnote citing the Tenth Amendment, not the Ninth.

Whereas Tucker viewed the Tenth Amendment standing alone as protecting states’ rights from a latitudinarian construction of federal powers, he viewed the Ninth Amendment, and the reference to “the people” in the Tenth, as protecting individual rights against latitudinarian constructions of federal

120. Lash, *supra* note 4, at 922 (first emphasis added; second emphasis in original).

121. Tucker, *supra* note 112, at app. 151 (original emphasis on “state”; additional emphases added). In this regard, Tucker is following Madison’s objections to the constitutionality of the Aliens and Sedition Acts in his Report of 1800 in which Madison made the exact same distinction between express powers and latitudinarian interpretations under the Necessary and Proper Clause that is employed by Lash:

[T]he first question is, whether the power be expressed in the constitution. If it be, the question is decided. If it be not expressed; the next enquiry must be, whether it is *properly* an incident to an express power, and *necessary* to its execution. If it be, it may be exercised by Congress. If it be not; Congress cannot exercise it.

James Madison, Report on the Alien and Sedition Acts, Jan. 7, 1800, in WRITINGS, *supra* note 26, at 608, 642 (emphases added). Yet, in his Report, Madison nowhere cites the Ninth Amendment. There was no need as the individual right violated by the Sedition Act was protected by the First Amendment. But Madison also opposed the Alien Friends Act on the ground that it employed a latitude of interpretation to violate the reserved powers of states. He bases this rule of construction protecting states rights on the Tenth Amendment.

power: “[A]s a social compact it ought likewise to receive the same strict construction, wherever the *right of personal liberty, of personal security, or of private property* may become the subject of dispute”¹²² This passage is followed by a footnote reference to both the Ninth and Tenth Amendments. Not only is this a strong affirmation that the Ninth Amendment protects individual or “personal” rights, Tucker makes no mention whatsoever of a collective or majoritarian right also being protected.

In sum, according to Tucker, and contrary to Lash, *both* the Ninth and Tenth Amendments justify a narrow construction of federal powers. The former when the personal rights of individuals are threatened; the latter when the rights and powers of states are threatened. And, also contrary to Lash, when Tucker refers to “the rights and powers” of the states, he invariably invokes the Tenth Amendment (“the latter of these articles”) rather than the Ninth.¹²³ Finally, when Tucker invokes the Ninth, it is solely in reference to “personal” liberties of “the citizen” or individual rights.

In the passage twice quoted by Lash, Tucker is merely summarizing this duality by using a parallelism, which I indicate by the letters inserted in brackets. “[T]he powers delegated to the federal government, are, in all cases, to receive the most strict construction that the instrument will bear, where the rights [a] of a state or [b] of the people, either [a] collectively, or [b] individually, may be drawn in question.”¹²⁴ Here “the rights of a state” parallel the term “collectively” while “the rights of . . . the people” parallel the term “individually.”¹²⁵ In context, Tucker’s parallelism is obvious unless one has succumbed to the majoritarian difficulty. By expressly asserting that the Tenth Amendment protects the collective rights of a state, Tucker is impliedly affirming that the Ninth Amendment does not protect any collective rights of the people, but is limited to individual rights.

CONCLUSION: STATE “CONTROL” OF THE RIGHTS RETAINED BY THE PEOPLE

While there is no free-standing collective right of a majority to rule in the states that is protected by the Ninth Amendment, constitutional limits on federal power indirectly preserve and protect whatever majoritarian features are incorporated into state constitutional schemes. So too does Article IV, section 4

122. Tucker, *supra* note 112, at app. 151 (emphasis added).

123. *Id.* at 308.

124. Lash, *supra* note 4, at 919 (quoting Tucker, *supra* note 112, at app. 154).

125. *Id.* The passage could be rephrased to eliminate the potentially confusing parallelism as follows: “The powers delegated to the federal government, are, in all cases, to receive the most strict construction that the instrument will bear, where the rights of a *state collectively* or of the *people individually*, may be drawn in question.” Or “The powers delegated to the federal government, are, in all cases, to receive the most strict construction that the instrument will bear, where the *collective rights of a state* or of the *individual rights of the people* may be drawn in question.”

in guaranteeing “to every state in this Union a republican form of government.”¹²⁶ Likewise, the Ninth Amendment protects the unenumerated individual rights of everyone in a state, including those in the majority, against abuses by the federal government. And according to St. George Tucker, the Tenth Amendment justifies a strict interpretation of the implied powers of Congress when the rights and powers of states are affected. But none of these constitutional protections of state or majoritarian power implies a retained right of a majority in a state to rule over minorities in violation of the natural individual rights retained by the people.

However, in addition to his assertions of collective and/or majoritarian *rights*, Lash also repeatedly refers to an altogether different concept: that of local and/or majoritarian *control* of the exercise of the rights retained by the people. Sometimes he refers to local or *state* control as, for example, when he says that “the fact that some rights are enumerated against the states shall not be construed to disparage or deny other rights left under local (state) control.”¹²⁷ Other times he refers to *majoritarian* control, for example when he says that “all retained rights (individual and otherwise) were left to the control of state majorities.”¹²⁸ Just as a collective right is not the same concept as that of a majoritarian right, however, so too local control is not the same as majoritarian control; and a local *power to control* an individual right is not the same thing as a collective *right to local control*.

At some point, all these different formulations of collective or majoritarian rights or powers need to be sorted out and supported by pertinent evidence. Rather than try to reconstruct what Lash is really claiming, let me conclude by

126. U.S. Const. art. IV, § 4.

127. Lash, *supra* note 4 at 903; *see also id.* at 920 (“to preserve local control of both individual and majoritarian rights”); *id.* at 922 (“[T]he Ninth and Tenth establish that all retained powers and rights are left under the control of the people in the states who may then delegate the same to their state governments, or expressly retain them under their state constitution.”); *id.* at 928 (“Even in regard to retained unenumerated individual rights, the text leaves these under the control of the people in the several states absent an express mandate in the Constitution itself.”); *id.* at 931 (“In addition to reserving certain subjects to local control, the Ninth Amendment also counsels against construing federal power as exclusive of concurrent state authority, unless absolutely necessary.”); *id.* at 933-34 (“[I]t is the text of the Ninth that calls for a limited construction of enumerated federal power in order to avoid *disparaging* the right of the people to keep certain matters under local control.”).

128. *Id.*, at 911; *see also id.* at 919 (“describing the Ninth Amendment as a provision reserving *all* retained rights, individual and majoritarian, to the control of local majorities”); *id.* at 920 (“Even those retained rights that are individual in terms of their application against the federal government are *collective* in terms of their being retained under local majoritarian control.”); *id.* at 924 (“All of the rights now protected by the Fourteenth Amendment originally fell within the category of rights removed from the federal government and left as an initial matter under majoritarian state control.”); *id.* at 915 (“Because ‘retaining’ a right, by definition, means leaving that right to the majoritarian control of the people in the states, all retained rights are federalist in their operative effect in that they are retained to the majoritarian control of the people in the several states.”).

offering my own views about the powers of federal and state governments to control or regulate the exercise of the natural individual rights; powers that are consistent with the Ninth and Fourteenth Amendments and the rest of the Constitution.

For reasons that are not fully articulated or easily reconstructed, Lash prefers to call an individual natural rights interpretation of the Ninth Amendment a "Libertarian reading" of the Ninth Amendment,¹²⁹ perhaps to disparage it as formulated to reach results in accordance with what he calls "libertarian political theory."¹³⁰ While the limitations on government powers required by the original meaning of the Constitution as amended may well be more protective of individual liberty than the constitutional law currently recognized by the Supreme Court, by no means are they perfectly or even radically libertarian.

Under the U.S. Constitution, the fact that a person may possess a natural right does not preclude the regulation of its exercise to protect the rights of others. As St. George Tucker explained,

the power of regulating the course in which property may be transmitted by deed, will, or inheritance; the manner in which debts may be recovered, or injuries redressed; the right of defining and punishing offences against the society, other than such as fall under the express jurisdiction of the federal government; all which, and all others of a similar nature are reserved to, and may be exercised by the state governments.¹³¹

For example, while Robert Farquhar had a natural right to enter into binding contracts that ought not be denied or disparaged by the state of Georgia, this would not prevent Georgia from establishing a general law of contracts to regulate their making, interpretation, and enforcement. The relationship between rights and regulation is reflected in the commonplace statement that the exercise of liberties was subject to the law of the land. To these state regulatory powers we must add the power of Congress "[t]o regulate Commerce with foreign Nations, among the several States, and with the Indian Tribes."¹³²

This power to regulate the exercise of natural rights applies both to enumerated and unenumerated rights. The natural retained right of freedom of speech¹³³ is consistent with government prohibition of wrongful speech—e.g., e.g., fraud and defamation—and with the regulation of rightful exercises of

129. *See id. passim.*

130. *Id.* at 933. Perhaps this is also why Lash persists in referring to me as "libertarian scholar Randy Barnett," *id.* at 898 n.11, which would be like identifying Lash or Amar as "collectivist" or "majoritarian" scholars, rather than as constitutional scholars who defend a collective rights reading of the Ninth Amendment as its original meaning.

131. Tucker, *supra* note 112, at app. 309.

132. *See* U.S. CONST. art. I, § 8.

133. *See* Barnett, *supra* note 15, at 33-38 (discussing the notes for Madison's bill of rights speech in which he referred to the "natural rights retained as speech").

speech in the form of rules governing the time, place, and manner of their exercise. So too is an individual right to keep and bear arms consistent with the government prohibition of the wrongful use of arms, as well as time, place and manner regulations of their possession and carry.¹³⁴

Lash's failure to appreciate the difference between a justified power to regulate individual rights and an unconstitutional power to deny or disparage them colors his entire analysis. He says: "A retained right is a right withheld from government control. The opposite of a retained right is an assigned right—one delegated to government control."¹³⁵ In other words, he seems to view constitutional rights as absolute or as trumps; to recognize an enumerated or unenumerated right is to remove all government control of its exercise. But, as was just explained, this is no more the case with the unenumerated rights "retained by the people" to which the Ninth Amendment refers than it is with the enumerated rights to which the First and Second Amendments refer.

The ever present danger that the individual rights of the people to keep and bear arms or to exercise the freedom of speech will be unjustly infringed warrants placing the onus on the government to justify its regulations of these liberties as truly necessary and proper. And the Ninth Amendment's mandate that the same constitutional protection be afforded the other rights retained by the people warrants creating what might be called a general "presumption of liberty."¹³⁶ Any such presumption of liberty, however, can be rebutted by a sufficient showing of necessity and propriety. In a system in which government judges are the only independent tribunals available to police the scope of governmental powers, the result will be far from a libertarian nirvana.¹³⁷

Therefore, to the extent that the power to regulate the exercise of the rights retained by the people was and remains primarily the responsibility of the states, Lash is quite correct that all these rights are subject to the control of state governments. The name we have given this power of control is the police power.¹³⁸ But the police power of states to regulate the rights retained by the people does not give states the right to deny or disparage them any more than the power to regulate contracts gives states the power to impair the obligation of rightful contracts.¹³⁹

134. See Gary E. Barnett, Note, *The Reasonable Regulation of the Right to Keep and Bear Arms*, 6 GEO. J.L. & PUB. POL'Y (forthcoming 2008) (analogizing reasonable regulations of firearms to time, place and manner regulations of speech).

135. Lash, *supra* note 4, at 911 (citation omitted).

136. See generally RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004) (explaining why a presumption of liberty is an appropriate way to put into effect the original meaning of the Constitution as amended).

137. Not to mention such unlibertarian constitutional provisions as the Sixteenth Amendment.

138. See Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429 (2004).

139. See U.S. CONST. art. I, § 10 ("No State shall . . . make any . . . Law impairing the Obligation of Contracts.").

Of course, under the original Constitution, the federal government had only a limited jurisdiction to protect the personal rights of the citizen from being violated by his or her state government.¹⁴⁰ For this reason, at the Founding, the issue of states violating natural rights was largely moot at the federal level. But this feature of the original constitution was altered by adoption of the Fourteenth Amendment, which stipulated that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.¹⁴¹

In *A Textual-Historical Theory of the Ninth Amendment*, Lash tentatively offers a novel and counterintuitive view of the relationship of the Ninth Amendment and the Fourteenth.¹⁴² But his hypothesis about the Fourteenth Amendment is wholly dependent on his claim that the Ninth Amendment protects a collective or majoritarian control of individual rights or a collective or majoritarian right to rule individuals. Unless this claim is first clarified and then proven we need not concern ourselves with how his reading of the Ninth Amendment can be reconciled with the subsequently-adopted Fourteenth Amendment. By this point, however, I trust fair-minded readers can see just how implausible is Kurt Lash's majoritarian interpretation of the Ninth Amendment.

140. The Contracts Clause, *id.*, is one example of an original federal limitation on state power.

141. U.S. CONST. amend. XIV, § 1. Notice how the Privileges or Immunities Clause combines the prohibitory phraseology of the Contracts Clause and First Amendment ("shall make no law") with the subject matter scope of the Privileges and Immunities Clause of Article IV. See BARNETT, *supra* note 136, at 60-68, 190-97 (discussing the meaning of "privileges or immunities" and the protection of these individual rights against state laws).

142. See generally Lash, *supra* note 4.

