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THE FEDERAL SYSTEM AS BILL OF RIGHTS: ORIGINAL UNDERSTANDINGS, MODERN MISREADINGS

Thomas B. McAfee*

I. Federalism and Rights: The Basic Confusion

In the modern era, we have almost completely lost track of the relationship that the Framers of the United States Constitution perceived between the structure of our federal system and the protection of popular rights.1 At least two obvious components of this confusion persist. First, as we have come to think of rights almost exclusively in terms of the claims of individuals against the government, we have lost the ability to hear the Framers' voices referring to rights held by the people in their collective capacity, including the rights of the people within each of the sovereign states to be free from undue federal intrusion on their power of self-governance.2 Second, our familiarity with the modern judiciary's reliance

* Professor of Law, Southern Illinois University School of Law. This Article is part of a larger, book-length project on the Ninth Amendment and the idea of an unwritten Constitution. A review of some of its basic themes was presented in lecture form at a symposium on federalism in October 1995, and the lecture was published, with accompanying footnotes, in a symposium issue in volume 1996 of the Brigham Young University Law Review. See Thomas B. McAfee, Federalism and the Protection of Rights: The Modern Ninth Amendment's Spreading Confusion, 1996 BYU L. Rev. 351, 351 (1996) (discussing "the relationship that the framers of the United States Constitution perceived between the structure of our federal system and the protection of popular rights").

1. The phrase "popular rights" is used purposefully to include rights that were held by the people collectively as well as rights that are usually called (for good reason) "individual rights." Although the founding generation often referred to individual rights (even in cases in which such rights were thought to promote a social good), they also debated the merits of rights that were to be held by the people in their collective capacity.

2. Indeed, it is undeniable that some tension exists between the idea of collective rights, in particular the idea of popular rule, and the idea of human rights—rights which might make claims against the authority of the people; but the existence of this real tension within the critical terms of the Framers' political theory does not exonerate us for failing to perceive that the point of our federal system (and, indeed, of the Bill of Rights) was partly to secure collective rights (including rights of local popular governance). See Walter Berns, The Constitution as Bill of Rights, in HOW DOES THE CONSTITUTION SECURE RIGHTS? 50, 58 (Robert A. Goldwin & William A. Schabram, eds., 1985) (observing that for Framers of American constitutions, both state and federal, "the right to share equally in this decision [on the form, organization and powers of the government instituted to secure the rights of all] is the most important human right because government is the means by which all other rights are secured"); see also Akhil Reed Amar, The Bill of Rights as a Constitution, 100 YALE L.J. 1131, 1162-73 (1991) (discussing federalism dimensions to original Federal Bill of Rights, with respect to both whole and specific provisions); Jay S. Bybee, Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act, 48 VAND. L. REV. 1539, 1542-76 (1995) (analyzing

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upon specific textual rights provisions as trump against otherwise valid claims of legislative authority has blinded us to the fact that claims based on lack of governmental authority are also individual rights claims. Most Americans, and even many legal thinkers, find it difficult to fathom that the Framers of the unamended Constitution saw this limited grant of authority as an adequate alternative to a comprehensive statement of rights in a declaration or bill of rights.

These modern tendencies of thought have been powerfully reinforced by the reality that the Framers' expectations of significantly limited federal authority have been largely swept aside in the twentieth century. This expansion of federal power may have been inevitable, in which case federalism dimensions of First Amendment and its relation to original federal structure). See generally Robert C. Palmer, Liberties as Constitutional Provisions, in William E. Nelson & Robert C. Palmer, Liberty and Community: Constitution and Rights in the Early American Republic 55 (1987) (discussing documentary contextual approach to constitutional provisions to help clarify First Amendment's meaning); Arthur E. Wilmarth, The Original Purpose of the Bill of Rights: James Madison and the Founders' Search for a Workable Balance Between Federal and State Power, 26 AM. CRIM. L. REV. 1261, 1263 (1989) ("[A] reconsideration of the original purpose of the Bill of Rights may be instructive in reminding us that a majority of the Founders believed that the liberty of the American people depended on a careful balancing and mutual checking of federal and state government powers.").

3. Compare United Pub. Workers v. Mitchell, 330 U.S. 75, 96 (1947) (referring to rights reserved by Ninth and Tenth Amendments), with Randy Barnett, Reconsidering the Ninth Amendment, 74 CORNELL L. REV. 1, 6 (1988) ("The Tenth Amendment does not speak of rights, of course, but of reserved 'powers."); Sanford Levinson, Constitutional Rhetoric and the Ninth Amendment, 64 CAL.-KENT L. REV. 131, 142 (1988) (observing that Tenth Amendment "refers to powers, not to rights," and to lack of "assigned power" even when individual rights are not implicated). According to one commentator, under the federal scheme, if an act is within a grant of authority, Congress may legislate "even at the cost of individual rights." Id. These assertions assume, however, that an individual's claim of immunity from a federal statute on the ground that it exceeded granted powers is not properly described as presenting a rights claim. Although a Tenth Amendment claim is hardly an individual rights claim in the modern sense, in that the right being claimed does not trump powers defined by the scope of the granted power, the founding generation referred to the security against excessive federal power offered by the system of delegated powers as "rights" nonetheless. See James Madison, Debates in the House of Representatives (June 8, 1789), in Creating the Bill of Rights: The Documentary Record from the First Federal Congress 69, 82 (Helen E. Veit et al. eds., 1991) (hereinafter Creating the Bill of Rights) (describing Constitution as creating "bill of powers" with "great residuum" being rights of people).

4. But see Madison, supra note 3, at 82 (describing enumerated powers scheme in Madison's proposed bill of rights). "'[T]he constitution is a bill of powers, the great residuum being the rights of the people.'" Id. For additional evidence of the difficulty modern commentators have in taking this view seriously, see infra note 11 and accompanying text.

5. See, e.g., Employment Div. v. Smith, 494 U.S. 872, 890 (1990) (holding that Free Exercise Clause did not prohibit state from applying facially neutral law to religious conduct even in absence of compelling interest); Wickard v. Filburn, 317 U.S. 111, 124-25 (1942) (finding that federal government's commerce power extends to interstate activities that so affect interstate commerce as to make federal regulation over such activities appropriate).
the Framers were wrong in assuming that the limited grant of authority would be a sufficient means for securing a wide range of rights in our system of fundamental law. Even if this were true, however, it does not warrant the modern tendency to denigrate their position as disingenuous or obviously implausible, let alone to refuse to acknowledge their argument for limited federal authority as its own distinctive form of rights discourse.

A. Federalism, Rights and the Ninth Amendment

Blindness to a basic understanding of the Framers’ design of our federal structure is largely responsible for the confusion that surrounds our understanding of the Ninth Amendment. Thirty years ago, in Griswold v. Connecticut, Justices Black and Stewart explained in separate dissenting opinions that the Ninth Amendment’s reference to the other rights “retained by the people” alluded to the collective and individual rights that the people retained by virtue of the Constitution’s grant of limited, enumerated powers to the national government. Although the overwhelm-


7. See Leonard Levy, Original Intent and the Framers’ Constitution 156 (1988) (arguing difficulty of crediting view that Framers “actually believed their own arguments to justify the omission of a bill of rights”); Levinson, supra note 3, at 140 (suggesting that Alexander Hamilton’s reliance on enumerated powers scheme in defending omission of bill of rights “does not fit altogether well with his defense of implied power only four years later in relation to the chartering of the Bank of the United States”); see also Gary Lawson & Patricia B. Granger, The “Proper” Scope of Federal Power: A Jurisdictional Reading of the Sweeping Clause, 43 Duke L.J. 267, 325 (1993) (referring to typical portrayal of omission of bill of rights as “a major blunder,” and to framers as “fools and knaves who concocted a desperate defense of a flawed document”). But see Berns, supra note 2, at 52 (concluding that, on whole, “history has vindicated the Federalists, who insisted that, so far as the federal government was the object of concern, a bill of rights was unnecessary.”); Wilmarth, supra note 2, at 1275 (stating view that federalists “genuinely believed that the rights of state citizens would not be threatened by the Constitution”). For a moderate assessment of the federalist argument, acknowledging both its force and its limitations, see infra notes 245-56, 267-74 and accompanying text.

8. See U.S. Const. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).


10. See id. at 519-20 (Black, J., dissenting) (stating that Ninth Amendment was intended to protect against notion that nonenumerated powers passed to federal government); id. at 530-31 (Stewart, J., dissenting) (same). Justice Black stated that the Ninth Amendment was adopted by the States simply to make clear that the adoption of the Bill of Rights did not alter the plan that the Federal Government was to be a government of express and limited powers, and that all rights and powers not delegated to it were retained by the people and the individual States. Id. at 529-30 (Black, J., dissenting).
ing evidence supports this interpretation of the Ninth Amendment, it has been widely rejected, and the single largest barrier to this interpretation's acceptance has been that the modern American mind has difficulty accepting the idea that the federal system itself was actually considered a sufficient guarantor of popular rights by those who drafted the Constitution.11

Justices Black and Stewart have thus been accused of ignoring the plain meaning of the Ninth Amendment's text,12 mistaking a rights provision for one about the allocation of power,13 and of generally confounding the Ninth with the Tenth Amendment.14 Until recently, the center of the critique of the Black/Stewart reading was the basic premise that federalism is only about governmental structure and not in any direct sense about securing popular rights.


Any provision that has survived [the amending] process must be presumed by interpreters of the Constitution to have some legitimate constitutional function, whether actual or only potential. Despite this long- respected presumption, the Supreme Court has generally interpreted the Ninth Amendment in a manner that denies it any role in the Constitutional structure.

Id.

12. See Levy, supra note 7, at 269 (stating Ninth Amendment "by force of its terms protects unenumerated rights of the people"); Stephen Macedo, Reasons, Rhetoric, and the Ninth Amendment: A Comment on Sanford Levinson, 64 CHI.-KENT L. REV. 163, 168 (1988) (viewing Ninth Amendment as "an elastic clause for individual rights that is at least as explicit as the Article I Elastic Clause for Congress' powers").

13. See Levinson, supra note 3, at 142 (documenting modern view of rights as trumps that impose limits on powers granted to government and noting inference is that rights provision cannot be about protecting scheme of allocating definite, limited powers to federal government). Thus, when a famous commentator dubbed the Black/Stewart construction as the federalism reading of the Ninth Amendment, he intended the characterization as a criticism that a rights guarantee was being transformed into a power-allocation provision. See John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 34 (1980) (describing "the received account of the Ninth Amendment," which is known by nearly every student of history); see also Douglas Laycock, Taking Constitutions Seriously: A Theory of Judicial Review, 59 Tex. L. Rev. 343, 351-52 (1981) (discussing John Hart Ely's views on Ninth Amendment); Lawrence E. Mitchell, The Ninth Amendment and "The Jurisprudence of Original Intention", 74 GEO. L.J. 1719, 1728 (1986) (arguing that "[i]t does not follow from a recognition that certain 'rights' are retained by the people, that certain 'powers' are retained by the states").

14. See Levy, supra note 7, at 280 (discussing one commentator's confusion between Ninth and Tenth Amendments); Laurence G. Sager, You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth. But What on Earth Can You Do with the Ninth Amendment? 64 CHI.-KENT L. REV. 259, 245 (1988) (discussing state-law thesis and its view that Ninth Amendment serves to preserve rights-protective enumerated-powers scheme because it "requires us to treat the ninth amendment as a colossally bad first draft of the tenth" and, thus, has no independent significance in constitutional scheme).
In two prior works, this author has defended the view that the purpose of the Ninth Amendment is to preserve the federal structure against a unique threat posed by enumeration of significant limits on federal power. In both works, a major task was to explicate how a structural or federalist reading of the Ninth Amendment is consistent with the undeniable fact that it is also a rights provision. A central thesis of those works was that modern readers have been misled in analyzing the textual and historical materials by the modern biases about rights and structure as outlined above; freed of those biases, the evidence bearing on original meaning takes on an entirely new cast. In fact, the burden of those works was to show that the historical evidence reveals that the whole point of the amendment was to foreclose a feared inference from the inclusion of the Bill of Rights: the rights-protective scheme of limited, enumerated powers was being overthrown in favor of a government of general legislative powers subject only to the specific restrictions stated in the Constitution and its amendments.

Apart from whether these works have established this reading as the original meaning of the Ninth Amendment, the view clearly presents us with a linguistically coherent and historically plausible accounting of the rights focus of the amendment. The fear that enumerating rights could


16. See Calvin R. Massey, Silent Rights: The Ninth Amendment and the Constitution's Unenumerated Rights 93 (1995) (acknowledging that "[i]t may be that the dominant motivation for [the amendment's] adoption was the desire to prevent the argument that enumeration of certain rights carried with it the implication that the federal government must, therefore, possess unenumerated powers to invade rights and this purpose "is directed entirely toward the objective of cabining implied governmental powers"); Michael J. Perry, The Constitution in the Courts 65-69 (1985) (rejecting McAffee's reading, although finding his historical reconstruction plausible, and acknowledging that judge who found its conclusion more acceptable institutionally might well find it persuasive); cf. Massey, supra, at 97 (arguing that we should invoke constitutional cy pres doctrine to secure rights originally thought to be guaranteed by limited powers scheme because "we no longer make any serious attempt to control the extent of the implied powers of Congress"). The courts typically apply the cy pres doctrine when they are faced with the dilemma of an expressed testamentary intent that is impossible to achieve by effectuating as nearly as possible the testator's intent. See id. (discussing application of cy pres doctrine). Professor Massey contends:

If the Ninth Amendment's intended purpose was simply to confirm the extent of congressional power by preventing a latitudinarian interpretation of the scope of that power, it is evident that, apart from a radical reconstruction of existing doctrine, that intent can no longer be accomplished. To effectuate the original intent as nearly as possible it is necessary to constrain governmental power by reading the Ninth Amendment as a source of judicially enforceable individual rights that operate to limit the exercise of governmental power.

Id. at 97-98.
raise an inference against the limited powers scheme was articulated by all of the Constitution’s leading defenders. The logic was simple. The state constitutions presumed legislatures of general powers and limited the exercise of those powers in their constitutional declarations of rights. In contrast, the Constitution, like the Articles of Confederation, limited national power by granting specific powers that defined the few areas over which the national government was to have special competence. If specific limiting provisions were included, they could be construed to suggest that the national government (like the governments of the states) was to be a government of general powers limited only by the specific restraints stated in the Bill of Rights. Many feared that by amending the Constitution to include a number of specific rights that they were anxious to preserve, the people might unwittingly undermine those rights already inherent in the structure of a limited federal system as established by the original Constitution.

Others contend, of course, that the reference to other rights retained by the people points beyond the Constitution to implied limitations on the


18. See id. at 1230-32 (analyzing speech by Wilson setting forth dichotomy between state and federal governments). For further documentation on this crucial dichotomy, see infra notes 175-79.

19. See James Iredell, Debates in the Convention of the Commonwealth of North Carolina on the Adoption of the Federal Constitution (July 28, 1788), in 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 144, 149 (J. Elliot ed., 2d ed. 1866) [hereinafter Elliot’s Debates] (recording James Iredell’s forceful and unequivocal statement of this point before North Carolina Ratifying Convention). A bill of rights would have been both proper and necessary if the Constitutional Convention had devised a general legislature of undefined powers as in “some of the American constitutions” because “it would have then operated as an exception to the legislative authority in such particulars”; where the Framers, however, had “expressly defined” legislative “powers of a particular nature, . . . [a bill of rights] is not only unnecessary, but . . . absurd and dangerous.” Id.

20. See Levinson, supra note 3, at 141 (posing as central question of argument opposing Bill of Rights, “[d]id any enumeration of limitations on government carry with it the negative pregnant that everything else was in fact permitted?”). If the answer to this question was in the affirmative, the clear implication would be a national government of general, rather than of assigned powers. See id. (addressing question of whether violation of those rights that were not enumerated was therefore permitted). As James Madison noted:

“[B]y enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure.”

Id. (quoting Madison, supra note 3, at 77). The Ninth Amendment, however, guards against granting to the federal government those powers that were not enumerated. See id. (stating that message of Ninth Amendment is “that the specification of some rights [is] not to be interpreted as denying the equal presence within the legal system of other, unenumerated rights”).
powers granted to the national government (and possibly on the states as well), which were to be deduced by judicial reference to natural law or to common law methodology.21 Perhaps the most striking feature of most of the modern writings advocating this alternative interpretation is the pervasive reliance on the idea that the other rights retained by the people cannot plausibly reference the rights secured by the Constitution's limited powers scheme.22 These critics of the "federal structure" reading of the amendment, however, have consistently displayed the modern propensity to denigrate or ignore the importance of the federal system as a means of securing popular rights.23

B. Federalism and Affirmative Rights: A Countertheme Emerges

The standard arguments against the structural interpretation of the Ninth Amendment, as described above, all assume that a constitutional provision must be either a power-allocation provision or a rights-securing

21. See Thomas B. McAffee, Prolegomena to a Meaningful Debate of the "Unwritten Constitution" Thesis, 61 U. CIN. L. REV. 107, 107 n.4 (1992) (discussing "the [largely unexplained] historical claim that the founding generation saw the Constitution as including a written document and unwritten principles of fundamental law"). This author has elsewhere described this view as the "affirmative rights" reading, given that it presumes that the unenumerated rights referred to in the Ninth Amendment affirmatively limit national powers; the federal-structure approach, by contrast, sees the unenumerated rights as the rights existing as a residuum from federal powers. See generally McAffee, Original Meaning, supra note 15, at 1215 (defining "affirmative rights" approach and contrasting residual-rights reading of Ninth Amendment with affirmative-rights interpretation).

22. Cf. McAffee, Original Meaning, supra note 15, at 1218-21, 1238-48, 1255-57, 1269-71 (discussing commentators' tendency to be misled because they fail to correctly apprehend and apply Framer's assumptions about rights-protective nature of federal system and stating that commentators who acknowledge that Framers relied upon Article I's limited grant of powers to national government in defending their decision to omit a bill of rights from the Constitution miss significance of this argument as they seek to explicate expressions of concern that bill of rights might jeopardize unenumerated rights); McAffee, supra note 21, at 150-64 (noting commentator's failure to correctly analyze Framer's assumptions).

23. But see Archibald Maclaine, Debates in the Convention of the Commonwealth of North Carolina on the Adoption of the Federal Constitution (July 28, 1788), in 4 ELLIOT'S DEBATES, supra note 19, at 139, 141 (recording speech defending Constitution in which Maclaine referred to security offered by Constitution's scheme of enumerated powers in very terms of Ninth Amendment). Maclaine stated: "We retain all those rights which we have not given away to the general government." Id. (emphasis added); see Samuel Spencer, Debates in the Convention of the State of North Carolina on the Adoption of the Federal Constitution (July 29, 1788), in 4 ELLIOT'S DEBATES, supra note 19, at 163, 163 (contending that if Constitution contained guarantee that "every power, jurisdiction, and right, which are not given up by it, remain in the states," there would be no need for bill of rights); A REVIEW OF THE CONSTITUTION PROPOSED BY THE LATE CONVENTION HELD AT PHILADELPHIA 1787, by a FEDERAL REPUBLICAN (Nov. 28, 1787) [hereinafter A FEDERAL REPUBLICAN], in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 303, 303-06 (Merrill Jensen ed., 1976) [hereinafter RATIFICATION OF THE CONSTITUTION] (stating that Constitution needed either bill of rights or declaration that all not "decreed to Congress" is reserved to states).
provision, an assumption that is belied by the form in which the First Amendment is drafted (as a power constraint rather than as an affirmation of a right) and by the Framers’ stated beliefs about the effect of the system of enumerated powers. These arguments also rest on the assumption that individual rights cannot be preserved structurally, by the granting and withholding of powers, even though the founding generation assumed the contrary. Over the years, however, a fascinating countertheme has emerged in the literature favoring the more expansive reading of the Ninth Amendment. Commentators have increasingly come to acknowledge that the federal system was in part a structure for securing popular rights.

24. See U.S. Const. amend. 1 (affirmatively protecting rights named therein by prohibiting Congress from using any of its powers to infringe those rights); Bybee, supra note 2, at 1556 (recognizing that First Amendment also disables government from interfering in range of areas by reliance on another power-allocative approach, enumerating powers that can be exercised). In fact, the First Amendment has been read as creating a different sort of protection in substance, and not merely in form; it creates a “subject-matter disability, as opposed to a procedural disability” in that it “puts a category of laws beyond the competence of Congress” rather than merely “qualifying the conduct of governmental affairs.” Id. Just as with enumerated powers, moreover, this no-power approach to the First Amendment works simultaneously to secure freedoms that were thought to be fundamental and to preserve critical areas of concern for the states. See id. at 1557 (stating that First Amendment’s prohibitions against congressional laws establishing religion and regulating free exercise of religion or freedom of speech and press benefitted American people as well as states). For a treatment of historical claims that the First Amendment presents us with a broad jurisdictional disability rather than a typical rights guarantee, see infra notes 406-19 and accompanying text.

25. See, e.g., Laycock, supra note 13, at 352 (stating that clause referencing “rights retained by the people” cannot be transformed into one “allocating powers between the state and federal governments”). This position not only presumes that structural provisions cannot be about rights, but also forgets that the Tenth Amendment reserves powers to the people and not alone to the states. The people, however, did not reserve merely the collective power to govern through the jurisdiction of the state governments; they also reserved to themselves, as rights, powers that they might have ceded up to government. See James Wilson, Address to the Pennsylvania Ratifying Convention (Nov. 28, 1787), in 2 Ratification of the Constitution, supra note 23, at 387, 388 (“A bill of rights annexed to a constitution is an enumeration of the powers reserved.”). Indeed, Wilson contended that Article I’s scheme of enumerated powers provided a better security of popular rights than a bill of rights because an imperfect “enumeration of the powers of government reserved all implied power to the people,” while an imperfect enumeration of rights in a bill of rights might implicitly concede dangerous powers to government. Id. Wilson’s entire argument proceeds on the assumption that strictly limited grants of power are as plausible a way to retain rights (“the powers reserved”) as affirmative limitations on powers in favor of specified rights.

There is, naturally, a catch: none of these commentators sees the federal structure, and especially the notion of a national government of few powers, as an alternative, indirect way of securing liberty; by one means or another, each of these commentators concludes that the federal structure itself was used as a device for securing affirmative limits on federal powers in favor of individual rights.\(^{27}\) Some insist that the Framers’ conception of federalism originally included the general idea of affirmative limits on government,\(^{28}\) while others suggest that particular amendments to the Constitution would not constitute a barrier against the exercise of governmental powers, they might nonetheless have an important role in determining the scope of these powers.\(^{27}\); David N. Mayer, The Natural Rights Basis of the Ninth Amendment: A Reply to Professor McAfee, 16 S. Ill. U. L.J. 313, 316-17 n.13 (1992) (discussing Norman Redlich’s view that “the last four words of the Tenth Amendment must have been added to conform its meaning to the Ninth Amendment and to carry out the intent of both.”); Suzanna Sherry, Natural Law in the States, 61 U. Cin. L. Rev. 171, 180 (1992) (“Professor McAfee would agree, I think, that there were unspecified rights (or unspecified limits on governmental powers) and that the Ninth Amendment was designed to guard against the possibility that later generations would read into the Bill of Rights an intent to codify all of those limits.”). Professor Barnett once ridiculed the idea that the Ninth Amendment could be about preserving the scheme of limited powers; he stated that the Tenth Amendment is about powers, while correcting a Supreme Court Justice about basic constitutional meaning. See Barnett, supra note 3, at 6 (“The Tenth Amendment does not speak of rights, of course, but of reserved ‘powers.’”). Now, however, he suggests that the Ninth Amendment secures unenumerated rights by providing a rule for construing federal powers, and the Tenth Amendment lends further support to the project. See Barnett, supra, at 776-77, 786 n.149 (relying on James Madison in contending that unenumerated rights are defended by limiting constructions that are lent support by these two “explanatory amendments”).

27. See generally Grey, supra note 26, at 145; Barnett, supra note 26, at 745; Heyman, supra note 26, at 327; Mayer, supra note 26, at 313; Sherry, supra note 26, at 171. It would have been useful, however, had these commentators more fully acknowledged that their own attempts to link affirmative constraints in favor of fundamental rights to the Constitution’s federal system also served to call into question the conventional insistence that talk of powers and of allocation of authority cannot be simultaneously talk of rights.

28. See Daniel Farber & Suzanna Sherry, A History of the American Constitution 380-81 (1990) (suggesting that Framers’ confidence in limited-powers scheme rested on expectation that powers granted to Congress would be construed against general background assumption of implied limitations in favor of natural and customary rights). But see McAfee, Original Meaning, supra note 15, at 1271 n.218 (criticizing assumption of implied limitations view); McAfee, supra note 21, at 154-58 (“[T]he limited construction reading of the Federalists’ argument of delegated powers appears to generate more problems than it solves.”). A similar idea is that this same general background assumption in favor of implied rights was thought to be written into the requirement that Congress’ acts be necessary and proper to execute the powers granted by the Constitution. See Grey, supra note 26, at 163-64 (stating that “laws passed by Congress must be both instrumentally useful in pursuing one of Congress’ delegated power (necessary) and consistent with traditionally recognized principles of individual right” and further noting that sovereign people can grant to Congress any powers they wished, but power to violate basic rights must be stated in explicit terms). But see McAfee, Original Meaning, supra note 15, at 1270 n.216 (contending that Grey misconstrues statements made by Theophilus Parsons during Massachusetts Ratifying Convention of 1788 to support contention that Ninth Amendment embodied implied limitations
tution were designed to build the idea of such limits into the federal scheme.\textsuperscript{29} Both groups, however, agree that the effect of either approach was to ensure that the Constitution produced a system of limited central government.\textsuperscript{30}

The purpose of this Article is to show that these attempts to read modern fundamental rights law back into the structure of the Constitution partake of the same fallacious assumptions that prompted commentators to reject the idea that the federal structure could be the source of the other rights referred to in the Ninth Amendment. This Article describes and criticizes three significant variations on the common theme that the Ninth Amendment was intended to lend support to a federal system that

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\textsuperscript{29} See, e.g., Mayer, supra note 26, at 313-16 (concluding that, notwithstanding federalist claims, lesson of struggle for bill of rights is that federal system of unamended Constitution did not adequately secure all rights to which many were committed). Accordingly, the Ninth and Tenth Amendments were inserted into the Bill of Rights to secure all the people’s rights and to assure the very sort of implied-rights limiting construction of federal power that others contend would have been warranted by the federal scheme as originally constructed. For a further description and analysis of this argument as to the Tenth Amendment, see infra notes 45-107 and accompanying text.

Going even further, it has even been suggested that the antifederalist critics of the Constitution intended the Ninth Amendment to provide another sort of federalism-based security for individual rights. See Massey, supra note 16, at 123-75 (arguing that Ninth Amendment limits scope of federal power by protecting rights created by state constitutions). Specifically, some argue that the Ninth Amendment empowers the states to adopt state constitutional guarantees that would be included among the unenumerated rights that affirmatively limit, or trump, federal powers. See id. at 124 (contending that “individual liberties secured by state constitutions against governmental intrusion are federalized by the Ninth Amendment”). For a further description and criticism of the state-law rights thesis, see infra notes 448-492 and accompanying text.

\textsuperscript{30} See Sherry, supra note 26, at 180 (suggesting that, so long as all agree that federal system was intended to preserve rights not specifically enumerated, distinction between affirmative rights and rights defined as residuum from powers granted is largely irrelevant and idea of unwritten rights reflecting natural rights tradition is reaffirmed by either view); cf. Massey, supra note 16, at 97-98 (advocating application of constitutional $cy pres$ doctrine to ensure that individual rights are secured even if federal powers scheme has been undermined or has shown itself ineffective at limiting federal power); Barnett, supra note 26, at 784 (advocating view that effectively treats rights retained by enumerated powers as warranting stringent test for whether exercise of power is necessary under the Necessary and Proper Clause). To the extent that it rests on anything other than pure confusion about the necessarily contingent nature of rights defined by reference to delegated powers, this sort of argument simply fails to recognize that the legal arguments from delegated powers also served to mask the real differences that would emerge over both the proper construction of federal powers and the appropriate limits to impose on government. The Constitution’s proponents’ belief that limited powers offered important security to the people does not imply that they would have agreed to an open-ended affirmative-rights provision to be enforced by the courts.
imposes unenumerated limitations on the powers granted to Congress in Article I.

C. A Brief Overview

Part II addresses the claim that, just as the Ninth Amendment's allusion to other rights "retained by the people" references affirmative prohibitions on powers granted by the Constitution, the Tenth Amendment's allusion to powers reserved "to the people" references the same affirmative prohibitions.\(^\text{31}\) According to this theory, the Tenth Amendment merely reinforces what the Ninth Amendment makes explicit, that there are certain inherent rights that serve to limit government power because they cannot be delegated among the "powers" of government; they are instead the reserved powers of the people. After raising questions of whether this reading is the most natural explication of the text,\(^\text{32}\) this Article will show that when the amendment is read in historical context, it becomes clear that the amendment was viewed as performing a critical rights-protective function without regard to whether it was drafted in favor of the states or the people.

The Tenth Amendment grew out of a deep fear that the failure to make clear and explicit in the Constitution the fundamental idea of the delegation of a few powers and the reservation of all other powers would endanger the Constitution's approach to ensuring limited government.\(^\text{33}\) The clear reservation of all powers not granted by the Constitution was viewed as a singularly important protection of the rights of both the states and the people.\(^\text{34}\) This Article will thus demonstrate that the amendment's reference to "the people" is most adequately explained as reflecting a desire to clarify that it is the people under the theory of the proposed Constitution, who ultimately grant and retain governmental powers.\(^\text{35}\)

Part III challenges the even bolder argument that the unenumerated rights secured by the Ninth Amendment were more than simply preexisting natural or customary rights; they were affirmative rights limitations that were already implicit in the original constitutional scheme by virtue of

\(^{31}\) For a further discussion of the Tenth Amendment, see infra notes 45-106 and accompanying text.

\(^{32}\) For a further discussion of the most natural explication of the text, see infra notes 56-64 and accompanying text.

\(^{33}\) For a further discussion of the history of the Tenth Amendment, see infra notes 65-86 and accompanying text.

\(^{34}\) See Patrick Henry, Debates in the Convention of the Commonwealth of Virginia on the Adoption of the Federal Constitution (June 14, 1788), in 3 ELIOT'S DEBATES, supra note 19, at 445-49 (arguing that provision in Constitution reserving all powers not expressly enumerated is necessary to protect rights of states and rights of individuals).

\(^{35}\) For a further discussion of the people's importance in the theory of the proposed Constitution, see infra notes 87-106 and accompanying text.
the Necessary and Proper Clause.\footnote{36} Under this jurisdictional interpretation of the Necessary and Proper Clause, as it is called, the word "proper" no longer plays a minimal, largely redundant function in the clause, as has been supposed; instead, the word provides the textual basis for judicial imposition of rights found to be fundamental in the common law and natural rights traditions. After summarizing fundamental ambiguities in this jurisdictional reading of the Necessary and Proper Clause, this Article provides an alternative textual exegesis of the Necessary and Proper Clause that calls into doubt the above-described interpretation.\footnote{37} In addition, it will also demonstrate that this novel reading runs against the grain of both the known purposes of the Necessary and Proper Clause and the overall thrust of the scheme of enumerated powers as a system for securing effective government while also protecting the rights of states and individuals.\footnote{38} We will discover, finally, that the textual and historical arguments supporting a more modest role for the Necessary and Proper Clause are strengthened by evidence from the period debate over the ratification of the Constitution and the adoption of the Bill of Rights.\footnote{39}

Finally, Part IV will address what is perhaps the most novel claim about the relationship between the Ninth Amendment and our federal system: the amendment establishes the authority of states to recognize and protect fundamental rights so as to preempt even federal law passed pursuant to one of the powers enumerated in the Constitution.\footnote{40} Opponents of the Constitution complained that the states' declarations of rights could be overridden by the exercise of the expansive new powers given the national government by the Constitution.\footnote{41} Accordingly, it has been argued that one purpose of the Ninth Amendment was to reverse this priority in favor of federal law when it came to the fundamental rights found in the constitutions of the states.\footnote{42} The concerns about federal supremacy, how-

\footnote{36} For a further discussion of the jurisdictional interpretation of the Necessary and Proper Clause, see infra notes 107-436 and accompanying text.\footnote{37} For a further discussion of ambiguities encountered under a jurisdictional reading of the Necessary and Proper Clause, see infra notes 133-83 and accompanying text. For a further discussion of an alternative textual exegesis of the Necessary and Proper Clause, see infra notes 188-224 and accompanying text.\footnote{38} For a further discussion of the critical analysis of this novel reading, see infra notes 226-94 and accompanying text. For a further discussion of the scheme of enumerated powers, see infra notes 295-388 and accompanying text.\footnote{39} For a further discussion of the period after ratification of the Constitution and Bill of Rights, see infra notes 392-436 and accompanying text.\footnote{40} For a further discussion of the power of the states to create and protect fundamental rights from federal encroachment, see infra notes 443-92 and accompanying text.\footnote{41} See Address of a Minority of the Maryland Ratifying Convention (May 6, 1788), reprinted in 5 THE COMPLETE ANTI-FEDERALIST 92, 94-95 (Herbert J. Storing ed., 1981) (proposing that Congress shall have only those powers expressly delegated in Constitution, thereby preventing to some extent Congress from effectively repealing portions of state bills of rights and state constitutions).\footnote{42} See Massey, supra note 16, at 123-73 (contending that Ninth Amendment places individual rights guaranteed by state constitutions on equal footing with any
ever, were closely tied to the arguments on behalf of a constitutional amendment clarifying that all powers not granted to the national government were reserved to the states.\textsuperscript{43} The net result was the adoption of the Tenth Amendment, not the Ninth. In turn, this Article will show that this sort of "Reverse Preemption Clause" reading of the Ninth Amendment is implausible historically and unworkable structurally as adopted in the constitutional scheme.\textsuperscript{44}

II. THE TENTH AMENDMENT AS A FUNDAMENTAL RIGHTS GUARANTEE

Traditionally the Tenth Amendment has been viewed as a structural guarantee designed to clarify the implications flowing from the Constitution's grant of limited powers to the national government.\textsuperscript{45} It makes explicit what was already implicit in Article I of the Constitution: the federal government was to be a government of limited, rather than general, powers, and the states would continue to exercise power over the vast range of matters over which the national government was not granted authority. The amendment thus appears to provide a classic example of a declaratory provision—a provision included in a legal document to confirm an existing understanding of its meaning or implications—rather than a provision to add a new substantive element or to change the document's meaning or implications.\textsuperscript{46} James Madison confirmed this purpose when he presented a draft of what became the Tenth Amendment to the first

\begin{itemize}
  \item[43] For a further discussion of the connection between these two concerns and these arguments, see infra notes 460-89 and accompanying text.
  \item[44] For a further discussion of a criticism of this sort of "Reverse Preemption Clause," see infra notes 477-492 and accompanying text.
  \item[45] See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").
  \item[46] See Amendments to the Constitution (Sept. 18, 1789), in CREATING THE BILL OF RIGHTS, supra note 3, at 3, 3 (noting Congress itself stated in its resolution adopting proposed Bill of Rights that states had "expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added" (emphasis added)). The Tenth Amendment has historically been viewed as an example of one of the declaratory clauses to be added to the Constitution. See United States v. Darby, 312 U.S. 100, 123-24 (1941) (contending that Tenth Amendment is largely superfluous). As Justice Story, delivering the opinion of the Supreme Court, wrote:

> There is nothing in the history of [the Tenth Amendment's] adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.

\textit{Id.}
\end{itemize}
Congress and acknowledged that many would think it completely unnecessary for this reason.  

In recent times, however, it has been suggested that the Tenth Amendment was intended not simply to reaffirm the federal structure, but also to guarantee fundamental rights limitations on the federal government.  

It is observed that the amendment eventually adopted by the states was not the same amendment Madison described as purely declaratory of the original federal design.  

According to one commentator, “[t]he addition of the words, ‘or to the people,’ to the end of the Tenth Amendment as it was finally adopted . . . made that amendment not only a guarantor of federalism but also of the retained rights of the people.”  

How do we know that this additional language was intended to guarantee limitations on the powers of Congress in addition to the ones set forth in the first eight amendments? The answer is not that Madison or any of his brethren asserted that this was the function of this additional language.  

Rather, it is that 

[t]he last four words of the Tenth Amendment must have been added to conform its meaning to the Ninth Amendment and to carry out the intent of both—that as to the federal government

47. See Madison, supra note 3, at 85 (acknowledging his understanding that reserved powers amendment “may be considered as superfluous,” but arguing that “there can be no harm in making such a declaration, if gentlemen will allow that the fact is as stated”).  

48. See Mayer, supra note 26, at 371 n.13 (arguing that Tenth Amendment serves dual role as guarantor of federalism as well as guarantor of retained rights of people); Norman G. Redlich, “Are There Certain Rights . . . Retained by the People?” 57 N.Y.U. L. Rev. 787, 806-07 (1982) (asserting that text of Tenth Amendment implies that people possess powers that neither federal government nor state governments possess).  

49. Madison Resolution (June 12, 1789), in Creating the Bill of Rights, supra note 3, at 11, 14 (“The powers not delegated by this constitution, nor prohibited by it to the states, are reserved to the states respectively.”). On September 7, 1789, the Senate added “or to the people” to the language describing the powers “not delegated.” See id. at 41 n.23.  

50. Mayer, supra note 26, at 317 n.13. Mayer’s formulation assumes that there is an important distinction between guaranteeing federalism and guaranteeing “the retained rights of the people.” Id. In the minds of those who sought to include the language that became the Tenth Amendment to the Constitution, however, a central end of guaranteeing federalism was precisely to guarantee “the retained rights of the people,” referring to all the rights and powers retained by the limited grants of power to the national government. See WilmARTH, supra note 2, at 1280-82 (discussing antifederalists’ emphasis on state autonomy and their demand for amendment reserving states’ rights and powers). One need not posit a new and dramatic purpose of implying additional qualifications of the powers granted by the Constitution to recognize that the Tenth Amendment belongs squarely in the Bill of Rights as a guarantee of the rights reserved to the people in granting only limited powers to the national government.  

51. See Redlich, supra note 48, at 806 (noting that Senate added this language to House’s proposed draft). Moreover, “we have no record of the Senate debates and this addition did not occasion any further debate in the House, which ultimately accepted the Senate version.” Id.
there were rights, not enumerated in the Constitution, which were 'retained . . . by the people,' and that because the people possessed such rights there were powers which neither the federal government nor the states possessed.\textsuperscript{52}

Notice that this entire course of argument contradicts central premises in the standard critique of the traditional reading of the Ninth Amendment; in important ways it turns the standard critique on its head. As noted above, commentators have uniformly contended that the federal structure reading of the Ninth Amendment renders the amendment utterly redundant of the Tenth.\textsuperscript{53} This fundamental rights reading of the

\textsuperscript{52} \textit{Id.} at 807 (first emphasis added). Professor Mayer endorsed this analysis by Professor Redlich. \textit{See} Mayer, \textit{supra} note 26, at 317 n.13 (citing Redlich for proposition that last four words of Tenth Amendment were adopted to carry out intent of both Ninth and Tenth Amendments). More recently, however, Mayer seems to suggest that the addition of the phrase in question suggested only a Jeffersonian rule of strict construction of federal powers because it transformed the provision "from a reservation of powers to the states to a more general rule for construing federal powers." David N. Mayer, \textit{Justice Clarence Thomas and the Supreme Court's Rediscovery of the Tenth Amendment}, 25 \textit{Cap. U. L. Rev.} 339, 351 (1996); \textit{see also id.} at 343 (stating purpose of Tenth Amendment was "to ensure that the federal government is truly a government of enumerated powers"); \textit{id.} at 352 (describing amendment as "rule of construction against additional federal powers"). Mayer thus praises Justice Clarence Thomas for recognizing both that the Tenth Amendment is not a mere "truism," but "a fundamental rule of construction limiting the federal government generally to a fairly strict reading of its powers enumerated in the Constitution," and that the Tenth Amendment thus "protects not only the rights of the people, the states, under a federal system of government, but also the rights of the people of the United States, under a constitutional scheme of limited government." \textit{Id.} at 422. It is difficult to see how this proposed rule of strict construction of federal powers relates to Mayer's prior argument that the same language, referencing "the people," was an allusion to constitutional rights that would affirmatively limit the scope of federal powers; nor does Mayer offer any explanation as to how this added language could have been intended to state both a general rule of strict construction and a guarantee of affirmative limitations on granted powers.

\textsuperscript{53} \textit{See} McAffee, \textit{Original Meaning}, \textit{supra} note 15, at 1307 (demonstrating that traditional claim lacks real merit given that Ninth Amendment secures general reservation of rights as created by scheme of enumerated powers against unique threat posed by enumeration of specific rights in Bill of Rights, something Tenth Amendment does not accomplish). Under this traditional reading, the Ninth and Tenth Amendments are twin guarantors of our federal system of granted powers and reserved rights; each is a cautionary provision that reflects the depth of concern and commitment that the Framers had with respect to our liberty-enhancing system of federalism. \textit{See id.} at 1306-11 (discussing several theories regarding symbiotic relationship between Ninth and Tenth Amendments).

Ironically, Redlich apparently viewed this reading of the Tenth Amendment as saving it from redundancy of the scheme embodied in Article I. He explains that "[a]s between the federal government and the states the Tenth Amendment is a redundancy" because in that regard it states the familiar truism that all is retained which has not been surrendered. Redlich, \textit{supra} note 48, at 802-07. Both the Ninth and Tenth Amendments, however, present redundancies in the sense referred to by Redlich, even with his reading of them. After all, the Ninth Amendment refers to rights already retained by the people, which according to his reading suggests that they are implied or inherent rights that already existed under the Constitution; in turn, the Tenth Amendment, even according to Redlich's analysis,
Tenth Amendment, however, suggests that the Tenth Amendment does everything that modern scholars have contended the Ninth Amendment does for us: it guarantees fundamental rights limitations beyond those enumerated in the first eight amendments to the Constitution. Thus, we return to the very sort of redundancy that was deemed implausible in the context of assessing the traditional reading of the Ninth Amendment.54

Students of the Constitution have also been told that whereas "the final text of the ninth amendment—which closely tracked the draft generated by the House of Representatives' 'Committee of Eleven' on which Madison sat—is all about rights; the language of power was reserved for the tenth amendment."55 Under the reading discussed above, however, the powers reserved to the people in the Tenth Amendment reference individual rights limitations that limit the scope of federal power. This acknowledges not only that it is possible to talk of rights through the language of powers, but also that a provision referring simply to the reservation of all the powers not granted might allude meaningfully to what the Ninth Amendment calls the other rights "retained by the people." It would be a sort of progress in the Ninth Amendment debate if we could all agree that these phrases—"powers . . . reserved to the . . . people" and "other [rights] retained by the people"—were equivalencies. Then the debate over the intended meaning of the Ninth Amendment could be resolved by determining from the text of the Tenth Amendment read in its historical context, what the Framers meant when they referred to the "powers . . . reserved to the . . . people." And, indeed, that is what this author proposes to do here in the course of evaluating the fundamental-rights interpretation of the Tenth Amendment.

A. The Text of the Tenth Amendment

The text of the Tenth Amendment seems to confirm Madison's assurance to Congress that the amendment restates what would already be a

alludes to the powers reserved by the people, not as a residuum from powers, but nevertheless, as a description of what they were deemed already to possess under the Constitution without a Ninth or Tenth Amendment.

54. It is striking that neither Mayer nor Redlich saw any need to confront the obvious redundancy their reading of the Tenth Amendment suggests. Indeed, in a subsequent writing Mayer seems to clearly separate the function of the provisions, arguing that the Ninth Amendment was to "guard against the danger of losing unenumerated rights" while the Tenth Amendment worked "against the danger of adding to the enumerated powers." Mayer, supra note 52, at 351-52. He offers no explanation, however, as to how this explication of the allocation of function between the two provisions is reconcilable with his earlier treatment of the meaning of the Tenth Amendment. It is also striking that, to date, not a single advocate of the standard critique of the traditional reading of the Ninth Amendment has noted the reintroduction of such redundancy by fellow advocates of the fundamental-rights reading of the Ninth Amendment.

55. Sager, supra note 14, at 250-51.
valid inference from the unamended Constitution. Madison suggested that there should be no objection to the amendment so long as it is agreed that “the fact is as stated.” The “fact” to which Madison refers is the fundamental idea that all the powers not granted to the nation by the Constitution are reserved powers that are beyond the authority of the federal government. Madison’s claim about the design of the unamended Constitution is strongly supported by ordinary rules of construction. The idea that Congress is limited to the powers granted and all other powers are reserved, is a reasonable inference from the language of Article I, Section 8 of the Constitution, which enumerates the powers of Congress under the Constitution. To begin with, Section 8 states that “[t]he Congress shall have Power” and then proceeds to provide a fairly substantial list of the various powers granted to Congress. Considering that this enumeration of powers followed the practice established in the Articles of Confederation, which stated the exclusive powers of the national government, this is an appropriate context in which to apply the traditional common law maxim of expressio unius est exclusio alterius—the inclusion of such a list of powers logically excludes others.

Moreover, the last clause of this section of the Constitution, the one we know as the Necessary and Proper Clause, further clarifies that this is indeed the correct inference, as it purports to acknowledge the existence of ancillary powers and to state the extent to which such powers may legitimately be exercised. If the listing of powers was intended merely to exemplify or illustrate what was intended to be a general set of national powers, rather than to define and limit the powers to be exercised by the nation, there would be no reason to state the power to execute the other named powers. The Necessary and Proper Clause rather obviously includes the pregnant negative; namely, that if an act of Congress does not

56. See U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").
57. Madison, supra note 3, at 85.
59. Id. Congress’ powers include the power to lay and collect taxes, duties, imposts and excises; to pay the country’s debts and to provide for the common defense and general welfare of the United States; to borrow money; to regulate commerce; to establish uniform rules for naturalization and bankruptcies; to coin money and to regulate its value; to establish post offices; to protect copyrights; to constitute tribunals inferior to the Supreme Court to punish piracies and felonies committed on the high seas as well as offenses against international law; to declare war; to raise and support the army and navy; to regulate the armed forces and to organize and regulate the national militia. See id. (providing also power to punish counterfeiting of securities and coin, to fix standard weights and measures and to control seat of national government).
60. See id. at art. I, § 8, cl. 16 (stating that Congress’ power is “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof").
bear the stated relationship to one of the enumerated powers, Congress
will have acted beyond the scope of its constitutional authority.

The text also seems to support the famous dictum of Justice Stone
that the Tenth Amendment "states but a truism that all is retained which
has not been surrendered." The reserved powers to which the amend-
ment refers are defined negatively as "[t]he powers not delegated." The
text itself suggests that, if any authority is actually delegated to the United
States, it follows that it has not been reserved, whether by the states or the
people. By contrast, notice that the fundamental-rights construction of
the text, which reads the Tenth Amendment as acknowledging the exist-
ence of fundamental rights over which the people hold power not dele-
gated to any government, suggests that some of the powers reserved by the
Tenth Amendment are rights that serve to constrain or limit the exercise
of the powers initially delegated. In short, these reserved powers function
as implied limitations.

It might have been conceived, of course, that the fundamental rights
secured by the Ninth and Tenth Amendments, were not delegated to the
nation because they could not be, even if a granted power might logically
seem to encompass authority to invade such a right. At the very least,
though, "powers not delegated" remains an unusual way to reference natural
and inalienable rights which, as noted above, are conceived as rights that
in their nature could not have been delegated to any government. This
seems especially true given the acknowledgment that, without the addition

61. United States v. Darby, 312 U.S. 100, 124 (1941). This is only to say, however,
that the text of the Tenth Amendment states what was already established
without it. See id. ("[T]here is nothing in the history of [the Tenth Amendment's]
adoption to suggest that it was nothing more than declaratory of the relationship
between the national and state governments as it had been established by the Con-
stitution before the amendment.").

This does not imply that the construction of the powers granted to the federal
government, and perhaps especially of the doctrine of implied powers, may not
properly be influenced by the governing assumptions as to the authority that had
been left to the states. Nor does it imply that the federal structure, and the idea of
sovereign states, quite apart from the text of the Tenth Amendment, may not be
the source of limits on national power. The historical doctrine of intergovernmen-
tal immunities, and the modern doctrine of structural limitations on federal
power, are neither commanded nor precluded by the text of the Tenth
Amendment.

62. U.S. Const. amend. X.

63. See, e.g., Mayer, supra note 26, at 822 (arguing that, for Framers, "written
law was not the source of rights, but merely affirmed preexistent rights, in order to
provide added security"). Individual-rights guarantees like those included in the
federal Bill of Rights were sometimes described as "powers withheld from govern-
ment. See Wilson, supra note 25, at 388 (describing bill of rights as "an enumera-
tion of the powers reserved"). Even so, it seems unlikely that the Framers would
have used the phrase "powers not delegated" to refer simultaneously to the resid-
uum of the powers granted, in referring to the states' reserved powers, and to
unspecified fundamental-rights limitations in referring to powers reserved by the
people. This, however, is the thesis that the fundamental-rights reading asks us to
adopt.
of the language suggesting powers reserved to the people, the powers "not delegated," but reserved to the states, referred to the residuum of the powers granted by Article I and did not include any implied limitations on those powers.\textsuperscript{64}

Surprising or not, the fundamental-rights reading might still make the best sense of the Tenth Amendment's text if we had reason to believe that the language referring to the reserved powers of the people was added to the amendment so that it would conform to a fundamental-rights understanding of the Ninth Amendment—one that read the rights "retained by the people" as a reference to affirmative limitations on government powers in favor of human rights. This demonstrates that the text seldom resolves such disputes definitively. Traditionally, however, we have used tools that focus attention beyond the text to clarify the intended meaning of the text, including an analysis of the mischief to which the amendment was actually addressed and the remedy that the amendment was thought to supply. By examining the relevant history, we may be able to determine whether the Framers in fact used "powers not delegated" to refer to separate sorts of things—the residuum from the powers actually granted the national government \textit{and} a set of fundamental rights that were apparently never delegated because they could not be.

\section*{B. The Mischief to Which the Tenth Amendment Was Addressed}

The participants in the debate over ratification of the Constitution would have agreed that the Tenth Amendment's reservation of powers, however framed, added further security for popular rights. At the same time, the historical evidence undercuts the view that the people's reserved powers included affirmative limitations on the powers granted to the national government. The textual antecedent to the Tenth Amendment is, of course, Article II of the Articles of Confederation, the original federal constitution, which provided that each state "retains every Power, Jurisdiction, and right, which is not by this confederation expressly delegated to the United States."\textsuperscript{65} Although this state sovereignty guarantee referred to retained rights, it is clear from the text that this language reserved gov-

\begin{footnotesize}
\begin{enumerate}
\item[64.] \textit{See} Redlich, \textit{supra} note 48, at 806 (stating that, as between federal government and states, Tenth Amendment "is a redundancy" because it states familiar truism that all that has not been surrendered is retained). \textit{See generally id.} at 806-07 (discussing significance of addition of four words, "or to the people," to Tenth Amendment). It is equally clear that this straightforward idea of reserved powers was viewed as rights protective; for example, Madison spoke of enumerated powers as a system for securing rights because "it follows that all [the powers] that are not granted by the constitution are retained," and hence "the constitution is a bill of powers, the great residuum being the rights of the people." Madison, \textit{supra} note 3, at 82. In this context at least, for Madison the "powers not granted" referred to the residuum that would be defined by reference to the powers, and did not refer to additional limitations on the exercise of granted powers. \textit{See id.} (discussing meaning of "powers not granted").
\item[65.] \textit{See generally Articles of Confederation} (1777).
\end{enumerate}
\end{footnotesize}
erning power to the respective states rather than specific individual rights limitations in the modern sense.

Even so, the antifederalist critics of the Constitution made the omission of the language of Article II of the Articles of the Confederation a linchpin in their arguments to defeat the Constitution. The antifederalists argued that the omission of Article II raised an inference of unlimited sovereignty in the national government, especially given the tendency of interpreters to presume that the omission of such crucial language from a succeeding document must have a purpose. Interpreters thus would conclude that the general government possessed general powers that superseded all the powers of the states. States, therefore, held no reserved sovereign powers at all, but acted completely at the sufferance of the national government.

Given this fear that an all-powerful consolidated form of government was the proper inference to be drawn from the omission of a general reservation clause, the antifederalists concurred with the view that such a provision would be "a summary of a bill of rights, which gentlemen are anxious to obtain." This conclusion was reached for at least two reasons. First, the states were considered to be mediating institutions that preserved the people's traditional rights, both in the common law and in the state constitutions' declarations of rights. Consequently, the consolidation of power in the nation by the omission of any general reservation of powers to the states meant that this source of security for individual rights would be nullified. Second, if the inference of unlimited power came about because of the omission of such a clause, notwithstanding the enumeration of powers in the Constitution, it meant that "many valuable and important rights would be concluded to be given up by implication."

66. Although a traditional spelling is "anti-federalist," this Article follows the spelling used by the editors of The Ratification of the Constitution. See generally The Complete Anti-Federalist, supra note 41; The Ratification of the Constitution, supra note 23.

67. See McAffee, Original Meaning, supra note 15, at 1244-45 (discussing antifederalists' arguments based on Article II of Articles of Confederation).

68. See id. at 1244 (discussing antifederalists' fear that failure to include general provision in Constitution reserving powers for states would "create a government of unlimited powers").

69. See id. at 1244 n.115 (reporting antifederalists' statements drawing this inference from omission of Article II's language).

70. Samuel Adams, Debates in the Commonwealth of Massachusetts on the Adoption of the Federal Constitution (Feb. 1, 1788), in 2 Elliot's Debates, supra note 19, at 130, 131.

71. See Henry, supra note 34, at 448-49 (noting that failure to include bill of rights in federal constitution invites federal government to intermeddle with and violate individual rights).

72. George Mason, Debates in the Convention of the Commonwealth of Virginia on the Adoption of the Federal Constitution (June 14, 1788), in 3 Elliot's Debates, supra note 19, at 444, 444. Once again, however, the rights that would be "given up by implication," as George Mason asserted, were the entire body of rights
Article II of the Articles of Confederation was drafted, as we have seen, in terms of reserving sovereign powers to the states. In substance, however, it did not matter whether the general reservation of power was stated in favor of the states or of the sovereign people. In demanding the sort of reservation provision that would be embodied in the Tenth Amendment, Patrick Henry asserted "that a general positive provision should be inserted in the new system, securing to the states and the people every right which was not conceded to the general government."73 No one took this language to be a request for the insertion of previously unstated limits on granted powers; rather, it was clear that Henry was echoing the pervasive call for a general reservation of power clause that would operate to enhance the security of the people and the states against excessive federal power—power that could easily be employed in derogation of liberties traditionally protected by the states.74

For the antifederalists a general reservation of all powers not granted was simply one of several strategies for ensuring that popular rights were secured by constitutional text.75 It was never exclusively about states rights. For example, the author of Letters from the Federal Farmer,76 the leading work of an opponent of the Constitution, contended that the Constitution was deficient both in its failure to include essential limitations on federal power and its failure to include a provision reserving the powers not granted.77 Conceding that a limited powers approach might be one way to secure rights, he contended that it would be unwise to rely exclusively upon "silent reservations," as he characterized Article I's implicit reservation of powers by the device of enumeration of powers.78 The better alternative was to combine the enumeration of carefully defined powers (as in Article I) with a general reservation clause and, as to especially im-

that would be subject to invasions without limitation if the Constitution were construed as effectively granting unlimited powers; they were not unstated limitations on powers specifically granted in the Constitution. See id.

73. Id. at 150 (emphasis added).
74. See Henry, supra note 34, at 446 (contending that without provision from Confederation "that every right was retained by the states, respectively, which was not given up to the government of the United States," it would follow, "by a natural and unavoidable implication," that people give up all their rights to general government); Mason, supra note 72, at 444 (suggesting similar loss).
75. See Letter from the Federal Farmer II (Oct. 9, 1787), reprinted in 2 The Complete Anti-Federalist, supra note 41, at 230, 233-34 (arguing that Constitution places very extensive powers in inherently defective federal government, which results in either neglected laws or military enforcement leading, in either case, to despotism).
76. See 2 The Complete Anti-Federalist, supra note 41, at 214 ("The Observations of the Federal Farmer are generally, and correctly, considered to be one of the ablest Anti-Federalist pieces . . . .")
77. See Letter from the Federal Farmer XVI (Jan. 20, 1788), reprinted in 2 The Complete Anti-Federalist, supra note 41, at 323, 323-26 (arguing that bill of rights must be included in Constitution to limit powers of federal government as well as a provision reserving those powers not enumerated.
78. Id. at 924.
important rights, specific limitations on the exercise of the powers granted by the Constitution:

[W]e might advantageously enumerate the powers given, and then in general words, according to the mode adopted in the 2d art. of the confederation, declare that all powers, rights and privileges, are reserved, which are not explicitly and expressly given up . . . . But admitting, on the general principle, that all rights are reserved of course, which are not expressly surrendered, the people could with sufficient certainty assert their rights on all occasions, and establish them with ease, still there are infinite advantages in particularly enumerating many of the most essential rights reserved in all cases; and as to the less important ones, we may declare in general terms, that all not expressly surrendered are reserved.\(^79\)

Advocates of the fundamental-rights reading of the Tenth Amendment might be tempted to read into this statement of the Federal Farmer the notion that the author is advocating a general reservation of implied limitations on the powers granted by the Constitution rather than a provision reserving to the people the residuum of the powers not granted to the national government. This, however, would be implausible.\(^80\) For one thing, the author’s reliance on Article II of the Articles of Confederation, tracking a consistent theme of the Constitution’s opponents, suggests that he is advocating the standard provision advocated hundreds of times in 1787 and 1788 to make explicit the idea that all powers not granted would be reserved.\(^81\) Moreover, the Federal Farmer is an unlikely candidate to

\(^{79}\) Id.

\(^{80}\) For one thing, as we have seen, Redlich and Mayer contend that the Tenth Amendment was transformed into a fundamental-rights provision, responsive to the notion of unenumerated rights embodied in the Ninth Amendment. See Mayer, supra note 26, at 317 n.13 (emphasizing addition of “or to the people” to proposed Tenth Amendment); Redlich, supra note 48, at 806-07 (underscoring language change referencing peoples’ retained rights and linking it to Ninth Amendment); cf. Mayer, supra note 26, at 313-16 (contending that unamended Constitution’s scheme of enumerated powers and reserved rights was flawed device for securing rights as reflected in ratification debate and that its demonstrable failures prompted adoption of Bill of Rights). One implication of Mayer’s arguments is that he understood the initial proposals to make the reservation of powers explicit as a straightforward argument about the powers granted without reference to any implied fundamental-rights limitations. Moreover, there is no reason to think that the Federal Farmer held any novel views as to the significance of advocating a general reservation of rights and powers in accordance with the pattern set by Article II of the Articles of Confederation.

\(^{81}\) Similar pleas for reliance on a general reservation of powers, as well as inclusion of a few key rights limitations, became a theme. See Letter from William R. Davie to James Madison (June 10, 1789), in Creating the Bill of Rights, supra note 3, at 246 (“Instead of a Bill of rights attempting to enumerate the rights of the indiv[du]al or the State Governments, they seem to prefer some general negative confining Congress to the exercise of the powers particularly granted, with some express negative restriction in some important cases.” (alteration in original)).
accept the premise that implied constitutional limits on powers were granted by the Constitution. As I have documented elsewhere, this leading antifederalist made clear in his writings that a central purpose of a written constitution is to specify important limitations on government and that customary and natural rights do not function as implied constitutional limitations. Thus, the Federal Farmer pointed to the most oft-discussed right omitted from the Constitution, freedom of the press, and made clear his view not only that the sovereign people hold the power to “annihilate or limit this right,” but also that “[t]his may be done by giving general powers, as well as by using particular words.”

Every state convention that offered amendments to the Constitution included a proposed amendment based on Article II of the Articles of Confederation. Every one of these proposals related back to the ratification-struggle argument about the potential dangers of omitting such a provision from the Constitution. In all the convention speeches, as well as the publications that sought to influence the conventions by the swaying of public opinion, not a single statement appeared in which proponents of such an amendment suggested that they held a concern that inherent or implied limitations on granted powers might be at risk because of the omission of such a provision from the Constitution. The only question left is whether there are reasons to think that a novel remedy to an entirely distinguishable mischief was inserted into this amendment at the eleventh hour.


83. Letter from the Federal Farmer XVI, supra note 77, at 329.

84. See McAffee, Original Meaning, supra note 15, at 1242 (“[A] provision like the tenth amendment is the only one that appears in the proposals of every ratifying convention that offered any.”).

85. Compare Debates in the Convention of the Commonwealth of Virginia on the Adoption of the Federal Constitution (June 25, 1788), in 3 Elliot’s Debates, supra note 19, at 653 (offering proposal for vote that “the powers granted under the [unamended] Constitution are the gift of the people, and every power not granted thereby remains with them, and at their will”), with Letter from the Federal Farmer XVI, supra note 77, at 324-26 (arguing that failure to include clause reserving powers to states could lead to infringement of rights).

86. See, e.g., Henry, supra note 34, at 448-49 (asserting that, in contrast to Virginia Constitution’s provision for essential rights, Federal Constitution invites federal government to violate individual rights with no suggestion that rights might ever be read in by implication); Letter from the Federal Farmer XVI, supra note 77, at 324 (stating risk of relying on implied general reservation is that powers will not be adequately defined to sufficiently “draw the line” between powers granted and rights reserved). The Federal Farmer implied that it is safer to list essential rights and rely on a limited powers scheme as a backup guarantee. See id. (failing to suggest implied rights limitations or that failure to include general reservation of powers clause cuts against any implied rights).
C. The "Remedy" Embodied in the Tenth Amendment

It was noted above that critics of the Constitution expressed fears for the rights of the people and the states if the Constitution were adopted without a provision stating a general reservation of powers not granted by the Constitution. This concern for the rights of both the people and the states is clearly reflected in an amendment proposed by the New York Ratifying Convention:

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

Additionally, general reservation clauses were worded in several different ways. Most of the states that proposed constitutional amendments, including Virginia, worded the amendment in terms of the reserved rights and powers of the states. These provisions, however, were just as often touted as important guarantees of popular rights as those framed in terms of "the people," just as the New York provision could equally be described as a "state rights" proposal. In each case, the purpose was to state the basic principle embodied in Article II of the Articles of Confederation. In the voluminous materials relating to the debate over ratification of the Constitution, no statement suggests that the participants perceived any difference in substance between the New York and Virginia forms of the proposed amendment.

This is not to say that the distinction between "the people" and "the states" had no relevance to those who employed the terms. The federalist proponents of the Constitution frequently relied upon the doctrine of popular sovereignty to justify the Philadelphia Convention's decision to draft a new Constitution, rather than follow the original charge to amend the Articles of Confederation, as well as to explain how governmental authority could be divided between the national and state governments without violating the traditional dictum against the possibility of divided

87. 2 Bernhard Schwartz, The Bill of Rights: A Documentary History 911-12 (1971); see The Ratifications of the Twelve States Reported in the General Convention (Rhode Island) (June 16, 1790), in 1 Elliot's Debates, supra note 19, at 334, 334 (stating proposed amendment in substantially same language as New York proposal).

88. See The Ratifications of the Twelve States Reported in the General Convention (Massachusetts) (Feb. 7, 1788), in 1 Elliot's Debates, supra note 19, at 322, 322 ("[A]ll powers not expressly delegated . . . are reserved to the several states . . . "); The Ratifications of the Twelve States Reported in the General Convention (South Carolina) (May 23, 1788), in 1 Elliot's Debates, supra note 19, at 325, 325 (noting states "retain every power not expressly relinquished by them"); The Ratifications of the Twelve States Reported in the General Convention (New Hampshire) (June 21, 1788), in 1 Elliot's Debates, supra note 19, at 325, 325-326 (declaring powers are "reserved to the several states").
sovereignty. If the people were truly the sovereign, as posited in American revolutionary theory, they held authority to reconsider their commitment to the Articles of Confederation and to withdraw power from their respective state governments in favor of a stronger central government.

89. See, e.g., Gordon S. Wood, The Political Ideology of the Founders, in Toward a More Perfect Union, supra note 26, at 7-19 (contending that very idea and role of popular sovereignty was altered by federalist attempts to confront objections to shifting locus of sovereignty from states to national government). In responding to the argument that sovereignty could not be divided between the federal government and the states, James Wilson contended before the Pennsylvania Ratifying Convention that true sovereign power, "from which there is no appeal, and which is therefore called absolute, supreme and uncontrollable," resides "with the people." James Wilson, Address to the Pennsylvania Ratifying Convention (Alexander J. Dallas ed., Nov. 24, 1787), in 2 Ratification of the Constitution, supra note 23, at 540, 548; accord Wood, supra, at 22 (quoting Wilson). Moreover, because this sovereignty "resides in the PEOPLE, as the fountain of government," the people "can delegate it in such proportions, to such bodies, on such terms, and under such limitations, as they think proper." Wood, supra, at 22 (quoting Wilson).

Wood summarized the position that emerged: [T]he people give some of their power to the institutions of the national government, some to the various state governments, and some at other extraordinary times to constitutional conventions for the specific purpose of making or amending constitutions. But unlike the British people in relation to their Parliament, the American people never surrender to any political institution or even to all political institutions together their full and final sovereign power.

Id. Wilson was not saying, as men had for ages, that all governmental power was derived from the people. Instead he was saying that all government was only a temporary and limited agency of the people—out, so to speak, on a short-term, always recallable, loan. See id.

90. Cf. Merrill Peterson, Thomas Jefferson, the Founders, and Constitutional Change, in The American Founding: Essays on the Formation of the Constitution 276, 276 (J. Barlow et al. eds., 1988) ("Political society is derived from the people, and established with their consent." (quoting Delaware Constitution)). Such restatements of fundamental revolutionary theory provided a foundation for the argument that the people's authority to adopt a new arrangement for the distribution of power was not limited by the terms of the existing compact among the states.

As early as 1776, two counties in North Carolina had informed delegates to their 1776 convention that "[p]olitical power . . . is of two kinds, one principal and superior, the other derived and inferior . . . . The principal supreme power is possessed by the people at large, the derived and inferior power by the servants which they employ[.]" Instructions of Mecklenburg and Orange Counties (1776), quoted in Gordon S. Wood, The Creation of the American Republic, 1776-87 364-65 n.37 (1969). Because authority of the people exceeded that of their representatives, it followed that the people could redistribute authority according to their own estimation of the public good. See id. (discussing problems of groups in 1776 being deeply mistrustful of legislatures); see also Forrest McDonald, Novus Ordo Seclorum: The Intellectual Origins of the Constitution 277-81 (1985) (summarizing popular sovereignty grounding of response to argument that Constitution sought to divide sovereignty); Charles Lofgren, The Origins of the Tenth Amendment: History, Sovereignty, and the Problem of Constitutional Intention, in Government From Reflection and Choice: Constitutional Essays on War, Foreign Relations and Federalism 70, 92-97 (1986) (describing complexity and differing points of emphasis among federalists relying on popular sovereignty to confront problem of divided sovereignty).
By contrast, the antifederalists tended to be stronger proponents of state power; many of them continued to see the states as the central building blocks in the union symbolized by the Constitution. These differing perspectives undoubtedly played a role in the tendency of some to emphasize the reserved powers of the states and for others to stress the concept of the reserved sovereign power of the people.

At the same time, the different formulations of the various state general reservation proposals do not reflect differences of any great substance as to their intended meaning and application. Madison, for example, was an important proponent of the popular sovereignty rationales for explaining the Convention's authority to propose a new Constitution and for the Constitution's adoption of the popular process. He served, however, on the committee that wrote proposed amendments for the Virginia Ratifying Convention, which drafted the reserved powers provision in terms of powers reserved to the states. As we have seen, he also followed Virginia's lead in focusing on the reservation of sovereign power to the states in his own draft.

What little evidence we have from the First Congress tends to confirm that the Tenth Amendment's language change, proposed by Congress and adopted by the Senate, reflected the preference for underscoring that it is the people who grant and reserve powers to both the federal and state governments. This is the same idea previously embodied in the New York proposal. We do know that a similar proposal was offered in the

91. See WilmARTH, supra note 2, at 1276 (stating that antifederalists feared that "ratification of the Constitution would create an oppressive national government and destroy the political authority of the United States").

92. See, e.g., THE FEDERALIST No. 46, at 315 (James Madison) (Jacob E. Cooke ed., 1961) (stating that governments of nation and states were "different agents and trustees of the people, instituted with different powers, and designated for different purposes").

93. See McAFFEE, ORIGINAL MEANING, supra note 15, at 1236 (describing Madison's service on Virginia Drafting Committee). Federalists John Marshall, George Wythe and James Madison, as well as leading antifederalists Patrick Henry and George Mason were members of the Virginia Drafting Committee. See id.

94. For a discussion of Madison's proposed reserved powers provision, see supra note 47 and accompanying text.

95. For a discussion of the Tenth Amendment, see infra notes 45-106 and accompanying test.

96. See The Ratification of the Twelve States Reported in the General Convention (New York) (July 26, 1788), in 1 ELLIOTT'S DEBATES, supra note 19, at 327, 327 (describing amendments from convention). The New York amendments stated that every proper jurisdiction, and right, which is not by the said Constitution clearly delegated to the Congress of the United States, or the departments of the government thereof, remains to the people of the several states, or to their respective state governments, to whom they may have granted the same; and that those clauses in said Constitution, which declare that Congress shall not have or exercise certain powers, do not imply that Congress is entitled to any powers not given by the said Constitution; but such clauses are to be construed either as exceptions to certain specified powers, or as inserted merely for greater caution.
House of Representatives on August 22, 1789, and that Representative Daniel Carroll objected to the change “as it tended to create a distinction between the people and their legislatures.”

The question of wording, however, arose again in the Senate, undoubtedly because the final version of the Tenth Amendment conforms more completely to the theory of the Constitution defended by its chief proponents than a provision that seemed to hearken back to the notion of the states as the parties to the agreement who delegated authority to the nation in the first instance. And because neither the critics nor the defenders of the Constitution saw a great difference of substance in the basic thrust of the proposed amendment—with or without the reference to the people’s reserved powers—it is not surprising that the language change passed with a minimum of discussion or debate. The unique history of

97. Debates in the House of Representatives (Aug. 22, 1789), in CREATING THE BILL OF RIGHTS, supra note 3, at 192, 193. An amendment with a similar purpose had also been proposed on August 18 by Representative Thomas Tudor Tucker, who would have added a prefix, “all powers being derived from the people,” to the proposed reserved powers provision, followed by the text being considered. Thomas Tucker, Debates in the House of Representatives (Aug. 18, 1789), in CREATING THE BILL OF RIGHTS, supra note 3, at 193, 197. The nature of the reaction to this proposal, however, is obscured because it was combined with a proposal to insert the word “express” into the amendment, a change which Madison adamantly opposed. See id. (stating that Tucker’s proposed changes thus were rejected by House along with proposal to insert word “express”).


99. See Letter from Richard Henry Lee to Patrick Henry (Sept. 14, 1789), in CREATING THE BILL OF RIGHTS, supra note 3, at 295, 295-96 (objecting to change of language in proposed reserved powers provision during 1789 debate). In his letter, Lee expressed bitter disappointment that additional amendments were not proposed by Congress, particularly in favor of states’ rights, and then claimed that the insertion of “the people” suggested that the reservation was on behalf of “[the] People of the United States, not of the Individual States,” and that it thus “was evidently calculated to give the Residuum to the people of the U. States, which was the Constitutional language [We the People &C.], and to deny it to the people of the Indiv. State.” Id. (first alteration in original). Lee’s objection confirms that at least some antifederalists would have feared the language referring to “the people” precisely because it lends support to the idea that the people of the entire United States constitute the sovereign power that establishes the Constitution, a view that cuts against the idea of a confederation of states that Lee and others preferred. This was, in fact, an old complaint, often lodged against the proposed Constitution more generally. See Wilmarth, supra note 2, at 1276-77 (summarizing objection of Patrick Henry and other antifederalists to preamble’s use of “We The People”). Lee did not suggest, however, that the basic operational effect of the provision, or the content of the guarantee embodied in the Tenth Amendment, would be altered by this language change. See Letter from Richard Henry Lee to Patrick Henry, supra, at 295-96. Indeed, Lee’s reading reflects the general consensus, described throughout the text above, that the rights secured by this reserved-powers provision were defined as “the Residuum” from the powers granted to Congress; this language was not a reference to fundamental rights limitations on the powers granted to the national government. See id.
the Tenth Amendment and its relation to the general theory of the Constitution thus provides a complete explanation of the purpose of adding language to the amendment as drafted by Madison and approved by the House of Representatives.\(^{100}\)

The fundamental-rights construction, by contrast, requires us to imagine, despite a dearth of evidence to support the conclusion, that the first Congress inserted this language about powers reserved to the people to transform dramatically the meaning and scope of the provision so as to reinforce the doctrine of unenumerated fundamental-rights limitations that is asserted to be the assumption underlying the Ninth Amendment.\(^{101}\) Yet, when the two amendments were actually discussed together during the debate over the ratification of the Bill of Rights in Virginia, the debate proceeded on the assumption that the purpose of both provisions was to provide, in the words of the prominent federalist Edmund Randolph, a "reservation against constructive power."\(^{102}\) In the course of con-

\(^{100}\) Cf. Lofgren, supra note 90, at 108-09 (contending that addition of language "or to the people" had "primarily a declaratory meaning to those in Congress" and may have been inserted in Tenth Amendment because somewhat similar language proposed for preamble had not been adopted). His further suggestions that the language (1) may have served the purpose of clarifying that the Constitution was not premised on "the notion of legislative or governmental sovereignty" but ultimately on popular sovereignty and (2) avoided any potential inference of state governmental sovereignty are also consistent with the analysis in this Article. Id. at 109. Lofgren's analysis supplies a compelling explanation for the addition of this language without any reference to the Ninth Amendment or the idea of implied, affirmative limitations on national powers. See id. at 113 (concluding that Tenth Amendment was "[d]eclaratory of the overall constitutional scheme" and "had no independent force as originally understood").

\(^{101}\) But see McAffee, Original Meaning, supra note 15, at 1277-1304 (giving historical evidence that purpose of Ninth Amendment was to assure that general reservation of rights and powers embodied in Article I and Tenth Amendment was not jeopardized by enumeration of specific rights, framed as specific limitations on granted powers, in Bill of Rights as well as in body of Constitution). One might have expected the logic to run in the opposite direction. Given the evidence that the reservation of sovereign power in the Tenth Amendment was viewed as a means of securing popular rights, it would make sense to consider whether the other rights retained by the people in the Ninth Amendment are not merely the same reservation from granted powers rather than implied limits on government.

\(^{102}\) Letter from Hardin Burnley to James Madison (Nov. 28, 1789), in 5 Schwartz, supra note 87, at 1188, 1188. In fact, the connection between the two amendments was widely perceived. For example, at the time Congress was considering the proposed Bill of Rights, a Virginia judge, Richard Parker, wrote to Richard Henry Lee that he considered a bill of rights unnecessary because "the States claim & have all power but what they have given away." Letter from Richard Parker to Richard Henry Lee (July 6, 1789), in Creating the Bill of Rights, supra note 3, at 260, 260. Even so, he stated that he had "no objection to such a bill of Rights as has been proposed by Mr. Madison because we declare that we do not abridge our Rights by the reservation but that we retain all we have not specifically given." Id. Similarly, a prominent southern gentleman, William Smith, identified the proposed Ninth and Tenth Amendments with each other and viewed them as together offering protection to the state law institution of slavery. See Letter from William L. Smith to Edward Rutledge (Aug. 10, 1789), in Creating the Bill of Rights, supra note 3, at 273, 273 (arguing that amendments should contain limit-
sidering the proposed amendments, Randolph expressed concern that the Ninth Amendment's text had been revised away from Virginia's original proposal, which had stated a specific prohibition of an inference of extended national powers from the enumeration of specific limits on granted powers.\textsuperscript{103} Hardin Burnley, a member of the Virginia Assembly that debated the Amendments, contended in response that whether the Amendment was framed in terms of powers or rights, it would serve to prevent undue extensions of federal power only "if [Congress'] powers are not too extensive already."\textsuperscript{104} According to Burnley, the efficacy of both the Ninth and Tenth Amendments would ultimately turn on whether the Framers had adequately performed the task of defining national powers so that the people had successfully retained a great many rights and powers.\textsuperscript{105} This interpretation undermines both the modern fundamental-rights reading of the Ninth Amendment and the equivalent construction of the Tenth Amendment. It indicates that the reserved rights and powers to which these amendments refer are simply the residuum from the powers delegated to the national government.\textsuperscript{106}

\textsuperscript{103} See Letter from Hardin Burnley to James Madison, \textit{supra} note 102, at 1188 ("It would be more safe, and more consistent with the spirit of the . . . amendments proposed by Virginia.").

\textsuperscript{104} Id.

\textsuperscript{105} See id. (stating if powers of Congress are not too extensive "the rights of the people & of the States" will be secured by the language of Ninth Amendment as finally adopted). That Burnley identified the Ninth Amendment's rights "retained by the people" with the rights of the people and the states reflects that reserved powers and the retained rights were thought of synonymously, but not in terms of affirmative limitations on granted powers. See id. (stating that Burnley did not see distinction between these concepts). Madison endorsed Burnley's view of the matter. See Letter from James Madison to George Washington (Dec. 5, 1789) in 5 \textsc{Schwartz}, \textit{supra} note 87, at 1189, 1190 ("If a line can be drawn between the powers granted and the rights retained, it would be the same thing, whether the latter be secured . . . by declaring that they shall, . . . or that the former shall not be extended."). For an extensive review of Burnley and Madison's letters, see McAfee, \textit{Original Meaning}, \textit{supra} note 15, at 1287-93. For evidence that Burnley's discussion of whether the line had been adequately drawn between federal power and state and popular rights was a reprise of arguments advanced during the struggle to ratify the Constitution, see \textit{infra} notes 256-61 and accompanying text.

\textsuperscript{106} See 3 \textsc{Joseph Story, Commentaries on the Constitution of the United States} 752 (1833) (discussing Tenth Amendment's meaning). This commentator noted:

\textit{[The Tenth Amendment] is a mere affirmation of what . . . is a necessary rule of interpreting the constitution. Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is}
III. Fundamental Rights and the “Proper” Scope of the Necessary and Proper Clause

The traditional understanding of the Necessary and Proper Clause is that it performs the mundane task of affirming the fundamental idea that Congress may exercise reasonable discretion in enacting legislation to implement the powers granted by Article I, Section 8. As suggested by its derogatory nickname, the “Sweeping Clause” generated great fears among those who were concerned that the Constitution portended a tyrannical federal government. During the debate over ratification of the Constitution, the Constitution’s antifederalist opponents launched some of their harshest attacks on the so-called Sweeping Clause, charging that its purpose was to grant unlimited authority to Congress so as to establish a consolidated government of general legislative powers that could displace state authority at will. In its defense, the federalists denied that the

withheld, and belongs to the state authorities, if invested by their constitutions of government respectively in them; and if not so invested, it is retained BY THE PEOPLE, as a part of their residuary sovereignty.

Id.

107. See U.S. Const. art. I, § 8, cl. 16 (“The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any department or Officer thereof.”); see also The Federalist No. 44, at 305 (James Madison) (Jacob E. Cooke ed., 1961) (explaining that Philadelphia Convention included clause, rather than relying on obvious inference that properly should have been drawn in favor of ancillary powers, to remove “a pretext which may be seized on critical occasions for drawing into question the essential powers of the Union”); The Federalist No. 33, at 205-06 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (stating clause was introduced “for greater caution, and to guard against all cavilling refinements in those who might hereafter feel a disposition to curtail and evade the legitimate authorities of the Union”); cf. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 420-21 (1819) (stating that Necessary and Proper Clause reflects “the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the constitution, if that instrument be not a splendid bauble”). Hamilton further suggested that the Convention feared State jealousy of federal power, and, under such circumstances, apparently thought it “necessary, in so cardinal a point, to leave nothing to construction.” The Federalist No. 33, supra, at 205-06.

108. For a discussion of these fears, see infra note 113 and accompanying text.

109. See George Mason, Objections to the Constitution of Government Formed by the Convention (1787), in 2 The Complete Anti-Federalist, supra note 41, at 11, 13 (noting under Necessary and Proper Clause, “the State Legislatures have no Security for the Powers now presumed to remain to them; or the People for their rights”); see also Aristocracy, The Government of Nature Delineated (1788), reprinted in 3 The Complete Anti-Federalist, supra note 41, at 196, 208 n.2 (treatying clause as evidence of scheme to create aristocratic rule); Essay of Brutus XI, N.Y. J., Jan. 31, 1788, reprinted in 2 The Complete Anti-Federalist, supra note 41, at 417, 421 (stating clause will lend itself to “an equitable construction” of constitution in which most important powers will be “unlimited [sic] by any thing but the discretion of the legislature”); Letter of Centinel V (Nov. 30, 1787), reprinted in 2 The Complete Anti-Federalist, supra note 41, at 166, 168-69 (stating under Necessary and Proper Clause “[w]hatever law congress may deem necessary and proper for carrying into execution any of the powers vested in
Necessary and Proper Clause carried the implication of unlimited power, contending that, if the principle set forth by the clause was not accepted, there would have been no point in empowering the national government. To these ends, they assured their opponents that the Clause was purely declaratory in nature and that it merely set forth the principle of agency that would have followed naturally, with or without such an explicit text, from the necessity of ancillary authority in a system of limited grants of power.

The Constitution's leading ratification-era defenders, however, lacked the help of modern legal commentators. The consequence was that they overlooked the fact that the Clause their opponents derided as the Sweeping Clause, based on their fear that it would serve to sweep all power into the federal domain, was actually the most powerful limiting clause in the

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110. See, Letter from C. William Cranch to John Quincy Adams (Nov. 26, 1787), in 14 RATIFICATION OF THE CONSTITUTION, supra note 23, at 224, 226 ("If they had not the power to 'make all laws which shall be necessary & proper for carrying into execution the foregoing powers' . . . the powers would be of no service"); A Landholder V, CONN. COURANT, Dec. 3, 1787, reprinted in 14 RATIFICATION OF THE CONSTITUTION, supra note 23, at 334, 338 (noting without acknowledgment of this authority, powers "would be evaded by the artful and unjust"); See also THE FEDERALIST NO. 44, supra note 107, at 302 (declaring Necessary and Proper Clause is provision "by which efficacy is given to all the rest").

111. See THE FEDERALIST NO. 44, supra note 107, at 302 (discussing essential character of Necessary and Proper Clause). Madison noted:

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

Id. at 304-05; accord THE FEDERALIST NO. 33, supra note 107, at 204 (stating that Clause declares "a truth, which would have resulted by necessary and unavoidable implication from the very act of constituting a Federal Government, and vesting it with certain specified powers"); id. at 205 (arguing that "a power to lay and collect taxes must be a power to pass all laws necessary and proper for the execution of that power; and what does the unfortunate and calumniated provision in question do more than declare the same truth"); James Wilson, Proceedings and Debates of the Pennsylvania Convention (Dec. 4, 1787), in 2 RATIFICATION OF THE CONSTITUTION, supra note 23, at 465, 469, 482 (noting that Clause "states no more than that the powers we have already particularly given shall be effectually carried into execution").
original Constitution.\footnote{112} At least this is the conclusion reached in a 1993 article by Gary Lawson and Patricia B. Granger.\footnote{113} With the arguments set forth by Lawson and Granger in hand, the federalists should have demonstrated how antifederalist fears were belied by the powerful constraining effect of the Necessary and Proper Clause. As construed and applied by Lawson and Granger, the so-called Sweeping Clause might have been better nicknamed the “Back Draft” Clause, considering that it was intended to serve as a virtually open-ended (and, thus, potentially destructive) jurisdictional limitation on the powers actually delegated to the national government by the Constitution—a limitation favoring principles of separation of powers, states’ rights and unenumerated individual rights, apparently to be explicated over time by the judiciary.\footnote{114} Using the Back Draft Clause as a weapon, the federalists’ defense of the Supremacy Clause, the omission of a bill of rights and the Constitution as a whole against the charge that each served to consolidate power in an unlimited national government would have been greatly simplified, providing, of course, that the federalists were willing to open the door to a discourse with the potential of undermining everything they had labored to accomplish during the long summer of 1787.

Unlike the logical speculation about the implications of language changes in the Tenth Amendment, discussed in Part II above, Lawson and Granger supply modern readers with a painstaking, sweeping review of the textual and historical materials that might bear on the original meaning of the Necessary and Proper Clause.\footnote{115} Underlying their prodigious inter-

\footnote{112. See Lawson & Granger, supra note 7, at 271 (stating that Sweeping Clause requires “executory laws to be peculiarly within Congress’s domain or jurisdiction—that is, by requiring that such laws not usurp or expand the constitutional powers of any federal institution or infringe on the retained rights of the states or of individuals”). Lawson and Granger note that “[t]he Sweeping Clause, so construed, serves as a textual guardian of principles of separation of powers, principles of federalism, and unenumerated individual rights.” \textit{Id.}}

\footnote{113. See id. at 270-71 (contending that Sweeping Clause “is not, nor did the Framers think it to be, a grant of general legislative power”). Lawson and Granger stated that “[t]he clause’s language limits its authorizing scope to laws that are ‘necessary and proper.’” \textit{Id.} They submit three reasons in support of their argument that the clause actually serves to limit national power. First, they contend that the “Sweeping Clause is not a self-contained grant of power.” \textit{Id.} at 274. The use of the power contained in the Sweeping Clause “must always be tied to the exercise of some other identifiable constitutional power of the national government.” \textit{Id.} at 274-75. Second, they agree that the laws enacted under the Sweeping Clause “must be both necessary and proper.” \textit{Id.} at 275. Third, “such laws must in fact be necessary and proper and not merely thought by Congress to be necessary and proper” because “Congress [is not] the sole judge of necessity and propriety.” \textit{Id.} at 276.}}

\footnote{114. See id. at 297 (stating jurisdictional construction of Sweeping Clause requires that executory laws be consistent with principles of separation of powers, federalism and individual rights).}

\footnote{115. See generally id. at 297-326 (describing Founders’ understanding of Sweeping Clause, comparing Sweeping Clause to other constitutional provisions and state constitutions and analyzing Framers’ design of Constitution).
pretive effort, however, is the same misapprehension of the Framers’ commitment to our federal system as a security to popular rights that informs the modern misreading of the Ninth and Tenth Amendments. It is this initial misapprehension, which they bring to the task, that determines the approach they take in resolving every significant question that arises from the historical and textual materials.

Lawson and Granger contend that the word “proper” in the Necessary and Proper Clause was “understood as a significant limitation on legislative power” that was jurisdictional in nature. Finding the legislative history unhelpful, the authors analyze the clause’s “language and role in the constitutional design” and conclude that, in the historical and legal context of its usage, “a ‘proper’ law is one that is within the peculiar jurisdiction or responsibility of the relevant governmental actor.” Consequently the Clause generates “internal limits” that “place constraints on the exercise of power” to the end of ensuring limited government. Among other implications, the authors conclude that this reading suggests that “unenumerated substantive rights,” including (but not limited to) all of the rights subsequently included in the Bill of Rights, were secured by the Necessary and Proper Clause even before the Bill of Rights was ratified. Summing up their conclusions, the authors write:

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

116. For a discussion of the Framers’ belief that the federal system would guard popular rights, see infra notes 308-14 and accompanying text. For a discussion of Lawson and Granger’s assumption that their thesis rescues an otherwise implausible argument from enumerated powers, see generally Lawson & Granger, supra note 7.

117. Lawson & Granger, supra note 7, at 314. The term “jurisdictional” is found not only in the title, but pervasively throughout the article. See id. passim. The quoted language, which suggests that the authors view this jurisdictional reading as involving important limitations, also seems borne out by the specific conclusions that the authors reach about the implications of their reading. See also id. at 299 (relying on ratification-era argument supporting view that word “proper” is “a powerful limitation on Congress’s executory authority”).

118. Id. at 285 & n.66, 291.

119. See id. at 280, 285 (stating that “one would expect the legislative power-granting provisions of a limited government to place constraints on the exercise of power”).

120. See id. at 273-74 (discussing ambit of Necessary and Proper Clause).

121. Id. at 271-72.
If anything is clear from the authors' treatment of the Sweeping Clause, it is that the provision creates a jurisdictional barrier to laws that would invade any of the individual rights deemed to be held by the people, whether those rights are included in constitutional text or not.\textsuperscript{122} Accordingly, the authors conclude that, even if the traditional understanding of the Ninth Amendment were in some important sense correct—that its purpose was to prevent an inference of extended national powers from the enumeration of rights in a bill of rights—the fundamental rights understanding of modern commentators would also be basically correct. This is because Congress' enumerated powers were subject to the internal limitation in favor of individual rights contained in the jurisdictional barrier of the Sweeping Clause, and it is the full extent of this limitation that is preserved by the prohibition of an inference against the people's retained rights.\textsuperscript{123}

Unfortunately, there is much about the authors' thesis that remains unclear to the careful reader, and a brief description of the interpretive difficulties presented by the authors' work must precede a critical review of the textual and historical materials relating to the Necessary and Proper Clause. After considering these interpretive difficulties, the textual argu-

\textsuperscript{122} See id. at 271-72 ("[L]aws [must] be peculiarly within Congress's domain [and] not usurp . . . retained rights . . . of individuals.").

\textsuperscript{123} See id. at 273 (describing author's view of effect of Ninth Amendment under both traditional and modern view): If Lawson and Granger have correctly construed the Necessary and Proper Clause, it would suggest that the Ninth Amendment preserves rights already secured by the system of federal powers. They fail to note, however, that in their interpretation of the word "proper" in the Necessary and Proper Clause, the word is thought to serve the function that enumerated rights filled under the state constitutions and did not purport to state a general constitutional theory of implied rights. See id. at 273-74 (contending that Sweeping Clause creates implied rights that are retained by people and, in essence, is "the precursor of the Tenth Amendment's declaration that 'the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people'".). According to their reading, neither the Necessary and Proper Clause nor the Ninth Amendment would say anything about the relationship between citizens and state governments. Moreover, given that their interpretation assumes that the system of enumerated powers and reserved rights, secured by the Necessary and Proper Clause and alluded to in the Ninth Amendment, was uniquely tied to the system of delegated power embodied in the Federal Constitution, it would seem to follow that the Ninth Amendment would not make a fitting candidate for incorporation against the states through the Fourteenth Amendment. If Lawson and Granger are correct that the source for securing unenumerated rights in the unamended Constitution was the textual requirement that executory laws be proper, a central goal of modern Ninth Amendment scholarship, to justify federal fundamental rights decision making against the states, would not have been realized in cases such as Roe v. Wade, 410 U.S. 113 (1973). It seems odd, therefore, that some proponents of the modern, fundamental rights reading of the Ninth Amendment have embraced the thesis of Lawson and Granger. See, e.g., Barnett, supra note 26, at 773 n.99 (agreeing that the word "proper" limits general legislative powers.
ments relied on by Lawson and Granger will be carefully analyzed. Having concluded that the text alone supports the conventional reading of the Clause as easily as the one proffered by Lawson and Granger, this Article next examines the historical materials that shed light on the original understanding of the provision.

Next, this Article places the Constitution’s enumerated powers scheme and the Necessary and Proper Clause in the setting of the system of enumerated powers in the Articles of Confederation. It then reviews the role of enumerated powers and the Necessary and Proper Clause in the constitutional design as demonstrated in the national debate over ratification of the Constitution. That national debate shows that the Framers of the Constitution combined specific affirmative limits on delegated powers with carefully selected grants of power in an attempt to create a government that would be the supreme power with respect to a limited number of objects of concern. The Necessary and Proper Clause plays the mundane role of affirming that the powers delegated to the national government would necessarily include authority to enact laws serving to execute those powers; it neither adds to nor detracts from the grant of powers in Article I.

The Constitution’s limited powers scheme is then placed in the philosophy of individual liberty that undergirded the constitutional design. It shows that the Framers of the Constitution were deeply committed not only to individual rights, but also to striking an appropriate balance between necessary government energy, which serves both individuals and society, and security for individual liberty. In this setting, it appears as a remote possibility that the Framers would have included a general limiting provision, along the lines of the jurisdictional reading of the Necessary and Proper Clause proffered by Lawson and Granger. Finally, this Article will consider the most important postratification evidence bearing on the original understanding of the system of enumerated powers and the Necessary and Proper Clause. We will find that the debates over the first

124. For a further discussion of these difficulties, see infra notes 133-87 and accompanying text. For a further discussion of Lawson and Granger’s textual arguments, see infra notes 188-225 and accompanying text.

125. For a further discussion of these historical materials, see infra notes 228-436 and accompanying text.

126. For a further discussion of the proper role of unenumerated rights, see infra notes 228-94 and accompanying text.

127. See generally 3 ELLIOT’S DEBATES, supra note 19 (giving entire history of framing of Constitution from Virginia debates).

128. See generally id. (discussing role of Necessary and Proper Clause).

129. For a further discussion of this philosophy, see infra notes 295-388 and accompanying text.

130. For a further discussion of this postratification evidence, see infra notes 295-388 and accompanying text.
national bank and the Alien and Sedition Acts of 1798\textsuperscript{131} belie that the Necessary and Proper Clause was intended to play a crucial role in the constitutional design as a means of securing affirmative limits on the national government.\textsuperscript{132}

A. Jurisdiction of the Necessary and Proper Clause—Restatement of Constitutional Assumptions or Source of Internal Limits on Legislative Power?

Lawson and Granger simultaneously add both plausibility to their thesis and difficulty to the task of assessing it by stating and defending their basic claims about the meaning of the Necessary and Proper Clause at a level of generality that makes disagreement difficult.\textsuperscript{133} This tendency is reflected in the subtitle of the article itself, which identifies the authors' construction of the Sweeping Clause as a jurisdictional interpretation.\textsuperscript{134} Modern constitutional doctrine, with tap roots going back to \textit{McCulloch v. Maryland},\textsuperscript{135} treats the Necessary and Proper Clause as jurisdictional in the sense that any assertion of federal power not explicitly authorized elsewhere in the Constitution must comport with the limiting terms of its grant of ancillary power.\textsuperscript{136} Modern doctrine also holds that the authority

\textsuperscript{131} Act of June 18, 1798 (Naturalization Act), ch. 54, 1 Stat. 566; Act of June 25, 1798 (Alien Friends Act), ch. 58, 1 Stat. 570; Act of July 6, 1798 (Alien Enemies Act), ch. 66, 1 Stat. 577; Act of July 14, 1798 (Sedition Act), ch. 74, 1 Stat. 596.

\textsuperscript{132} But see generally Lawson & Granger, supra note 7, at 280 & n.48, 281-308 (stating that law must be both necessary and proper and, therefore, cannot be beyond Congress' power). They note that, during the debate over the first bank of the United States, the members of the House of Representatives accepted the Sweeping Clause "as a limiting construction." \textit{Id.} at 282.

\textsuperscript{133} See generally id. (stating that Sweeping Clause is not general grant of legislative power and must be interpreted to be consistent with principles of separation of powers, federalism and individual rights).

\textsuperscript{134} See \textit{id.} at 267, 272 (defining jurisdictional interpretation as requiring laws to be "peculiarly within the jurisdiction or competence of Congress—that is, to be laws that do not tread on the retained rights of individuals or states, or the prerogatives of federal executive or judicial departments").

\textsuperscript{135} 17 U.S. (4 Wheat.) 316 (1819).

\textsuperscript{136} See, e.g., Lawson & Granger, supra note 7, at 282-85 (supporting jurisdictional interpretation of Sweeping Clause). If this thesis sounds trivial, it is important to appreciate that the Constitution's first critics perversely read the Sweeping Clause as granting unlimited discretion to Congress to determine the reach of its own powers. Lawson and Granger provide a devastating critique of these pessimism-driven interpretations. See \textit{id.} (asserting different reasons for why proponents of unlimited congressional discretion might have construed Sweeping Clause this way and then criticizing those reasons). First, Lawson and Granger suggest that such an interpretation might have reflected "doubts about the availability of judicial (or presidential) review of legislation; if Congress is the final authority on all questions regarding its constitutional powers, it is of course the final judge of its powers under the Sweeping Clause." \textit{Id.} at 284. Second, the interpretation might have been the result of political processes. See \textit{id.} (stating that interpretation might have been used as political pose because "argument that the proposed Constitution would in practice create an unlimited national government was one of the anti-federalists' strongest weapons"). Third, people might have
granted by the Sweeping Clause is subject to all the same limitations that confront any other exercise of federal power—limitations found in explicit prohibitions in the Constitution as well as limitations that are implicit in the systems of separation of powers and federalism established by the Constitution.137 As Lawson and Granger observe, the word "proper" has not received significant attention, and it has often been read to add little, if any, meaning to the word "necessary"; but, as they acknowledge, "proper" is often taken as conveying the idea that a law enacted to execute a granted power cannot pass constitutional muster if it conflicts with a limiting provision found in the Constitution.138 Whether textual and structural limitations on federal powers are taken to be textually based in the term "proper," or are viewed as external limitations to which even exercises of executive power under the Clause are subject, an important question is raised as to whether the general thesis of Lawson and Granger clearly adds anything of substance to the understanding that it purports to replace.

The authors' analysis of the word "proper," and its function in the Necessary and Proper Clause, boils down to a general claim that the term supports the view that Congress' ancillary powers are limited by well-established jurisdictional boundaries rooted in foundational constitutional principles.139 For example, the authors analogize the use of the term "proper" in the Necessary and Proper Clause with state constitutional provisions limiting the branches of government to their proper functions in a

made "honest mistakes when interpreting the clause." Id. at 285. Lawson and Granger contend that, whatever the reason for the claim, the Sweeping Clause does not give unlimited general legislative power to Congress based on reasoning from language and structure of the clause. See id. They also tend, however, to treat statements construing the Clause to state enforceable standards as lending support to their own jurisdictional reading. See id. at 285-296.

137. See id. at 315-26 (stating that federalists agreed that federal bill of rights prohibits federal government from violating individuals' or states' rights and liberties, and therefore, amendments limited exercise of federal power). Any law that violated such a limiting provision would not pass constitutional muster, however well it advanced an object of legislation authorized by Article I.

138. See id. at 285 & n.68 ("The word 'proper' has been read to mean 'appropriate,' which adds little to 'necessary,' except for ... that legislation is appropriate only when it does not conflict with another constitutional provision." (quoting Stephen L. Carter, The Political Aspects of Judicial Power: Some Notes on the Presidential Immunity Decision, 131 U. Pa. L. Rev. 1341, 1378 (1983))).

139. See id. at 291 ("'[P]roper' law is one that is within the particular jurisdiction ... of the relevant governmental actor."). Thus, in describing the use of the term "proper" in analogous legal texts of the founding era, Lawson and Granger sum up an early Supreme Court decision's explication of the term "proper" with the conclusion that "[u]nder this interpretation, a 'proper' allocation of governmental powers is one that conforms to generally accepted jurisdictional lines." Id. at 296. This incorporation of the term "jurisdictional" in describing a number of treatments of the term in legal contexts suggests that the authors see this focus on generally accepted boundaries as the sort of inquiry that is called for by the term "proper" in the Sweeping Clause.
tripartite scheme. The bulk of the argument about the probable meaning of the term "proper" in the Necessary and Proper Clause rests on analysis of uses of the term in legal and constitutional contexts in which the term seems to refer to the appropriate domain or province of a governmental entity. If, however, the only implication of Lawson and Granger's thesis is the recognition that the exercise of executory authority as set forth in the Necessary and Proper Clause cannot constitutionally exceed well-established jurisdictional boundaries rooted in the structure of the constitutional order, their thesis hardly calls for the kind of serious reconsideration of constitutional doctrine that they seem to advocate. At most, it might suggest the possibility that courts and advocates might more often employ the term "proper" in articulating why laws furthering constitutional ends might nonetheless violate the Constitution.

It is hardly clear, however, why it should be considered especially significant whether all commentators agree that structural limitations on congressional authority stem from an appropriate analysis of the word "proper," the Necessary and Proper Clause considered as a whole or more general constitutional reasoning based upon the idea that all powers are subject to limits imposed by the Constitution itself. The matter of real import is that all commentators agree that the Sweeping Clause does not serve to insulate acts of Congress enacted pursuant to its terms from effec-

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140. See id. at 291-92 (citing various state constitutions' language and analogizing to federal model). For example, the Virginia Constitution provided: "The legislative, executive, and judiciary department, shall be separate and distinct, so that neither exercise the powers properly belonging to the other." Va. Const. of 1776, ¶ 1 (emphasis added), reprinted in 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3815 (Francis Newton Thorpe ed., 1909) [hereinafter cited as FEDERAL AND STATE CONSTITUTIONS].

141. See Lawson & Granger, supra note 7, at 291-97 (citing uses of word "proper" in limiting capacity).

142. See id. at 274 (contending that "word 'proper' serves a critical, although previously largely unacknowledged, constitutional purpose by requiring executory laws to be peculiarly within Congress's domain or jurisdiction"). They further argue that the Sweeping Clause, when properly understood as a jurisdictional limitation on the scope of Congress' power, is a "vital part of the constitutional design." Id.

143. But see generally CHARLES BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1st ed. 1969) (arguing that quest for text to focus on sometimes distracts us from grappling with what are often fundamentally structural issues). Along these lines, it is striking that the textual focus on the word "proper" preferred by Lawson and Granger as a solution to more than one constitutional conundrum is found in a clause repeatedly described, by both sides of debate over its meaning, as adding no new content to the Constitution; it is equally striking that, although the theme that the clause is purely declaratory pervades discussion of the clause, it is not referred to once in their 69-page article. See Lawson & Granger, supra note 7 (choosing instead to focus on Founders' understanding of Clause and comparing it to other constitutional provisions, state constitutions and design of Federal Constitution); cf. Barnett, supra note 26, at 772-86 (adding 14 pages of analysis supporting broad jurisdictional reading of Sweeping Clause without referencing this uniform characterization of Clause as purely declaratory in nature).
tive judicial review based on relevant constitutional limitations on national powers, whether rooted in specific texts or grounded in general reasoning from constitutional structure.\textsuperscript{144} At least this suggestion that the general thesis of the jurisdictional interpretation might be unnecessary seems well-grounded unless the word "proper" actually does much more work than what is suggested by these general formulations.

Lawson and Granger often leave the impression that they share this assessment of the matter, as they manage to assimilate virtually every statement that there are enforceable limitations on congressional authority, whether grounded on an explication of the term "proper" or not, as lending support to their jurisdictional interpretation of the clause.\textsuperscript{145} When Representative Niles argues that establishing stagecoaches in contradiction of state law is not sufficiently related to furthering Congress' power to establish post offices and postal roads, even if mail carriage might become "a little less expensive" and, thus, concludes that such a law invades states' rights and can hardly be justified as a proper law pursuant to the Necessary and Proper Clause, the authors conclude that he endorses their jurisdictional reading of the clause.\textsuperscript{146} Similarly, when St. George Tucker illustrates his contention that the Necessary and Proper Clause does not grant unlimited discretion to Congress by positing a law outlawing the bearing of arms to the end of preventing insurrections, despite the prohibition contained in the Second Amendment, he is taken as endorsing the jurisdictional reading of the clause and as confirming the general thesis "that laws that violate individual rights are not 'proper,' regardless of whether they are 'necessary.'"\textsuperscript{147}

\textsuperscript{144} Compare Lawson & Granger, supra note 7, at 281 (describing Virginia Ratification Convention's recognition that judiciary had right to scrutinize Congress' use of its powers under Sweeping Clause and declare any law in excess of those powers void), with Barnett, supra note 26, at 763 (stating that legislative decisions were "not immune from judicial assessment of constitutionality and nullification").

\textsuperscript{145} For examples of their approach, see infra notes 146-47 and accompanying text.

\textsuperscript{146} See Lawson & Granger, supra note 7, at 300-01 ("St. George Tucker expressed a similar view of the Sweeping Clause . . . ." (quoting 3 ANNALS OF CONG. 309-10 (1792))). The point here is not that Representative Niles does not discuss the term "proper," but that his discussion only confirms the conclusion he has reached based on a fairly restrictive understanding of the term "necessary" that is undergirded by a strong states-rights understanding. Niles rejects the argument that establishing a stage-coach line is a "proper" way to save a trifling on the ground that it would prove too much: "What, sir, may not be construed as proper to be done by Congress?" 3 ANNALS OF CONG. 310. He does not address the question whether the term "proper" does significant work beyond that done by the term "necessary," nor does he suggest that this law was improper because it violated an affirmative limitation that operated as a constraint on a law that otherwise would be viewed as sufficiently related to the enumerated power. See generally Lawson & Granger, supra note 7, at 301 (stating only that permitting this law suggests that "the whole powers vested in Congress . . . will be found in the magic word proper").

\textsuperscript{147} Lawson & Granger, supra note 7, at 303. Lawson and Granger concede that St. George Tucker's statement supports their interpretation "somewhat ob-
Perhaps most significantly, when Chief Justice Marshall concludes that an act of Congress establishing a national bank is an "appropriate measure" because such a measure is not "prohibited by the constitution" nor enacted "under the pretext of executing its powers" in order to "pass laws for the accomplishment of objects not intrusted to the government,"148 Lawson and Granger read him as lending support to their jurisdictional construction of the Sweeping Clause.149 Although Chief Justice Marshall clearly perceived federalism limits on the exercise of national power, beyond the requirement of mere fit between the end of an enumerated power and the means of executory legislation—framed in terms of a pretextual use of implied power—his argument did not proceed as an explication of limitations emanating from the term "proper" in the Necessary and Proper Clause.150 Rather, after insisting that the term "neces-

lishly," acknowledging that he does not explicate his thesis directly in terms of the jurisdictional analysis of the term "proper" that they espouse. Id. at 301. They clearly view him, however, as adopting their view in substance. Id. What they fail to acknowledge, however, is that Tucker's analysis comports with the modern understanding that they purport to reject as well as it does with theirs because the thrust of his argument is that any other understanding would render the Second Amendment "a mere nullity." Id. at 302 (quoting St. George Tucker, Appendix to 1 William Blackstone, Commentaries 302 (St. George Tucker ed., Philadelphia, Birch & Small 1803)).

Moreover, that Tucker's analysis supports the view that the Necessary and Proper Clause does not authorize even a supposedly necessary law that conflicts with specific textual limitations on granted powers does not imply that the word "proper" supplies a ground for rejecting any statute that the interpreter believes to violate valid conceptions of individual rights. Tucker was not analyzing the role of the word "proper" in the constitutional scheme, but was arguing generally against a view that read the provision as granting limitless discretion to Congress over the means chosen to implement the granted powers. Lawson and Granger frequently seem to conflate the notion of enforceable limits on congressional discretion under the Sweeping Clause with their own jurisdictional interpretation, a move that threatens to trivialize their thesis.

149. See Lawson & Granger, supra note 7, at 304-05.
150. See generally McCulloch, 17 U.S. at 421 (giving Chief Justice Marshall's analysis of whether law is constitutional). The statement in text is true and that Chief Justice Marshall neither employs the term "proper" (or, for that matter, "improper") in describing laws violating these limits nor states in any form the idea that the limits he contemplates proceed from any logic inherent in the Necessary and Proper Clause rather than simply from a conception of the constitutional doctrine of legislative powers limited to particular general objects or areas of concern. See id. (stating simply that "the powers of the government are limited, and that its limits are not to be transcended"). Lawson and Granger, however, suggest a subtler argument, that because Marshall's pretext analysis proceeded despite the efficacy of the law in furthering authorized ends, it follows that he "must have meant that the law would not be 'proper.'" Lawson & Granger, supra note 7, at 306 (emphasis added). Their conclusion, however, does not follow. Chief Justice Marshall says nothing to suggest that the limits passed proceed from the terms "necessary" and "proper." See generally McCulloch, 17 U.S. at 316 (describing power given to government). Rather, Marshall appeared to believe that the Constitution's delegation of powers is sufficiently clear as to the legitimate ends to be pursued (as well as the ends not to be pursued) that interpreters would be able to discern when purported
sary" was not employed to indicate a broad and rigorous limitation on legislative choice of means, Marshall made a point of emphasizing that the Constitution itself provided the barrier beyond which Congress may not go in selecting the means for executing its granted powers.\textsuperscript{151}

As these examples suggest, there is little reason to think that thoughtful commentators have ever perceived the Sweeping Clause as an independent source of limitation on national power. Lawson and Granger enlist Alexander Hamilton to their cause, contending that he "argued that the word 'proper' in the Sweeping Clause embodies principles of federalism" and that, thus, he adopted what they call the "jurisdictional interpretation."\textsuperscript{152} This conclusion rests on Hamilton's use of the term "propriety" in the course of answering his own inquiry with respect to how to judge "the necessity and propriety of the laws to be passed for executing the powers of the Union."\textsuperscript{153} Hamilton defended the Sweeping Clause against an antifederalist onslaught; the general premise of his defense, as we have noted, was that the Clause restated what would have been implicit in the grant of powers.\textsuperscript{154} Consistent with this general premise, Hamilton responded to his own question: "I answer first that this question arises as well and as fully upon the simple grant of those powers [by the Constitution], as upon the declaratory clause."\textsuperscript{155} According to Hamilton, the means ostensibly served legitimate ends, but only pretextually. See id. at 420-21 (stating that there are limits to government power, although construction of Constitution allows legislature to determine means used to achieve end). For an example of this thesis at work, see infra notes 152-57 and accompanying text.

151. See McCulloch, 17 U.S. at 420 (demonstrating that Chief Justice Marshall's general formulation of this limiting idea takes form of test for evaluating legislative acts passed pursuant to Necessary and Proper Clause). The Court focused on the relationship between means and end: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." Id. at 421.

152. Lawson & Granger, supra note 7, at 299.

153. The Federalist No. 33, supra note 107, at 206. Specifically, Hamilton answers his own question with the general observation that "[t]he propriety of a law in a constitutional light, must always be determined by the nature of the powers upon which it is founded." Id. Lawson and Granger read Hamilton as suggesting that the key to deciding whether a law exceeds the authority granted by the Sweeping Clause is to look at its propriety in light of general principles of our constitutional system. See Lawson & Granger, supra note 7, at 299 ("Alexander Hamilton similarly argued that the word 'proper' in the Sweeping Clause embodies principles of federalism.").

154. See The Federalist No. 33, supra note 107, at 204 (describing clause as "necessary and unavoidable implication from the very act of constituting a Federal Government").

155. Id. at 206. Lawson and Granger fail to note Hamilton's assertion that the problem of defining the appropriate limits to federal power does not turn on the language of the Necessary and Proper Clause; accordingly, they offer no explanation as to how Hamilton perceives the clause as containing powerful limiting language. See Lawson & Granger, supra note 7, at 299 (asserting that Hamilton argued that word "proper" embodied principles of federalism by relying on single quote without explaining how quote supports their reading).
olution of the issue of the scope of Congress’ constitutional authority, however it is framed, “must always be determined by the nature of the powers upon which [the law] is founded,” so that the crux of a determination that Congress had “exceeded its jurisdiction” would be that its claim of power was based upon “some forced constructions of its authority,” not, he might well have added, on a failure to grasp the jurisdictional interpretation of the Sweeping Clause.\textsuperscript{156}

The example of Hamilton’s analysis of federal power points out not only how problematic it is to suggest that a jurisdictional interpretation offers a unique understanding of the Sweeping Clause, but also how unlikely it is that the invocation of the word “proper,” as a touchstone for analysis, is likely to contribute any of the real work in establishing constitutional claims. In Hamilton’s analysis of federal power, he contended that a federal law that attempted to vary the law of descent from the one established in a state could only be based upon an illegitimate “forced construction[ ]” of federal power.\textsuperscript{157} An apparent implication of Hamilton’s analysis is that the boundaries of federal authority might be especially clear with respect to some matters—in this case, establishing the law of succession—contemplated to be within the states’ domain by the limited grant of national powers. This same sort of idea, sometimes referred to as the pretext doctrine, has been invoked historically, first by Chief Justice Marshall in dictum in \textit{McCulloch},\textsuperscript{158} and subsequently in the Supreme Court’s rather infamous decisions in \textit{Hammer v. Dagenhart}\textsuperscript{159} and \textit{Bailey v.}\n
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\textsuperscript{156} The \textit{Federalist} No. 33, supra note 107, at 206. \\
\textsuperscript{157} Id. \\
\textsuperscript{158} \textit{McCulloch} v. Maryland 17 U.S. (4 Wheat.) 316, 423 (1819) (“[N]or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government.”). Hamilton followed up his “law of descent” hypothetical with an example of a federal law abrogating a state land tax to facilitate collection of a federal tax, suggesting that such a law could rest only “upon the pretense of an interference with [federal] revenues.” The \textit{Federalist} No. 33, supra note 107, at 206. \\
\textsuperscript{159} 247 U.S. 251, 276 (1918) (striking down federal statute prohibiting interstate transport of goods produced by companies employing child labor because statute sanctioned “an invasion by the federal power of the control of the matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the states”). Although the Court expressly disclaimed any investigation into congressional motives, Justice Holmes’ dissent suggests the extent to which the Court did just that: [I]f an act is within the powers specifically conferred upon Congress, it seems to me that it is not made any less constitutional because of the indirect effects that it may have, however obvious it may be that it will have those effects, and that we are not at liberty upon such grounds to hold it void. The first step in my argument is to make plain what no one is likely to dispute—that the statute in question is within the power expressly given to Congress if considered only as to its immediate effects . . . . The statute confines itself to prohibiting the carriage of certain goods in interstate or foreign commerce. Congress is given power to regulate such commerce in unqualified terms. \\
\textit{Id.} at 277 (Holmes, J., dissenting).
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Drexel Furniture Co.\textsuperscript{160} Although these modern invocations of the idea of the pretextual use of federal authority have been censured as rooted in a strict construction and a discredited "dual federalism,"\textsuperscript{161} as well as defended as reflecting the anxiety of many of the Founders with preserving state sovereignty, it seems extremely dubious to suggest that the jurisdictional reading of the Sweeping Clause will supply us with the debate-stopping argument.\textsuperscript{162} Lawson and Granger come close to acknowledging as much, at least with respect to the federalism issue to which their jurisdictional interpretation of the Sweeping Clause might seem most clearly to speak: the question whether federal executory statutes that "impair the autonomy of state governments can be 'improper'" as conflicting with our federal system.\textsuperscript{163} Although they acknowledge this doctrine's "checkered history" before the Supreme Court, the authors decline to supply any particular answer as to whether it is justified as an interpretation of the Constitution of the Founders, even as they "do insist that the answer lies in the Sweeping Clause."\textsuperscript{164}

\footnotesize{160. 259 U.S. 20, 39-40 (1922) (concluding that child labor tax law at issue was actually penalty and attempt by Congress to regulate child labor). The Court invoked Marshall's decision in \textit{McCulloch} to support its holding:

[\textit{S}hould Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land.]

\textit{Id.}

161. See, e.g., United States v. Darby, 312 U.S. 100, 116 (1941) (stating \textit{Hammer}'s thesis that "the motive of the prohibition or its effect to control in some measure the use or production within the states of the article thus excluded from the commerce can operate to deprive the regulation of its constitutional authority" had ceased to have force).

162. Thus, if one starts with the proposition that the central goal of the Framers was to create an effective national government, along the lines of the dictum contained in \textit{McCulloch} and adds to that the widely held modern conviction that changes in the nature and extent of commerce have simply brought a vastly larger category of activities with the domain of commerce that involves two or more states, it is not difficult to conclude that modern exercises of the commerce power, especially as illustrated by \textit{Hammer v. Dagenhart}, "conform[ ] to generally accepted jurisdictional lines." Lawson & Granger, \textit{supra} note 7, at 296. See generally \textit{Hammer}, 247 U.S. at 251; Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189, 194 (1824); \textit{McCulloch} 17 U.S. at 408 ("A government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution.") There are obviously counters to each of these arguments, but the idea that the Sweeping Clause embodies a jurisdictional barrier does not contribute to building the opposite case.

163. Lawson & Granger, \textit{supra} note 7, at 332.

164. \textit{Id.} Acknowledging the cogency of the Supreme Court's expression of skepticism about employing "freestanding conceptions of state sovereignty" to measure Congress' authority under the Commerce Clause, Lawson and Granger insist that it is quite a different question whether the Court might have a similar duty to measure congressional authority under the Sweeping Clause. \textit{Id.} (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 558 (1985)). Instead,
Therefore, it is tempting to conclude that disagreements of real substance with conclusions reached by Lawson and Granger are likely to relate not so much to the meaning of the Necessary and Proper Clause, but to the proper construction of limitations on national powers to be inferred from the text and structure of the Constitution itself. At the outset of their article, Lawson and Granger present the individual rights implications they perceive in the Sweeping Clause as an alternative to the contest between, on the one hand, a textualism that arguably precludes unwritten rights and, on the other hand, a general theory of implied rights and indeed, of an "unwritten Constitution." Even so, it seems apparent that Lawson and Granger have been greatly influenced by the body of scholarly literature claiming that the Founders not only believed in natural rights, but viewed them as inherent in the social contract and as an implicit part of fundamental law under a republican constitution. Indeed, it is difficult in the final analysis not to perceive their jurisdictional interpretation of the Sweeping Clause as simply another attempt, as with the modern construction of the Ninth Amendment, to find a textual foundation for a theory of unwritten rights. Consequently, much of the historical material bearing on their proffered theory of the Sweeping Clause will be material that is also responsive to analogous claims made on behalf of the Ninth Amendment and the general notion of unwritten rights.

because "the Constitution was enacted against a background understanding of sound principles of federalism . . . 'proper' executory laws must conform to those principles." Id. If Hamilton is right that the answers are not found in the declaratory Sweeping Clause, however, or if Lawson and Granger are right that the jurisdictional boundaries embodied in the Sweeping Clause are defined by reference to "generally accepted jurisdictional lines," it is difficult to see how the question of implied state sovereignty limits on federal power will turn, either in terms of finding a constitutional basis for or defining the scope of any such limitations, on the idea that the Sweeping Clause is jurisdictional. See id. at 296 (discussing jurisdictional views as to meaning of "proper"). The jurisdictional thesis reflects the very mindset that one commentator has appropriately criticized as too wrapped up in finding textual homes for constitutional doctrine and too little concerned with the historical and functional questions that necessarily characterize structural analysis. See Black, supra note 145, at 22-32 (arguing for constitutional analysis utilizing "structure and relation").

165. See Lawson & Granger, supra note 7, at 269-70 ("Neither of the views described above identifies the constitutional source . . . of Congress's power . . . and thus never asks whether that source contains internal, textual limits . . . "). Lawson and Granger note that modern scholars have engaged in a spirited debate as to whether the founding generation perceived that there were enforceable implied limitations on government power that were inherent features of early American constitutions (state and federal) based on natural or fundamental common law. See id. at 269 & n.6 (collecting sources contributing to debate over unenumerated limitations on government in favor of individual rights).

166. See, e.g., Suzanna Sherry, The Founders' Unwritten Constitution, 54 U. Chi. L. Rev. 1127, 1167 (1987) (discussing inherent natural rights as part of "unwritten constitution").

167. See generally Lawson & Granger, supra note 7, at 326-30 (interpreting Sweeping Clause as protecting individual rights similar to Ninth Amendment).
Notwithstanding these points, however, it is in the individual-rights
area that Lawson and Granger seem to go beyond the clearest and rela-
tively modest implications of their general formulations of the jurisdic-
tional role of the term "proper" in the Necessary and Proper Clause. It is
in the individual rights arena that they most clearly suggest that the word
"proper" serves as more than a textual repository for the idea that laws
executing federal powers are limited by norms found explicitly or implicit-
ly in jurisdictional boundaries already present in the Constitution.168 In
this context, at least, the authors appear to claim that the term "proper"
serves as the textual source of a unique doctrine of affirmative constitu-
tional limitations—a doctrine that serves as an unprecedented tool of lim-
ited government in the context of a government of enumerated
powers.169

Lawson and Granger thus contrast the Necessary and Proper Clause
with both state and federal constitutional provisions describing the powers
of governments that are not limited to specific areas of legislative author-
ity, provisions that they describe as lacking any "effective internal limi-
tation on the general legislative power."170 They observe, for example, that
the Territories Clause of the Constitution,171 granting Congress the power
to make "all needful" rules and regulations respecting American territo-
ries, describes a general legislative authority over the territories, as con-
trasted with the apparently more limiting "necessary and proper"
requirement describing Congress' power to pass laws to execute the enu-
merated powers.172 They conclude that this omission of the word
"proper" from the Territories Clause "highlights the word's role in the
Sweeping Clause as a textual limitation on Congress's legislative pow-
ers."173 According to Lawson and Granger then, the Framers intended

168. See id. at 328 (concluding that by reading Sweeping Clause as "an enu-
merated power, no different in principle from Congress's other enumerated pow-
ers, . . . one can completely identify the rights retained by the people and the states
by determining the scope of the national government's delegated powers").

169. See id. at 273 ("[T]he Sweeping Clause's requirement that laws be
'proper' means that Congress never had the delegated power to violate those
rights in the first instance.").

170. Id. at 313 n.190.

171. U.S. Const. art. IV, § 3, cl. 2.

172. See Lawson & Granger, supra note 7, at 310-11 ("It is noteworthy that
Congress's general power over territories and property is described as the power to
'make all needful Rules and Regulations' whereas in its role as part of a government
of limited powers, Congress is granted only the power to make laws that are both
'necessary and proper.'" (footnote omitted)).

173. Id. at 311. This same point of contrast is powerfully articulated with re-
spect to the general grants of legislative power to the legislatures of the states
under their state constitutions. See id. at 312 ("The Sweeping Clause has no clear
antecedents in [the constitutions and charters of the original states]."). Lawson
and Granger stated:

[T]he phrase "necessary and proper" does not appear in an American
governmental charter until the Constitution. That absence is not surpris-
ing. The state governments were all general governments whose powers
that the limited-powers design should include unique limitations on the exercise of federal power in addition to those presented by a straightforward construction of the scope of the powers themselves and any external limits specified in the Constitution or inherent to all grants of legislative power; most importantly, the term "proper" provides the textual statement of the existence of these limits.\textsuperscript{174}

It is precisely at this point, however, where their jurisdictional interpretation appears to have the most bite, that the explication of their theory becomes the most amorphous. If Lawson and Granger are clear that the individual-rights limitations embodied in the word "proper" stem from the limited delegation of powers, they fail to supply any background theory that would guide interpreters seeking to determine the contours of this guarantee.\textsuperscript{175} Moreover, although they refer to rights retained by the people because of the Necessary and Proper Clause, confident that even prior to the Bill of Rights the Framers contemplated enforcement of unenumerated affirmative limitations on powers granted by the Constitution, Lawson and Granger do not supply a clue as to how a federal system or enumerated powers generate or define such legal limits on government.\textsuperscript{176} Nor do they explain how it is that these limits on legislative power are to be understood as well-established jurisdictional boundaries, given that they acknowledge that these same pre-existing rights did not
did not depend on specific enumerations in a constitution. It would therefore be odd for a state constitution even to declare that its legislature could pass all necessary laws, much less necessary and proper laws. Such a provision could be seen, however, as necessary for a government of limited and enumerated powers.

\textit{Id.} Lawson and Granger concluded that because the state legislatures are not subject to any "effective internal limitation" on their general powers, it is important that their otherwise unlimited power be subject to specific limitations in a bill of rights. \textit{Id.} at 313 n.190; see also \textit{id.} at 317 (citing argument in ratification debate that "special reservations and exceptions" provide citizens subject to government of general powers with security beyond "the sound policy, good faith, virtue, and perhaps proper interests" of government (quoting ALEXANDER C. HANSON, REMARKS ON THE PROPOSED PLAN OF A FEDERAL GOVERNMENT, \textit{reprinted in Pamphlets on the Constitution of the United States, Published During Its Discussion by the People, 1787-1788}, at 241-42 (Paul L. Ford ed., B. Franklin 1971 (1888)). According to Lawson and Granger, however, reliance by the Constitution's defenders on the contrasting federal scheme of enumerated powers as a substitute for a bill of rights was premised on the limits imposed internally by the jurisdictional language of the Necessary and Proper Clause. \textit{See id.} at 318 ("The federalists' argument that a bill of rights was unnecessary makes sense, of course, only if the national government's enumerated powers do not authorize that government to violate the people's or the states' rights and liberties.").

\textsuperscript{174} See \textit{id.} at 315-21 (discussing Framers' intent in general terms).

\textsuperscript{175} See generally \textit{id.} at 330 ("The task of identifying those unenumerated rights, if any, that the Sweeping Clause and the Ninth Amendment jointly protect is beyond the scope of our inquiry.").

\textsuperscript{176} See \textit{id.} at 271 (stating that aspect of jurisdictional interpretation of word "proper" is that Congress may not pass laws that "infringe on the retained rights of the states or of individuals"). The Sweeping Clause thus serves as "a textual guardian of "unenumerated individual rights." \textit{Id.} at 272.
function as implicit jurisdictional boundaries under the constitutions of the states.\footnote{177} This point seems especially compelling because Lawson and Granger seem to reject implicitly the much broader argument that various fundamental rights were considered to be "inalienable" or "inherent," typically on the ground that these were natural rights retained by individuals as they entered into society under traditional social contract theory.\footnote{178}

\footnote{177. See generally id. at 312-14 (discussing general powers granted by state constitutions). The acknowledgment that these preexisting rights, rooted in English constitutionalism and natural-rights theory, did not function as legal limitations in the state constitutions, comports with the thrust of the ratification-era debate. Just a few weeks after the Constitutional Convention adjourned, James Wilson explained that whereas under the state constitutions the people had "invested their representatives with every right and authority which they did not in explicit terms reserve, under the Constitution "the reverse of the proposition prevails, and everything which is not given, is reserved." James Wilson, Speech in the State House Yard, PA. HERALD, Oct. 9, 1787, reprinted in 2 RATIONIFICATION OF THE CONSTITUTION, supra note 23, at 167, 167-68; accord George Nicholas, Debates in the Convention of the Commonwealth of Virginia on the Adoption of the Federal Constitution (June 14, 1788), in 3 ELLIOT'S DEBATES, supra note 19, at 449, 450 (contrasting case of Virginia, where "all powers were given to the government without any exception," with "the general government, to which certain special powers were delegated for certain purposes"). Nicholas suggests that it is safer to grant "certain limited powers" than "to grant general powers." Nicholas, supra, at 450; see Edmund Randolph, Debates in the Convention of the Commonwealth of Virginia on the Adoption of the Federal Constitution (June 5, 1788), in 3 ELLIOT'S DEBATES, supra note 19, at 463, 467 (distinguishing state legislatures that have "no limitation to their powers" from legislature "with certain delineated powers" and contending that while bill of rights is "necessary in the former, it would not be in the latter" because "the best security that can be in the latter is the express enumeration of its powers"). Wilson's contrasting descriptions, and especially the idea that under the Federal Constitution all not granted was retained, became almost slogans during the months of debate that followed this initial presentation. See McAfee, Original Meaning, supra note 15, at 1291-92 (noting that Wilson, who gave more speeches than any other member of Philadelphia Convention, strongly influenced Madison and Hamilton in constructing their defense of Constitution).

This view also comports with a compelling body of historical work showing that the standard view during the founding era was that natural and customary rights were viewed as imperfect rights that did not become constitutional and legal rights until embodied in a written constitution. See, e.g., Phillip A. Hamburger, Natural Rights, Natural Law, and American Constitutions, 102 YALE L.J. 907, 909, 930-55 (1993) (espousing imperfect rights view); McAfee, supra note 21, at 135-46 (addressing view of natural rights as "imperfect"). The pervasive antifederalist fears that their rights were forfeited by the proposed Constitution indicates that traditional and natural rights did not in general hold the status of well-established jurisdictional limitations in a legal sense—a fact that cuts sharply against the view that the word "proper," to the extent that it textually grounds well-established jurisdictional limits on the exercise of power, would have been understood to include these traditional and natural-rights limitations on government.

178. See Grey, supra note 26, at 162-68 (describing view that there are unenumerated individual rights that are protected); Mayer, supra note 26, at 319 (noting that federalists claimed that "enumeration of fundamental rights was unnecessary because these rights were so well known and, in the case of natural rights, inalienable"); McAfee, Original Meaning, supra note 15, at 1265-77 (describing view "in absence of a bill of rights, the constitutional scheme would recognize fundamental law and natural rights as limitations on the exercise of the enumer-
Under the state constitutions the general legislative powers were typically controlled by express limitations contained in a declaration of rights; a suggestion might be that the word "proper" served as a functional equivalent to these specific limitations. The state constitutions' declarations of rights, however, hardly explain the reversal of doctrine suggested by the broad jurisdictional interpretation of the Necessary and Proper Clause. As Lawson and Granger acknowledge, there is a section of the Constitution, Article I, Section 9, that states specific limitations on the powers delegated to Congress. Considering that the limited jurisdiction inherent in the idea of granting a few, rather than many, powers serves by itself as a tool of limited government, logically one might conceive that there would be less need, rather than more, for a provision creating a general, basically undefined limit on legislative jurisdiction in favor of individual rights. A question raised is whether the founding genera-

179. See Lawson & Granger, supra note 7, at 312-13 (explaining absence of "clear antecedents" to Sweeping Clause because it would be odd to declare that legislatures with general powers could pass necessary laws, much less necessary and proper laws). They also suggest that such a provision could be seen "as necessary for a government of limited and enumerated powers." Id. at 313.

180. See U.S. Const. art. I, § 9 (stating specific limits on acts of Congress, including prohibitions on bills of attainder and ex post facto laws).

181. Professor Barnett does not offer any help in addressing the theory of rights underlying the purported general requirement that laws be proper. Barnett was on record as contending there were enforceable implied rights under the unamended Constitution long before discovering the word "proper" as a textual grounding for the idea. See Barnett, supra note 26, at 745 ("It should go without saying . . . that the framers of the U.S. Constitution believed in 'the pre-existent rights of nature.'"). Barnett thus appears to endorse a thesis that rests in part on the idea that the text under consideration is necessary because there is no general doctrine of implied rights—hence the need to include jurisdictional limiting language in the clause granting executory power—even as he insists that the rights secured were pre-existent and required no such language. See id. at 792-93 (arguing that Necessary and Proper Clause should be viewed as creating textual limit on congressional powers that serves to protect unenumerated rights of people and also noting that prior to Bill of Right's enactment "all of the natural rights retained by the people were unenumerated"). Moreover, in the context of endorsing (in some measure) the broad jurisdictional reading of the Sweeping Clause, Barnett also takes the unusual step of repudiating the works of other scholars, including his own prior writings, that had perceived the general implied-rights doctrine as including both inalienable natural rights and rights that had been fundamental as a matter of positive law (rights such as the right to trial by jury and the prohibition on general search warrants). See id. at 778-81; Mayer, supra note 26, at 325; Sherry, supra note 26, at 195. Explicating the jurisdictional limits of the Sweeping Clause, Barnett concludes that only the inalienable natural rights are retained by the people and, thus, are secured under the Clause. See Barnett, supra note 26, at 793 ("The people retained the natural rights that protected their liberties."). He does not offer, however, a rationale for this change of position; this narrower thesis was a necessary outgrowth, an attempt to reconcile his new emphasis on a jurisdic-
tion would have recognized more profound reasons than any mentioned by Lawson and Granger for subjecting legislative power in the states only to specific written limitations rather than by reference to a general jurisdictional concept of limited government and undefined individual rights.\textsuperscript{182}

In any event, the net result of the omission of any foundational theory for the existence of unenumerated legal limits on legislative authority is that readers are left essentially in the dark as to how such limits might be explicated. Stating that the task of identifying the unenumerated rights protected by the Sweeping Clause was beyond the scope of their inquiry, Lawson and Granger suggest only that, for originalists at least, such rights would include "those rights the violation of which the general public in 1789 would have thought 'improper.'"\textsuperscript{183} Lacking any foundational theory of the relationship between rights and a legislature possessing enumerated powers, however, an obvious question is whether a judge might just as plausibly construe the term "proper" as an invitation for the judge to determine, by his or her own best lights and without any special regard for the beliefs of the Framers or the people, what rights the people deserve as against the federal authority.\textsuperscript{184}

Notwithstanding these interpretive difficulties, however, it is this thesis that the Sweeping Clause embodies "internal limits" on congressional

\textsuperscript{182} For evidence that the Framers of the Federal Constitution saw the task of providing constitutional limitations, even to a government of limited powers, as involving a delicate and sensitive task in which the important purposes for which governments are created must be addressed, see infra notes 299-322 and accompanying text.

\textsuperscript{183} Lawson \& Granger, supra note 7, at 330.

\textsuperscript{184} Even the evidence relied on by Lawson and Granger lends itself to a very expansive construction of the notion of individual-rights limitations on Congress. See, e.g., id. at 321 (relying on assurance of Theophilus Parsons that "no power was given to Congress to infringe on any one of the natural rights of the people by this Constitution") (quoting Theophilus Parsons, Massachusetts Ratifying Convention (Feb. 5, 1788), in 2 Elliot's Debates, supra note 19, at 162). If Parsons is construed as referring to affirmative limitations on behalf of fundamental natural rights, it is difficult to avoid the implication that it is natural rights, and not some 1791 consensus, that are protected by the Sweeping Clause. Cf. United States v. Bryan \& Woodcock, 13 U.S. (9 Cranch) 374, 377 (1815) (addressing argument of legal counsel to effect that retroactive civil law would not be proper law "because it would overturn instead of "establish [i] justice"). Lawson and Granger, however, hint that perhaps only well-established, traditional rights were to be protected by their jurisdictional interpretation of the Sweeping Clause. Cf. Lawson \& Granger, supra note 7, at 329 n.254 (suggesting possibility that "one or more of the rights enumerated in the Bill of Rights are not rights whose violation would have been 'improper' before 1791").
power—and not merely the general idea of unwritten limits on legislative power—that requires critical review in light of the textual and historical materials bearing on the meaning of the Clause.185 Before turning to that task, however, two summary observations are required. First, the idea that the term “proper” might function in part as a textual acknowledgment of pre-existing (and, indeed, external) limitations on legislative power, ones implicit or explicit in the Constitution’s tripartite scheme or the federal system itself, could be described as a jurisdictional interpretation, but would not present an issue of important controversy. It seems reasonable, therefore, to refer to the Lawson and Granger thesis as presenting a broad jurisdictional interpretation of the Sweeping Clause, that includes internal limits deemed essential to preserve some general conception of limited government thought to be contemplated by the Constitution’s drafters. It is this broad jurisdictional interpretation that will be criticized in what follows.186 Second, it is critical to recognize that the evaluation of this broader thesis is aided very little by the careful textual and contextual analysis used by Lawson and Granger to find that the term “proper,” understood historically in a general legal setting, refers to compliance with established jurisdictional boundaries.187 The term “proper” already plays this role under the modern reading of the Necessary and Proper Clause, without being viewed as an independent source of additional (internal) limitations based on some general theory of governments of limited or enumerated powers. Our focus will necessarily be on the materials bearing on the probability that the Framers intended a single term in the Sweeping Clause to play the critical role posited by Lawson and Granger, as well as on the materials related to the Framers’ theory of the relationship between our federal structure and popular rights that is reflected in Article I of the Constitution.

B. The Text of the Necessary and Proper Clause

As noted above, in developing their jurisdictional interpretation, Lawson and Granger place considerable weight on a careful analysis of the language of the Sweeping Clause and, in particular, on a close comparison between it and other power-granting clauses both in the federal and state constitutions.188 They first review the word “proper” itself, observing that

185. The general debate over unwritten limitations will proceed based on a careful analysis of historical materials bearing on the relation between thinking about human rights and written constitutions at the founding. The explicit claim of Lawson and Granger, however, is that one can find a basis for implied individual-rights limitations in the text of the Sweeping Clause without resolving the larger debate over unwritten limitations.

186. For a critical analysis of Lawson and Granger’s broad jurisdictional analysis, see infra notes 188-225 and accompanying text.

187. See Lawson & Granger, supra note 7, at 291-97 (providing historical analysis of term “proper”).

188. See id. at 291-97, 308-14 (comparing state and federal grants of constitutional power).
the definition in 1787 included the words "fit," "adapted" or "suitable" and the idea of being peculiarly within a particular domain or of "not belonging to more."189 They contend that the latter meaning, which they describe as "jurisdictional," was the use probably intended by the Framers, both because it was common "in contexts involving the allocation of governmental powers,"190 and because this understanding would avoid conflict with "the venerable legal maxim of document construction that preserves that every word of a statute or constitution is used for a particular purpose."191 The alternative meaning of the term, referring to fitness or suitability, would render the word "proper" as redundant of "necessary," leaving the former without any real function in the Clause.

1. The Question of Redundancy

Although it will hardly settle the issue of the intended meaning of "proper" in the Necessary and Proper Clause, it seems doubtful that the maxim presuming a particular purpose for each word in a legal document is likely to contribute much to determining which meaning of the word "proper" was intended by the Framers of the Sweeping Clause. In the first place, if the entire clause was viewed as a declaratory provision and, thus, as redundant of what was already implicit in the enumerated powers scheme, it would be less than surprising if it contained some internal redundancy as well. More importantly, the cited maxim exists in tension with common law maxims that require the meaning of general terms to be limited because of their proximity and relation to other words used in the same text.192 In his McCulloch opinion, Chief Justice Marshall, whom the authors rely on in support of the maxim they invoke, strikingly applied the principle underlying these competing maxims in rejecting Maryland's argument that the term "necessary" required that a law be essential or indis-

189. Id. at 291.
190. Id.
191. Id. at 290.
192. See Reed Dickerson, The Interpretation and Application of Statutes 233 (1975) (stating maxim that "words are to be read in context with the neighboring words in the same document (noscitur a sociis) recognizes that in the field of communication the whole transcends the parts" (footnote omitted)). A closely related maxim, ejusdem generis, states "that if a series of more than two items ends with a catch-all term that is broader than the category into which the preceding items fall but which those items do not exhaust, the catch-all term is presumably intended to be no broader than that category." Id. at 234. Although the latter maxim does not literally apply here because "necessary and proper" does not constitute a series of more than two items, the background idea that general words might properly be given a limiting construction to fit with surrounding language may well apply here. Of course, scholars have generally agreed that the maxims can almost never be substituted for a careful analysis of the context of the legal language being construed, including evidence of the known purposes of the enactment in question. See, e.g., id. at 228 (cautioning against mechanical application of rules of interpretation). Dickerson warned that "each situation [is] unique and the particular reader is obliged to do a delicate, complicated balancing act." Id.
pensable. Based on the premise that "we may derive some aid from that with which [the word 'necessary'] is associated," Marshall finds it implausible that the Framers would have added the term "proper," the "only possible effect of which is to qualify that strict and rigorous meaning" and "to present to the mind the idea of some choice of means of legislation not straitened and compressed within the narrow limits for which gentlemen contend." Having apparently already concluded that the term "proper" had been employed to refer to measures that are fitting or adapted to accomplish authorized ends, Marshall argues that his more limited construction of the word "necessary" better squares with "the usual course of the human mind" and avoids attributing to the Framers the use of contradictory terms.

Beyond confirming that Marshall did not perceive the word "proper" as playing a critical jurisdictional role, the Chief Justice's analysis raises important questions regarding the jurisdictional interpretation offered by Lawson and Granger. The term "necessary," particularly as construed in McCulloch and later decisions, merely restates what the Framers believed would be apparent even without such a clause, namely, that Congress' powers implicitly include authority to take action as needed to accomplish

193. See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 418-19 (1819) ("If the word 'necessary' was used in that strict and rigorous sense . . . it would be an extraordinary departure from the usual course of the human mind . . . to add a word, the only possible effect of which is to qualify that strict and rigorous meaning.").

194. Id. Chief Justice Marshall's criticism, however, did not dampen the enthusiasm of his critics for the argument placing virtually all the weight of the provision on the term "necessary." See A Virginian's "Amphictyon" Essays, reprinted in JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 52, 66 (Gerald Gunther ed., 1969) [hereinafter JOHN MARSHALL'S DEFENSE] (responding that "inference from that association of 'necessary' with 'proper' is directly the reverse of that of the supreme court"). If it were not for the word "necessary,"

Congress might have made all laws which might be 'proper,' that is 'suitable, or fit, for carrying into execution the other powers; in that case they would have had a wider field of discretion: they would then have only been obliged to enquire what were the suitable means to attain the desired end; . . . After you have ascertained the means which are suitable, or proper, you must go further and ascertain whether they are necessary. If they are not necessary to attain the end, although they may be good in themselves, yet you shall not use them.

Id. Marshall's critic, of course, implicitly establishes Marshall's point—that the word "proper" is rendered utterly superfluous (because it is contained within "necessary") when "necessary" is construed as such a strong requirement; however, Marshall and his critic agree on the meaning of "proper" as it is used in the Clause. See id.; see also McCulloch, 17 U.S. at 418-19.

195. McCulloch, 17 U.S. at 418-19. Earlier in the opinion, Chief Justice Marshall previewed this criticism: "The word 'necessary,' is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory." Id. at 413.

196. For a further discussion of Marshall's interpretation, see supra notes 148-51 and accompanying text.
the authorized ends.\textsuperscript{197} Lawson and Granger suggest that the word "proper," by contrast, plays a critical role as the textual source of important limitations on congressional authority.\textsuperscript{198} Indeed, their interpretation appears to warrant limiting Congress’ powers in ways that would seem strained based upon the wording of the grant of power themselves, especially as it provides a basis for imposing unwritten limitations on Congress in behalf of unenumerated individual rights. It can thus be argued that the more limited interpretation of the word "proper," as suggested by Chief Justice Marshall, would fit more cohesively with the word "necessary" and with the purpose of the Clause, confirmed by various spokespersons, to declare the existence of an ordinary power of Congress.\textsuperscript{199}

Contrary to the analysis of Lawson and Granger, the contemporaneous power-granting provision that most closely tracks the Necessary and Proper Clause of Article I lends support to this construction of "necessary and proper," which views the phrase as basically expressing a single idea. The Georgia Constitution of 1789, which the authors note was modeled after the Federal Constitution, stated that "[t]he general assembly shall have power to make all laws and ordinances which they shall deem necessary and proper for the good of the State, which shall not be repugnant to this constitution."\textsuperscript{200} Lawson and Granger emphasize that this provision places the phrase "which they shall deem" in front of the necessary and proper language, thereby granting "the legislature discretion to determine the necessity and propriety of the laws it makes."\textsuperscript{201} They argue that the inclusion of this "express grant of discretion" is suggestive that "the phrase 'necessary and proper' [was] understood as a significant limitation on legislative power," which needed to be qualified to avoid undermining "the otherwise general authority of the state legislature."\textsuperscript{202}

Another explanation seems more plausible, however. The qualifying language suggests an inclination to recognize the legislature as generally the sole judge of the fit between proposed laws and the good of the state, no doubt in recognition that the initial grant of power was so broad and general as to render judicial review of such judgments inappropriate (or even improper). It seems unlikely, however, that the Framers of this provision could have intended to grant an unqualified discretion to the legisla-

\begin{itemize}
\item\textsuperscript{197} See McCulloch, 17 U.S. at 418 ("It is a means for carrying into execution all sovereign powers . . . .").
\item\textsuperscript{198} See Lawson & Granger, supra note 7, at 271 (stating that word “proper” requires “executory laws to be peculiarly within Congress’s domain or jurisdiction”).
\item\textsuperscript{199} According to this reading of the Sweeping Clause, Congress’ powers are not understood to be wholly discretionary, let alone limitless; it is simply that, beyond the limits on executory authority suggested by Chief Justice Marshall’s construction of the terms of the Necessary and Proper Clause, the limits to Congress’ executory authority are external to the Clause and are found in the body of the Constitution or its subsequent Amendments.
\item\textsuperscript{200} Ga. Const. of 1789, art. I, § 16.
\item\textsuperscript{201} Lawson & Granger, supra note 7, at 313.
\item\textsuperscript{202} Id. at 314.
\end{itemize}
ture to make decisions as to whether laws pursuing the general aims of legislation nevertheless overstepped commonly accepted jurisdictional boundaries. The implication is that the word “proper” was probably understood by those drafting the Constitution as having a more restricted meaning than the strong jurisdictional interpretation of the term professed by Lawson and Granger. Lawson and Granger suggest that their interpretation of the Georgia provision is reinforced by the language limiting the grant of authority to laws not repugnant to the state constitution. 203 They reason that the jurisdictional meaning of “proper” would otherwise imply that the legislature was the final judge of the constitutionality of its own laws. 204 Under their reading, however, the provision amounts to saying that the legislature has complete discretion to determine, among other things, constitutional questions of jurisdictional boundaries, except when the issue goes to constitutionality. By contrast, the more restrictive interpretation of “proper” enables an interpreter to avoid double-talk even while recognizing that the legislature cautiously sought to clarify that the discretion granted did not extend to constitutional questions.

2. A Particular Purpose for the Term “Proper”

Alternatively, there is a construction of “proper” that fits with all of the common-law maxims reviewed above and comports with the purpose of including an executory power provision in the first place. It is possible that the term “proper” was employed because, on the one hand, it fits with the term “necessary” to suggest that Congress has a reasonable, but limited, discretion to implement its powers; on the other hand, it confirms what would be true without any executory power clause: Congress’ ancillary powers are subject to constitutional limitations or, in other words, that Congress’ executory power is only effective within the jurisdictional parameters of the Constitution. 205 Under this construction, the term makes a distinctive contribution, in that it provides a barrier against misconstructions that could occur if the term “necessary” was used alone, for example, the idea that Congress could pass any law with a requisite connection to promoting an authorized end, notwithstanding limitations stated or implied elsewhere in the Constitution. 206 At the same time, it is read so as to

203. See id. ("The provision in the 1789 Georgia constitution that legislation not be 'repugnant to the constitution' reinforces this interpretation.").

204. See id. ("The measure of the law's constitutionality would be the legislature's belief . . . .").

205. These limitations would include the prohibitions included in Article I, Section 9, as well as the limitations implicit in the system of separation of powers and federalism. See, e.g., U.S. Const. art. I, § 9 (limiting, for example, Congress' power to suspend habeas corpus writ, pass bills of attainder and ex post facto laws, prefer one state's ports over another's and grant titles of nobility).

206. Notice that this reading corresponds with what was described above as the modern construction, in which the word "proper" is given little independent weight other than to suggest that executory laws must be constitutional laws. See
fit well with the term "necessary" and not to turn a clause authorizing ancillary powers into a powerful limiting clause and an independent source of prohibitions on congressional power. This interpretation renders neither the term "proper," nor the Clause as a whole, entirely superfluous or potentially revolutionary in their implications. 207

3. The Form and Placement of the Sweeping Clause

Common-law maxims of construction aside, the interpretation of "proper" suggested above receives further support from the form and placement of the Necessary and Proper Clause. Virtually all of Chief Justice Marshall's critique of the restrictive interpretation of congressional power by reliance on the term "necessary" applies with equal or greater force to the broad jurisdictional reading of the Necessary and Proper Clause proffered by Lawson and Granger:

The clause is placed among the powers of congress, not among the limitations on those powers. Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already

Lawson & Granger, supra note 7, at 285 (noting that "word 'proper' has generally been treated as a constitutional nullity or, at best, as a redundancy" and that there are "strong textual and structural arguments that suggest that 'proper' . . . is a term distinct from, and supplementary to, 'necessary' and that [the word "proper"] functions as an integral part of the constitutional design for a limited national government."). This construction could even be described as a "jurisdictional" interpretation, provided it is understood that the jurisdictional boundaries are the ordinary ones, external to the Sweeping Clause, for which the term "proper" serves as a textual confirmation. See id. at 285-86 (describing jurisdictional interpretation of Sweeping Clause). The Clause, according to this reading, does not establish any internal limits on the grants of power in Article I, Section 8.

207. The suggestion that the term "proper" might serve a dual purpose in the clause granting executive power accords with a similar analysis that Lawson and Granger supply of the grant of legislative power to Congress to enforce the Reconstruction Amendments. See Lawson & Granger, supra note 7, at 311. The Thirteenth through Fifteenth Amendments empower Congress to enforce the amendments by "appropriate" legislation, and the question raised concerns "why the drafters of the amendments adopted during the Reconstruction did not simply follow the language of the Sweeping Clause." Id. at 311 n.189. Pointing to evidence that the Framers intended to convey essentially the same idea, Lawson and Granger reason that the word "appropriate" provides "a good substitute for the phrase 'necessary and proper'" because it "can plausibly function as a synonym both for 'proper' in its jurisdictional sense and for 'necessary' in its sense of fitness for a particular end." Id. at 312. Similarly, the term "proper" can plausibly reinforce both notions of fitness for a particular end and compliance with limitations imposed by the Constitution.

The somewhat more restricted reading of the term "proper" suggested above also fits more comfortably into the substitute framework of the Reconstruction amendments that employed the term "appropriate," because no historical evidence suggests that the enforcement clauses of those amendments were intended to generate significant internal limitations on congressional authority—limitations going beyond compliance with the limiting norms contained in the Bill of Rights and elsewhere in the Constitution.
granted. No reason has been, or can be assigned for thus concealing an intention to narrow the discretion of the national legislature under words which purport to enlarge it. The framers of the constitution wished its adoption, and well knew that it would be endangered by its strength, not by its weakness. Had they been capable of using language which would convey to the eye one idea, and, after deep reflection, impress on the mind another, they would rather have disguised the grant of power, than its limitation. If, then, their intention had been, by this clause, to restrain the free use of means which might otherwise have been implied, that intention would have been inserted in another place, and would have been expressed in terms resembling these. “In carrying into execution the foregoing powers, and all others, &c., ‘no laws shall be passed but such as are necessary and proper.’” Had the intention been to make this clause restrictive, it would unquestionably have been so in form as well as in effect.208

The Sweeping Clause as construed by Lawson and Granger amounts to exactly the sort of limiting provision that Chief Justice Marshall found to be implausible as a construction of a constitutional provision that purported to be one of the grants of power to Congress.209 Marshall’s structural analysis, moreover, seems even more persuasive in this context than in analyzing the interpretation of “necessary” he criticized.210 It is at least plausible, after all, to think that the Framers of the Constitution intended a relatively narrow construction of ancillary powers to the end of ensuring that the national government remained a government responsible for the relatively few areas of concern specified in the Constitution; the result could have been the drafting of a power-granting provision designed to clarify the priority in favor of somewhat limited congressional discretion in pursuing national ends. In logical terms, any questions about the relative importance, as a general matter, of the goals of effective national power and a national government limited to a few important objects of concern might properly be addressed in the clause recognizing the concept of implied powers.211


209. See generally Lawson & Granger, supra note 7, at 285-99 (arguing for reading of word “proper” that goes “well beyond [the] requirement of a telic relationship between means and ends” suggested by word “necessary”).

210. See McCulloch, 17 U.S. at 418 (criticizing Maryland’s interpretation of “necessary”).

211. It can be argued that Marshall’s analysis proceeded on the basis of an original normative conception of implied powers by which he characterized his opponents’ views as “restrictive” compared to his own model; his opponents regularly denied that their construction posited that the clause was more restrictive than the common-law agency principle under which the clause was often discussed. See id. at 418-21 (relying on common-law materials to establish strict necessity as standard of necessary).
As to limitations on the powers granted, in favor of individual rights, however, the Constitution already included Article I, Section 9, which specified limits on congressional authority.\textsuperscript{212} A provision intended to function in part as a supplement of these specified limits, and not merely to declare the idea of executory authority, would logically seem to belong in this section of the Constitution.\textsuperscript{213} In this context, Chief Justice Marshall’s argument that the Framers of the Constitution would not have drafted such an obscure limiting provision, particularly when opposition to the Constitution would inevitably come from those fearful of national power, seems especially powerful; if the Sweeping Clause had been intended as a key to the Constitution’s concept of limited government, it seems likely that it would have been inserted in the power-limiting section and in a form along the lines suggested by Chief Justice Marshall.\textsuperscript{214}

Recognizing the potential force of Marshall’s analysis, Spencer Roane was especially pointed in denying that the stricter rule of construction proposed by Marshall’s critics logically should have dictated placing the clause as a limiting clause.\textsuperscript{215} In fact, Roane vehemently denied that the Necessary and Proper Clause served as a limitation on the powers granted:

\textsuperscript{212} See U.S. CONST. art. I, § 9 (prohibiting Congress from suspending writ of habeas corpus, passing bills of attainder or ex post facto laws, or imposing taxes or duties on state exports).

\textsuperscript{213} Lawson and Granger acknowledge the existence of the Constitution’s limiting provisions, but fail to address why the Necessary and Proper Clause would not have been included there if it was a limiting provision. See Lawson & Granger, \textit{supra} note 7, at 315-16 (noting “government could legitimately exercise only those powers granted to it, expressly or by fair implication, by the Constitution”). Proponents of the Constitution justified the limitations included in Article I, Section 9 as essential exceptions to the powers granted by the Constitution—an argument that simply contradicts the idea that fundamental rights, such as the prohibition on ex post facto laws, were already implicit in the requirement that executory laws be proper as well as necessary.

\textsuperscript{214} Lawson and Granger would undoubtedly resist this argument on the ground that the limits imposed by the word “proper” constitute “denials of delegated power rather than affirmative constraints.” \textit{Id.} at 328. Their claim, however, is a purely formal one, considering that, according to their reading, means that immediately execute granted powers are denied to Congress precisely because they invade traditional rights. The prohibitions in Section 9 function as means constraints on means in almost exactly the same way, as do most of the guarantees included in the Bill of Rights. See Barnett, \textit{supra} note 11, at 14-19, 25-29 (arguing that constitutional rights, including unenumerated constitutional rights secured by Ninth Amendment, operate as means constraints on legitimate government powers as often as they function as end constraints). Barnett also contends that unenumerated rights are essential to guard against the potential abuse of “means” afforded by the discretion granted to Congress by the Necessary and Proper Clause. \textit{See id.} (stating that, construed this way, constitutional rights will complement delegated powers of federal government); cf. Bybee, \textit{supra} note 2, at 1556 & n.73 (describing most of guarantees in Bill of Rights as procedural disabilities suffered by Congress because they qualify or limit manner of exercising legitimate government powers rather than placing entire categories of laws beyond competence of Congress).

If the object in using [the terms “necessary and proper”] was merely for greater caution, and to put down all uncertainty on the subject, that was the proper place for them. It would have been wrong to have placed [these terms] among the prohibitions, as they are not pretended to prohibit anything to the general government: it is only contended that they create no enlargement of the powers previously given. In what place, therefore, could these words have been so properly inserted?

Lawson and Granger, by contrast, can make neither of Roane’s claims. Unlike Roane’s narrow reading of the common law principle of implied agency that guides and controls his interpretation of the provision, their broad jurisdictional reading creates limits on the reach of the granted powers that are “internal” to the Necessary and Proper Clause; and the limitations they identify as being dictated by their jurisdictional interpretation would clearly fit into Article I, Section 9. In fact, the whole point of Lawson and Granger’s article is to establish that there may not have been a need for a Bill of Rights because the Necessary and Proper Clause was the source of powerful, if heretofore neglected, limits on federal powers in favor of unenumerated individual rights—a thesis that simply contradicts Roane’s insistence that, correctly analyzed, the Necessary and Proper Clause did not prohibit anything, but also did not enlarge the powers previously given. It does not bode well for a limiting theory of the Necessary and Proper Clause when the leading advocate of strict construction of federal powers—and of the Clause—effectively rejects it; if anyone during the generation following the founding would have been sympathetic to an interpretation of the Constitution that lent itself to limiting national power, Spencer Roane should have been that individual.

106, 125-38 (analyzing McCulloch decision with respect to “necessary and proper” language).

216. Id. at 126. Roane’s analysis takes on added significance because he was an important Virginia judge who was a strong advocate of states’ rights. See Gerald Gunther, Introduction to John Marshall’s Defense, supra note 194, at 1, 9-10 (noting Roane’s influence and his role in Richmond Junto, Virginia political group dedicated to protecting states’ rights).

217. See Lawson & Granger, supra note 7, at 219-98. When Madison proposed amendments to Congress that amounted to a Bill of Rights, he included the very limitations that Lawson and Granger claim were already secured by the Necessary and Proper Clause, and he proposed that these constraints be included in Article I, Section 9. See Madison Resolution, supra note 49, at 12 (proposing that “in article 1st, section 9 . . . be inserted these clauses” protecting freedom of religion, speech and press).

218. See Roane, supra note 215, at 126 (“[T]he terms ‘necessary’ and ‘proper’ are not pretended to prohibit anything to the general government: it is only contended that they create no enlargement of the powers previously given.”).
4. The Necessary and Proper Clause and the Idea of a Written Constitution

A further advantage of a more restricted reading of "proper" than the one advanced by Lawson and Granger is that it forecloses, rather than invites, expansive forms of argument that could undermine the written Constitution. Among the statements relied upon by Lawson and Granger to illustrate the use of "proper" in a jurisdictional sense, they state conclusions based on normative argument about constitutional design rather than based on a description of premises embodied in the text of the Constitution.\(^{219}\) For example, Lawson and Granger rely on the statement of one delegate to the Constitutional Convention opposing the granting of the appointment power to Congress on the ground that "[t]he Legislature was an improper body for appointments."\(^{220}\) Similarly, at the Pennsylvania Ratifying Convention, James Wilson responded to the argument that "improper powers are . . . blended in the Senate."\(^{221}\) Lawson and Granger might have noted more generally that the term "proper" was in fact commonly employed in debate over the drafting of constitutions during the founding era, as well as in discussing their merits.\(^{222}\)

A central purpose of the written Constitution was to settle questions as to the "proper" allocation of government power, even though the de-

\(^{219}\) See generally Lawson & Granger, supra note 7, at 291-98 ("In each of these instances, the word "improper" is clearly used to describe a departure from sound jurisdictional principles of separation of powers.").

\(^{220}\) Id. at 293 (quoting 1 1787: DRAFTING THE U.S. CONSTITUTION 899 (Wilbourn E. Benton ed., 1986)).

\(^{221}\) James Wilson, Debates in Convention of the State of Pennsylvania on the Adoption of the Federal Constitution (Dec. 11, 1787), in 2 ELLIOT'S DEBATES, supra note 19, at 494, 505.

\(^{222}\) See The Federalist No. 41, at 268 (James Madison) (Jacob E. Cooke ed., 1961) (joining debate over powers granted to national government by Constitution by asking "[w]hether any part of the powers transferred to the general Government be unnecessary or improper"); see also James Madison, Speech to Philadelphia Convention (Aug. 9, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 230, 235 (Max Farrand ed., 1911) (opposing proposed amendment to draft of Constitution that would require 14 years of citizenship as qualification for Senators on ground that to place such restriction in Constitution would be "unnecessary, and improper"); Edmund Pendleton, Debates in the Convention of the Commonwealth of Virginia on the Adoption of the Federal Constitution (June 12, 1788), in 3 ELLIOT'S DEBATES, supra note 19, at 293, 301 (defending federal system by arguing that there will be no needless clashes between states and national government "if each power [state and federal] is confined within its proper bounds, and to its proper objects"). Even though they offered these normative views about the proper scope of federal powers and the propriety of particular constitutional provisions, these spokespersons would never have thought that their own views on such questions established jurisdictional boundaries; that was the point of drafting and ratifying a written Constitution. None of these questions would have been properly revisited via judicial review of laws passed to execute delegated powers. If we equate these uses of the term "proper," however, with a supposed jurisdictional limitation built into the Necessary and Proper Clause, we invite this normative inquiry into the appropriate boundaries of a national legislature. This is the inquiry Lawson and Granger contend that the word "proper" invites with respect to individual rights.
bate over ratification was filled with contention as to whether the Convention had "properly" drawn these lines. If anything should be clear, however, it is that the word "proper" in the Necessary and Proper Clause would not have been inserted as a wild card permitting constitutional interpreters to revisit fundamental questions of constitutional design. A provision permitting interpreters to impose their personal ideas of federal-state relations and the appropriate roles of the branches in a tripartite scheme of government would have been considered "improper" by everyone involved in the process of drafting the Constitution. Yet the broad jurisdictional reading proffered by Lawson and Granger implies that decision makers might go outside the constitutional text and plain inferences of the constitutional structure and, in effect, revisit the question of the appropriate balance between government authority to accomplish authorized ends and the claims of individuals to freedom from government control.223

Moreover, if the word "proper" invites a search for additional limitations on behalf of individual rights, in addition to the limits specified in the Constitution, it might just as plausibly be read as a normative limitation of federal legislative power in the broadest sense; whatever acts of Congress are viewed as inconsistent with its peculiar jurisdiction, as understood in the normative constitutional theory of the interpreter, would be unconstitutional. Although Lawson and Granger do not advocate such an expansive theory of the role of the term "proper" in limiting congressional authority, they do not offer any explanation as to how the term might properly be read to foreclose such a normative inquiry as to questions of separation of powers or federalism when their own analysis of the individual rights area necessarily requires interpreters to rely upon theories for limiting power that go well beyond textual provisions or relatively clear structural inferences.224

223. See generally Lawson & Granger, supra note 7, at 298 ("[A] proper law under the Sweeping Clause must respect limitations that are not expressly enumerated in the constitutional text." (citing An Impartial Citizen V, PETERSBURG, VA. GAZETTE, Feb. 28, 1788, reprinted in 8 RATIFICATION OF THE CONSTITUTION, supra note 23, at 431)). The extent to which their interpretation authorizes an open-ended normative inquiry depends on the precise theory of rights developed for explicating the limits suggested by the term "proper." Their theory, however, readily lends itself to the broadest natural-rights theory that would delegate resolution of the central issues of government authority versus popular liberty to the courts. For a further discussion of their theory, see supra notes 133-87 and accompanying text.

224. See Lawson & Granger, supra note 7, at 297-98 n.131 ("[W]e do not discuss in detail the precise content of the national government's jurisdiction—for example, whether it is defined solely by reference to express constitutional provisions or in part by background principles that underlie the Constitution."). At the very least, the above analysis points out the risks of placing great reliance, as Lawson and Granger have done, on the use of a term like "proper" in contexts other than the Clause under consideration. See id. at 291-97. Use of the term "proper" in debates over constitutional design did not describe well-established jurisdictional boundaries or any legal or constitutional doctrine. Its use in such debates filled the rhetorical need to suggest that one's own position is not simply a
If the text of the Sweeping Clause hardly requires the broad jurisdictional interpretation, it is fair to say that by itself it does not preclude it either. If it could be shown that the Framers contemplated affirmative limitations on the powers of Congress, signaled by the word “proper,” but not enumerated in the text, the text of the Sweeping Clause does not by its terms clearly foreclose the realization of such a purpose. We must necessarily turn, then, to the evidence extrinsic to the text to determine whether the text, read in a relevant context, lends support to the broad jurisdictional interpretation.225

C. The Sweeping Clause and the Framers’ Concept of Limited Federal Powers

As noted above, Lawson and Granger observe that the drafting history of the Sweeping Clause is almost completely uninformative. Consequently they turn to textual and structural analysis to determine that the term “proper” was intended to play a critically important role in the design of the Constitution. The lack of a significant drafting history, however, may be more significant than their analysis suggests. One might have expected that a provision that was to play such a critical role in the constitutional design would have received more attention and, perhaps, discussion and debate. More importantly, however, the lack of relevant legislative history suggests that the Framers believed the enumeration of powers and the Sweeping Clause, taken as a whole, formed a scheme that would not be novel or foreign to the relevant audience. This is almost certainly because the Constitution’s limited-powers scheme was designed to track, by and large, the system embodied in America’s original constitution, the Articles of Confederation.226 This conclusion is borne out by analysis of the ratifi-

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225. Cf. Barnett, supra note 26, at 777 n.113 (offering “normative” rather than “originalist” argument for adopting “a conception of propriety [in the Sweeping Clause] that restricts the government’s power to violate the background rights retained by the people”). In thus purporting to adopt the basic analysis of Lawson and Granger, Barnett simply avoids confronting the materials reviewed above as a plausible construction of the Necessary and Proper Clause. In the spirit of the founding period, it should be noted that this author views any approach that ignores the best textual and historical evidence as an improper method for constructing a written constitution.

226. See McAfee, Original Meaning, supra note 15, at 1243-44 (noting that both new Constitution and Articles of Confederation “creat[ed] a national government of limited and defined powers that related to specific objects of national concern, with a general reservation of all other rights and powers”). Compare U.S. Const. art. I (describing requirements to serve, election of members and powers of each branch of Congress), with ARTICLES OF CONFEDERATION art. V-IX (1777) (describing powers of government).
cation-era debate in which the Articles of Confederation and the Constitution are compared and contrasted.227

1. *The Articles of Confederation and the Concept of Enumerated Powers*

Surprisingly enough, although Lawson and Granger draw support for their interpretation from the discussion of the implications of the enumerated-powers scheme during the ratification-era debates, they fail to examine that scheme against the backdrop of the analogous scheme employed in the Articles of Confederation. Throughout the debates over ratification, the federalist proponents of the Constitution defended the Constitution against the general claim that it would establish an all-powerful Leviathan—as well as against the specific criticism that it threatened basic rights by its omission of a bill of rights—by relying on the precedent established by the Articles of Confederation.228 The centerpiece of this defense was the straightforward argument that because the national government is given constitutional authority over a few areas of unique concern to the nation as a whole, and the states retain a general jurisdiction over the great mass of problems to which legislation might be applied, there is no need for a comprehensive declaration of the rights that the people retain in granting power to government.229 It was thus commonplace for federalists to observe that the Articles of Confederation included no comprehensive declaration of rights along the lines of those included in a number of the state constitutions in existence at the time it was drafted; likewise, the proposed Constitution did not require the inclusion of a bill of rights.230

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228. See generally *id.* at 1243 (describing how antifederalists distinguished Constitution from Articles of Confederation). As this author noted:

The theory of the Constitution rested on the model of the Articles of Confederation . . . . However, the Antifederalists distinguished the Constitution from the Articles of conferred general powers upon the national government that might allow it to threaten the people's rights . . . .

Second, because the Constitution omitted the provision in the Articles of Confederation that had expressly stipulated that each State "retains every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States," the Antifederalists contended that it would be construed as a surrender of all rights and as confirming an intent to create a government of unlimited powers.

*Id.* (footnotes omitted).

229. See, e.g., The Report of Connecticut's Delegates to the Constitutional Convention, NEW HAVEN GAZETTE, OCT. 25, 1787, reprinted in 13 RATIFICATION OF THE CONSTITUTION, supra note 23, at 470, 471 (defending Constitution because its powers "extend only to matters respecting the common interests of the Union, and are specially defined, so that the particular states retain their Sovereignty in all other matters").

According to the federalists, Article I of the Constitution not only tracked the pattern of enumerating national powers established in the Articles of Confederation, it also included a provision, the Necessary and Proper Clause, that served the same function as Article II of the Articles of Confederation,231 the provision that expressly reserved to the states all powers not granted to the national government.232 Although the antifederalists resisted the claim that the Sweeping Clause was an adequate substitute for Article II of the Articles of Confederation—and hence the universal demand for what became the Tenth Amendment—it nonetheless seems apparent that the Clause should be read in para materia with Article II if we accept Madison's assertion that the Tenth Amendment itself was redundant of the scheme of enumerated powers (including the Necessary and Proper Clause). As stated already, Article II is a reservation of sovereign power to the states and does not purport to define national authority by reference to affirmative limitations on behalf of individual rights or the means employed to implement the powers granted.

Even the language in Article II that lacks a counterpart in the federal Constitution—the language reserving all power not "expressly delegated"—does not carry any implication of affirmative limitations on national power. As an example, it is plausible to think that Congress' express powers to make decisions as to peace and war and the use of force generally, in combination with its express power to raise an army and navy, necessarily included authority to decide whether to rely upon standing armies or citizen militias.233 If so, Article II did not create any barrier to the exercise of that power, despite the fact that reliance upon standing armies in peacetime had been thought to be a violation of the British Constitution and some state constitutions' declarations of rights purported to limit legislative authority to establish standing armies.234

which from error or disingenuousness are urged against the new one," and that "[n]either of them have a bill of rights").

231. See Articles of Confederation art. II (providing that each state "retains every Power, Jurisdiction, and right, which is not by this confederation expressly delegated to the United States").

232. See, e.g., Charles Jarvis, Debates in the Convention of the Commonwealth of Massachusetts on the Adoption of the Federal Constitution (Feb. 4, 1788), in 2 Elliot's Debates, supra note 19, at 155 ("The first article proposed . . . is an explicit reservation of every right and privilege which is nearest and most agreeable to the people."); Maclaine, supra note 23, at 141 (describing Necessary and Proper Clause as "an express clause which . . . clearly demonstrates that [Congress is] confined to those powers which are given them").

233. See Articles of Confederation art. IX (stating that Congress "shall have the sole and exclusive right and power of determining on peace and war . . . to build and equip a navy . . . raise the men and cloth, arm and equip them in like manner"); The Federalist No. 24, at 154-55 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (noting that Articles of Confederation imposed no restraint on United States regarding military establishments in time of peace).

234. For a discussion of the English Constitution and state declarations of rights, see infra notes 347-48 and accompanying text.
This understanding of Article II of the Articles of Confederation, and hence also of the enumerated-powers scheme of the Federal Constitution, is powerfully confirmed by the course of debate during the struggle to ratify the Constitution. Thus, some antifederalist critics of the Constitution acknowledged that, if a federal constitution included a limited set of carefully defined powers and a general reservation-of-powers clause, the strategy of enumerating powers might be an adequate substitute for a declaration of rights.235 The proposed Constitution could not fit this bill, however, not only because it omitted a general reservation of all powers not delegated, but also because the powers granted to the federal government greatly exceeded those granted by the Articles of Confederation and could in many ways directly affect the rights and interests of the people.236 The addition of various crucial powers, including the powers to tax the people and to regulate commerce, among others, raised the specter of federal laws that might invade rights that had come to be held dear by the people, including the rights stated in the constitutions and declarations of rights in the states.237

The federalists, by contrast, were adamant that those demanding a bill of rights simply failed to grasp that the Constitution proceeded on the

235. See Address by Denatus, Va. Indep. Chron., June 11, 1788, reprinted in 5 The Complete Anti-Federalist, supra note 41, at 260, 263 (acknowledging that there would be "no need of a bill of rights, were the states properly confederated" by document that created "[a] land-mark clearly drawn between the powers that give [i.e., the states] and "the power given"); Luther Martin, Address No. II, Md. J., Mar. 21, 1788, reprinted in 16 Ratification of the Constitution, supra note 23, at 452, 455 ("[H]ad the government been formed upon principles truly federal, as I wished it, legislating over and acting upon the states only in their collective or political capacity, and not on individuals, there would have been no need of a bill of rights."). Indeed, some antifederalists went so far as to say that, if the proposed Constitution were amended to include a provision like Article II of the Articles of Confederation, there would be no need for a comprehensive bill of rights. See Spencer, supra note 23, at 163 (noting that clause "expressly declaring, that every power, jurisdiction, and right, which are not given up by it, remain in the states" would "render a bill of rights unnecessary"); A Federal Republican, supra note 23, at 304, 306 (arguing that Constitution should be amended to have all powers accurately defined and include either bill of rights or declaration that powers not delegated to Congress remain rights of citizens).

236. See A Democratic Federalist, Pa. Herald, Oct. 17, 1787, reprinted in 2 Ratification of the Constitution, supra note 23, at 193 (contending that under Articles of Confederation Congress was "merely an executive body," lacking power to raise money and adjudicatory power). Of particular concern was that Congress' expanded power "extend[ed] to the individuals as well as to the states," and national government will possess "the three essential powers of government." Id.; see Essay of Brutus II, N.Y. J., Nov. 1, 1787, reprinted in 13 Ratification of the Constitution at 524, 526-28 (providing extensive analysis of instances in which granted powers could readily be construed to empower Congress to invade traditional rights of the people).

237. See generally McAffee, Original Meaning, supra note 15, at 1229 (noting that antifederalists believed that "broad grants of power contained in article I, read in conjunction with the supremacy clause, would permit the national government to override state law, including the fundamental rights secured by declarations in the various state constitutions").
basis of a theory of enumerating powers rather than enumerating rights.\textsuperscript{238} As Madison put it, the standard federalist argument was that "the Constitution is a bill of powers, the great residuum being the rights of the people."\textsuperscript{239} This summary of a standard refrain harks back to the simple idea of granted and retained powers as embodied in the Articles of Confederation. To the claim that the proposed Constitution unduly expanded national power, which in turn necessitated inclusion of a comprehensive set of limitations, the federalists responded that "[t]he powers vested in the federal government are only such as respect the common interests of the Union, and are particularly defined, so that each State retains [its] Sovereignty in what respects its own internal government."\textsuperscript{240} According to the federalists, the limited nature of the grant of national power simultaneously protected the states and the people, and the people's rights would receive additional security from the existence of the declarations of rights in their state constitutions.

2. \textit{The Enumerated Powers Scheme and the Argument Against the Necessity of a Bill of Rights}

Lawson and Granger enter the debate over omission of a bill of rights in the middle, ignoring the dialogue that originated in the analogy to the Articles of Confederation, and simply observe that the federalists uniformly claimed that the Constitution did not include the power to invade basic rights.\textsuperscript{241} They cite statements, for example, from an impressive list of the Constitution's leading defenders who joined in denying that the Constitution delegated a "national power over speech and press."\textsuperscript{242} Based on a review of these and other confident assertions about the limited scope of federal powers, they conclude that "the federalists must have believed that the Sweeping Clause does jurisdictional work."\textsuperscript{243} Acknowledging that these assertions were rarely couched in terms of the word "proper" in the Necessary and Proper Clause,\textsuperscript{244} Lawson and Granger sug-

\textsuperscript{238} See id. at 1230-31 (noting that Wilson refuted antifederalist claims by arguing that they failed to perceive distinctive nature of Constitution).

\textsuperscript{239} I ANNALS of CONG. 455 (1789) (Joseph Gales ed., 1834).

\textsuperscript{240} Letter from Roger Sherman to Unknown (Dec. 8, 1787), in 14 RATIFICATION OF THE CONSTITUTION, supra note 23, at 387.

\textsuperscript{241} See Lawson & Granger, supra note 7, at 318-21 (reviewing federalist arguments against necessity of bill of rights).

\textsuperscript{242} Id. at 319.

\textsuperscript{243} Id. at 323.

\textsuperscript{244} Id. Even this acknowledgment that the matter was "rarely explicitly stated in terms of [improper]," somewhat understates the point. Id. In fact, Lawson and Granger cite to an individual in the ratification debate who claimed that the term "proper" would stand as a barrier to laws that violate traditional rights, but otherwise appear to be within the scope of a federal power. See id. at 298-99 (relying on argument set forth by An Impartial Citizen, Lawson and Granger conclude that "this construction of the word 'proper' reflects 'the usual acceptation of words' as understood by the public" (quoting An Impartial Citizen V, supra note 223, at 428, 431)).
suggest the alternative possibility that, in a legal universe not yet dominated by the reasoning of McCulloch, "[the federalists] could have meant that the words 'necessary and proper' jointly constrain the national government's ability to violate protected rights." 245 Even this suggestion is almost pure speculation, however, because virtually all of the statements they cite make confident assertions about the scope of the grants of powers themselves, properly construed, and are not cast as interpretations of the Necessary and Proper Clause or any limiting principle emanating therefrom. 246

If the Necessary and Proper Clause had really been the key to defending the Constitution, it seems highly probable that the federalists would have directly invoked its terms at the most critical junctures in the public debate. Far from invoking the Sweeping Clause, however, the federalists offered only that it did not add to the powers of Congress, and that it was merely declaratory of what would have followed from the granting of powers to the national government. 247 Even Lawson's and Granger's argu-

245. Id. at 322. Lawson and Granger do not base this suggestion on statements made during the debate over ratification of the Constitution, but on a statement by Madison made to Congress during the course of justifying the adoption of a bill of rights. See id. at 322-25 (noting Madison argued that bill of rights would protect against abuse of "certain discretionary powers" granted to Congress (quoting 1 ANNALS OF CONG. 438 (1789) (Joseph Gales ed., 1834))). Madison's statement, however, does not purport to summarize the position taken by the defenders of the Constitution, either with respect to the scope of national powers or the meaning of the Necessary and Proper Clause.

246. Cf. Barnett, supra note 26, at 780 n.127 (appearing to infer that inalienable natural rights, including freedom of press, would be secured by limited delegation of powers idea that rights would operate as jurisdictional limits on powers even in absence of enumeration of rights). Barnett's assertion, however, misses that the federalists were not announcing a limiting rule of construction that would prohibit interpretation of granted powers to allow Congress to impinge on natural rights; rather, they were stating their convictions as to the appropriate outcome of a faithful construction of the powers actually granted. Strikingly, a number of the many statements in which federalists clarify their stance, including the argument that a free-press clause most certainly would have been essential had Congress been delegated a power to regulate literary publications, have been readily available even as Barnett blithely continues to read these assurances as though they lent straightforward support to a doctrine of implied rights that serve to limit any and all powers actually delegated to Congress. See, e.g., McAffee, Critical Guide, supra note 15, at 70-72, 86-87 (noting that Iredell stated "where [there] are powers of a particular nature, and, expressly defined, as in the case of the [Federal] Constitution before us, ... a bill of rights is not only unnecessary, but would be absurd and dangerous" (quoting Iredell, supra note 19, at 149 (alteration in original))); Thomas B. McAffee, Federalism and the Protection of Rights: The Modern Ninth Amendment's Spreading Confusion, 1996 BYU L. REV. 351, 371 (1996) (noting that James Wilson observed that because Constitution did not grant Congress power to regulate press freedom of press guarantee not necessary). One presumes that this use of the historical record could well be one fruit of preferring a normative to an originalist reading of the foundations of the Framers' constitutional structure. See McAffee, Original Meaning, supra note 15, at 1317-19 (finding historical record supports residual rights reading and articulates no theory of unwritten fundamental law).

247. See, e.g., THE FEDERALIST NO. 33, supra note 107, at 205-06 (stating that Necessary and Proper Clause was added for protection and to leave nothing to
ment that the Clause played a role in the securing of popular rights is at times cast as an argument that the Clause further clarified that Congress is confined to powers granted by the Constitution.248

Having ignored the origins of the argument from enumerated powers against a bill of rights—that the Constitution tracked the Articles of Confederation—Lawson and Granger not only place their own spin on the federalist arguments, they also appear to miss highly relevant arguments that were developed as the dialogue continued. The ensuing discussion, moreover, proceeded on premises that belie their construction of the federalist arguments. The federalist assurances as to the narrow scope of federal power prompted a continuing, thoroughgoing review of whether the Constitution adequately identified and defined national powers. Participants in this debate, both critics and proponents, wrote and spoke as though this was a question to be answered by an analysis of the powers granted and the definition of the powers set forth in the Constitution; the debate did not proceed on either side as though an important key to its resolution could be in the understanding that executory laws that ran afoul of unenumerated individual rights would be deemed improper and hence unconstitutional.

James Iredell, for example, defended the omission of a bill of rights by referring to the enumerated powers themselves, not the Sweeping Clause, claiming that they included “such a definition of authority as would leave no doubt” so that “any person by inspecting [the Constitution] may see if the power claimed be enumerated.”249 Indeed, federalists frequently referred to particular rights that were not enumerated in the Constitution as to which fears of federal power had been expressed and challenged their opponents to show which clause in the Constitution empowered the national government to invade the cherished right.250

construction). Once again, even though Lawson and Granger describe the jurisdictional limits imposed by the word “proper” as “denials of delegated power rather than affirmative constraints on an otherwise delegated power,” this distinction of form would hardly have stood in the way of the Constitution’s defenders, faced with charges of having proposed an unlimited government, from directly relying on the Clause as the provision that served every purpose to be fulfilled by a bill of rights. Lawson & Granger, supra note 7, at 328.

248. See, e.g., An American Citizen IV: On the Federal Government, supra note 230, at 434 (noting that old Constitution and new Constitution were very similar and neither included bill of rights).

249. James Iredell, Debates in the Convention of the Commonwealth of North Carolina on the Adoption of the Federal Constitution (July 29, 1788), in 4 Elliot’s Debates, supra note 19, at 170, 171-72; accord Letter from Roger Sherman to Unknown, supra note 240, at 387 (contending that states have nothing to fear from federal government because the “distinction between their jurisdictions will be so obvious, that there will be no great danger of interference”).

250. See Wilson, supra note 111, at 455 (challenging opponents to show “what part of this system puts it in the power of congress to attack [the rights of conscience]”); see also Randolph, supra note 178, at 469 (demanding to be shown “the particular clause which gives liberty to destroy the freedom of the press”). Such inquiries are at best disingenuous if the implicit claim actually rests on a jurisdic-
Equally important, their opponents interpreted these arguments in a straightforward fashion as reflected by their own carefully constructed arguments attempting to show that various powers delegated by the Constitution would lend themselves to abuse of traditional or widely accepted natural rights. These arguments were offered without reference to the Necessary and Proper Clause.

It is equally clear that both sides of the debate concerning the omission of a bill of rights acknowledged not only that the people might relinquish rights that were deemed fundamental, but that they might do so through the use of generally worded grants of powers, as opposed to provisions expressly relinquishing specific rights. This sort of claim was, of course, a major premise in the antifederalist contention that the Constitution was fatally flawed without a bill of rights. In perhaps the most important, as well as cogent, antifederalist work, Letters from the Federal Farmer, the author writes:

The people’s or the printers claim to a free press, is founded on the fundamental laws, that is, compacts, and state constitutions, made by the people. The people, who can annihilate or alter those constitutions, can annihilate or limit this right. This may be done by giving general powers, as well as by using particular words.

The Federal Farmer expressed the standard view on both sides of the debate. James Wilson, perhaps the leading federalist spokesman in defending the omission of a bill of rights, accepted the Federal Farmer’s premise, but argued that there was not, in fact, any clause in the proposed Constitu-

tion-limiting requirement that executory laws be proper rather than on the substantive content of the power revealed by the language of the grant itself.

251. These responsive arguments took two forms: (1) the Sweeping Clause itself would be construed as a grant of absolute and unreviewable discretion to Congress and used pretextually to enact legislation on any subject and (2) specific grants of power might lend themselves to legislation invasive of fundamental rights. Compare Cumberland County Petition to the Pennsylvania Convention, Carlisle Gazette, Dec. 5, 1787, reprinted in 2 Ratification of the Constitution, supra note 23, at 310 (stating that Sweeping Clause grants “unlimited powers” because it makes representatives “the judges of what laws shall be necessary and proper”), with A Republican I, N.Y. J., Oct. 25, 1787, reprinted in 13 Ratification of the Constitution, supra note 23, at 477, 479 (arguing that Copyright Clause of Constitution grants Congress power over literary publications and therefore press), and Cincinnatus I: To James Wilson, Esquire, N.Y. J., Nov. 1, 1787, reprinted in 13 Ratification of the Constitution, supra note 23, at 529, 531-32 (arguing that Congress’ power to “define and punish offences against the law of nations” could empower Congress to make articles critical of treaties offence against law of nations and violation of domestic law). Regarding the first argument, Lawson and Granger supply a powerful critique of this misreading of the clause. See Lawson & Granger, supra note 7, at 282-85 (supplying critique of reasons why Sweeping Clause might have been erroneously interpreted to grant “unlimited Congressional discretion”).

tion that could fairly be read to include authority to limit the freedom of the press.\footnote{253}{See Wilson, supra note 177, at 167, 167-68 (including "liberty of the press" as among rights that were reserved to people because no power related to press was given to Congress).}

In advancing his argument, Wilson freely acknowledged that if the Constitution had delegated a power "to regulate literary publications," it would have been critical to include a freedom of the press provision as an exception to, or limitation on, this general regulatory power.\footnote{254}{See id. at 168 (stating specific grant of liberty of press would be nullity and such grant could be construed as implication that power over press was given to general government by state). Wilson confirmed not only the Federal Farmer's claim that the sovereign people are empowered to relinquish even the most fundamental rights, but also that they may do so by generally worded grants of power as much as by provisions that purport to give up some right to government. See id. (stating that, if given, power to regulate press could be "general in its operation" and exception would be needed to preserve liberty of press). Thus, when Wilson and others demanded to be shown the provision whereby rights are relinquished, they were asking merely for a provision that could fairly be construed as empowering the national government to regulate the matter under discussion. See McAfee, \textit{Original Meaning}, supra note 15, at 1269-70 n.215 (giving examples of James Wilson and Edmund Randolph asking to be shown specific provisions that give Congress power to regulate certain matters). Wilson would have agreed with Brutus, an important New York antifederalist who argued in favor of including a bill of rights, that "[t]he powers, rights, and authority, granted to the general government by this constitution, are as complete, with respect to every object to which they extend, as that of any state government." \textit{Essay of Brutus II}, supra note 236, at 374.}

Wilson contended, however, that no general power actually granted to Congress would logically include the authority to regulate the press.\footnote{255}{See Wilson, supra note 177, at 167-68 (arguing that because proposed form of government had no control over press any formal declaration on subject would be nugatory). Wilson asked: "[W]hat control can proceed from the federal government to shackle or destroy that sacred palladium of national freedom?" \textit{Id}. Wilson took these arguments seriously. See id. at 167 (stating that although unprepared to speak, attacks on Constitution induced him to come to its defense). In other contexts, Wilson acknowledged that the general language of a particular grant of authority effectively granted discretion to Congress to define and secure, or to narrow or eliminate, rights that others deemed to be fundamental.}

Based on such common premises, the debate over the adequacy of the Constitution's powers scheme was often cast in terms of whether the Framers had drafted the powers so as to effectively "draw a line" between legitimate national powers and the powers properly reserved to the states and the people. Before the Pennsylvania Ratifying Convention, James Wilson contended that it did:

I think there is another subject with regard to which [the] Constitution deserves approbation. I mean the accuracy with which the line is drawn between the powers of the general government, and [the powers] of the particular state governments. We have heard some general observations on this subject, from the gentlemen who conduct the opposition. They have asserted that these pow-
ers are unlimited and undefined . . . . [I]t is not pretended, that the line is drawn with mathematical precision; the inaccuracy of language must, to a certain degree, prevent the accomplishment of such a desire. Whoever views the matter in a true light will see that the powers are as minutely enumerated and defined as was possible, and will also discover that the general clause, . . . against which so much exception is taken, is nothing more than what was necessary to render effectual the particular powers that are granted.256

Responding to similar claims, the Federal Farmer agreed that one could rely on a limited delegation of powers if there were grounds for confidence that "the particular enumeration of the powers given adequately draws the line between them and the rights reserved."257 In his view, however, this was not the case with the proposed Constitution.258 In any event, he argued, it was safer to enumerate limitations on rights, at least as to "the most essential rights," if for no other reason than to reassure those who held doubts about relying on a general reservation from granted powers.259

Two years later, near the end of the process that eventuated in the adoption of the Bill of Rights, Madison defended the Ninth Amendment's focus on securing retained rights, rather than prohibiting an inference of extended power, on the ground that, under either formulation, the success of the venture would come down to whether federal powers were defined and limited so that, contrary to the claims of the antifederalists, many rights were preserved: "If a line can be drawn between the powers

256. Wilson, supra note 111, at 493, 496. Subsequently Wilson returns to a theme already discussed: "Is there any increase of risk, or rather are not the enumerated powers as well defined here, as in the present Articles of Confederation?"

Id.

257. Letter from The Federal Farmer XVI, supra note 77, at 324. The Federal Farmer writes:

[I]n forming a federal constitution, which *ex vi termin*, supposes state governments existing, and which is only to manage a few great national concerns, we often find it easier to enumerate particularly the powers to be delegated to the federal head, than to enumerate particularly the individual rights to be reserved; and the principle will operate in its full force, when we carefully adhere to it.

Id.

258. See id. at 326 ("Even a cautionary provision implies a doubt, at least, that it is necessary . . . ."). The Federal Farmer explained:

The distinction, in itself just, that all powers not given are reserved, is in effect destroyed by this very constitution, as I shall particularly demonstrate—and even independent of this, the people, by adopting the constitution, give many general undefined powers to congress, in the constitutional exercise of which, the rights in question may be effected.

Id. at 325.

259. See id. at 324 ("People, and very wisely too, like to be express and explicit about their essential rights, and not to be forced to claim them on the precarious and unascertained tenure of inferences and general principles . . . .").
granted and the rights retained, it would seem to be the same thing, whether the latter be secured . . . by declaring that [the rights] shall [not be abridged], or that the former shall not be extended. 260 Notice that Madison’s use of the contingent term “if” reflects both that the rights secured by the Ninth Amendment are defined by reference to the powers granted, understood in a straightforward fashion, and that the success of the line-drawing venture by which the rights were identified would depend on the drafter’s success in stating the limited scope of the powers granted. 261

All of these discussions would be incoherent under the broad jurisdictional interpretation of the Sweeping Clause offered by Lawson and Granger. Under their interpretation, after all, the security of individual rights is not contingent upon the selection of powers to be granted, or, by their definition, as contained in the grants of power in Article I. The line between power and rights is established by the jurisdictional boundary created by the requirement that every exercise of power be proper; so far as securing the rights of the people are concerned, the adequacy of the drafting of the delegation of power is largely irrelevant. If Lawson and Granger are correct in their interpretation of the Necessary and Proper Clause, the resulting implication is that the leading spokesmen on both sides of the ratification debate did not understand its meaning and implications.

Observing that the Framers’ arguments for omitting a bill of rights have typically been portrayed as weak attempts to justify a mistake, Lawson and Granger suggest that a virtue of the jurisdictional interpretation of the Sweeping Clause is precisely that it rescues the Framers from being characterized as “fools and knaves who concocted a desperate defense of a flawed document.” 262 For it is “under a jurisdictional interpretation of the

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261. Cf. Letter from Hardin Burnley to James Madison, supra note 102, at 1188 (discussing final form of Ninth Amendment and whether Constitution had drawn line between powers granted and rights reserved). Burnley argued that the amendment, as revised, would be effective “if [Congress’] powers are not too extensive already, & so by protecting the rights of the people & of the States, an improper extension of power will be prevented & safety made equally certain.” Id. Burnley’s statement also confirms what is implicit in Madison’s, namely that the “rights of the people” are secured in exactly the same way the rights of the states are secured, by the limited nature of the powers granted; both statements not only presume that there is not a separate group of limitations on federal powers in favor of the states and individuals, but also that there is not a set of affirmative limitations on federal powers packed into a jurisdiction-limiting provision. See id. (rejecting need to distinguish whether proposed amendments should operate as reservations of rights or limitations on federal power); Letter from James Madison to George Washington, supra note 105, at 1189-90 (discussing relative unimportance of characterizing amendments as rights retained or abridgment of federal power).

262. Lawson & Granger, supra note 7, at 325. The point here seems highly inflated, for it is possible to recognize that the federalist arguments were overstated, and perhaps even influenced by the highly charged political struggle in
Sweeping Clause, and **only** under such an interpretation of the Sweeping Clause, *[that] the federalists' view that the Bill of Rights was unnecessary and superfluous makes perfect sense.*263 As a simple matter of logic, the flip-side of this proposition is equally valid: the acknowledgment that the Bill of Rights was neither unnecessary nor superfluous, notwithstanding the enumerated-powers scheme, suggests that the argument from limited powers was never actually based on the inclusion of a rights-limitation jurisdictional provision in the power-granting section of the Constitution.

Yet this was the view adopted by a rather prominent federalist defender of the Constitution, James Madison. Although Madison advocated the party line during the debates over ratification, in private correspondence to Jefferson he acknowledged that the argument against the need for a bill of rights was somewhat overstated.264 In the long run, of course, Madison became the central figure in the efforts to amend the Constitution, and he presented a draft proposal of amendments to Congress on June 8, 1789. In the course of his presentation, Madison summarized all the main arguments advanced by both sides on the merits of a bill of rights, including the argument that the enumerated-powers scheme adequately protected rights. This argument includes Madison’s construction of the Necessary and Proper Clause and bears directly on the broad jurisdictional interpretation offered by Lawson and Granger:

I admit that these arguments [from enumerated powers] are not entirely without foundation; but they are not conclusive to the extent which has been supposed. It is true the powers of the general government are circumscribed, they are directed to particular objects; but even if government keeps within those limits, it has certain extraordinary powers with respect to the means, which may admit of abuse to a certain extent,... because in the constitution of the United States there is a clause granting to Congress the power to make all laws which shall be necessary and proper for carrying into execution all the powers vested in the government of the United States, or in any department or officer

which they were engaged, without seeing them as fools and knaves, or even as disingenuous. This appears to be the considered view of a prominent member of their body, James Madison.

263. *Id.* at 326.

264. *See* Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 THE PAPERS OF JAMES MADISON 299, 300 (William T. Hutcheson et al. eds., 1962) [hereinafter MADISON’S PAPERS] (acknowledging that Madison did not view bill of rights as superfluous to extent that other federalists had). Moreover, Madison acknowledged to Jefferson that his strongest reservation about bills of rights went to their efficacy as a tool for limiting government—an argument suggestive that this was the core reason that he had not been an advocate of a bill of rights at the Convention. *See id.* (discussing potential for abuse of power despite “parchment barrier” provided by bill of rights). Despite his reservations, Madison wrote that he could support adding a bill of rights “provided it be so framed as not to imply powers not meant to be included in the enumeration.” *Id.*
thereof; this enables them to [fulfill] every purpose for which the Government was established. Now, may not laws be considered necessary and proper by Congress, for it is for them who are to judge of the necessity and propriety to accomplish those special purposes which they may have in contemplation, which laws in themselves are neither necessary or proper; as well as improper laws could be enacted by the state legislatures, for fulfilling the more extended objects of those governments. I will state an instance which I think in point, and proves that this might be the case. The general government has a right to pass all laws which shall be necessary to collect its revenue; the means for enforcing the collection are within the discretion of the legislature: may not general warrants be considered necessary for this purpose, as well as for some purposes which it was supposed at the framing of their constitutions the state governments had in view. If there was reason for restraining the state governments from exercising this power, there is like reason for restraining the federal government.265

Madison’s argument to Congress acknowledges that the federalist reliance on the enumerated-powers scheme had not done justice to the possibilities for abuse inherent in the Constitution’s grant of “certain extraordinary powers with respect to the means” by which the enumerated powers would be executed.266 Strikingly, given the emphasis that Lawson and Granger place on the distinction between the role of a bill of rights in limiting general legislative power and the contrasting “internal” limits they find in the Sweeping Clause, Madison justifies his partial rejection of the federalist position by an extended comparison between the discretion granted by the state and federal constitutions. In general terms, Madison argued that just as the general grant of power to state legislatures may “admit of abuse . . . to an indefinite extent,” so might the more limited grants of power to Congress “admit of abuse to a certain extent,” within the boundaries suggested by the limited objects as to which it might regulate.267 Extending the analogy, Madison suggests that just as the Framers

265. Madison, supra note 3, at 82-83.
266. Id. at 82.
267. Id. Madison’s argument tracks perfectly with the comparison that Wilson drew when he acknowledged that a freedom of the press guarantee would have been essential had Congress been granted a general power, similar to the Commerce Clause, to regulate literary publications. See Wilson, supra note 177, at 167-68 (arguing that specific grant of “liberty of the press” would be nullity and possibly construed as implication that such liberty was given by state). Wilson stated: “With respect likewise to the particular district of ten miles, which is to be made the seat of federal government, it will undoubtedly be proper to observe this salutary precaution [of a free press guarantee], as there the legislative power will be exclusively lodged in the . . . United States.” Id. The clear implication of Wilson’s argument comparing a hypothetical power to regulate literary publications with the general power Congress would have within the district is that the need to se-
of the state constitutions could have supposed that a general legislature might have its purposes for authorizing general search warrants, such warrants could equally be thought to further the end of enforcing revenue laws of the nation. Madison concludes that the prohibition on general warrants, as provided in what would become the Fourth Amendment, is justified for precisely the same reasons that such a provision was considered necessary "for restraining the State Governments from exercising this power."

Madison's analysis strikes a fair balance between the federalist's somewhat inflated claims about the rights-protective capacity of enumerated powers and the overblown antifederalist claims that the Constitution portended an unlimited national government. For at least a century, the federal government under the Constitution remained a government directed toward a relatively few objects of national concern, suggesting that the federalist defense of the omission of a bill of rights was not wholly cure specific rights against the wrongful exercise of power actually granted to government applies both to governments of general or enumerated powers (to the extent that the powers actually enumerated raise the potential of threatening particular rights). Madison is making the same comparison. See Madison, supra note 3, at 82 (arguing in favor of bill of rights because even though powers of federal government are circumscribed it possesses "certain extraordinary powers with respect to the means" that are as susceptible to abuse as general powers possessed by state governments).

268. Madison, supra note 3, at 82-83.

269. Id. Lawson and Granger focus their attention exclusively on Madison's description of potential abuses as involving laws that "in themselves are neither necessary nor proper," and they draw from his use of the language of the Sweeping Clause the conclusion that he was justifying this limiting provision only by reference to a potential misconstruction of the scope of authorization contained in the clause. See Lawson & Granger, supra note 7, at 323 n.229 (contending that Madison's hypothetical raises concern about potential misreading of scope of authorization granted by Necessary and Proper Clause). This conclusion, however, is implausible for several reasons. First, the premise of Madison's analysis was that the federalists' argument against the necessity of a bill of rights was not completely accurate. If Madison were alluding only to unanticipated misconstruction of the constitutional design, he would not have suggested that the federalist argument was flawed, but only that additional safeguards may prove useful. Second, Madison is clearly referring to the potential abuse of a legal grant of discretion over legislative means; he never suggests that such abuses were already prohibited by the Constitution.

Third, Madison's extended comparison to state legislative power, as summarized above, confirms that he was referring to the possibility of legislative bodies exercising granted authority to enact laws that are improper even though legally within their grants of authority. Madison, supra note 3, at 82 ("[E]ven if the [general] government keeps within [its] limits, it has certain extraordinary powers with respect to the means, which may admit of abuse to a certain extent . . . ."). Considering that Madison used the term "improper" to refer to state laws, as well as hypothetical acts of Congress, it is clear that he was not using the term in a legal and jurisdictional sense, for his point was that state legislative authority to enact such laws necessitated bills of rights just as Congress' executory authority necessitated a federal bill of rights. For a further discussion of Madison's views regarding the potential abuse of the general government's authority, see infra notes 282-85 and accompanying text.

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implausible. At the same time, it is difficult to deny the force of the antifederalist argument that, to use a single example, if it was essential to secure the right to jury trial in federal criminal cases, it was equally essential to secure the other procedural rights traditionally associated with due process of law. The federalists never managed any effective responses to such arguments. Even as to rights in which the federalist arguments seem stronger, such as freedom of religion and the press, cases like the inaugural free speech cases of the modern era, in which general criminal statutes designed to support the war effort in World War I were challenged under the First Amendment, illustrate that Madison's general conclusion regarding the potential reach of the Necessary and Proper Clause is well-grounded.270

270. But cf. Barnett, supra note 26, at 780 (modifying antifederalist argument and concluding that unamended Constitution would allow government invasion of positive rights). Barnett relies on Madison's descriptive catalogue of provisions contained in a bill of rights, including both inalienable natural rights and "positive rights." See Madison, supra note 3, at 81 (including trial by jury as positive right). Focusing on Madison's example of general warrants, Barnett concludes that government invasion of such positive rights "would have to be expressly prohibited to be improper." Barnett, supra note 26, at 780. According to Barnett, however, Madison was still presuming that "interference with the natural right of freedom of speech would have been improper without the greater caution provided by what became the First Amendment." Id. Although Madison did so catalogue bill of rights provisions, he does not purport to rely on any such distinction in advancing his argument as to the need for a bill of rights based on the potential abuse of discretion granted by the Sweeping Clause. See Madison, supra note 3, at 82 (arguing that bill of rights would protect rights against abuse of power by general government without distinguishing between natural rights and positive rights). Moreover, Madison's language comparing the state and federal constitutions was general in nature and referred to bill of rights guarantees that either might include. See id. at 282-83 (comparing similar potential abuse of power under both federal constitution and state constitutions). Finally, Madison justified the Constitution's prohibition on religious tests for holding federal offices as an essential qualification of Congress' implied authority to establish qualifications—as an exception to a specific granted power, rather than as a mere cautionary guarantee. Yet freedom of religion, or "conscience" as it was often called in this period, would have been considered an inalienable natural right, one that Barnett insists would have been covered by the requirement that all executory laws be proper as well as necessary. See Barnett, supra note 26, at 780 (characterizing right to freedom of speech as natural right, which could not be interfered with even in absence of First Amendment).

Nor does Barnett's explanation of Madison's argument square with his own prior analysis. At an earlier time, Barnett concluded, based on Madison's argument, that the potential for congressional abuse of discretion as to the means for accomplishing delegated ends explained the need for both the Bill of Rights and the Ninth Amendment. See Randy E. Barnett, Foreward: Unenumerated Rights and the Rule of Law, 14 Harv. J.L. & Pub. Pol'y 615, 635 n.74 (1991) (stating that Madison argued for bill of rights as one way to police abuse of discretionary powers given to general government). Accordingly, an implication was that both the Bill of Rights in general, and the Ninth Amendment in particular, should be read through this Madisonian lens rather than through the lens of the losing argument against a bill of rights based on the enumerated powers scheme. See Barnett, supra note 11, at 1, 10, 14-20 (characterizing limited powers scheme as "a losing argument against enumerating any constitutional rights" and advocating what author calls "power-
Madison’s analysis, moreover, is consistent with the alternatives to the broad jurisdictional reading of the Sweeping Clause, as described above, but cannot be reconciled with the broad jurisdictional reading proffered by Lawson and Granger.271 It is Madison’s analysis, however, that comports with the weight of the evidence from the historical record, which includes both a pattern of design running from the Articles of Confederation to Article I of the Constitution and the Framers’ understanding of the enumerated powers scheme in the design of the Constitution.

3. The Threat to Rights Presented by a Bill of Rights

The Framers’ understanding of the enumerated powers scheme and the role of the Necessary and Proper Clause is further clarified by the ratification-era discussion of the potential threat that a bill of rights might pose to the rights thought to be retained by the federal system. After contending that the Constitution granted the federal government no control over the press, James Wilson argued that a free-press provision might not only be nugatory, but might even be construed “to imply that some degree of power was given, since we undertook to define its extent.”272 Notice that one of the assumptions underlying this argument is the premise that one purpose of the guarantees contained in a bill of rights is to define the extent of a granted power by limiting the scope of its application. Bills of rights, as Madison later explained, “limit and qualify the powers of government, by excepting out of the grant of power those cases in which the government ought not to act, or to act only in a particular mode.”273 Wilson thus makes a fairly compelling point in suggesting that a free press guarantee might logically be taken as an exception to a presumed or implied power, thereby generating a construction of power where none was intended.274

Subsequently, Wilson and others offered an even more expansive variation on the same theme. Just as an express limitation on a nonexistent power might raise an inference that such a power had in fact been granted, the inclusion of a comprehensive bill of rights that enumerates

constraint” conception in favor of bill of rights). In none of these prior works did Barnett suggest any critical distinction between positive and natural rights as a key to understanding Madison’s argument or the asserted need to include limiting provisions as a device to prevent congressional abuse of the discretionary means granted by the Necessary and Proper Clause.

271. For a further discussion of the alternatives to the broad jurisdictional reading of the Sweeping Clause, see supra notes 249-65 and accompanying text.
272. Wilson, supra note 177, at 167-68.
274. See Wilson, supra note 177, at 167-68 (arguing that specific grant of “liberty of the press” would be nullity and possibly construed as implication that some power over liberty of press was given by state to general government); see also The Federalist No. 84, at 575, 579 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (stating that proposed bill of rights was not only unnecessary, but dangerous, reasoning; “[w]hy declare that things shall not be done which there is no power to do?”).
multiple unnecessary provisions would present the risk of completely reversing the governing premise of enumerated powers that all not granted was retained.\textsuperscript{275} Thus, a federalist slogan became that, although under the proposed Constitution “every thing not granted is reserved,” an attempt to comprehensively enumerate the people’s rights would raise the inference “that every thing omitted is given to the general government.”\textsuperscript{276}

Far from resisting the premises of Wilson’s argument, his antifederalist opponents suggested that the argument raised serious doubts about the validity of Wilson’s original claim that under the Constitution all powers not granted were retained by the states and the people. For example, the Federal Farmer observed that Article I, Section 9 prohibited Congress from granting titles of nobility, notwithstanding that a power to grant such titles was not included among the grants of power in Article I, Section 8.\textsuperscript{277} From this starting point, he reasons along lines very similar to Wilson:

Why then by a negative clause, restrain congress from doing what it would have no power to do? This clause, then, must have no meaning, or imply, that were it omitted, congress would have the power in question, either upon the principle that some general words in the constitution may be so construed as to give it, or on the principle that congress possess the powers not expressly reserved.\textsuperscript{278}

In light of their own argument about the dangers posed by a bill of rights, the inclusion of what was in effect a partial bill of rights became a source of embarrassment to the federalists. As Leonard Levy has observed, “[t]he protection of some rights opened the Federalists to devastating rebuttal,” and the “danger argument” thus “boomeranged” on the Constitution’s defenders.\textsuperscript{279} Patrick Henry argued, for example, that the inclusion of various rights “reverses the position of the friends of this Con-

\textsuperscript{275} See James Wilson, Proceedings and Debates of the Pennsylvania Convention (Nov. 28, 1787), in 2 Ratification of the Constitution, supra note 23, at 382, 387-88, 389 (arguing against necessity of including bill of rights in proposed constitution). Thus, Wilson was referring to a bill of rights when he asserted that “[a] proposition to adopt a measure, that would have supposed that we were throwing into the general government every power not expressly reserved by the people would have been spurned at, in that house [in which the Convention had been held], with the greatest indignation.” \textit{Id.}

\textsuperscript{276} James Madison, Debates in the Convention of the Commonwealth of Virginia on the Adoption of the Federal Constitution (June 24, 1788), in 3 Elliot’s Debates, supra note 19, at 616; see McAfee, \textit{Original Meaning}, supra note 15, at 1249-59 (discussing thoroughly this federalist argument against bill of rights).

\textsuperscript{277} See Letter from the Federal Farmer XVI, supra note 77, at 323, 326 (arguing, with specific examples, that Constitution violates principle that powers not enumerated are reserved).

\textsuperscript{278} \textit{Id.}

\textsuperscript{279} Levy, supra note 7, at 160.
stitution, that every thing is retained which is not given up; for, instead of this, every thing is given up which is not expressly reserved."280 Given that any risks posed by a bill of rights had already been created by the enumeration of rights in the Constitution, it followed that a bill of rights "could do no harm, but might do much good."281

The federalist struggle to answer this rebuttal is extremely instructive as to their understanding of the enumerated powers scheme and, only somewhat less directly, of the role of the Necessary and Proper Clause. In a February 1788 letter to James Madison, Edmund Randolph posed the very question that federalist opposition to a bill of rights had given rise to: "Does not the exception as to a religious test [for any office under the authority of the United States] imply that Congress by the general words had power over religion?"282 On April 10, Madison responded in the negative, contending that the religious test prohibition implied "nothing more than that without that exception a power would have been given to impose an oath involving a religious test as a qualification for office. The constitution of necessary offices being given to Congress, the proper qualifications seem to be evidently involved."283 According to Madison, the distinction between the limitations included in the Constitution and those proposed for a bill of rights was precisely that those already included were necessary exceptions to authority implicit in the granted powers, not exceptions to nonexistent or general powers that might give rise to an inference of new or extended powers to the detriment of the enumerated-powers scheme.284

Far from abuses such as religious tests being prohibited by the grant of limited powers, understood as including the rights-protective requirement that executorial laws be proper as well as necessary, Madison's analysis makes it clear that such laws might well be adopted in the absence of a

280. Henry, supra note 34, at 406-61; accord letter from Arthur Lee (Oct. 29, 1787), in R Ratification of the Constitution, supra note 23, at 510, 510 (arguing that "[t]he want of a promised declaration of rights" was important defect, because "exceptions in the Body of [the Constitution], . . . in which no power is expressly given, implies that every thing not excepted is given").


282. Letter from Edmund Randolph to James Madison (Feb. 29, 1788), quoted in, Robert J. Morgan, James Madison on the Constitution and the Bill of Rights 141 (1988); see U.S. Const. art. VI, cl. 3 (mandating that both state and federal government officials be bound by oath to support United States Constitution but prohibiting application of religious tests as qualification for public office).

283. Letter from James Madison to Edmund Randolph (April 10, 1788), in R Ratification of the Constitution, supra note 23, at 730, 731; see U.S. Const. art. II, § 2, cl. 2 (stating that U.S. officers not provided for in Constitution may be established by law, thereby giving Congress power to establish offices).

284. See Letter from James Madison to Edmund Randolph, supra note 283, at 730-31 (specifically referring to provision under discussion as exception to powers granted by Constitution).
specific limiting provision. Accordingly, even though a comprehensive bill of rights might well be superfluous, as well as dangerous, the specific limits included in the proposed Constitution were neither. Randolph took Madison’s insight and ran with it. At the Virginia Ratifying Convention, he provided an analysis of virtually every important limiting clause in the Constitution in the attempt to show that each one “is an exception, not from general powers, but from the particular powers therein vested.”

The key to resolving the controversy over the risks of inserting rights that might be unnecessary was in the recognition that, ultimately, it had to be confronted as an issue separate and apart from the larger debate over whether the limited-powers scheme was drafted with sufficient precision to effectively secure fundamental rights. The only way to bring James Madison and Patrick Henry together was to agree to amend the Constitution to include additional individual rights guarantees, as Henry insisted, and to add an unprecedented provision that would prohibit any inference extending Congress’ powers from the inclusion of specific exceptions without begging the question as to whether any particular guarantee was an essential exception to a granted power or an arguably unnecessary limit on an unintended power. This is, of course, exactly what happened at the Virginia Ratifying Convention. James Madison and Patrick Henry served on a committee that was charged with drafting proposed amendments to the Constitution and that drafted language which confronted this very problem:

That those clauses which declare that Congress shall not exercise certain powers, be not interpreted, in any manner whatsoever, to extend the powers of Congress; but that they be construed either

285. See id. Given that the religious-test limitation would have implicated a fundamental natural right—freedom of conscience—under the jurisdictional interpretation of the Sweeping Clause, Madison should patiently have explained to Randolph that no such power had ever been granted to Congress and that the provision was at most a cautionary provision that was declaratory of the limited power actually granted in any event. There is no such view, however, in Madison’s response.

286. Randolph, supra note 177, at 463-64; see id. at 464-65 (illustrating how various clauses in Constitution are exceptions to specific powers expressly granted to Congress in Constitution rather than exceptions to “general power”). Lawson and Granger cite to Randolph’s argument, but appear to miss its implications as to the federalist view of the relationship between the powers granted and the limits included in the text of the Constitution. See Lawson & Granger, supra note 7, at 318 n.206 (citing Randolph’s argument for proposition that textual protection of free speech is unnecessary because no constitutional provision interferes with that right).

287. Letter from James Madison to Thomas Jefferson, supra note 264, at 299, 300 (stating that Madison would be in favor of bill of rights if “it be so framed as not to imply powers not meant to be in the enumeration”).
as making exceptions to the specified powers where this shall be
the case, or otherwise, as inserted merely for greater caution.\textsuperscript{288}

The proposed amendment provided for every contingency and
doubt. Individual rights guarantees might prove in many instances, as sug-
gested by the federalists, to be non-essential, or as "inserted merely for
greater caution."\textsuperscript{289} Depending in part on the reach of federal powers, as
construed by authoritative interpreters, some provisions would be "ex-
ceptions to the specified powers."\textsuperscript{290} For the purposes of this proposed
amendment, however, the category in which any guarantee would fall was
less important than the recognition that, under either construction of the
included guarantees, such limiting provisions should not be construed as
suggesting powers not included in the enumeration of powers contained
in Article I, as understood in connection with the Necessary and Proper
Clause.\textsuperscript{291}

This Virginia proposal, from which Madison drafted the Ninth
Amendment, confirms the measure of consensus achieved despite the
heated debate over the inclusion of a bill of rights. Both sides eventually
acknowledged that the powers granted by the Constitution might in some
instances be subject to abuse, which justified the inclusion of limiting pro-
visions creating exceptions to granted powers.\textsuperscript{292} They also concurred
that there may be purpose in adding guarantees that were arguably not
essential because of the limited scope of federal power, if for no other
reason than to reassure those who were uncertain whether federal power
might be construed broadly enough to permit encroachment on an im-

\textsuperscript{288} Amendments Proposed at the Virginia Ratifying Convention (June 27,
1788), \textit{in} 2 Schwartz, \textit{supra} note 87, at 844 (listing amendments to Constitution
proposed by Committee of Virginia Ratifying Convention, including statement
that any provision limiting Congress' power shall not be interpreted to otherwise
extend Congress' power).

\textsuperscript{289} Id.

\textsuperscript{290} Id.

\textsuperscript{291} See id. (prohibiting inference that Congress' power is extended because
of limiting provision without regard to whether such extension would abridge natu-
ral or positive rights).

\textsuperscript{292} See Letter from The Federal Farmer XVI, \textit{supra} note 77, at 323, 326
(anticipating, by several months, Virginia's proposed resolution). The Federal
Farmer first argues that the federalist claim that enumerated powers provide an
adequate substitute for a bill of rights was overstated, especially given the inclusion
of limiting provisions such as the prohibition on granting titles of nobility when
such power was not included in the enumerated powers. See id. (noting that nega-
tive clause serves no purpose unless Congress would otherwise be empowered to
act). Even if such a limiting provision, however, did not imply the existence of a
power from which it was excepted, it suggested the value of another kind of provi-
sion: "But this clause was in the confederation, and is said to be introduced into
the constitution from very great caution. Even a cautionary provision implies a
doubt, at least, that it is necessary; and if so in this case, clearly it is also alike
necessary in all similar ones." \textit{Id.}
portant right. Given the common denominator that delegated powers that are potentially subject to abuse should be limited by the written constitution, disagreement as to the nature and extent of power actually granted became less central; in other words, it was determined that reassurance could be given to both sides of the debate. As the Virginia proposal suggests, neither the debate nor its resolution proceeded on the basis of anyone's claim that all limiting provisions, or even all guarantees in favor of fundamental rights, were basically pointless because the Constitution included a general limiting provision in favor of individual rights.

D. The Sweeping Clause, the Bill of Rights and the Balance Between Government "Energy" and the Protection of Individual Rights

Lawson and Granger assert not only that their broad jurisdictional interpretation of the Necessary and Proper Clause provides the most reasonable explanation of the Framers' insistence that the enumerated-powers scheme secures fundamental rights, but that it "is consistent with almost everything we know about the Constitution's design." The burden of this discussion is to show that the introduction of a wild card into the system of delegated and reserved powers is the last thing that the Framers of the Constitution would have intended. Also, this section illustrates that an open-ended limiting provision runs counter not only to the central idea of a written constitution, but also the Framers' views about the need to carefully strike a balance between the claims made on behalf of popular rights and the need for power and energy to accomplish the important purposes of government. The Framers would much rather have relied upon the political and institutional checks built into the structure of government created by the Constitution than to have introduced an open-ended and potentially dangerous general limiting provision.

293. See id. It might be thought that the federalists' denial of the necessity of a bill of rights—whether rooted in a belief in inherent rights, a power-limiting jurisdictional provision (as suggested by Lawson and Granger) or a relatively strict construction of national power—entailed a belief that any or all limiting provisions were cautionary at best. The explanation by Madison and Randolph, however, of why limiting provisions did not generate the danger anticipated by opponents of a bill of rights and Madison's explanation of the need for additional limiting provisions before Congress, confirm that the debate concerned the number of limiting provisions actually required, rather than whether any were needed at all.

294. Amendments Proposed at the Virginia Ratifying Convention, supra note 288, at 840-45 (listing proposed amendments advocated by Virginia Convention, which included both limiting provisions and declarations of fundamental rights).

295. Lawson & Granger, supra note 7, at 315 (asserting that jurisdictional interpretation of Sweeping Clause is necessary to make sense of federalists' advocacy of Constitution without bill of rights).

296. For a discussion of the need to strike a balance between preserving rights and establishing an effective government, see infra notes 299-322 and accompanying text.

297. For a further discussion on the Framers' reliance on these political and institutional checks, see infra notes 304-22 and accompanying text.
These conclusions are confirmed by the Framers’ statements of general philosophy about government power and popular rights, their deliberate decisions (and the rationales for those decisions) to omit from the Constitution widely accepted limitations on government power and the conservative approach taken by controlling figures in the process of drafting and ratifying amendments to the Constitution.\footnote{298}

1. **Striking the Balance Between Energy and Liberty**

The formalistic legal arguments that dominated the debate over the necessity for a bill of rights only partly obscured the very real differences between the contending forces about the potential costs of placing legal restrictions on government in the Constitution and the disagreements they held over the appropriateness of particular limitations. For the federalists, the overriding purpose of the Constitutional Convention in Philadelphia was to create a government of greater energy and efficiency,\footnote{299} and the urgency of this goal was often reiterated in defense of the Constitution and, in particular, the decision to omit a bill of rights.\footnote{300} In their minds, the goal of adequately empowering government served the end of liberty as much as it served the end of meeting needs for national security and strength.\footnote{301} In a standard formulation, Madison observed that “lib-

\footnote{298. For a further discussion of the Framers’ statements, decisions and approach, see infra notes 299-314, 327-88 and accompanying text.}

\footnote{299. See Levy, supra note 7, at 150 (observing that in minds of those most responsible for Constitution “[t]he principal task of the Convention was to provide for an effective national government by redistributing the powers of government”); see also Julius Goebel, Jr., 1 History of the Supreme Court of the United States: Antecedents and Beginnings to 1801, at 238 (1971) (stating that constitutional convention notes reflect that “no word in the vocabulary of contemporary politics was used less often” than liberty because “[n]either the task nor the idiom of discussion required it”); Wood supra note 90, at 544 (observing that many federalists proceeded on assumption that well-constituted republican government was “shield and protector” of liberty and that establishing government with ample authority aided cause of justice and liberty).}

\footnote{300. See, e.g., James Wilson, Proceedings and Debates of the Pennsylvania Convention (Dec. 11, 1787), in 2 Ratification of the Constitution, supra note 23, at 550, 552-53 (disputing claim made by minority that Constitution’s opponents were “contending for the rights of mankind”). Wilson described existing conditions as: “Without a government! without energy! without confidence internally! without respect externally! the advantages of society were lost to thee!” Id.}

\footnote{301. See id. ("Thy various interests were neglected—thy most sacred rights were insecure."); see also Edmund Pendleton, Debates in the Convention of the Commonwealth of Virginia on the Adoption of the Federal Constitution (June 4, 1788), in 3 Elliot’s Debates, supra note 19, at 35, 37 (arguing that there is “no quarrel between government and liberty” because government “is the shield and protector” of liberty and war is “between government and licentiousness, faction, turbulence, and other violations of the rules of society, to preserve liberty”); Edmund Randolph, Virginia Ratifying Convention (June 16, 1788), in 2 Schwartz, supra note 87, at 775, 777 (stating proposed government “secures the liberty of the citizen” and checks “that excessive licentiousness which has resulted from the relaxation of our laws”). According to Randolph, licentiousness “had produced tyranny” and “contributed as much (if not more) as any other cause whatsoever to
erty may be endangered by the abuses of liberty, as well as by the abuses of power," and "the former rather than the latter is apparently most to be apprehended by the United States." Federalists continually reminded their audience of the social contract theory that the people must necessarily cede some of their natural rights "to vest [government] with requisite powers." 

Underlying this rhetoric was the fear that the demand for a bill of rights might divert the people "from the main task of providing themselves with effective government." Believing that they had already struck the appropriate balance between granting necessary powers and providing sufficient safeguards for liberty, federalists feared that the attempt to provide a bill of rights would needlessly undermine the prospects for ratifying the Constitution in generating controversy over which safeguards would be added and in what form. Worse yet, they feared that the amending

the loss of . . . liberties." Randolph, supra, at 777; see John Marshall, Debates in the Convention of the Commonwealth of Virginia on the Adoption of the Federal Constitution (June 10, 1788), in 3 Elliot's Debates, supra note 19, at 222, 225 (noting that "friends of the Constitution are as tenacious of liberty as its enemies," and that government is empowered "to secure and protect it").

302. The Federalist No. 63, at 422, 428-29 (James Madison) (Jacob E. Cooke ed., 1961); see id. at 426 (referring to need to "blend stability with liberty").

303. See The Federalist No. 2, at 8 (John Jay) (Jacob E. Cooke ed., 1961) (noting that "[n]othing is more certain than the indispensable necessity of Government" and that "the people must cede to it some of their natural rights, in order to vest it with requisite powers"); Archibald Macaine, Publicola: An Address to the Freemen of North Carolina (March 20, 1788), reprinted in 16 Ratification of the Constitution, supra note 23, at 435, 437 (stating that people "must, in order to obtain protection, give up some of their natural liberty, in order to secure the rest"). Publicola noted that the tendency was for "small states" to retain more, but to be "more subject to violence and oppression" from powerful neighbors; therefore, he touted the benefits of empowering the union to accomplish larger purposes. Id.; cf. James Bowdoin, Debates in the Convention of the Commonwealth of Massachusetts on the Adoption of the Federal Constitution (Feb. 6, 1788), in 16 Ratification of the Constitution, supra note 23, at 290 n.15 ("[A]s all government is founded on relinquishment of personal rights in a certain degree, there was a clear impropriety in being very particular about them.").


305. See, e.g., Letter from Samuel Holden Parsons to William Cushing (Jan. 11, 1788), in 3 Ratification of the Constitution, supra note 23, at 569 (arguing against necessity of including Bill of Rights in Constitution). Parsons argued that the proposed Constitution

grant[s] such powers as if properly exercised will accomplish the best good and greatest happiness of the members and . . . sufficiently guard[s] against an undue use [of those powers and preserves] as much political and civil liberty . . . as we have reasonably to expect from a constitution where so many different interests are to be consulted, and in a case where union is necessary.

Id.

306. See Wood supra note 90, at 587 (suggesting federalist opposition to bill of rights actually reflected belief "that the frenzied advocacy of a bill of rights by most antifederalists masked a basic desire to dilute the power of the national government in favor of the states"). Given that bills of rights had been as much about
process could yield provisions that would upset the balance between the competing values of securing requisite powers for government and preserving the people's rights.307

Almost immediately after the adjournment of the Constitutional Convention, two of the Constitution’s prominent defenders, Roger Sherman and Oliver Ellsworth, contended that the Convention’s purpose had been “to provide for the energy of government on the one hand, and suitable checks on the other hand, to secure the rights of the particular states, and the liberties and properties of the citizens.”308 The Constitution’s drafters attempted to strike this essential balance by two broad and rather distinct strategies. In the first instance, they relied upon various structural and political safeguards to supplement and strengthen the security against arbitrary government provided by representative government.309 Given declaring first principles as to the collective rights of the people, as about securing individual liberty, the fear of eliminating the federalism balance of the proposed constitution fits logically into the idea of opposing a bill of rights. Moreover, whatever the precise nature of their fears, the federalists exhibited greater concern about the risks attendant to limiting the national government than to the risks to basic liberties presented by the Constitution; that their goal was to achieve an appropriate balance, rather than to establish a clear priority for personal liberty, is reflected in the federalism debate as well as in the debate about specific limiting provisions to guarantee individual rights.

307. See, e.g., James Bowdoin, Debates in the Convention of the Commonwealth of Massachusetts on the Adoption of the Federal Constitution (Jan. 23, 1788), in 2 Eliot’s Debates, supra note 19, at 81-87 (expressing view that there is “clear impropriety” in creating exceptions to government powers because such exceptions could prevent government “from doing what the private, as well as the public and general, good of the citizens and states might require”). Bowdoin recognized what some modern minds have difficulty grasping: the proliferation of rights guarantees raises the prospect of rights in conflict and may hamper government from protecting the rights of some.

308. Letter from Roger Sherman and Oliver Ellsworth to Governor Huntington (Sept. 26, 1787), in 15 Ratification of the Constitution, supra note 23, at 471, 471.

309. See generally Levy, supra note 7, at 150 (discussing features of Constitution designed to protect states and people from potentially abusive federal government, including right to trial by jury in criminal cases, bans on titles of nobility, guaranteed privileges and immunities for citizens of each state while in other states, representative government, ban against taxation without representation and separation of powers); Michael W. McConnell, A Moral Realist Defense of Constitutional Democracy, 64 Chi.-Kent L. Rev. 89, 106 (1988) (listing features of U.S. republican system that are designed to protect natural rights); Jennifer Nedelsky, The Protection of Property in the Origins and Development of the American Constitution, in To Form a More Perfect Union: The Critical Ideas of the Constitution 38, 61-65 (Herman Belz et al. eds., 1992) [hereinafter cited as Perfect Union] (discussing Madison's conception of representative government to prevent popular injustice and balance tension between political liberty and private rights); Wood, supra note 90, at 547-62 (discussing federalists’ reliance on governmental checks and balances and bicameral system in arguing in favor of ratification of Constitution). Although Madison and others involved in drafting and defending the Constitution looked primarily to supplemental safeguards, an important theme among a number of the defenders of the Constitution was actually that a bill of rights is largely irrelevant in authentic republican government. See, e.g., An Independent Freeholder, Winchester
widespread skepticism about the efficacy of the "parchment barriers" supplied by limiting provisions.\textsuperscript{310} the Framers placed their greatest confidence in structural features such as a bicameral legislature (including its respective chambers' varied terms of office) and the system of checks and balances, as well as the political safeguard provided by the extended nature of the republic created by the Constitution.\textsuperscript{311}

More formally, but less centrally, they relied upon the substantive limits to federal authority that they perceived to be inherent in the grant of limited powers and the relatively small number of provisions establishing specific limitations on the powers granted. Notwithstanding the federalist arguments that fundamental rights were not endangered by the limited powers granted to the national government, they often acknowledged that various powers given to the national government could lend themselves to various kinds of abuse, both legal and illegal.\textsuperscript{312} Common rejoinders to arguments from the risks of such abuse were the basic observations that all power can be abused and that this risk of abuse must always be weighed against the dangers presented by the failure to grant power that was essential to accomplish the important ends of government.\textsuperscript{313} They also

\textsuperscript{310} See, e.g., Nicholas, supra note 177, at 449-50 (contending that bills of rights provide no security against abuse of power because their provisions are "but a paper check"). See generally McAfee, supra note 82, at 290-91 (arguing that federalists, skeptical of "parchment barriers," sought "clarity, explicitness, and specificity in stating the nature and limits of government power" (citing Cecilia M. Kenyon, \textit{Introduction to The Antifederalists} lxxv-lxxvi (Cecilia M. Kenyon ed., 1966)).

\textsuperscript{311} See \textit{The Federalist} No. 9, at 50, 51-52 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (focusing on checks and balances, an independent judiciary, republican government and "enlargement of the orbit within which such systems are to revolve," i.e., the extended republic); \textit{The Federalist} No. 49, at 332 (James Madison) (Jacob E. Cooke ed., 1961) (referring to strategy for avoiding absorption of all power by legislature—connecting and blending powers to achieve effective separation of powers "essential to a free government").

\textsuperscript{312} For a further discussion of the Framers' awareness that the Constitution granted powers to the national government to act inconsistent with at least some of the traditional rights that many regarded as fundamental, see \textit{infra} notes 330-32 and accompanying text.

\textsuperscript{313} See \textit{Letter from George Washington to Bushrod Washington} (Nov. 10, 1787), in \textit{7 Ratification of the Constitution}, supra note 23, at 152, 154 (stating that he had "never yet been able to discover the propriety of placing it absolutely out of the power of men to render essential Services, because a possibility remains of their doing ill"); James Iredell, Debates in the Convention of the Commonwealth of North Carolina on the Adoption of the Federal Constitution (July 26, 1788), in \textit{4 Elliot's Debates}, supra note 19, at 95 (arguing that "[n]o power, of any kind or degree, can be given but what may be abused" and that keys are to "consider whether any particular power is absolutely necessary" and to recognize that "possible abuses [of powers] ought not to be pointed out, without at the same time considering their use").
pointed to the checks provided by democratic government and the structural features of the Constitution.\footnote{314}{See Wilson, supra note 221, at 514, 515 (opposing argument that assumed abuse by general government). Reacting to the extreme nature of the predictions offered by the Constitution’s critics, Wilson asserted that when the Convention was formed it was not supposed that “the legislature under this Constitution would be an association of demons.” Id. at 515.}

For their part, the antifederalist critics of the Constitution believed that their opponents held too much regard for the necessity of empowering government and too little for the need to preserve the people’s rights.\footnote{315}{See Letter from the Federal Farmer XVI, supra note 77, at 323, 329 (“[M]any of us are quite disposed to barter [our freedom] away for what we call energy, coercion, and some other terms we use as vaguely as that of liberty.”); Mentor (Apr. 3, 1788), reprinted in 16 Ratification of the Constitution, supra note 23, at 578, 579 (stating that, given powers granted and justifications offered, “[A]re we not to think that our rights and liberties, our instruction and welfare, are no longer leading objects in the eyes of those we have set over us . . . ?”); Letter from Richard Henry Lee to Patrick Henry, supra note 99, at 295 (stating that he was “grieved to see that too many look at the Rights of the people as a Miser examines a Security to find a flaw in it!”).}

A central antifederalist theme was the idea that individuals entered into the social contract to obtain greater security for their rights, not to relinquish them all to government.\footnote{316}{See, e.g., Mercy Warren, A Columbian Patriot: Observations on the Constitution (Feb. 1787), reprinted in 16 Ratification of the Constitution, supra note 23, at 272, 278 (quoting oft-cited statement of Blackstone that “the principal aim of society is to protect individuals in the absolute rights which were vested in them by the immediate laws of nature”). Although some of the differences of opinion in this competing rhetoric reflected opposing descriptive assessments of the extent of power granted by the Constitution, some of their debate was normative and substantive, and it is clear that the federalists erred on the side of government, and especially on the need to empower the national government, to a larger extent than their antifederalist opponents.}

Despite these real and important differences of emphasis, and in assessment of whether the Constitution would likely pose a threat to liberty, the need to balance collective need and individual liberty was acknowledged by the Constitution’s critics as well as its defenders. Thus, George Mason and Patrick Henry both objected to the Constitution’s Ex Post Facto Clause, which they construed as prohibiting retroactive civil laws, on the ground that there may be occasions when such laws would be justified by public necessity.\footnote{317}{See Copy of George Mason’s Objections to the Constitution Sent to George Washington (Oct. 7, 1787), in 13 Ratification of the Constitution, supra note 23, at 346, 350 (objecting to prohibition against ex post facto laws because public safety requires them); Patrick Henry, Virginia Ratifying Convention (June 15, 1788), in 2 Schwartz, supra note 87, at 802-03 (questioning fate of old Continental paper dollars as example of need for ex post facto laws). It should be underscored that George Mason was the principle drafter of the Virginia Declaration of Rights, which included a general declaration in favor of natural rights, and the foremost advocate of the inclusion of a bill of rights in the Constitution. See 13 Ratification of the Constitution, supra note 23, at 346-47 (relating Mason’s advocacy of bill of rights and describing influence of Mason’s “Objections to the Constitution”). It seems especially significant that an assumption underlying his objection to this clause is that, absent such a provision, the matter would be left to}
Given their commitment to balancing the need to limit government with the need to empower it, it seems clear that the Framers would have opposed a proposal to include a general limiting provision on behalf of popular rights, precisely because it would present a serious risk of skewing the balance. From the process of drafting the Constitution through the process of adopting amendments to the Constitution, the Framers exhibited a wariness of including unwarranted limitations on government. Thus, at the Philadelphia Convention, the Committee of Detail stated in an introduction to a draft of the Constitution that one of its purposes was “[t]o insert essential principles only, lest the operations of government should be clogged by rendering those provisions permanent and unalterable, which ought to be [accommodated] to times and events.”

The concern expressed by the committee had at least two dimensions. First, there was the fear that absolute prohibitions might prove dangerously inflexible or in a crisis lead to disregard for, and ultimately the undermining of, the Constitution. As Madison wrote to Jefferson, “I am inclined to think that absolute restrictions in cases that are doubtful, or where emergencies may overrule them, ought to be avoided.” Second, the Framers were deeply concerned that only provisions that could be permanent should be included in the Constitution. The federalists “endeavored to exclude from the Constitution such rules and structures as would need to be adapted flexibly to changes in American society.”

Although the federalists were insistent that the powers delegated did not extend to the fundamental natural rights as to which concerns were being expressed, the historical record is equally clear that they deliberately omitted some traditional rights that they understood to be within the reach of powers granted to the national government. Considering the specific powers delegated by the Constitution, these omissions implicitly recognized discretionary authority in Congress that could be used to redefine, or even to eliminate, the rights in question. Moreover, these omissions reflect that, although the federalists argued that a bill of rights was

legislative discretion to the extent that Congress’ powers extended to the particular object of legislation. Mason would have equally opposed a general limiting provision that would have empowered courts to impose the same restriction on government authority based on general reasoning.


319. Letter from James Madison to Thomas Jefferson, supra note 264, at 300 (applying this general idea to proposal for limit on legislative authority as to standing armies in peacetime). The same general concern explained George Mason’s adamant opposition to the prohibition on ex post facto laws.

320. Hamburger, supra note 318, at 275. Hamburger states that, to the Framers, “[r]ules that had to be mutable required the flexibility of ordinary law.” Id.

321. For a discussion of specific examples, see infra notes 323-88 and accompanying text.
unnecessary to secure many important rights and might even pose a danger to rights secured by the enumerated-powers scheme, they also feared that rights guarantees could harm the nation if unreasonable and inflexible limiting provisions were included in the Constitution.

One of the most pervasive objections to the Constitution during the struggle over ratification concerned the omission of provisions guaranteeing the right to trial by jury in civil cases and prohibiting the establishment of a standing army in peacetime. The federalists, however, did not contend that these traditional rights were secured by the concept of limited powers, let alone the Necessary and Proper Clause; rather, they defended the Convention’s decision to omit these particular limits on government power. Their arguments confirm that, within the confines of the powers granted by the Constitution, Congress was intended to have a broad discretion over the means to authorized ends, subject to the limits specified in the Constitution itself. A review of the debate regarding these two critical omissions is, therefore, most helpful in understanding the general philosophy and structural design of the Framers.

2. Civil Juries and Standing Armies: The Rights Omitted

If careful attention is paid to the federalist arguments about the omission of rights, an important distinction emerges. As we have seen with a number of omitted rights, such as the guarantee of a free press, the federalists clearly and unequivocally argue that the Constitution does not grant any power that might properly be read as authorizing the abridgment of the right. In other cases, however, the Constitution’s defenders offer an entirely different set of assurances as to why the people need not fear the power granted by the Constitution. In the second category of cases, the federalist arguments proceed on the premise, sometimes assumed but often made explicit, that a delegated power had granted discretionary authority to Congress as to the degree of protection that would be given to the right under discussion. In such cases, the arguments in defense of the omission of the right rested on justifications for not restricting legislative discretion, as well as on the mechanisms that would prevent serious abuses from the discretion actually granted.

322. For a discussion of the federalists’ defense of these omissions, see infra notes 326-61 and accompanying text.
323. For examples, see supra notes 253-56 and accompanying text.
324. For a discussion of various examples, see infra notes 326-61 and accompanying text.
325. The claims set forth in text are later developed at some length but it is striking how much this general analysis is confirmed by the different treatment given to these various rights when they are taken up together. Following a pattern established by George Mason, critics frequently complained of the omission of declarations “for preserving the liberty of the press, the trial by jury in civil causes, [and] against the danger of standing armies in time of peace.” George Mason, George Mason’s Objections (Nov. 21, 1787), in 14 Ratification of the Constitution, supra note 23, at 149, 151. By contrast to the antifederalist tendency to
a. Trial by Jury in Civil Cases

The classic example of this distinctive argument is the federalist defense of the omission of a right to trial by jury in civil cases. By almost any account, this right would fit among the rights that Lawson and Granger take to be secured by the limits established in the Sweeping Clause. The jury trial right clearly ranked among the most fundamental of the rights of Englishmen.\(^\text{326}\) From the demands made at the Constitutional Convention\(^\text{327}\) through the adoption of the Bill of Rights, this omission from the Constitution was one of the most oft-cited specific complaints of its critics.\(^\text{328}\) The extent of the outcry during the ratification struggle virtually equate the status of these rights, the federalist defenses of these omissions proceed in very different directions. See, e.g., Cassius II: To Richard Henry Lee, Esquire (Mar. 28, 1788), in 9 Ratification of the Constitution, supra note 23, at 713, 715 (describing Constitution as giving "Congress no power over either [the rights of conscience or the freedom of the press]," and thus Congress will not "dare to exercise any"). By contrast, Cassius II relies upon the lack of a uniform rule among the states as to civil juries to justify the obvious grant of discretion to Congress in "drawing the particular lines" as to the occasions in which a jury trial will be required. Id. Based on the provision guaranteeing the right to a jury trial in criminal cases, he also contends that the Constitution "implies" that "when [juries] can be had in civil controversies, it is preferable." Id. Despite their effort to put the best face on the omission of a civil jury guarantee, the very structure of the authors' argument confirms that two quite different defenses are being employed.

326. See, e.g., John Phillip Reid, Constitutional History of the American Revolution: The Authority of Rights 47-48 (1986) (observing that Blackstone thought trial by jury to be "as fundamental as anything else in British constitutional law" and referring to "the sacrosanct centrality of jury trial in British constitutional thought during the age of the American Revolution"); Sherry, supra note 26, at 1138-40 (treating confederation-era cases on right to trial by jury and viewing it as among inherent rights that founding generation believed bills of rights did not establish, but merely declared).

327. See Hugh Williamson, Convention Debates Before the Second General Constitutional Convention (Sept. 12, 1787), in 13 Ratification of the Constitution, supra note 23, at 197 (noting that no provision was made for juries in civil cases and suggesting necessity of it). In response, Nathaniel Gorham argued that it would be difficult to formulate an appropriate rule and suggested that the "Representatives of the people may be safely trusted in this matter." Id. Roger Sherman agreed that "the Legislature may be safely trusted." Id. Elbridge Gerry concurred in Williamson's insistence that such a provision was essential. See id. at 199 (refusing to sign Constitution because it gave power "to establish a tribunal without juries," which would create "a Star-Chamber as to Civil Cases").

328. See Letter from George Mason to George Washington Containing Objections to the Constitution (Oct. 7, 1787), in 8 Ratification of the Constitution, supra note 23, at 40, 45 (listing failure to include any declaration for "the Trial by jury in civil Causes" as one reason he refused to sign Constitution); An Address of the Seceding Assemblyman (Oct. 2, 1787), in 13 Ratification of the Constitution, supra note 23, at 295-96 (criticizing actions of Convention for exceeding authority by forming new constitution that, among other things, abolished juries for civil trials); Letter from the Federal Farmer XVI, supra note 77, at 323, 326 (noting that trial by jury had long been considered fundamental right); An Old Whig VIII (Feb. 6, 1788), reprinted in 16 Ratification of the Constitution, supra note 23, at 52, 53 (stating that calling constitutional convention would be warranted if only to preserve right to trial by jury); Letter from James Bowdoin to James de Caledonia (Feb. 27, 1788), in 16 Ratification of the Constitution, supra note
ensured that it would be included among the rights added by way of amendment. Thomas Jefferson, whose influential voice added to the momentum of those demanding a bill of rights, included the civil trial jury right as among six guarantees that the people should, at a minimum, have protected by the Constitution.\textsuperscript{329} Unsurprisingly, Lawson and Granger suggest that the right to trial by jury in civil cases was secured by the Sweeping Clause.\textsuperscript{330}

The federalist defense of the decision to omit this right proceeded along lines distinct from arguments about freedom of religion and freedom of the press.\textsuperscript{331} The reason is clear: although the Constitution did not by its terms grant any authority that would incidentally include limiting these other freedoms, Congress' authority to establish federal trial courts, with jurisdiction in civil suits between citizens of different states, logically includes the power to decide on the mode of trial (including whether jury trials would be required). The need for such an exception in favor of civil juries was powerfully reinforced by the Constitution's explicit provision for the right to trial by jury in federal criminal cases—a provision that was taken to be, consistent with the terminology pervasively employed, a necessary exception to the power of Congress to establish the procedures governing criminal cases in the federal courts.\textsuperscript{332} At a more general level, given that the question of trial by jury appears to fall within the powers granted to Congress, the apparent consensus that rights could only be secured in fundamental law by inclusion in the written Constitution suggests that the right to a civil jury trial would not have any legal protection.\textsuperscript{333}

\textsuperscript{23}, at 237, 240 (noting satirically that abolishing trial by jury in civil cases would be sufficient to "chain down all America"); \textit{Warren}, supra note 316, at 272, 279 (criticizing abolition of jury trial in civil cases while noting "how admirably this mode is adapted to the investigation of truth beyond any other the world can produce").

\textsuperscript{329}. \textit{See Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in 14 RATIFICATION OF THE CONSTITUTION, supra note 23, at 482, 482 (declaring his support of some elements of proposed Constitution while expressing dislike for other features including omission of bill of rights).}

\textsuperscript{330}. \textit{See Lawson & Granger, supra note 7, at 320-21 ("Congress, under the original Constitution, could not abolish jury trials in civil cases . . . .").}

\textsuperscript{331}. These differences were apparent at the Convention. \textit{See Letter from Samuel Holden Parsons to William Cushing, supra note 305, at 569, 572 (summarizing arguments against inclusion of civil jury provision, including assurance that Congress could be trusted with discretion to regulate circumstances under which it would be provided).}

\textsuperscript{332}. \textit{See Letter from The Federal Farmer XVI, supra note 77, at 323, 326-27 (noting omission of civil jury guarantee, as well as other fundamental procedural guarantees, despite inclusion of jury right in criminal cases and contending that "the implication indubitably is, that [the people] mean to relinquish [such omitted rights], or at least feel indifferent about them"); Robert Whitehill, Proceedings and Debates of the Pennsylvania Convention (Dec. 7, 1787), in 2 RATIFICATION OF THE CONSTITUTION, supra note 23, at 513, 514 (contending that Constitution's "direction of trials of crimes by a jury excludes trials in civil cases by a jury").}

\textsuperscript{333}. \textit{Letter from The Federal Farmer XVI, supra note 77, at 323, 326-27 (pointing out that omission of civil jury right was especially important because}
The federalists, however, did not contest the basic reasoning of the antifederalist claims as to the legal effect of the omission of a civil jury guarantee, nor offer assurances that Congress' power was limited in favor of civil juries by the jurisdictional boundaries supposedly established by the Sweeping Clause. To the contrary, they offered an assortment of arguments as to why it would have been unwise to include such a limitation on legislative discretion and as to why, despite this omission, the people's liberty was not threatened by the Constitution. At the center of this defense was the invocation of the concerns that required distinguishing between matters that ought to be included in fundamental law and matters that ought to be left to the greater flexibility of ordinary law.

federal Constitution would be "the supreme act of the people" and hence it would be "improper to refer to the state constitutions" to establish claim to civil jury and other fundamental procedural rights. The state constitutions, after all, were "entirely distinct instruments and inferior acts." Id. In a more general vein, the Federal Farmer observed that "[t]hese rights are not necessarily reserved" because "they are stipulated rights" that must be "secured and established by the constitution or federal laws." Id. at 328; see LETTER FROM THE FEDERAL FARMER IV, supra note 109, at 246 (arguing that Constitution would be people's "last supreme act" and that "wherever this constitution, or any part of it, shall be incompatible with the ancient customs, rights, the laws or the constitutions heretofore established in the United States, it will entirely abolish them and do them away"); Essay of Brutus II, supra note 286, at 376 (arguing that Constitution "will be an original compact" that will "vacate every former agreement inconsistent with it" being "ratified by the whole people, all other forms, which are in existence at the time of its adoption, must yield to it").

334. Although the Federal Farmer's essays were among the most widely read and admired of the writings in opposition to the Constitution, it does not appear that the federalists ever challenged either of the central claims he offered to support the view that the Constitution did not secure a right to a civil jury. See Letter from Samuel Holden Parsons to William Cushing, supra note 305, at 569, 572 (summarizing arguments against inclusion of civil jury provision including assurance that Congress could be trusted with discretion to regulate circumstances under which it would be provided). These central claims included the idea that fundamental English rights needed to be provided for in the written Constitution, as well as the idea that the state constitutions would be an improper source from which to infer the existence of such limits on federal legislative power. The failure to contest the Federal Farmer's grounds for argument as to the necessity for securing the jury trial right thus suggests both that there was no provision in the Federal Constitution from which to infer legal protection of the right and also that a generally worded provision to keep Congress within its proper jurisdictional boundaries would not have been perceived as incorporating affirmative limits on legislative power with no cognizable roots in the text of the Federal Constitution.

335. See generally LETTERS FROM THE FEDERAL FARMER I-XVIII, reprinted in 2 THE COMPLETE ANTI-FEDERALIST, supra note 41, at 214, 214-357 (noting that supreme power is in people and not in our government and so there are two options: either carefully enumerate rights reserved to people and rights given to government or remain silent).

336. See Iredell, supra note 19, at 144-45 (distinguishing between constitutions and laws). Iredell noted:

[T]here is a material difference between an article fixed in the Constitution, and a regulation by law. An article in the Constitution, however inconvenient it may prove by experience, can only be altered by altering the Constitution itself, which manifestly is a thing that ought not to be
One crucial sticking point, according to the federalists, was the lack of uniformity among the states with respect to the scope of the jury trial right.\textsuperscript{337} Whereas a provision in the Federal Constitution in favor of any one approach might have created division and resentment, keeping the matter as one of ordinary law would grant Congress the flexibility to find a path acceptable to all, as well as to repeal any provision that proved unacceptable to most states.\textsuperscript{338} A related difficulty was that there may be any number of cases unique to the federal system—such as cases involving foreign parties, including other nations—in which a general rule in favor of jury trials could work against the security and well-being of the nation as a whole; Congress, therefore, should have the discretion to make such judgment calls about the appropriate scope of the jury trial right.\textsuperscript{339}

Retaining the flexibility of governing the civil jury right by ordinary law carried a more general advantage as well. Congress would have the flexibility to adapt the scope of the right to a changing society. Thus, Alexander Hamilton wrote:

The best judges of the matter will be least anxious for a constitutional establishment of the trial by jury in civil cases, and will be the most ready to admit that the changes which are continually happening in the affairs of society, may render a different mode of determining questions of property, preferable in many cases, in which that mode of trial now prevails . . . . I suspect it to be impossible in the nature of the thing, to fix the salutary point at which the operation of the institution ought to stop; and this is with me a strong argument for leaving the matter to the discretion of the legislature.\textsuperscript{340}

Underlying Hamilton’s suggestion that the right to trial by jury in civil cases ought to be subject to change by ordinary legislation was the assumption that, for whatever advantages jury trials in general offered, the pres

\textsuperscript{337} See id. at 145, 151 (discussing how some states have jury trials only for criminal, some for equity and some for admiralty); The Federalist No. 83, at 565-71 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (same); James Wilson, Speech at a Public Meeting in Philadelphia (Oct. 6, 1787), in 13 Ratification of the Constitution, supra note 23, at 337, 340-41 (same).

\textsuperscript{338} Such arguments carried little weight with proponents of a bill of rights. The antifederalists agreed with Jefferson, who contended that the argument from a lack of uniformity amounted to accepting the least common denominator and to establishing a “general wrong” rather than a “general right.” See Letter from Thomas Jefferson to James Madison, supra note 329, at 482, 483 (arguing that these states that have abandoned trial by jury should be brought back to it by provision in bill of rights).

\textsuperscript{339} See The Federalist No. 83, supra note 337, at 568 (relating problems with jury trial in cases concerning foreign nations).

\textsuperscript{340} Id. at 573.
ence of juries in civil cases was not really a fundamental guarantee of liberty, as contrasted with the right to a jury in criminal trials.\(^3^4^1\)

While the critics of the Constitution took the arguments about the need for flexibility as flat admissions that the right to trial by jury was abolished by the Constitution, the federalists insisted that this was not the case because Congress would undoubtedly continue to recognize the right\(^3^4^2\) and would not abuse the discretion it had been granted to define its scope.\(^3^4^3\) In turn, however, the antifederalists were incredulous that their opponents would actually seek to justify the effective granting of fundamental rights to the government.\(^3^4^4\) For the federalists, however, any risks posed by this grant of discretionary authority to Congress was not truly

\(^{341}\) See, e.g., Wilson, supra note 337, at 341 (defending omission of civil jury trial right and assuring that, in any event, "the oppression of governmen[t] is effectually barred, by declaring that in all criminal cases the trial by jury shall be preserved").

\(^{342}\) See id. at 337, 340-41 (stating that claim that "trial by jury is abolished in civil cases" is "disingenuous" and right is secured because Congress "is a faithful representation of the people"); see also Edmund Pendleton, Debates in the Convention of the Commonwealth of Virginia on the Adoption of the Federal Constitution (June 30, 1788), in 3 Elliott's Debates, supra note 19, at 546 (stating that "there was no exclusion of (jury trials) in civil cases, and that it was expressly provided for in criminal cases"). Furthermore, as to abolishing the right to a jury trial, there was never "any tendency towards it." Id. Thus, despite their acknowledgment that the Constitution by its terms did not limit Congress' discretion as to jury trials, the federalists took great offense at the suggestion that they had abolished or relinquished this fundamental right.

\(^{343}\) See An American Citizen IV: On the Federal Government, supra note 230, at 434-35 (arguing that "[t]he known principles of justice, the attachment to trial by jury whenever it can be used, the instructions of the state legislatures, the instructions of the people at large" and operation of federal regulations "on the property of a president, a senator, a representative, a judge, as well as on that of a private citizen, will certainly render those regulations as favorable as possible to property"); Wilson, supra note 221, at 516 (contending that "[w]here the people are represented—where the interest of government cannot be separate from that of the people (and this is the case in trial between citizen and citizen)—the power of making regulations with respect to the mode of trial may certainly be placed in the legislature").

\(^{344}\) See Letter from Richard Henry Lee to Governor Edmund Randolph (Dec. 6, 1787), in 14 Ratification of the Constitution, supra note 23, at 364, 369 (stating that suggestion that remedy to omissions of natural rights, including civil juries, will lie with legislature misses point that "a succeeding assembly may repeal the provisions"). Lee went on to say that where the "evil" rests on a "constitutional bottom," the "remedy" should not be: placed upon "the mutable ground of legislation." Id.; see also Letter from Thomas Jefferson to Uriah Forrest (Dec. 31, 1787), in 14 id. at 489 ("I have a right to nothing which another has a right to take away; & Congress will have a right to take away trials by jury in all civil cases."); An Old Whig VIII, supra note 328, at 53 (summarizing argument that "[i]f too much power is vested in [Congress], they will not abuse it" but will "divest themselves of it"). Instead, the author contended that the people "ought not to repose all our liberty and all our happiness in the virtue of our future rulers." Id.; see Patrick Henry, Debates on the Convention of the Commonwealth of Virginia on the Adoption of the Federal Constitution (June 20, 1788), in 3 Elliott's Debates, supra note 19, at 539, 544 (countering federalist assurances that Congress would honor right because of strong feelings as to its basic nature with suggestion that "the enormity
threatening because, after all, "the general genius of a government is all that can be substantially relied upon" for securing liberty, and specific constitutional provisions "have far less virtue and efficacy than are commonly ascribed to them."\textsuperscript{345}

b. Standing Armies in Peacetime

Modern Americans have difficulty grasping the importance of the standing army issue to many founding-era Americans. The foremost authority on constitutional issues surrounding the American Revolution, John Phillip Reid, has written that there were "few principles better established in eighteenth-century law than that a standing army was unconstitutional."\textsuperscript{346} The question of standing armies went directly to popular freedom because standing armies had historically been tools for establishing tyrannical government. Not surprisingly, constitutional limitations on standing armies were found in the pre-1787 state constitutions,\textsuperscript{347} and the omission of a specific limitation on the power to create a standing army was an oft-stated objection to the proposed Constitution.\textsuperscript{348} In turn, such of the offence is urged as a security against its commission"). Henry implored the people not "to concede every thing to the virtue of Congress." \textit{Id.}

\textsuperscript{345} The Federalist No. 85, supra note 337, at 574. Thus, Hamilton observed that, although civil juries were controlled by legislative discretion in Great Britain as well as in Connecticut, the right to jury trial had been less abused in those places than in New York in the years since the American Revolution despite the inclusion of such a limitation in the state constitution of New York. \textit{See id.} at 573-74 (comparing rights in areas with and without protection under Constitution).

\textsuperscript{346} John Phillip Reid, The Concept of Liberty in the Age of the American Revolution 49 (1988). Indeed, Reid notes that among the colonies' grievances leading to the American Revolution was the claim that England had illegally kept standing armies in the colonies in time of peace. \textit{See id.}

\textsuperscript{347} \textit{See Virginia Declaration of Rights, reprinted in 7 Federal and State Constitutions, supra note 140, at 3814 (providing "that standing armies, in time of peace, should be avoided, as dangerous to liberty"). Pennsylvania and North Carolina also had provisions against standing armies in peacetime. \textit{See Pa. Const. of 1790, art. I, § 22 (providing that "no standing army shall, in time of peace, be kept up without the consent of the legislature"); see also N.C. Const. of 1776, art. I, § 30 (stating that "standing armies, in time of peace, are dangerous to liberty"). Several other states had provisions recognizing the danger of standing armies, but only requiring the consent of the legislature. \textit{See, e.g., Ky. Const. of 1799, art. I, § 24 (stating that "no standing army shall, in time of peace, be kept up, without the consent of the legislature" (emphasis added))).

\textsuperscript{348} \textit{See Philadelphiensis IX, Phila. Freeman's J., Feb. 6, 1787, reprinted in 16 Ratification of the Constitution, supra note 23, at 58 (observing that under Constitution lives, liberties and property of American citizens will be subject to the "president general" who "to all intents and purposes" will be "a king elected to command a standing army"); Warren, supra note 316, at 280 (arguing that standing armies "have been the nursery of vice and the bane of liberty from the Roman legions . . . to the planting the British cohorts in the capitals of America" and that "freedom revolts at the idea" that they are necessary for safety of nation); The Dissent of the Minority of the Pennsylvania Convention (Dec. 18, 1788), in 15 Ratification of the Constitution, supra note 23, at 33 (suggesting that purpose of authorizing permanent standing army was recognition that Constitution could
limitations were among the amendments proposed by state ratifying conventions, as well as proffered by such important figures as Thomas Jefferson and Richard Henry Lee, as among the essential guarantees to be included in a bill of rights. Consequently, Leonard Levy lists the prohibition on standing armies as among the "positive rights . . . deriving from the social compact that creates government" that he claims the Ninth Amendment was intended to secure.

Lawson and Granger suggest that the jurisdictional limitation they find in the Sweeping Clause prohibited the enactment of laws that violated any of the rights that would later be included in the Bill of Rights, as well as "those rights the violation of which the general public in 1789 would have thought 'improper.'" In these terms, it is difficult to imagine a more fitting candidate for inclusion among the unenumerated rights secured by a broad jurisdictional interpretation of the Sweeping Clause. For example, there is no provision in the Constitution that purports to relinquish this right. Congress' powers to declare war and to raise an army could readily be construed, given internal limits established by a generally worded jurisdiction-defining clause, as not including authority to engage in the improper act of creating a standing army in peacetime.

There is a big problem, however: Congress was deliberately granted the discretion to keep a standing army, and this deliberate delegation

only be implemented by force); Essay of Brutus VIII, N.Y. J., Jan. 10, 1788, reprinted in 2 The Complete Anti-Federalist, supra note 41, at 405, 407 (stating that armies "have generally proved a scourge to a country" and "destructive of their liberty"). Brutus noted that it is "indeed impossible that the liberties of the people in any country can be preserved where a numerous standing army is kept up." Essay of Brutus VIII, supra, at 407. See generally Joyce Lee Malcolm, To Keep and Bear Arms 155-56 (1994) (discussing threat of standing armies).

349. See Amendments Proposed by the States, in Creating the Bill of Rights, supra note 3, at 16, 17 (containing New Hampshire's tenth proposed amendment); id. at 17, 19 (containing Virginia's seventeenth amendment); id. at 21, 22, 25 (containing New York's proposed amendment).

350. Letter from Thomas Jefferson to James Madison, supra note 332, at 249, 250 (listing "protection against standing armies" as among six rights that should be included in a bill of rights to be added to Constitution); Richard Henry Lee, Proposed Amendments (Oct. 16, 1787), in 8 Ratification of the Constitution, supra note 23, at 65 (including prohibition on keeping standing armies absent vote of two-thirds of each house of the legislature as among handful of individual rights provisions he would insert into Constitution).

351. Levy, supra note 7, at 278-79. Levy reasons that the right to be free from standing armies in time of peace was "among existing positive rights protected by various state laws, state constitutions, and the common law," and that such rights "could legitimately be regarded as rights of the people before which the power of government must be exercised in subordination." Id. at 279.

352. Lawson & Granger, supra note 7, at 330.

353. See U.S. Const. art. I, sec. 8, cl. 12. For a helpful summary of the Convention's decision making about military matters generally, confirming that the decision to permit a standing army was deliberate and reflected the carefully considered views of those most responsible for giving us the Constitution, see Malcolm, supra note 348, at 151-55.
of authority was universally understood even though it was cast as a general grant of power rather than as an express relinquishment of a right.\textsuperscript{354} Moreover, this initial decision was defended by the leading supporters of the Constitution without second thoughts; the attempt to insert such a limitation in the Bill of Rights was, in the first instance, rejected by Madison, the initial draftsman, and ultimately rejected by the Congress that recommended amendments to the states.\textsuperscript{355} Equally important, among the rationales for this decision to leave discretion in Congress were ones rooted in the general concerns relating to limiting government described above.

For example, when Madison wrote to Jefferson of his concerns about inflexible prohibitions, he used the issue of standing armies in peacetime as a primary example.\textsuperscript{356} No constitutional prohibition would be heeded, he argued, if Britain or Spain established armies near America’s borders.\textsuperscript{357} More generally, Roger Sherman argued that such a ban could “embarrass the public concerns and endanger the liberties of the people” so that “it might become improper strictly to adhere to” such a ban.\textsuperscript{358} Hamilton concurred, bluntly challenging the demand for such a limit in terms that Lawson and Granger have described as jurisdictional: “With what colour of propriety could the force necessary for defence, be limited by those who cannot limit the force of offence?”\textsuperscript{359} As Isaac Kramnick has perceptibly observed, Hamilton’s preference for a standing army reflected both a liberal skepticism as to the viability of expecting a citizen militia to adequately provide for the security of the nation’s frontiers and a convic-

\textsuperscript{354} In defending the Convention’s decision as to standing armies, James Madison framed the issue by posing this question: “[W]as it necessary to give an indefinite power of raising troops, as well as providing fleets; and of maintaining both in peace, as well as in war?” \textit{The Federalist No. 41, supra} note 222, at 270.

\textsuperscript{355} See \textit{Creating the Bill of Rights}, \textit{supra} note 3, at 30 n.16, 36 n.13 (noting that both congressional houses rejected proposed amendments restricting Congress’ power to create standing armies). Despite the proposals for amendments relating to standing armies, no such amendment is found among Madison’s proposal. See Madison Resolution, \textit{supra} note 49, at 11-14.

\textsuperscript{356} See Letter from James Madison to Thomas Jefferson, \textit{supra} note 264, at 299, 300.

\textsuperscript{357} See id.

\textsuperscript{358} Roger Sherman, \textit{The Letters of a Countryman}, reprinted in \textit{Essays on the Constitution} 222 (Paul Ford ed., 1892); \textit{accord} Iredell, \textit{supra} note 313, at 95-96 (discussing importance of standing armies in time of peace to protect citizens).

\textsuperscript{359} \textit{The Federalist No. 41, supra} note 222, at 270; \textit{accord} Wilson, \textit{supra} note 337, at 341 (noting that, although standing armies have “always been a topic of popular declamation,” all nations find it “necessary and useful to maintain the appearance of strength in a season of the most profound tranquility,” no one “who regards the dignity and safety of his country, can deny the necessity of a military force, under the control and with the restrictions which the new constitution provides”). \textit{But see John DeWitt, To the People of America} (Jan. 3, 1788), reprinted in \textit{The Origin of the Second Amendment} 211, 214 (David E. Young ed., 1991) (arguing Wilson’s statement shows that he and others were “for unequivocally establishing [standing armies] in time of peace” and that, even worse, “to object to them, is a mere popular declamation!”).
tion that the future of the nation lay in becoming a powerful commercial state that was capable of protecting its interests around the world.\textsuperscript{360}

The point of these arguments in most instances was not that standing armies were clearly desirable or presented no threat whatsoever to liberty. Rather, it was that there was a greater danger involved in withholding a power that might prove essential. Even if the situation presented in 1787 did not require or justify reliance on standing armies, it was contended that the necessity "might in [the] future exist, of maintaining large armies and navies."\textsuperscript{361} The parties to this conflict weighed the competing values differently and reached differing conclusions but they all understood that they were deciding for greater protection of national security or greater security for popular liberty against potentially tyrannous government. Moreover, neither side of the debate believed that the issue would ultimately be resolved by the judiciary under the guise of construing the traditional rights held by the people.

3. \textit{The Content of the Bill of Rights: The Rights Not Added}

The Framers' competing views about how to strike the balance between liberty and government energy, especially within a constitution that was to endure for the indefinite future, is reflected as well in the first Congress' decisions relating to what became the Bill of Rights. Madison set

\textsuperscript{360} See ISAAC KRAMNICK, \textit{The Discourse of Politics in 1787: The Constitution and Its Critics on Individualism, Community, and the State}, \textit{reprinted in Perfect Union, supra} note 309, at 166, 173-74, 210-11 (discussing implications of Hamilton's preference for standing armies); see also \textit{The Federalist No. 24, supra} note 233, at 156 (arguing against use of citizen militia in protecting frontier against various threats on ground that citizens in militia would be "dragged from their occupations and families to perform that most disagreeable duty in times of profound peace"). Hamilton argued that such "frequent rotation of service and the loss of labor, and disconcertion of the industrious pursuits of individuals, would form conclusive objections to the scheme." \textit{The Federalist No. 24, supra} note 233, at 156. Kramnick observed that Hamilton's argument "was a further blow to the ideals of civic virtue, which had always seen professional armies as evil incarnate, undermining the citizen's self-sacrificial participation in the defense of the public realm that had been the premise of the militia." KRAMNICK, \textit{supra}, at 173-74.

Kramnick powerfully argued that the standing army debate is thus a reflection of important differences between Hamilton, and other federalists, and the antifederalist critics of the Constitution, who were rooted in competing models of traditional republicanism, on the one hand, with its emphasis on subordination of private interest to the public good, and an emergent liberal individualism, on the other hand, with its emphasis on private rights and personal autonomy. \textit{See id.} at 169 (stating that proper interpretation requires consideration of both views). In an environment of such fundamental differences of perspective and philosophy which lead to disagreements about the necessity for including what had been viewed as fundamental protections, it seems especially unlikely that there would be agreement on a general limiting provision.

\textsuperscript{361} James Duane, \textit{The Debates in the Convention of the State of New York} (July 1, 1788), in 2 ELLIOT'S \textit{DEBATE, supra} note 19, at 379. In some cases, as with Alexander Hamilton, this anticipation of potential future exigencies reflected a belief about the destiny of the nation in the world of states.
the tone, making it clear from the outset that his purpose was to “proceed with caution” so as to make the “revisal” of the Constitution “a moderate one.”\textsuperscript{362} He thus reassured his colleagues that he intended to support inclusion of constitutional safeguards “against which I believe no serious objection has been made by any class of our constituents” and as to which “they have been long accustomed to have interposed between them and the magistrate who exercised the sovereign power.”\textsuperscript{363} Madison’s goal was to provide for all “essential rights,”\textsuperscript{364} but to omit all others, and this determination became the source of debate in Congress. By others’ lights, Madison sometimes erred on either side in striking the balance between popular liberty and government energy, and the debate in Congress frequently turned to the question of precisely how to strike that balance.

Perhaps the classic example is the proposed clause that would have exempted from military service any one who conscientiously objected to bearing arms in a military context.\textsuperscript{365} Several state declarations of rights included such exemptions, and one could certainly build an argument that such exemptions embodied a natural right—freedom of religion or, more broadly, freedom of conscience.\textsuperscript{366} Being apprised of the full scope of the Sweeping Clause as a limiting provision, the proponents of this constitutional right would not have hesitated in asserting that a law compelling service by those with religious scruples should have been deemed improper and, hence, unconstitutional; had they only known that the Ninth Amendment recognized all the traditional and natural rights that

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\begin{enumerate}
\item Madison, supra note 3, at 79.
\item Id.; see also Letter from James Madison to Edmund Randolph (June 15, 1789), in 12 Madison’s Papers, supra note 268, at 219 (explaining that he would limit his amendments to those “which are important in the eyes of many and can be objectionable in those of none”). Madison’s greatest concern, of course, was to avoid structural amendments that would undermine the system of government proposed by the Philadelphia Convention, but he used this criteria in assessing proposed popular rights as well.
\item Letter from James Madison to George Eve (Jan. 2, 1789), in 11 Madison’s Papers, supra note 268, at 404-05 (stating that Congress should recommend “provisions for all essential rights”).
\item See The Ratifications of the New Federal Constitution (Augustine Burke ed., 1788), reprinted in Contexts of the Bill of Rights 135 (Stephen L. Schechter & Richard B. Bernstein eds., 1990) (containing Virginia’s nineteenth proposed amendment in declaration of rights which provided that “any person religiously scrupulous of bearing arms ought to be exempted upon payment of an equivalent to employ another to bear arms in his stead”); id. at 140-41 (containing North Carolina’s nineteenth proposed amendment with proposal similar to Virginia’s). The provision was retained in the House Resolution proposing amendments. See House Resolution and Articles of Amendment (Aug. 24, 1789), in Creating the Bill of Rights, supra note 3, at 37, 38 (discussing exemption clause in fifth article). On September 4, however, the Senate voted to amend the proposed article to eliminate the conscientious-objection guarantee. See id. at 38-39 n.13.
\item See, e.g., N.H. Const. of 1784, pt. 1, art. 13 (providing that “[n]o person who is conscientiously scrupulous about the lawfulness of bearing arms, shall be compelled thereto, provided he will pay an equivalent”).
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they could not succeed in inserting into the Constitution, they undoubtedly would have concurred as well that this right would be among that amendment’s “unenumerated rights.” Madison believed it fundamental enough to warrant inclusion in the Bill of Rights.

The historical evidence, however, reveals that the proposed limiting clause was opposed by others precisely on the grounds that conscientious objection is not a natural right, given the claim of civil society on individuals to defend the community against external threat, and that legislative discretion should not be curtailed when it is impossible to foreclose the possibility that exigencies warranting compulsory service might present themselves. Once again, opposition to inclusion of such a guarantee did not necessarily reflect hostility toward the interests of conscientious objects so much as a preference for placing trust in the legislative branch to balance the competing values. Despite this determination, how-

367. See Elias Boudinot, Debates in the House of Representatives (Aug. 22, 1789), in Creating the Bill of Rights, supra note 3, at 198 (stating that Constitution should “let every person know that we will not interfere with any person’s particular religious profession,” and that to omit such provision will “lead such persons to conclude that we mean to compel them to bear arms”). Representative Boudinot asked: “[W]hat justice can there be in compelling [conscientious objectors] to bear arms?” Id.

368. See Madison Resolution, supra note 49, at 12 (providing that “no person religiously scrupulous of bearing arms, shall be compelled to render military service in person”).

369. See James Jackson, Debates in the House of Representatives (Aug. 17, 1789), in Creating the Bill of Rights, supra note 3, at 182, 183 (arguing that provision “was unjust” to others “unless the constitution secured an equivalent”); Roger Sherman, Debates in the House of Representatives (Aug. 17, 1789), in Creating the Bill of Rights, supra note 3, at 182, 183 (stating that he did not “see an absolute necessity for a clause of this kind,” given that “[w]e do not live under an arbitrary government” and considering that, without such clause, many members of religious sects opposed to war “will turn out” and “defend the cause of their country”). Sherman believed it would be “improper to prevent the exercise of such favorable dispositions” so long as nations are disposed to fight wars. Id.; see Egbert Benson, Debates in the House of Representatives (Aug. 17, 1789), in Creating the Bill of Rights, supra note 3, at 184 (arguing that matter should be left “to the benevolence of the legislature,” given that “[n]o man can claim this indulgence of right” because, although it may be “religious persuasion,” it is “no natural right”). Representative Benson concluded, therefore, that the issue “ought to be left to the discretion of the government,” stating that it is “extremely injudicious to intermix matters of doubt with fundamentals,” especially given that the legislature will likely “indulge” such persons. Id. at 184; see Thomas Scott, Debates in the House of Representatives (Aug. 22, 1789), in Creating the Bill of Rights, supra note 3, at 198 (viewing issue as “a matter of legislative right altogether” and arguing that under such provision “we can neither call upon such persons for service nor an equivalent”). If the country was unable to call upon conscientious objectors for military service, Representative Scott feared that the result would be that “you can never depend upon your militia.” Id. Scott believed that such a condition would lead to the inevitable conclusion that the country must have “recourse to a standing army,” a state which would then lead to the undermining of the “right of keeping arms.” Id. Scott also feared that such a provision may not have permanence given that “religion is on the decline” and, thus, the provision would become merely a pretext “to get excused” from military service. Id.
ever, the Sweeping Clause as explicated by Lawson and Granger would remand the question to an unelected federal judiciary, opening the door to the reversal of the decision of the first Congress.

The same divisions over balancing the claims of government and of individuals is almost certainly reflected in the decision of Congress not to include an antimonopoly provision. Some state declarations of rights had included such limitations, and Thomas Jefferson included the antimonopoly limitation among six provisions to which the people are entitled under any constitution. Fears of federally created monopolies were also voiced during the ratification struggle, and Jefferson's judgment was concurred with by several state-ratifying conventions. Madison, by contrast, responded to Jefferson's suggestion with the view that, although some grants of monopoly are inconsistent with equality under law, the granting of monopolies is a necessary tool in wise government. Unsurprisingly, Madison omitted a prohibition on the granting

370. See Md. Const. of 1776, art. 41 (stating that “monopolies are odious, contrary to the spirit of a free government, and the principles of commerce; and ought not to be suffered”); Mass. Const. of 1780, pt. 1, art. 6 (stating that “[n]o man, nor corporation, or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public”); N.C. Const. of 1776, art 1, § 34 (stating “[t]hat perpetuities and monopolies are contrary to the genius of a free State, and ought not to be allowed).

371. See Letter from Thomas Jefferson to James Madison, supra note 329, at 482 (stating that Constitution should have bill of rights “providing . . . for freedom of religion, freedom of the press, protection against standing armies, restriction against monopolies, the eternal & unremitting force of the habeas corpus laws, and trials by jury in all matters of fact triable by the laws of the land & not by the law of Nations”); see also id. at 483 (arguing that “a bill of rights is what the people are entitled to against every government on earth, general or particular, & what no just government should refuse, or rest on inference”).

372. Cf. Elbridge Gerry, The Constitutional Convention, A Second General Convention, and a Bill of Rights (Sept. 15, 1787), reprinted in 13 Ratification of the Constitution, supra note 23, at 199 (“Under the power over commerce, monopolies may be established.”).

373. See The Ratifications of the New Federal Constitution, supra note 365, at 124 (providing in Massachusetts' ratification “[t]hat Congress erect no company of merchants, with exclusive advantages of commerce”); id. at 118 (providing in New York ratification “[t]hat the Congress [does] not grant monopolies, or erect any company with exclusive advantages of commerce); id. at 133 (providing “[t]hat no man or set of men are entitled to exclusive or separate public emoluments or privileges from the community, but in consideration of public services”).

374. Letter from James Madison to Thomas Jefferson, supra note 264, at 300. Madison also suggested that monopolies posed a less serious risk under republican governments, where power is in the hands of the many rather than the few. See id. (expressing doubts about real risks of monopolies). He confirmed that his concern was that “the few will be unnecessarily sacrificed to the many” rather than the converse (which is the evil posed by monopolies). Id. Madison saw democracy as an adequate check on the tendency to grant unwarranted privileges; but democratic decision making more clearly risked the deprivation of the rights of those with wealth and property. See id. Madison's suggestion that the need for constitutional protection of rights might turn on the structural analysis and the likelihood
of monopolies in his proposed amendments, and when such a limitation was proposed in the first Congress, it was rejected.\textsuperscript{375}

Interpreting the precise significance of the omission of an antimonopoly clause is a fairly tricky business. Unlike the issues of standing armies and civil juries, where the Constitution clearly grants sufficient authority to invade the interests that many would protect constitutionally, in this case there is room for debate regarding whether the Constitution is properly read as granting Congress authority to grant monopolies of any kind.\textsuperscript{376} As the Ninth Amendment teaches us, the mere omission of a limiting provision is not properly taken as evidence that Congress holds such authority; in fact, this very sort of inference was the one that the federalists had feared and had sought to draft against.\textsuperscript{377} Madison, on the

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that ordinary political processes will adequately protect particular rights anticipates modern suggestions that the exercise of judicial review should be affected by similar evaluations. \textit{See id. See generally Ely, supra note 15, at 4-7 (discussing democracy and judicial review).}
\end{quote}

375. \textit{See Tucker and Gerry Amendments (Aug. 22, 1789), in Creating the Bill of Rights, supra note 3, at 36 (recording antimonopoly provision introduced in House on August 22, 1789, and considered in Senate on September 7, 1789); see also Additional Articles of Amendment, in Creating the Bill of Rights, supra note 3, at 41, 42 (providing "[t]hat Congress shall not erect any Company of Merchants with exclusive advantages of Commerce"). The omission did not go unnoticed, as Jefferson wrote to Madison expressing disappointment that a limiting provision as to monopolies was not included. \textit{See Letter from Thomas Jefferson to James Madison (Aug. 28, 1789), in 2 Schwartz, supra note 87, at 1143 (noting that he would "have been for going further," and listing antimonopoly provision as among "alterations and additions" he would make to proposed amendments).}

376. \textit{See Raoul Berger, Government by Judiciary 378, 386 (1977) (suggesting Philadelphia Convention’s rejection of proposal to include power of incorporation among Congress’ powers confirms intent to withhold such power from Congress); Hans W. Baade, “Original Intent” in Historical Perspective: Some Critical Glosses, 69 Tex. L. Rev. 1001, 1004 (1991) (describing how, under originalist interpretation, no power would exist without text). The evidence, however, is far more equivocal than such claims suggest, inasmuch as the Convention notes reflect the views of only a few delegates, and some of the discussion emphasized the impact of such a provision on the prospects for ratifying the Constitution. See Thomas B. McCaffee, Reed Dickerson’s Originalism—What it Contributes to Contemporary Constitutional Debate, 16 S. Ill. U. L.J. 617, 642-43 (1992) (discussing compromises made in ratification process); H. Jefferson Powell, Rules for Originalists, 73 Va. L. Rev. 659, 684-85 (1987) (same). Moreover, James Wilson expressed the view that the power to incorporate mercantile monopolies was implicit in the power to regulate commerce. \textit{See 2 The Records of the Federal Convention of 1787, supra note 222, at 616 (containing discussions at federal convention between Rufus King and James Wilson). No one suggested in response that such a construction would be precluded by the Sweeping Clause, and George Mason used Wilson’s position as a reason for opposing the Constitution. See George Mason: Objections to the Constitution (Oct. 7, 1787), in 13 Ratification of the Constitution, supra note 23, at 350 (objecting that “[u]nder [the federalists’] own Construction of the general Clause at the End of the enumerated Powers, the Congress may grant Monopolies in Trade & Commerce”).}

other hand, had proposed inclusion of a general power of incorporation as among the grants of authority to Congress—a grant of power that was opposed on the ground that it would include authority to establish "mercantile monopolies"—and also opposed inclusion of an antimonopoly provision within a bill of rights as a matter of general philosophy.\footnote{378} He certainly would have been greatly surprised to learn that the grant of exec- tory power in the Sweeping Clause included general words of limitation by which Jefferson’s conflicting Clause view might be written into the Constitution.\footnote{379}

The final illustration of a fundamental right that was rejected to the dismay of its proponents is the right of the people to instruct their representatives. At first blush, this might strike some as an odd candidate for a limitation that might be read in to the Necessary and Proper Clause (even presuming the broad jurisdictional reading offered by Lawson and Granger). It is hardly a natural right that individuals were thought to bring to the social contract, nor is it a long-standing, customary right under the English constitution. On the other hand, it was a right that had been recognized in fundamental law in the founding era, which presumably would have been a logical place to look for implied jurisdictional limits on delegated power.\footnote{380} Equally important, an argument can be made that

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\footnote{378}{See also \textit{The Records of the Federal Convention of 1787}, supra note 222, at 616 (discussing Madison’s proposal that Congress be granted general power of incorporation).}

\footnote{379}{It is possible, of course, that the provision was not included among the amendments proposed by Congress because it was perceived as clearly unnecessary in light of the limited powers of Congress. Considering, however, that the fear of monopolies was commonly expressed during the ratification struggle, and that Wilson and others were on record as believing that Congress held a power to create commercial monopolies under its commerce power, it seems more likely that the failure to include such a provision as at least a cautionary guarantee reflects that many were opposed to this sort of intrusion on governmental flexibility. What would have surprised those who believed that Congress’ powers included such authority, in any event, is the thought that the fight over Congress’ authority would not be over the meaning of the grants of federal powers, but rather over the existence of an unwritten limitation on those powers that had been smuggled into the Constitution in the guise of a clause authorizing executory power to Congress. For a discussion of the remarkable and historically suspect view that Madison opposed the constitutionality of the first bank on the ground that it violated the right to protection against monopoly secured by the Ninth Amendment, see \textit{infra} notes 402-12 and accompanying text.}

\footnote{380}{See, \textit{e.g.}, \textit{Vt. Const.} of 1777 (granting rights to instruct representatives).}
this right flows from one of the fundamental principles of the American founding, a principle that was itself described as a fundamental natural right, the doctrine of popular sovereignty. As we have seen, the Federal Constitution had itself been justified as an exercise of the “unalienable and indefeasible” right of the people to reform or alter government “in such manner as shall be by that community judged most conducive to the public weal.” Finally, more than one ratifying convention proposed a right of instruction among their proffered amendments.

As with the restrictions relating to standing armies and creation of monopolies, however, although the right of instruction was proposed before Congress, notwithstanding Madison’s omission of such a provision from his proposed amendments, it was defeated. The reasons are clear, and they reflect competing visions both of the political theory underlying

381. See Samuel Chase, BALTIMORE MD. J., Feb. 13, 1787, quoted in Wood, supra note 90, at 371 (arguing that sovereignty of people “is like the light of the sun, native, original, inherent, and unlimited by human authority” while power of their “rulers or governors” is “like the reflected light of the moon, and is only borrowed, delegated and limited by the grant of the people”); see also James Wilson, Address to the Pennsylvania Ratifying Convention (Thomas Lloyd ed., Nov. 24, 1787), reprinted in 2 Ratification of the Constitution, supra note 23, at 361-62 (contending that “the supreme, absolute, and uncontrollable power remains in the people” with consequence that “the people are superior to our constitutions” and can thus change “the constitutions whenever and however they please”). Wilson contended that this right was one “of which no positive institution can ever deprive them.” Wilson, supra, at 362. Unsurprisingly, advocates of the right of instruction in the first Congress invoked this fundamental principle of American constitutionalism. See Elbridge Gerry, Debates in the House of Representatives (Aug. 15, 1789), in Creating the Bill of Rights, supra note 3, at 152 (arguing that if “the sovereignty resided in the people,” he “could not conceive why they had not the right to instruct and direct their agents at their pleasure”).

382. PA. CONST. of 1776 (emphasis added).

383. See The Ratifications of the New Federal Constitution, supra note 365, at 116 (containing New York’s proposed amendment providing “[t]hat the people have a right peaceably to assemble together to consult for their common good, or to instruct their representatives”); see also id. at 1 (proposing Virginia amendment for “right peaceably to assemble together to consult for the common good, or to instruct their representatives”). In the minds of its advocates, the power of the sovereign people to instruct their representatives was closely related to their right to assemble together and to petition their government. If inclusion of First Amendment freedoms were simply unnecessary in the Federal Constitution because the jurisdictional limit embodied in the Sweeping Clause was already in place, it might plausibly be contended that the right of instruction was among the rights thereby retained by the people. The only distinction is that, although many viewed the right of instruction as a corollary of the doctrine of popular sovereignty and as closely related to the people’s right to assemble and petition, many opposed that view as well. Under the construction of the Sweeping Clause offered by Lawson and Granger, however, this very dispute about the implications of first principles of our constitutional order presumably was consigned to the judicial branch under their duty to explicate the meaning of the Constitution.

384. See House Committee Report (July 28, 1789), in Creating the Bill of Rights, supra note 3, at 29, 30 n.11 (recording that Rep. Tucker proposed to insert language guaranteeing people’s right “to instruct their representatives,” but that motion was soundly defeated).
the Constitution and of the criteria for inclusion of constitutional limits on government. The guarantee of a right of instruction rested on a conception of representation that many rejected\textsuperscript{385} and, in many minds, it also fit the description of a guarantee that could not serve representative government in all times and seasons.\textsuperscript{386} Thus, Madison spoke in opposition, suggesting that "this right of instructing was at least a doubtful right" and that the amendments to go to the people should consist of "simple and acknowledged principles" that "were certain and fixed."\textsuperscript{387} In this setting, as in the others we have reviewed, the question of whether the independent exercise of authority by representatives is constitutionally improper was resolved by the decision not to insert any such limitation on the legislative power; no one would have thought that it might be addressed and, perhaps, resolved differently by a court consisting of judges who were sympathetic with the idea that the right of instruction is a corollary of democratic government.\textsuperscript{388}

\textsuperscript{385} See George Clymer, Debates in the House of Representatives (Aug. 15, 1789), in \textit{Creating the Bill of Rights}, \textit{supra} note 3, at 151 (contending that guarantee "would destroy the very spirit of representation itself, by rendering Congress a passive machine instead of a deliberative body"); Michael Stone, Debates in the House of Representatives (Aug. 15, 1789), in \textit{Creating the Bill of Rights}, \textit{supra} note 3, at 156 (stating guarantee "would change the nature of the constitution" away from being "a representative government"). It is fair to say, in fact, that the Federal Constitution as a whole embodied a view that was far more suspicious of popular authority, and hence more oriented toward deliberative government—as reflected in the terms of legislative office and the system of checks and balances—than the view of popular authority that the "right of instruction" symbolized.

\textsuperscript{386} See Thomas Hartley, Debates in the House of Representatives (Aug. 15, 1789), in \textit{Creating the Bill of Rights}, \textit{supra} note 3, at 151 (arguing that "practice on this principle might be attended with danger" because there would be "periods when from various causes the popular mind was in a state of fermentation and incapable of acting wisely").

\textsuperscript{387} \textit{Id.} at 152. Madison also questioned more generally whether particular constituencies could in any way be equated with the sovereign people and, more particularly, whether representatives could properly be bound by popular instructions to act unconstitutionally. \textit{See id.} (discussing uncertainty surrounding right of instruction in proposed amendments).

\textsuperscript{388} The possibility of courts taking on such a task might once have seemed implausible, but it is difficult to make such a claim in an era in which the courts have entered not only the thicket of legislative apportionment based on a theory of political equality hardly spelled out in the Constitution, but have more recently invalidated state-created congressional term limits in part by relying on a supposed underlying theory of representative government. \textit{See U.S. Term Limits, Inc. v. Thornton}, 514 U.S. 779, 783 (1995) (holding that states cannot formulate diverse qualifications for their congressional representatives); \textit{cf.} Miller v. Johnson, 515 U.S. 900, 916 (1995) (holding that plaintiffs must prove race is "predominant factor" in drawing of district lines in racial gerrymander cases); Shaw v. Reno, 509 U.S. 630, 649 (1993) (articulating equal protection principles that govern state's drawing of congressional districts).
E. The Postratification Evidence From the Founding Era: The National Bank and the Crisis of 1798

Interpreters have often consulted postratification materials that might shed light on the historical meaning of a statutory or constitutional provision.\(^{389}\) Such materials are often relevant to determining the original public meaning of the provision at issue, even if they arguably deserve less weight than pre-adoption evidence.\(^{390}\) At the very least, postratification materials can often provide evidence to confirm conclusions supported by the pre-adoption materials or, alternatively, raise doubts or concerns about the analysis of those materials. One aid we receive from a careful examination of the debates after ratification is that we are able to test constitutional theories in a setting in which the political goal of ratifying the Constitution does not impact on the content of the debate.\(^{391}\) In this case, during the decade following ratification of the Constitution, two landmark constitutional debates ensued. They concerned the constitutionality of the proposed national bank and the infamous Alien and Sedition Acts and provided leading figures in the process of adopting the Constitution with an opportunity to address the meaning and scope of the Necessary and Proper Clause. The evidence from these heated but carefully constructed debates confirms that the Necessary and Proper Clause was viewed by leading spokespersons on all sides as a declaratory provision that merely confirmed what would have been implicit in the Constitution. The debates also confirm that the ratification argument that popular rights were protected by enumerated powers was understood as referring to the residuum from granted powers: the rights reserved were to be determined, and indeed defined, by reference to a proper construction of the powers granted by the Constitution.

1. The Debate Over the National Bank

Every law student who has studied *McCulloch v. Maryland* knows that the national bank controversy provided the nation with its first opportunity to determine whether priority would be given to ensuring that the national government would be effective, which arguably suggested wide

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389. See, e.g., Amar, *supra* note 2, at 1133-37 (looking to postratification views of Bill of Rights); Barnett, *supra* note 3, at 3 (relying on Madison's speech in debate over proposed bank before House of Representatives after Bill of Rights was ratified).

390. See, e.g., Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57 (1884) (giving great deference to construction placed on constitutional language by early congresses, comprised of "men who were members of the convention which framed it" and stating when such constructions "have not been disputed during a period of nearly a century" they are "almost conclusive").

391. The influence of politics, however, is ever-present in the universe of the Constitution, and particular political contexts and the goals of those offering views to be examined must always be taken into account. Our best hope for reaching sound conclusions, however, is that many important areas of consensus are reiterated by many individuals on both sides of particular debates.
latitude and flexibility with respect to choice of legislative means, or to the contrary, to ensuring that the national government remained a government of a few particular powers, thus preserving the sovereignty thought to have been retained for the states and the people.\textsuperscript{392} As is well-known, Madison and Jefferson both opposed the first national bank on constitutional grounds, and the constitutional issues were debated both in Congress and in the administration.\textsuperscript{393} In the published accounts of all these debates, two central points of relevance to our discussion stand out. First, the debate proceeded as an explication of the limited-powers scheme of the Constitution; the arguments of advocates often developed a general theory of implied authority, and more often than not contended that the Necessary and Proper Clause simply made explicit the generally accepted agency principle that the authority required to implement authorized powers is implicit in the powers themselves.\textsuperscript{394} In the same vein, no advo-

\textsuperscript{392} McCulloch v. Maryland 17 U.S. (4 Wheat.) 316, 325 (1819).

\textsuperscript{393} See, e.g., Thomas Jefferson, Opinion of Thomas Jefferson, Secretary of State, \textit{in Legislative and Documentary History of the Bank of the United States} 91, 93 (M. St. Clair Clarke & D.A. Hall eds., reprint ed. 1967) [hereinafter \textit{Documentary History of the Bank}] (insisting that "necessary" be understood as stating stringent requirement that power to be exercised by implication be "essential" to implementing enumerated power).

\textsuperscript{394} See 1 \textit{Abridgments of the Debates of Congress} 276 (1855) (Rep. Madison) [hereinafter \textit{Abridged Debates}] (stating Necessary and Proper Clause is "merely declaratory of what would have resulted by unavoidable implication"); 1 \textit{id.} at 279-80, 282 (Rep. Ames) (arguing that opponents presume safety lies in strict construction and relying upon hypothetical of war thrust upon nation when power to raise army had not been expressly given). Ames concluded that a more liberal construction of federal power is natural and safe, and clarified that he "did not pretend that [the Sweeping Clause] gives any new powers," but only that "it establishes the doctrine of implied powers." \textit{id.} at 282; \textit{see id.} at 282 (Rep. Sedgwick) (arguing general premise that it is "universally agreed that wherever a power is delegated for express purposes, all the known and usual means for the attainment of the objects expressed are conceded also"). Sedgwick also contended that the Sweeping Clause "did not restrict the power of the Legislature to enacting such laws only as are indispensable." \textit{id.} at 283; \textit{see id.} at 284 (Rep. Lawrence) (suggesting that "we ought not to deduce a prohibition by construction" and contending that "every power necessary to secure [the great objects of this Government] must necessarily follow"); \textit{id.} at 285 (Rep. Jackson) (arguing against "latitude contended for in constructing the constitution" and contending that opponents' construction of Sweeping Clause would lead to unlimited government); \textit{id.} at 290 (Rep. Boudinot) (relying on same general principle that all necessary means is to be implied); \textit{id.} at 293 (Rep. Stone) (complaining that bank's proponents admit "that the sweeping clause in the constitution confers no additional power," but then developing doctrine of implied powers that undermines limited-powers scheme).

Moreover, an important common denominator in the debate between John Marshall and the critics of his \textit{McCulloch} opinion is their joint claims that common law and general reasoning supported their position and that the opposing view presented a significant enlargement or restriction, respectively, of the preexisting rule. \textit{Compare A Virginian's "Amphictyon" Essays, supra note 194, at 64, 69-70 (characterizing \textit{McCulloch} as calling for "liberal construction"), with John Marshall, "A Friend to the Union" Essays (1819), reprinted in John Marshall's Defense, supra note 194, at 97-98 (noting Marshall's denial that \textit{McCulloch} calls for}
cate on either side of the debate advanced an argument that the Clause was intended to serve as an important limiting device.\footnote{395} Second, at the center of the debate over the constitutionality of the bank in the arguments advanced by both sides is the question of the nature and degree of fit required between the ends of the enumerated powers and the means of asserted ancillary powers (in this case, the bank bill).\footnote{396} Considering that individual rights concerns—albeit unenumerated individual rights—were at least arguably raised by the bank bill, the omission of any serious discussion of the Sweeping Clause's jurisdictional limits in favor of individual liberty provides fairly strong confirmation that such limits were not contemplated and that the word "proper" was never intended to do as much work as Lawson and Granger would have it do.

Most students of the subject are familiar with the arguments advanced by Jefferson and Hamilton, arguments that are replicated in Chief Justice Marshall's opinion in \textit{McCulloch}. For Jefferson, and subsequently for the advocates of the state of Maryland, the crucial step in the analysis was the insistence that the word "necessary" be understood as stating a stringent requirement; the power to be exercised by implication was required to be "liberal" or "latitudinous" construction and affirming that clause neither enlarges nor restrains powers of Congress), \textit{and Roane}, \textit{supra} note 215, at 117-21, 124-26 (summarizing authorities on common law and law of nations in support of relatively narrow application of principle of agency at stake and relying on assertions that clause adds nothing to powers given Congress and arguing that \textit{McCulloch} relies upon placement of clause in Article I, Section 8 as justification to enlarge implied powers). Both sides claim total victory based upon analysis of the rule governing implied authority had such a clause never been added to the Constitution, and both equally charge the other with manipulating the Necessary and Proper Clause to alter the rule otherwise established. No one argues that the Clause was intended to play a decisive role in the constitutional scheme, or indeed that it was to add anything; rather, they exchange charges that the opposing party is attempting to wrest its language to alter the established principle.

395. Edmund Randolph, \textit{Opinion of Edmund Randolph}, in \textit{Documentary History of the Bank}, \textit{supra} note 393, at 86, 87 (writing opinion as Attorney General for President Washington's consideration specifically addressing meaning of words "and proper"). After arguing that "if it has any meaning" it "does not enlarge the powers of Congress, but rather restricts them," Randolph concludes that just as friends of the bank should claim no advantage from this clause, its enemies should not "quote the clause as having a restrictive effect," but recognize it "as among the surplusage which as often proceeds from inattention as caution." \textit{Id.} at 89 (emphasis added). Randolph's argument comports with his own arguments before the Virginia Ratifying Convention that various prohibitions in the Constitution constituted exceptions to delegated powers—a position that is irreconcilable with the idea that those powers were already subject to a set of exceptions reflected in the requirement that executory laws be proper as well as necessary. \textit{See Alexander Hamilton, Opinion of Alexander Hamilton on the Constitutionality of a National Bank}, in \textit{Documentary History of the Bank}, \textit{supra} note 393, at 95, 99 (arguing against strict construction generally and noting Attorney General's admission that Necessary and Proper Clause "cannot be a rule of restrictive interpretation").

396. The focus was on the word "necessary" rather than the word "proper," and the debate concerned whether competing standards for explicating and applying that requirement better comport with the general goals of an effective, but nevertheless limited, national government.
essential to implementing the enumerated power, a power that must be inferred if the granted power is not to be nugatory.\textsuperscript{397} This was the key to ensuring that the national government remained a government of a few powers, leaving the many powers to the states.

It appears, however, Madison sensed the vulnerability of the strict necessity test to the objection that a great many things that are plainly incidental to, and logically comprehended within, a delegated power might nevertheless not be absolutely necessary.\textsuperscript{398} Without abandoning the insistence that mere convenience would not suffice, Madison offered the further suggestion that the nature of the power being asserted as ancillary should itself be an important area of focus; the question of the required fit between means and end would be determined on this approach both by how directly and immediately the ancillary power furthered an authorized end, as well as by the intrinsic importance of the power offered as a means to other ends.\textsuperscript{399} Under this test, the Constitution would “condemn the exercise of any power, particularly a great and important power, which is not evidently and necessarily involved in an express power.”\textsuperscript{400} Put somewhat more bluntly, the more important the implied power, the closer its connection must be to the express power if it is to be justified under the Necessary and Proper Clause. Despite the differences in emphasis between Madison and other opponents of the bill, however, in each case the question related to the nature of the relationship required between a law passed as a means and some enumerated power as an authorized end.\textsuperscript{401}

This focus on relationships between means and ends in explicating the Necessary and Proper Clause might be explained away on the ground that the bank bill presents a classic problem in federalism, but not a serious individual rights issue. On this view, the broad jurisdic- 
tional understanding of the Clause simply did not come into play in the course of

\textsuperscript{397} Jefferson, supra note 393, at 91, 93; see ABRIDGED DEBATES, supra note 394, at 292 (Rep. Giles) (defining standard of “necessary” as “that mean without which the end could not be produced”).


\textsuperscript{399} The general theme of remoteness, of concern lest a multiplication of means/ends connections be used to justify actions quite far removed from the original grant of power, is of course common to the analysis of Jefferson and Madison. Even so, Madison’s analysis emphasized the nature and importance of the power under scrutiny as a key to determining if the power is fit as a means to implementing delegated authority. In doing so, he attempts to confront the remoteness problem without undermining Congress’ power to select from among a range of obviously subsidiary actions where the implied power under consideration poses less of a threat to the balance our federal system sought to maintain.

\textsuperscript{400} 2 ANNALS OF CONG. 899 (1791).

\textsuperscript{401} The purpose of the present analysis is not to arrive at a complete theory of federalism or to resolve the historical debate between strict and liberal construction of federal power. Claims to the contrary notwithstanding, this author has never endorsed Chief Justice Marshall’s relatively broad construction of the Necessary and Proper Clause. But see, e.g., Barnett, supra note 26, at 783 (asserting that McAfee advocates “Marshallian” concept of necessity).
considering the proposed national bank. It is striking, however, that some
did object that the bank bill established a monopoly; indeed, it arguably
created the sort of monopoly that some had expressed fears that the Con-
stitution would be read to authorize. 402 In fact, two scholars have ad-
vanced the argument that, in attacking the bank bill, Madison relied upon
the Ninth Amendment and one of its unenumerated retained rights, in
providing a limited construction of the Necessary and Proper Clause (Law-
son and Granger would say a jurisdictional construction). 403 Specifically,
they contend that Madison focused on the fact that the bank created a
monopoly in violation of the equal rights of citizens. 404 To the contrary,
however, Madison’s speech in Congress opposing the bank illustrates that
his opposition to the bank was based on a straightforward application of
his own variation on the appropriate means/ends test for determining the
reach of the delegated powers. It did not rest on any sort of theory of
implied rights or on an affirmative rights reading of the Ninth Amend-
ment. 405 Accordingly, although the occasion of the debate over the bank
provided a perfect opportunity to assert unenumerated rights, the debate
turned instead on competing theories of the scope of enumerated powers

402. For a further discussion of the fear of a monopoly, see infra note 370-75
and accompanying text.

403. Barnett, supra note 26, at 781-86 (analyzing Madison’s position); Mayer,
supra note 26, at 318-19 (same).

404. Barnett, supra note 26, at 782 (noting that Madison focused on need to
guard against danger of congressional abuse of discretionary powers to enact laws
that were “neither necessary nor proper”); Mayer, supra note 26, at 319 (discussing
Madison’s view).

405. Barnett, supra note 26, at 781, 784-85 (contending that Madison relied
on Ninth Amendment to buttress conclusion that law affecting equal rights would
be subject to level of scrutiny appropriate in case of invasion of retained right and
would require especially strong necessity to be justified as falling within Congress’
powers).

Barnett explains away Madison’s prior concession that Congress’ discretion
might well include authority to invade traditional rights, absent their enumeration
in a bill of rights, by insisting that Madison made this concession only as to positive
rights, such as the prohibition against general search warrants. See id. at 778-82
(discussing Madison’s distinction between natural and positive rights). If it is
clear, however, that the prohibition on general search warrants stated a positive
right that would have received no security from the Necessary and Proper Clause
(and hence the Ninth Amendment), it would be equally clear that the right to be
free from government-created monopolies would give way to government power
under the same analysis. In each case, the right in question, just as with the right
to trial by jury, fits perfectly with Madison’s definition of a positive right—a right
that is not an inalienable natural right, but that “may seem to result from the
nature of the compact” and that “regulates the action of the community” in a way
viewed “as essential to secure the liberty of the people as any one of the pre-exis-
tent rights of nature.” Madison, supra note 3, at 81. The case against freedom
from monopoly being treated as a retained right under Barnett’s own analysis
would be strengthened further by the fact, shown above, that Madison did not view
freedom from monopoly as any sort of fundamental right, natural or positive, that
was deserving of protection in a bill of rights.
and the relationships between means and ends required by the Necessary and Proper Clause.

Moreover, this debate proceeded along straightforward lines of argument about the meaning of the grants of powers and the appropriate understanding of the Sweeping Clause when read against the backdrop of general principles of agency. Just as with the debate over ratification of the Constitution, implied rights advocates insisted upon reading their own special meaning into the dialogue over enumerated powers. Thus, Randy Barnett contends that Madison and others relied upon the old assurances about the limited nature of the delegated powers and offered such a guarantee of protection by adopting "a restrictive interpretation of necessity."406 Barnett's argument, however, appears simply to equate an additional reason for a relatively restrained reading of enumerated powers with a special limiting rule that precludes any reading of powers, together with the Sweeping Clause, in a way that would impinge on perceived fundamental rights.407 In effect, Barnett has reversed means and ends. A careful construction of enumerated powers and a fairly constrained reading of the Necessary and Proper Clause was for Madison a means of reserving popular rights (but equally reserved state power); Barnett, on the other hand, reads Madison's arguments as suggesting that the people's rights supply a distinctive means for limiting federal power and indeed justify a special rule for construing the delegated powers as they are perceived as impinging on rights.

The crucial premise of Madison's argument against the bank was precisely that the establishment of a bank was the exercise of a great and important power.408 As we have noted, for Madison an implication of the critical premise that these are limited grants of power is that there is a barrier to the exercise of a "great and important power, which is not evidently and necessarily involved in an express power."409 In supporting the thesis

406. Barnett, supra note 26, at 781 (finding significance in Madison's insistence that only restrictive reading of Sweeping Clause enabled Constitution's defenders to disprove that powers threatened fundamental rights). No one doubts, of course, that strict construction was favored because it better protected the states and the people; the question is whether it amounted to a rule that the powers would be invariably limited whenever they bumped up against independently defined retained rights.

407. See id. at 784 (describing McAfee as arguing that enumerated powers should not "be cabined in such a way as to protect unenumerated rights"). Read carefully, Barnett trades on a certain equivocal method of expression, continually blurring the line between a general method of strict (or at least stricter) construction, in which the question concerns displacing state power or individual prerogative, and a special rule for explicating the word "necessary" in the case of individual rights deemed sufficiently important to require more scrutiny.

408. See 2 ANNALS OF CONG. 1894-1909 (1791) (describing desire to limit congressional powers).

409. Id. at 1899. In elaborating on the analysis, Madison stated that the power to incorporate is by "its nature a distinct, an independent and substantive prerogative, which not being enumerated in the Constitution, could never have been meant to be included in it, and not being included, could never be rightly exer-
that it is undeniable "that the power proposed to be exercised [in the bank bill] is an important power," Madison relies on a number of critical factors, including the legislative nature of the proposed bank's power to make by-laws, the power granted to the bank to purchase and hold real property, the support the bank would receive from penal regulations and, finally, the particular point that the bank was effectively granted a monopoly in derogation of the "equal rights of every citizen." Madison's net conclusion is that these factors, when taken together, show that "the power of incorporation exercised in the bill" may not "be deemed an accessory or subaltern power, to be deduced by implication, as a means of executing another power."  

410. 2 ANNALS OF CONG. 1899.

411. Id. at 1900. The question whether the bank established a monopoly or was objectionable on that account did become a subject of some discussion, but no one advanced the argument that this was a ground for concluding that the bank bill was constitutionally improper under the Sweeping Clause or that this feature should prompt a unique, rights-protective stringency in applying the means test of necessity. See ABBREVIATED DEBATES, supra note 394, at 285 (Rep. Lawrence) (contending that proposals to prohibit power to establish "companies with exclusive privileges" shows that those states "considered that Congress does possess the power to establish such companies"); see also id. at 273 (Rep. Jackson) (referring to bank monopoly as something that "contravenes the spirit of the constitution" because it uses "the public moneys for the benefit of the corporation to be created"); id. at 304 (Rep. Sherman) (contending that bank does not "restrain the States or private banks, or even individuals, from negotiations of a similar nature with those permitted to the stockholders" and, therefore, "has not a feature of monopoly"). The issue of whether a proposed public action adversely affects private rights and interests or works an injustice to those who are not beneficiaries of the legislation is always an appropriate subject of legislative debate. The debate over the bank included discussion of the policy merits of the bank bill and its constitutionality. What is most significant about the comments directed to the "monopoly" issue, however, is that it did not yield a separable argument that the bank transgressed a jurisdictional boundary as an improper means to the end to be achieved by the establishment of a national bank or constituted a violation of an unenumerated right.

412. Id. The most interesting question raised by Madison's argument is whether the threat posed to a traditional or natural fundamental right, of itself, might suffice to characterize the power claimed as important enough to require an explicit grant of power to warrant a right-threatening law. Madison does not say as much, and his argument as to general search warrants in presenting the Bill of Rights to Congress cuts against this view. At least, however, with respect to a general regulation of the press or of religious establishments, even prior to the Bill of Rights, Madison and others logically could have contended that such general regulations would have too many important implications to be justified based on relatively remote relations to granted powers. The logic of such an argument, however, cannot be separated from a general theory of federal powers; unlike modern commentators, who seem to want to have their McCulloch and their Roe, too, Madison and Jefferson would never have unhinged the enumerated-powers scheme's protection of the people and the states—it was a single system of enu-
At no point did Madison state or imply that the monopoly status of the bank would be a sufficient basis by itself to warrant constitutional objection. Furthermore, he did not suggest that the bank’s monopoly status held any connection to the Ninth Amendment.413 Finally, Madison did not claim that any jurisdictional limitation in favor of personal rights lodged in the Necessary and Proper Clause, whether framed in terms of a proper exercise of authority or a unique rights-protective requirement stated in terms of whether the exercise of power was sufficiently necessary.414 Rather, Madison propounded a general theory for construing enumerated and implied powers, without explicating an individual-rights theory under the guise of construing federal powers.415

mericated powers and retained rights and powers, and the key in their minds was to make sure that the system did not become one of theoretically limited ends but unlimited means.

413. Madison used the Ninth Amendment in this speech to buttress his argument for a restrained reading of federal powers, not to refer to unenumerated affirmative-rights limitations that served to limit the reach of implied powers. But see Barnett, supra note 270, at 687 (contending that Madison saw Ninth Amendment as authority for rule of strict construction of delegated powers when legislation affects rights retained by people). Barnett quotes Madison’s statement that “[t]he latitude of interpretation required by the bill is condemned by the rule furnished by the Constitution itself,” and then points to Madison’s citation to the Ninth Amendment as the apparent source of this rule limiting the reach of the means that can be employed under the Necessary and Proper Clause. Id. (quoting 2 ANNALS OF CONG. 1899 (Rep. Madison)). Madison’s reference, however, to “the rule furnished by the Constitution itself” alluded to the practice in Article I, Section 8, of expressly providing for important powers that related to, but did not clearly fall under, other express powers. See 2 ANNALS OF CONG. 1899 (Rep. Madison) (arguing that established practice of including all important powers among express grants in Article I establishes “a general rule of construction” that forbids finding important power to be “implied power”); see also id. at 1901 (linking Madison’s reference to Ninth Amendment with Tenth Amendment and relying on its general purpose “guarding against a latitude of interpretation” and including no reference to general rule of construction).

414. See Barnett, supra note 26, at 637 (noting that argument as to whether bank was proper by reference to background individual rights was never advanced). If the broad jurisdictional reading of the Necessary and Proper Clause was correct, however, and had Madison been relying on affirmative limits he perceived in an unenumerated right against monopoly, it seems fairly obvious that he would have used the straightforward contention that the bank law was an improper exercise of federal power, quite apart from the issue of the fit between means and ends. Despite endorsing the Lawson and Granger thesis, however, Barnett offers no explanation as to why Madison would have foregone a straightforward argument in favor of an (at best) obscure reliance on means-ends analysis.

415. See 2 ANNALS OF CONG. 1899 (concerning meaning of Necessary and Proper Clause and promoting “a rule of interpretation very different from that on which the bill rests”). Nor does Barnett advance his case by insisting that Madison’s reference to the Ninth Amendment in his antibank speech proves that Madison believed that the Ninth Amendment had an important constitutional role beyond preventing a misconstruction of the Constitution based on its inclusion of individual rights. See Barnett, supra note 26, at 782 n.137 (relying on Madison’s speech to argue that McAffee unduly restricts application of Ninth Amendment in reading provision as preventing only misconstruction of inclusion of rights). In the first place, it is the text of the Ninth Amendment that states that it is “[t]he
It would have been surprising, moreover, had Madison been relying
on an antimonopoly right, given his history of opposition to an antimonopo-
ly constitutional prohibition. Equally important for our purpose is
that Jefferson was included among the prominent opponents of the na-
tional bank, and he had a record of supporting antimonopoly provisions;
yet Jefferson failed to rely upon unenumerated rights, the Ninth Amend-
ment, or the word "proper" in objecting to the constitutionality of the

416 For a discussion of antimonopoly arguments, see supra notes 373-75 and
accompanying text.
bank bill. As in other areas, of course, Jefferson did not have the benefit of modern commentary.

2. The Crisis of 1798

The debate over the infamous Alien and Sedition Acts provided an opportunity for constitutional thinkers to discuss the implications of the Necessary and Proper Clause in the context of disputing the exercise of federal power that clearly implicated claims of individual right. Given its individual-rights setting, this debate may be even more relevant to assessing the merits of the broad jurisdictional reading of the Sweeping Clause. Notwithstanding the existence of the First Amendment and its guarantee of freedom of the press, the opponents of the Alien and Sedition Acts placed at least as much weight on the argument that Congress lacked authority to pass such laws in the first instance as they did on the First Amendment prohibition. The opponents of these laws even interpreted the First Amendment as resting on premises of federalism more than on concepts of personal liberty and natural right; the protection offered to personal rights was of an indirect nature. Although this construction of the First Amendment is deservedly controversial, it nonetheless shows that the original debate over congressional power to regulate the press sounded in allocation of power rather than in a jurisdictional barrier in favor of personal rights emanating from the Sweeping Clause.

In perhaps the most complete critique of these laws, Madison's Report on the Virginia Resolutions, the author devotes a number of pages to demonstrating that in the Sedition Act Congress exercised “a power not dele-

417. See Jefferson, supra note 398, at 91, 98 (discussing bill for establishing national bank). Jefferson alludes to the monopoly status of the bank, but he uses the point as Madison does. He questions whether for a shade or two of convenience, more or less, Congress should be authorized to break down the most ancient and fundamental laws of the several States, such as those against mortmain, the laws of alienage, the rules of descent, the acts of distribution, the laws of escheat and forfeiture, the laws of monopoly?

Id. at 93. Responsive to his own query, Jefferson concludes: “Nothing, but a necessity invincible by any other means, can justify such prostration of laws, which constitute the pillars of our whole system of jurisprudence.” Id. at 93-94. The argument relates to the question of necessity and sounds in federalism and respect for state law, not to any limiting principle rooted in a doctrine of implied rights, whether rooted in the word “proper” or otherwise. In Hamilton's effective response, he does not construe Jefferson's argument as an individual rights claim.

If these are truly the foundation laws of the several States, then have most of them subverted their own foundations: or there is scarcely one of them which has not, since the establishment of its particular Constitution, made material alterations in some of those branches of its jurisprudence, especially the law of descents. But it is not concerned how any thing can be called the situation, unalterable by the ordinary legislature. And, with regard to the question of necessity, it has been shown, that this can only constitute a question of expediency, not of right.

Id. at 100.
gated by the Constitution."\(^{418}\) In the course of that treatment, Madison does not suggest that such a power had not been delegated because its exercise would be improper as an invasion of individual liberty. In fact, he spends several pages addressing the bases for federal authority proffered by those who defended the Act.\(^{419}\) All of this discussion is directed at the question of the powers that were granted to the federal government and their connection to a law such as the one passed by Congress. Considering that Madison viewed the law as an invasion of a fundamental right, one would have expected a fundamental-rights analysis to at least supplement his treatment of the powers granted to Congress if fundamental rights limitations were contained in the Sweeping Clause and were considered part of what comprised the original delegation of power.

In the course of this analysis of possible bases for such federal action, Madison took up the Necessary and Proper Clause. Considering that Lawson and Granger take Madison's argument against the Sedition Act as supportive of their position, it is important that we consider his entire analysis:

The plain import of [the Necessary and Proper Clause] is, that Congress shall have all the incidental or instrumental powers necessary and proper for carrying into execution all the express powers, whether they be vested in the government of the United States, more collectively, or in the several departments or officers thereof.

It is not a grant of new powers to Congress, but merely a declaration, or the removal of all uncertainty, that the means of carrying into execution those otherwise granted are included in the grant.

Whenever, therefore, a question arises concerning the constitutionality of a particular power, the 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 inquiry, 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.

Let the question be asked, then, whether the power over the press, exercised in the Sedition Act, be found among the powers expressly vested in Congress. This is not pretended.

Is there any express power, for executing which it is a necessary and proper power?

\(^{418}\) MADISON'S REPORT ON THE VIRGINIA RESOLUTIONS, reprinted in 4 ELLIOT'S DEBATES, supra note 19, at 546, 561-68 (citing several possible constitutional bases for Sedition Act).

\(^{419}\) See id. at 569 (discussing how defenders of Sedition Act cite Sweeping Clause for support and citing to provisions of Constitution that could be interpreted to do same).
The power which has been selected, as least remote, in answer to this question, is that "of suppressing insurrections;" which is said to imply a power to prevent insurrections, by punishing whatever may lead or tend to them. But it surely cannot, with the least plausibility, be said, that the regulation of the press, and punishment of libels, are exercises of a power to suppress insurrections. The most that could be said would be, that the punishment of libels, if it had the tendency ascribed to it, might prevent the occasion of passing or executing laws necessary and proper for the suppression of insurrections.420

Madison’s treatment makes it clear that the relevant consideration, for the purpose of applying the Necessary and Proper Clause, is the proximity (or lack thereof) between libels and insurrections; he does not treat the fact that this is a regulation of the press, as opposed to a prohibition on oral slander to other private parties, for example, as having any particular relevance to the means/end analysis called for, or to the scope of the grant of power to Congress. When Madison subsequently examines the Sedition Act by reference to the First Amendment freedom of the press, he again alludes to the Necessary and Proper Clause, but his statements there must be understood against the backdrop of his earlier analysis of congressional power.421

Lawson and Granger focus on Madison’s First Amendment treatment in which he recapitulates federalist assurances about fundamental rights, “that the power over the rights in question, and particularly over the press, was neither among the enumerated powers, nor incident to any of them: and consequently that an exercise of any such power would be manifest usurpation.”422 They supply a longer excerpt from Madison’s work, but the quoted language is placed in italics, with the apparent implication that Madison is suggesting that the people retained their right to freedom of the press by virtue of an individual rights jurisdictional implication of the Sweeping Clause.423 This reading, however, is manifestly incorrect, given that Madison had previously clarified, as shown above, that the claim about freedom of the press was a factual claim about the powers actually granted, read in light of an appropriately constrained idea of what could be viewed as incidental to those powers; it was not a claim about the nor-

420. Id. at 567-68.
421. See id. (“[T]he construction here put on terms ‘necessary and proper’ is precisely the construction which prevailed during the discussions and ratifications of the Constitution . . . [I]t is a construction absolutely necessary to maintain their consistency with the peculiar character of the government, as possessed of particular and definite powers only . . . .”).
422. Id. at 571-72; Lawson & Granger, supra note 7, at 319.
423. See Lawson & Granger, supra note 7, at 319 (reiterating Madison’s opposition to Alien and Sedition Acts and emphasizing portions of cited passage in which “[James Madison recalled this federalist consensus and indicated that it specifically extended to the Sweeping Clause, which in no way authorized Congress to violate rights such as the freedom of the press.”).
mative implications of any language in article I, whether it was proper or necessary and proper, functioning as a source of a jurisdictional barrier in favor of fundamental personal rights.

The balance of Madison's treatment of the First Amendment issue provides strong confirmation that his powers analysis did not rest on thinking grounded on traditional individual rights constraints on government. Madison's free-press analysis operates at two levels. At one level, he assumes for purposes of argument that the provision limits the federal government in the same way that a state free press guarantee would limit state government; and the burden of his treatment is to defend the position that freedom of the press properly receives greater protection under American constitutions than it was given under English common law. At a second level, however, Madison offers the far broader claim that the First Amendment went beyond merely securing the general idea of freedom of the press understood as an individual right against government interference, actually codified reassurances about the absence of any federal power over the press and, thus, was intended as "a positive denial to Congress of any power whatever on the subject."

In effect Madison reads the First Amendment as an attempt to affirm in positive language what he believed had been achieved by the lack of inclusion of any express power over the press; although this provision might thus give security to a free press against any threat of federal encroachment, his claim is that the Clause operates as a broad subject matter disability rather than as a means constraint on the exercise of federal power in favor of individual liberty. In fact, on Madison's reading, the First Amendment functions as a guarantee of exclusive state power to regulate the press up to the boundaries of a proper understanding of the freedom of the press as much as it serves as a guarantee of personal liberty. To the extent that personal liberty is implicated, it is not so much

424. Madison's Report, supra note 418, at 569-71 (discussing common-law freedom of press and concluding that "[t]he essential difference between the British government and the American constitutions will place this subject in the clearest light").

425. Id. at 571. In fact, the language from Madison's work upon which Lawson and Granger rely, in which he looks back to the ratification-era assurances that Congress lacked power over the press, was offered to lend support to his reading of the First Amendment as a broad subject matter disability. Cf. Bybee, supra note 2, at 1567 ("The real issue for the Republicans was not what comprised the freedoms of speech and press, but whether Congress had any power at all in these areas.").

426. See Bybee, supra note 2, at 1556 (adopting view similar to Madison's, contrasting First Amendment with other limits in Bill of Rights that "restrain the way the government conducts its legitimate functions," such as conducting criminal investigations and trials). Bybee concludes that the First Amendment "is a subject-matter disability, as opposed to a procedural disability" in that it "puts a category of laws beyond the competence of Congress." Id.

427. See Madison's Report, supra note 418, at 570 (noting that "freedom of the press" is not absolute right even while asserting view that Congress lacked all authority respecting it). Hence he acknowledges "the difficulty of all general questions, which may turn on the proper boundary between the liberty and licentious-
about personal liberty per se as it is about personal liberty vis-à-vis the national government. If Madison’s original claims about the absence of federal power over the press had rested on an individual rights jurisdictional barrier, however, his subsequent analysis of the First Amendment would be incoherent; he should properly have confined himself to contending that the Sedition Act prohibitions invaded the sphere of freedom of the press rather than claiming that all regulation of the press had been reserved to the exclusive jurisdiction of the states.

There may be room to doubt whether Madison and his allies correctly read the First Amendment as a broad subject matter disability to Congress precluding all regulation of the press. This view certainly has not prevailed historically, and perhaps for good reason. As John Marshall pointed out, by contrast to the Establishment Clause’s broad prohibition of all laws respecting an establishment of religion, the Free Press Clause merely prohibits laws “abridging the freedom of . . . the press.” Moreover, the very ness of the press,” even as he eventually insists that the First Amendment embodies a policy of binding the hands of the federal government from touching the channel which alone can give efficacy to its responsibility to its constituents, and of leaving those who administer it to a remedy, for their injured reputations, under the same laws, and in the same tribunals, which protect their lives, their liberties, and their properties?

Id. at 570, 573. Madison believed that the press might be held accountable for abuses, but only under state law; Congress had passed a federalism-based boundary that incidentally worked to protect personal freedom from interference from the national government. Madison would have specifically denied that Congress could have regulated the press provided they did not improperly invade freedom of the press. Cf. Thomas Jefferson, Kentucky Resolutions of 1798 and 1799, in 4 ELLIOT’S DEBATES, supra note 19 at 540-41 (stating that in light of First and Tenth Amendments “all lawful powers respecting [the press] did of right remain, and were reserved to the states, or to the people” and thus people were determined “to retain to themselves the right of judging how far the licentiousness of speech, and of the press, may be abridged without lessening their useful freedom, and how far those abuses which cannot be separated from their use, should be tolerated rather than the use be destroyed”).

428. See Palmer, supra note 2, at 115 (writing without considering relevance of issues to proper construction of Necessary and Proper Clause). In fact, it seems fair to say that the tendency of Madison and others to see the issues primarily in terms of affirming the lack of federal authority contributed to the failure of the First Congress to clarify fully their intentions as to the scope of the liberties guaranteed in the First Amendment. See id. at 115-17 (describing proposal of amendments by Madison to First Congress and his state-oriented idea of bill of rights).

429. U.S. CONSTR. amend. I, cl. 4 (“Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .”); see JOHN MARSHALL, REPORT OF THE MINORITY ON THE VIRGINIA RESOLUTIONS, reprinted in 5 THE FOUNDERS’ CONSTITUTION 136, 138 (Philip B. Kurland & Ralph Lerner eds., 1987) (discussing how term “abridgment” differs from “respecting” and stating that “[i]t becomes then necessary in order to determine whether the act in question be unconstitutional or not, to inquire whether it does in fact abridge the freedom of the press”). Less acceptable is Marshall’s suggestion that the wording of the First Amendment was evidence of a power to regulate the press because it would have been unnecessary to modify the legislative power “if the power itself does not exist.” Id. at 137. This is precisely the argument about the implication of including a free-press provision that the
linkage of the First Amendment language to the ratification-era debate over the omission of a Bill of Rights seems suggestive that the guarantee was a cautionary provision in the truest sense—a guarantee of an individual right that the legislative power was not to abridge, but that many claimed would never have to be invoked because no power over the press had been granted, either expressly or by implication.\textsuperscript{430} The assurances of the Constitution's proponents that a power to regulate the press had not been granted, upon which Madison relies in explicating the First Amendment, cannot be conclusive on the original question of federal authority any more than the antifederalists' claims to the contrary.\textsuperscript{431} Nothing in the drafting history of the First Amendment, moreover, suggests that its federalists had feared and had sought to guard against in adopting the Ninth Amendment. \textit{Cf.} Madison's Report, supra note 418, at 572 (describing opponents' position as declaring that states denied that any power of press had been delegated by Constitution).

\textsuperscript{430} See Paul Finkelman, \textit{The Ten Amendments as a Declaration of Rights}, 16 S. Ill. U. L.J. 351, 389-94 (1992) (stating that driving force behind inclusion of Bill of Rights was concern for individual liberty that might potentially be threatened by federal power). The Bill of Rights became the handiwork of "pragmatic Federalists" who did not believe that a Bill of Rights was essential, but were willing "to support formal protections of individual liberty" to obtain a wider acceptance of the Constitution. \textit{Id.} at 395. Finkelman's thesis is consistent with a recognition that federalist confidence in the protection of liberty secured by the unamended Constitution contributed to a relative inattention to issues concerning the intended scope of the guarantees included.

\textsuperscript{431} See, \textit{e.g.}, Madison's Report, supra note 418, at 576 (relying on Virginia ratification Convention's recital of understanding that Constitution granted no authority to United States to affect liberty of press). The question of whether any given regulation of the press can be viewed as incidental to some other power, express or implied, can only be answered by recourse to the powers themselves and an appropriate application of the Necessary and Proper Clause; this is a difficult question to answer \textit{a priori}, except perhaps as to a fairly broad and general regulation of the press as such. \textit{Cf.} Bybee, supra note 2, at 1567-68 ("Any law might incidentally affect speech and press, but the Sedition Act was, after all, a law about speech and press, and that Congress had no power to enact."). Even the Sedition Act was targeted at protecting federal officials from purportedly seditious speech, a task that (if legitimate at all) seems an unlikely one to reserve to the states, that might have conflicting interests when it came to the federal government and its enemies. The Sedition Act reads in part:

That if any person shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published, or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either House of the said Congress, or the President of the United States, with intent to defame the said government, or either House of the said Congress, or the said President, or to bring them, or either of them into contempt or disrepute; or to excite against them or either or any of them, the hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein, for opposing or resisting any law of the United States, or any act of the President of the United States, done in pursuance of any such law, or of the powers vested in him by the Constitution of the United States, or to resist, oppose, or defend any such law or act, or to aid, encourage, or abet any hostile designs of any foreign
purpose was to do anything beyond reassuring the people that freedom of speech and of the press, as they understood those freedoms, would not be threatened—whether because Congress lacked any authority over speech or press in the first instance or because it was expressly precluded from abridging the legitimate exercise of press freedom.432

Finally, although a broad subject matter disability on congressional regulation of speech and press could have been an option considered, it appears an extreme outcome in light of the language actually employed in the First Amendment. It could also be read to preclude what seems to be obviously reasonable exercises of congressional power that, nevertheless, directly or indirectly constitute regulations of speech or press (though not necessarily invasions of the respective freedoms). To use an obvious example of an extreme result it could occasion, Congress is expressly granted

nation against the United States, their people or government, then such person being thereof convicted, etc.

Act of July 14, 1798 (Sedition Act), ch. 74, 1 Stat. 596.

432. See Madison, supra note 3, at 79-80 (describing his proposed Bill of Rights as designed to satisfy public that fundamental rights were secure under Constitution); see also Egbert Benson, (Aug. 15, 1789), in CREATING THE BILL OF RIGHTS, supra note 3, at 159 (acknowledging that freedom of speech, press, and assembly are “inherent” and asserting that purpose of provisions is “to provide against . . . their being infringed by the government”); Elbridge Gerry, supra note 381, at 160 (finding First Amendment rights also to be “essential” and only “a declaration to that effect” can make people “secure in the peaceable enjoyment” of these rights). Others stressed that such provisions gave reassurance that these rights were secure for those who did not accept the argument from limited powers. See John Vining, Debates in the House of Representatives (Aug. 15, 1789), in CREATING THE BILL OF RIGHTS, supra note 3, at 160-61 (agreeing to provisions if they were “harmless” and “would tend to gratify the states that had proposed amendments”); Rep. Hartley (Aug. 19, 1789), in CREATING THE BILL OF RIGHTS, supra note 3, at 160-61 (observing that rights and powers not granted to government “were retained by states and the people” and that provisions “were as necessary to be inserted in the declaration of rights as most in the clause”). None of these statements suggested that a broad subject matter disability was contemplated rather than a guarantee of a traditional freedom in terms recognized as such by all; nor was there any suggestion that the guarantee ran in favor of the states, as opposed to individuals. See generally Finkelman, supra note 430, at 378-79 (examining arguments of those demanding bill of rights and attempting to show bill of rights “as a protector of individual liberty”).

Moreover, Madison’s favorite proposed amendment, which was not adopted by Congress, was a proposal to limit state power, and it provided that “no state shall violate . . . the freedom of the press.” CREATING THE BILL OF RIGHTS, supra note 3, at 11-13 (emphasis added). This language tracks with both Madison’s original proposal for a press guarantee to be included in Article I, Section 9, and the text of the First Amendment. Compare id. at 12 (stating Madison’s proposal for Article I, Section 9, as reading “[t]he 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”), with U.S. CONST. amend. 1 (providing that “Congress shall make no law . . . abridging . . . freedom of the press”). There is every reason to think that the two statements of government disability as to the press were substantially identical in scope, but were to be applied to two different levels of government.
the power "to declare the punishment of Treason," and it is difficult to imagine that a press revelation of a critical military secret might not fit the definition of "treason" supplied by the Constitution. To the extent that a law punished such an act, however, it could be characterized as a regulation of the press subject to the broad subject matter disability supposedly embodied in the First Amendment, and purely as a matter of logic, one might insist that even such an extreme abuse of press freedom should be reserved for redress in the states. There are good reasons, however, for the federal government to be able to prosecute a member of the press who commits an act fairly characterized as treason and no reason to think that the Framers of either Article I or the First Amendment intended to prevent it.

434. See id. at art. III, § 3, cl. 1 (defining treason as consisting "only in levying War against" country, or "in adhering to their Enemies, giving them Aid and Comfort").
435. See Madison's Report, supra note 418, at 572-73 (taking up question whether federal government is "desitute of every authority for restraining the licentiousness of the press, and for shielding itself against the libelous attacks which may be made on those who administer it?"). His answer is terse; if such a law "be expressly forbidden, by a declaratory amendment to the Constitution,—the answer must be, that the federal government is desitute of all such authority." Id. at 573. It is not clear why Madison's express prohibition would not equally apply to an act of treason committed through either an exercise or abuse of liberty of the press, and the same factors that Madison relies upon to justify this broad exclusion—the magnitude of powers granted the national government, duration required for the function of some of its departments, peculiar distance between the seat of that government and its constituents and great need for a press to circulate knowledge about the actions of the federal government—are equally applicable in the more extreme case. See id. (concluding that "these considerations . . . account for the policy of binding the hands of the federal government" and "leaving those who administer it to a remedy, for their injured reputations, under the same laws, and in the same tribunals, which protect their lives, their liberties, and their properties").
436. See id. at 573-74 (discussing penalty for publication of any scandalous, false or malicious writing against U.S. government or any house of Congress). Similarly, even under stringent modern standards giving significant protection to freedom of speech, press, and assembly, it seems apparent that acts of speech and the press can incite illegal and violent conduct against federal interests, undermine legitimate exercise of federal authority and adversely impact on important national goals such as the successful prosecution of a war. It seems implausible to think that the language of the First Amendment requires that Congress is totally disabled from meeting such threats to valid national purposes merely because the conduct in question fits within these broad subject matter categories, regardless of whether they fall within the scope of legitimate exercise of freedom. See U.S. Const. art. I (creating Congress and its powers). As illustrated by the treason example in text, such a guarantee appears to operate as an arbitrary limitation on the reasonable application of the general language of federal powers; its force would be felt in a range of much more mundane cases. Can Congress, for example, provide reasonable time, place and manner regulations on protest gatherings outside federal buildings around the country, or is all authority to restrict petition and assembly reserved to the states? May Congress prohibit individuals from threatening the life of the President, or may only the states weigh the speech interest against the threat to government?
Even if the opponents of the Alien and Sedition Acts overstated their case, however, the overall debate does not offer any support to the broad jurisdictional reading of the Necessary and Proper Clause. Under a fairly constrained reading of federal powers, the federal structure of the Constitution has in fact offered a considerable amount of protection to freedom of speech and freedom of the press. At the same time, consistent with the outcome of the Bill of Rights debate itself, the First Amendment stands as a backstop to secure legitimate exercise of speech and press freedoms in those cases in which the enumerated powers scheme fails to operate as a barrier. There is no reason to think, however, that the individual-right guarantees that would be placed in the First Amendment had previously stood as individual-right limitations on federal power under the language of the Sweeping Clause. Neither the ratification debate nor the debate over the Alien and Sedition Acts supports such a reading.

F. Concluding Observations

Lawson and Granger are hardly the first to suggest that the adoption of a Bill of Rights may have served to promote inattention to the rights-protective potential of the federal system.\textsuperscript{437} Before the theme was picked up by contemporary advocates of the unwritten Constitution, Herbert Storing floated the idea that individual-rights limitations might have been read into the federal structure absent the inclusion of a Bill of Rights.\textsuperscript{438} Lawson and Granger also seem to intimate that we have basically lost track of the Sweeping Clause as a jurisdictional limitation that secured various individual rights because we have come to rely exclusively on the Bill of Rights; they propose to reinvigorate the Sweeping Clause in part as a means of realizing the Framers’ rights-protective goals.\textsuperscript{439} Such ap-

\textsuperscript{437} See Storing, supra note 304, at 16 (observing that federalists gave Constitution to America and antifederalists gave Bill of Rights to America and “when so much of constitutional law is connected with the Bill of Rights” it is “plausible . . . to conclude that the antifederalists, the apparent losers in the debate over the Constitution, were ultimately the winners.”). Storing noted: It is interesting to consider what our constitutional law would be like today if there had been no Bill of Rights. Its focus would presumably be to a far greater extent than it is today on the powers of government. We might expect a more searching examination by the Supreme Court of whether federal legislation that seems to conflict with cherished individual liberties is indeed “necessary and proper” to the exercise of granted powers. We might expect a fuller articulation than we usually receive of whether, in Marshall’s term, “the end” aimed at by given legislation, “is legitimate.” Might this not foster a healthy concern with the problems of governing; a healthy sense of responsible self-government?

\textsuperscript{438} See id. at 25 (relying on federalist assurances that natural rights were secured by structure of Constitution and suggesting that natural rights might have been relied upon directly in absence of Bill of Rights).

\textsuperscript{439} See Lawson & Granger, supra note 7, at 274 (“The Sweeping Clause, when properly understood as a jurisdictional limitation on the scope of federal power, is a vital part of the constitutional design. That understanding has largely been lost
proaches strike one as back and fill operations, designed to read into the Constitution what was never intended to be there; there is no avoiding the reality that the Constitution enumerated powers sufficient to authorize invasion of fundamental freedoms and that there was a critical need for the adoption of the Bill of Rights.

Even so, modern attempts to rescue the Constitution from itself point to some truths worthy of our consideration. First, given the importance of a number of fundamental rights to the people of the United States, the search for a savings clause of some kind was and is a natural enough temptation. Second, there is something to be said for the idea that dangerous reliance upon a bill of rights may lull us into a false sense of security that may prompt us to pay insufficient attention to alternative devices for securing liberty. There is little room for doubt that, despite their concerns about the possibility of overburdening government with unnecessary limitations, the federalists were not bent on establishing aristocratic tyranny, notwithstanding the sometimes harsh claims of their opponents. Partly out of haste, partly out of concern of getting bogged down in conflict over the content of limits on government, and partly out of skepticism about the value of parchment barriers, the Framers did not make the effort to provide a comprehensive list of limitations on government. They did believe that the federal nature of the government established by the Constitution made the enterprise less essential than under the state constitutions, but they did not sufficiently think through the implications of this general position or the fact that this distinction could not satisfactorily account for all the rights omitted.

Considering that the defense of the decision to omit a bill of rights began to falter at the outset and never really recovered, it should come as no surprise that a very small number of defenders of the Constitution were tempted to rely upon the time-honored nature of some of the threatened rights and to suggest that legislation invasive of such rights violated norms inherent to government itself or would constitute improper laws under the Sweeping Clause.

It is the existence of such statements, and the tradition of unwritten norms of fundamental law on which they all to some degree rely, that explains why there is a debate over whether the Framers

in modern times. We hope to reclaim it here.

Lawson and Granger argued that the jurisdictional meaning of the word "proper" in the Sweeping Clause was the best interpretation of the word. See id. at 286 (stating that "a jurisdictional meaning of 'proper' was in ordinary usage during the framing era").

440. See McAfee, Original Meaning, supra note 15, at 1227 ("The lack of sustained debate on the inclusion of a bill of rights suggests that the leading members of the convention underestimated the effect of the decision not to include a more complete set of rights provisions on the prospects for ratification of the new Constitution.").

441. See id. (giving historical overview of Ninth Amendment and debates surrounding Bill of Rights).

442. See id. at 1270 n.216 (discussing similar argument advanced by proponent of Constitution).
intended an unwritten Constitution. Even if such statements serve as a starting point for building a normative theory of the Constitution, the historical evidence shows that these statements contradict the pervasive and predominant themes of the ratification debate. They are thus unlikely candidates for aiding the attempt to discover the best construction of the Necessary and Proper Clause.

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

The final theory linking the federal system to fundamental rights is the most novel—and perhaps least plausible—of the group. As has been demonstrated, those who opposed the Constitution often linked the concern for protecting personal liberty to the preservation of state authority. A variation on this theme was the claim that the Supremacy Clause (and the Constitution generally) empowered Congress to enact laws that would override conflicting state laws, including basic individual rights embodied in state declarations of rights.

This line of attack was partly defensive in nature because the Constitution's proponents argued against a bill of rights on the ground that the people's rights would continue to be secured by the declarations of rights in the state constitutions. This defense rested on a premise of a limited national government that had not been empowered to override those rights. Nevertheless, statements about the potential threat to state law rights posed by the Constitution have prompted some scholars to suggest that the other rights retained by the people in the Ninth Amendment consist of, or at least include, rights secured by state law.

443. See, e.g., Mason, supra note 109, at 9, 11 (arguing in favor of bill of rights and observing that "the Laws of the general government" are "paramount to the Laws and Constitutions of the several States").

444. See Letter from Roger Sherman to Unknown, supra note 240, at 386-87 (underscoring that Federal Supremacy Clause applied only to laws not exceeding powers granted by Constitution and noting that states will police system to ensure that national government has not overstepped boundaries). Sherman, of course, would have had no disagreement with Mason as to the legal effect of the Supremacy Clause; the real substance of their disagreement concerned whether the powers granted to the national government granted sufficiently broad authority to invade the fundamental sorts of rights included in the state declarations of right. See id. at 389 (stating Sherman's view that "[i]n order to [have] a well regulated government, the legislature, Should be dependant on the people, and be vested with a plenitude of power . . . to be exercised only for the public good"). Some opponents of the Constitution, however, relied on the text of the Supremacy Clause as independent evidence that the Framers of the Constitution intended to create a consolidated, all-powerful government over the nation as a whole. See, e.g., Letter of Centinel V, supra note 109, at 168 (arguing that if "foregoing powers should not suffice to consolidate the United States into one empire" Convention added Supremacy Clause "as if to prevent the possibility of doubt" and result will be "iron-handed despotism").

445. See Caplan, supra note 415, at 227-28 (discussing rights included in Ninth Amendment); Calvin R. Massey, Federalism and Fundamental Rights: The Ninth
McAffee: The Federal System as Bill of Rights: Original Understandings, Mona 1998

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The most extreme version of this theory, set forth in several works by Calvin R. Massey, posits that one purpose of the Ninth Amendment was to serve as a kind of "Reverse Preemption Clause."446 For example, rights protected as fundamental by state constitutions would trump inconsistent acts of Congress, despite the Supremacy Clause, because the inclusion of rights in a state constitution would assure their status as rights retained by the people and limit the scope of federal power.447 Not surprisingly, Massey's claim that the Ninth Amendment secures state-created rights as affirmative limitations on federal power had not been advanced by a single commentator between 1789 and the 1980s. This reading, moreover, presents an incoherent amalgamation of diametrically opposed readings of the text and history of the Ninth Amendment.

A. State Law Rights and the Ninth and Tenth Amendments

As originally set forth in the work of Russell Caplan, upon which Professor Massey relied, the state-law rights thesis was an attempt to reinforce the close historical link between the Ninth and Tenth Amendments. The thesis posited that the Ninth Amendment took the role of securing the rights, existing under state law, that had been guaranteed by Article II of the Articles of Confederation.448 As we have seen, Article II was the state sovereignty provision of the Articles, which provided that each state "retains . . . every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States."449 Article II was a rights guarantee in exactly the same sense that the Tenth Amendment is a rights

446. See Massey, supra note 16, at 123-73 (discussing Ninth Amendment and "Reverse Preemption Clause"); Massey, supra note 42, at 988 (same); Calvin R. Massey, The Anti-Federalist Ninth Amendment and its Implications for State Constitutional Law, 1990 Wis. L. Rev. 1229, 1254-61 (same).

447. See Massey, supra note 445, at 1233 (stating "state citizens have the power, through their state constitutions, to preserve areas of individual life from invasion by the federal Congress in the exercise of its delegated powers."). He characterizes this view as "radical stuff, for it amounts to a form of reverse preemption." Id.

448. See Caplan, supra note 415, at 262 ("[T]he ninth and tenth amendments both derived from article II of the Articles of Confederation."). Caplan also contends that the Ninth Amendment has its origins in the seventeenth Virginia amendment. See id. at 254 n.132 (stating that commentators usually acknowledge descent from seventeenth Virginia amendment to Ninth Amendment).

449. ARTICLES OF CONFEDERATION art. II (declaring completely that "[e]ach state retains its sovereignty, freedom, and independence, and every power, jurisdic-
guarantee—it secured for the states the sovereign power, including the
authority to recognize rights in state law, beyond the authority granted to
the nation.\textsuperscript{450} The security this added to personal rights was purely an
indirect result. One implication of this retained sovereignty was that the
rights guaranteed by state law would continue to be secure to the extent
that powers actually delegated to the national government did not include
authority sufficient to displace such state-law rights.\textsuperscript{451}

Caplan's article suggested that the rights referred to, and secured by,
Article II of the Articles of Confederation were the individual-right guar-
antees found within state law, whether constitutional or statutory.\textsuperscript{452} He
concluded that the rights in question were state rather than federal
rights.\textsuperscript{453} Therefore, just as with reserved powers under the Tenth
Amendment, Caplan found the security given these rights by the Ninth
Amendment depended entirely on an appropriate construction of federal
powers to determine whether those powers extended far enough to permit
federal preemption of such state law rights.\textsuperscript{454} In support of this reading,
Caplan pointed to a statement attributed to Edmund Randolph that
linked together the texts of the Virginia equivalents of the Ninth and
Tenth Amendments.\textsuperscript{455} Caplan concluded that inasmuch as the Tenth

\textsuperscript{450} See id. (providing in part that states retain "sovereignty, freedom, and
independence").

\textsuperscript{451} See Caplan, supra note 415, at 236 (explaining that under Article II of
Articles of Confederation, states "retained the right of self-government and, conse-
quently, the right to enact and maintain laws regarding individual liberties.").

\textsuperscript{452} See id. ("The Articles of Confederation recognized that the country's funda-
mental law consisted of the states' fundamental laws.").

\textsuperscript{453} See id. at 243 (contending that "enforceable rights beyond those enumer-
ated in the Constitution (or in the form of federal statutes) would exist only in the
governments of the various states"); id. at 262-63 (arguing that Ninth and Tenth
Amendments were each derived from Article II of Articles of Confederation and
"were paired in the final version of the Bill of Rights probably because of their
analogous residual purposes"). Clearly, Caplan sees the Ninth Amendment as se-
curing only residual rights. Moreover, unlike Massey, he places no weight on
whether the rights exist as a matter of ordinary positive law, as in a statute or in a
state's fundamental law; each sort of state law, on his reading, receives the same
security as being guaranteed to the extent that it is not preempted by a valid exer-
cise of granted power.

\textsuperscript{454} See id. at 261 (stating that Ninth Amendment rights "cannot form a basis
for holding acts of Congress unconstitutional" because "they are state rather than
federal in character").

\textsuperscript{455} See id. at 255-56 (discussing view that Madison based Ninth Amendment
on First and Seventeenth proposed Virginia amendments). Madison recounted
Randolph's opposition:

His principal objection was pointed agst. the word 'retained,' in the ele-
venth proposed amendment [the Ninth Amendment], and his argument
if I understood it was . . . that as the rights declared in the first ten of the
proposed amendments were not all that a free people would require the
exercise of, and that as there was no criterion by which it could be deter-
mined whether any other particular right was retained or not, it would be

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Amendment, unlike Article II, referred only to powers and not to rights, it followed that the Ninth Amendment became the textual grounding for securing rights that exist under state law, but which are subject to the exercise of powers actually granted by the Constitution.456

Professor Massey, on the other hand, culled from Caplan's analysis the bare conclusion that the Ninth Amendment was at least in part "an attempt to be certain that rights protected by state law were not supplanted by federal law simply because they were not enumerated."457 Contrary to Caplan's analysis, however, Massey found that the Ninth Amendment's state law rights trump federal powers in the event of conflict.458 He rested this conclusion on two arguments: (1) the textual argument that, if the unenumerated state-law rights limit only state power, and not federal power, these unenumerated rights would be disparaged vis-à-

more safe and more consistent with the spirit of the 1st and 17th amendments proposed by Virginia that this reservation agst. constructive power, should operate rather as a provision agst. extending the powers of Congs. by their own authority, than a protection to rights reducible to no definite certainty.

Id. (quoting Letter from James Madison to George Washington, supra note 105, at 431).

Another commentator who embraced Caplan's thesis, Arthur Wilmarth, also relied upon the same dialogue from Virginia to which Randolph had contributed. See Wilmarth, supra note 2, at 1302 & n.209 (concluding that Ninth and Tenth Amendments reflect "parallel intent" and were designed to "work together to restrain the extension of congressional powers by implication").

456. See Caplan, supra note 415, at 263-64 (comparing Ninth and Tenth Amendments and concluding that "[t]he ninth amendment looks to the past, to established rights that have been or shall be 'retained'; the tenth amendment looks to the future, allowing the states to legislate, to revise their constitutions, and in general to engage in appropriate governmental operations"). At first glance, Caplan's conclusion might seem more plausible because the Virginia proposal that anticipated the Tenth Amendment used Article II's "rights, powers, and jurisdiction" language, while Madison's Tenth Amendment proposal used only the language of "powers." Compare Debates in the Convention of the Commonwealth of Virginia on the Adoption of the Federal Constitution, in 3 Elliot's Debates, supra note 19, at 659 ("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 federal government."), with 1 Annals of Cong. 454 (Joseph Gales ed., 1789) ("The powers delegated by this constitution are appropriated to departments to which they are respectively distributed.").

457. See Massey, supra note 16, at 121-22 (discussing purpose of Ninth Amendment "to do more than secure unenumerated state-sourced rights from federal invasion" and "serve as a barrier to encroachment upon natural rights retained by the people" (citing Caplan, supra note 415, at 254)); see also id. at 123-24 (stating that "even originalist commentators such as Russell Caplan have concluded that the Ninth Amendment 'simply provides that the individual rights contained in state law are to continue in force under the Constitution until modified or eliminated by state enactment, by federal preemption, or by a judicial determination of unconstitutionality'" (quoting Caplan, supra note 415, at 228)).

458. See id. at 124 (arguing that Ninth Amendment rights "are, by definition, federal constitutional rights, whatever their ultimate source may be").
vis the enumerated rights, which do limit federal power;\textsuperscript{459} and (2) the historical claim that the antifederalists were seeking to limit federal power and would not have agreed to a provision that did not protect fundamental state-law rights against federal power.\textsuperscript{460}

A fundamental problem, however, is that the two proffered reasons for refusing to limit the state-law rights as proposed by Caplan would equally be grounds for rejecting Caplan’s conclusion that the Ninth Amendment was about securing state-law rights as such—a conclusion that rested on the finding that the purpose was only to reserve state law rights that were not superseded by the powers granted by the Constitution.\textsuperscript{461} Thus, if we reject Caplan’s attempt to analogize the protection given state-law rights by the Ninth Amendment to the protection given residual state powers by the Tenth, as Massey insists we must based on the Ninth Amendment’s prohibition on disparaging unenumerated rights, we equally undercut the major piece of evidence Caplan relies upon to link the Ninth Amendment to securing state law rights: Edmund Randolph’s statement linking together the basic thrust of the Virginia equivalents of the Ninth and Tenth Amendments.\textsuperscript{462} Similarly, if it is true that the antifederalists would not have been satisfied with a simple reassurance that state-law rights would not be displaced except by the legitimate exercise of delegated power, it follows that the very foundation of Caplan’s argument—

\textsuperscript{459} See id. (stating that Ninth Amendment forbids interpreters to “deny or disparage” other rights retained by people in state constitutions); see also U.S. Const. amend. IX (“The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.”).

\textsuperscript{460} See Massey, supra note 445, at 1244 (finding fault with Caplan’s reading in part because it “assumes that the Anti-Federalists failed to realize that the ninth amendment would not do what they demanded of it: preserve individual rights rooted in state law against federal invasion”). Massey went further to state: “Given the evident and overriding concern of the Anti-Federalists on this point, it is highly unlikely that the Anti-Federalists would have acceded to an amendment so ill-suited to their purpose.” Id.

\textsuperscript{461} See id. (discussing Caplan’s view). Remarkably, Massey states these contradictory conclusions without questioning the line of analysis by which Caplan reasoned that state law rights were protected by the Ninth Amendment, including his use of evidence linking both the Ninth and Tenth Amendments to Article II of the Articles of Confederation. See id. ("Caplan contends that the [Ninth] amendment simply provides that the individual rights contained in state law are to continue in force under the Constitution until modified or eliminated by state enactment. . . .") (quoting Caplan, supra note 415, at 254). Massey’s analysis attempts to link the Ninth Amendment to the debate over the Supremacy Clause and the adequacy of the state declarations of rights, but Caplan’s analysis links the amendment to the fears expressed as to the omission of Article II of the Articles of Confederation. Id. at 1254 (arguing that his interpretation of Ninth Amendment does not violate Supremacy Clause). Consequently, whereas Caplan’s analysis is premised on the view that all state-law rights are secured, but only residually (to the extent not preempted by powers granted the nation), Massey focuses exclusively on state fundamental law. Id. at 1258-63 (discussing Ninth Amendment as preserving state fundamental law).

\textsuperscript{462} For a discussion of Edmund Randolph’s view, see supra note 102-03 and accompanying text.
that the Ninth Amendment grew out of Article II of the Articles of Confederation—must equally be rejected.\footnote{463}{See Massey, supra note 445, at 1238 n.50 (suggesting that his own state-law rights interpretation is bolstered because other commentators have followed Caplan's lead in perceiving Ninth Amendment as guarantee of rights secured by state law). This claim is unwarranted. In each case, the authors linked up with Caplan's idea that the rights secured by the Ninth Amendment are state-law rights in their nature and concluded that the Ninth Amendment performs the same function for state-law rights that the Tenth Amendment performs for state powers. See, e.g., Wilmuth, supra note 2, at 1302-03 n.209 (distinguishing view that Ninth Amendment is "barrier against the extension of federal powers by unwarranted implication," which follows Caplan, from view that Amendment acts as "limitation on the means by which [federal] powers could be exercised"). Although Caplan and those who have followed his lead may well have confounded the purposes of the Ninth and Tenth Amendments, the evidence and analysis they rely upon hardly furthers Massey's conception of the project embodied in the Ninth Amendment. For a discussion of the Ninth and Tenth Amendments, see supra notes 378-82 and accompanying text.}

Massey's state-law rights thesis and Caplan's analysis, however, begin at fundamentally opposed starting points for understanding the project embodied in the Ninth Amendment. Caplan sees the Amendment as an outgrowth of Article II and, therefore, as a complementary provision to the Tenth Amendment's general reservation of all power not granted to the national government.\footnote{464}{For a discussion of Caplan's Ninth Amendment analysis, see supra note 445 and accompanying text.} Massey sees the Amendment as an expansion of the limiting provisions of the first eight amendments and, thus, as complementary to the idea of stating affirmative limitations on powers granted to government.\footnote{465}{For a discussion of Massey's view of the Ninth Amendment, see supra notes 457-60 and accompanying text.} Although these views are superficially similar, virtually every bit of evidence that would support Caplan's reading would undermine Massey's, and vice-versa.

The key to resolving the issue of the relationship between concerns about state-law rights and the Bill of Rights is to understand that the fear of displacement of state law was really a variation on the general antifederalist themes of unlimited powers and consolidated government. Maryland's antifederalist minority, for example, proposed that "Congress shall exercise no power but what is expressly delegated by this constitution."\footnote{466}{See Address of a Minority of the Maryland Ratifying Convention, supra note 41, at 94 (agreeing to this amendment to Constitution by "unanimous vote" or "great majority" and restraining powers given to Congress in Article I).} Its proponents claimed that, pursuant to this provision, the "general powers given to Congress" by the Necessary and Proper Clause and the Supremacy Clause would be restrained, constructive powers prevented and "those dangerous expressions by which the bills of rights and constitutions of the several states may be repealed by the laws of Congress, in some degree moderated, and the exercise of constructive powers wholly pre-
vented." This state-law-rights-based argument and proposal leads directly to the Tenth Amendment as drafted by Madison. Furthermore, it underscores that inferences against rights to be reserved structurally, by the grant of limited powers and the reservation of all powers not granted, were feared as much as deficiencies in the elaboration of specific, affirmative limitations on government power.

To put the same basic point another way, the debate over the significance of the Supremacy Clause begged the question presented by the balance of the debate over the Constitution as a whole. The Constitution’s defenders conceded that the Supremacy Clause meant that federal law would displace conflicting state law, but they denied that the powers granted to the national government were extensive enough to present a real threat to traditional rights secured by state law. Those who opposed the Constitution believed that the Supremacy Clause eliminated the security of state-law guarantees because the rest of the Constitution could be read to grant so much power to the national government as to render state-law protections meaningless. The debate over the Supremacy Clause became simply another angle from which to continue the dialogue between those demanding and those opposing a bill of rights in general and a clause reserving power to the people and the states in particular.

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

467. See id. at 94-95 (referencing one of thirteen amendments agreed to by Maryland convention and referred to committee). This proposal is simply another version of the general reservation clause demanded by antifederalists at every convention; it is the functional equivalent of the Tenth Amendment.

468. See Caplan, supra note 415, at 245 (stating that “antifederalists pointed out that Article II of the Articles of Confederation had embraced individual as well as state rights, and argued that a bill of rights was necessary to guarantee individuals the same protection under the proposed Constitution”).

469. See id. at 259-60 (finding that provision that antifederalists envisioned ultimately became Ninth Amendment).

470. For a discussion of the Constitution’s scheme of enumerated powers and reserved rights, see supra note 56-62 and accompanying text.
that the powers actually granted to the national government did not conflict with them.

The Ninth Amendment protected exactly the same rights—those defined as the residuum from the powers delegated to the nation by the Constitution—but from an entirely different potential threat. Federalist critics feared that a bill of rights, as described above, that attempted to enumerate specific limitations on the powers delegated by the Constitution might threaten the rights secured structurally by creating the inference that the federal government was limited only by the specific rights contained in the bill of rights.\footnote{471} A related argument was that the inclusion of fundamental rights as to which no power had in fact been granted could itself raise an inference that unintended powers had been granted as to which such specified rights served as exceptions or limitations.\footnote{472} The Constitution’s antifederalist critics, who demanded a bill of rights, simply added to the concerns that led to the Ninth Amendment, inasmuch as they chose to adopt the thrust of these arguments, in responding that the partial enumeration of rights in the proposed Constitution itself suggested the very implications that the federalists feared from a bill of rights. The Ninth Amendment’s purpose to secure the rights reserved by the Constitution’s enumerated powers scheme is reflected in Virginia’s seventeenth proposed amendment, drafted by Madison and prominent antifederalists and later drawn on by Madison in drafting the Ninth Amendment.\footnote{473} This provision prohibited an inference of extended national powers from the enumeration of specific clauses limiting the exercise of federal powers and clarified that these stated limitations might in some cases be mere cautionary provisions that do not qualify any power actually granted.\footnote{474}

\footnote{471} The federalists feared that the attempt to set forth a comprehensive set of rights would be taken as exhausting the people’s rights as against the new government, in effect demolishing the distinction between the federal government, intended as a government of enumerated powers, and the state governments, which were conceived as governments of general powers. \textit{See 4} \textit{Elliott’s Debates, supra} note 19, at 149 (“A bill of rights, as I conceive, would not only be incongruous, but dangerous.”). For a further discussion of Iredell’s fears, see \textit{supra} note 19 and accompanying text. For a discussion of the fear of such a bill of rights, see \textit{supra} notes 17-20 and accompanying text.

\footnote{472} \textit{See}, e.g., \textit{The Federalist} No. 84, \textit{supra} note 274, at 579 (asserting that bill of rights is not only unnecessary but also dangerous). Hamilton expressed concern that a bill of rights “would contain various exceptions to powers which are not granted; and, on this very account, would afford a colourable pretext to claim more than were granted.” \textit{Id.}

\footnote{473} \textit{See} McAfee, \textit{Original Meaning}, \textit{supra} note 15, at 1236 (noting that Madison served on committee appointed by Virginia Ratifying Convention, which included prominent antifederalists George Mason and Patrick Henry, to draft Virginia proposed amendments which later became Madison’s basis for Ninth Amendment).

\footnote{474} \textit{See} 2 Schwartz, \textit{supra} note 87, at 844 (discussing Virginia’s seventeenth proposal). It read:
When the Ninth and Tenth Amendments are understood in this way, it becomes clear why Massey’s fails to turn concerns of the antifederalists about state-law rights into a sword against delegated federal powers. If the goal of these amendments was to ensure that state-law rights secured by reserved state sovereignty remained unthreatened, the rights referred to in the Ninth Amendment would in no sense be disparaged. They would only be disparaged if, contrary to the amendment’s command, interpreters inferred enlarged rights-threatening federal power from the enumeration of the specific limitations in the Constitution and Bill of Rights. Massey’s other argument against Caplan’s state-law rights analysis, that the antifederalists would have insisted that state-law rights serve as affirmative limits on federal power, is simply not supported by history. The evidence overwhelmingly shows an insistence by the antifederalists that the Constitution should be amended to include the rights-protective features of both specific affirmative limitations on delegated powers and a general reservation of all powers not granted. At the same time, the antifederalists were full participants in the process by which amendments were proposed by the state ratifying conventions, and none of the conventions that proposed amendments included any proposals for an amendment that would have qualified the Supremacy Clause or empowered states to overcome its effect by the adoption of individual rights guarantees in state law.

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

Id.; see McAfee, supra note 15, at 1278; see also Wilmarth, supra note 2, at 1298 (discussing evidence suggesting that Ninth Amendment was linked to Virginia’s proposed limit on appropriate inference to be derived from inclusion of particular limiting clauses).

475. See McAfee, Original Meaning, supra note 15, at 1247 n.131 (noting textual argument that Ninth Amendment disparages unenumerated rights to afford them lesser power in constitutional system). After all, no one claims that the rights secured by Article I’s enumerated powers (as argued by its leading defenders) are disparaged simply because they do not serve as affirmative limitations on delegated powers, nor that the rights that antifederalists sought to protect in the Tenth Amendment are disparaged because they flow from the truisms that all not granted is reserved to the states and people. These are all, however, unenumerated rights. Moreover, if the summary of the historical purpose of the Ninth Amendment set forth in text is correct, these sources of rights are the proper baselines for comparison, and the text of the Ninth Amendment is fully implemented by recognizing that it protects state law rights, but only in a limited way. See id. (observing that text-based disparagement argument begs question). Most disappointingly, despite the proffered critique, Massey writes as though the point is both unassailable and unchallenged.

476. See Massey, supra note 445, at 997 (discussing constitutional amendments proposed by Pennsylvania Ratification Convention). The statement in the text is true notwithstanding Massey’s assertion that his reading receives “explicit support” from “such declarations” as the one he states was “proposed by the Pennsylvania ratification convention.” Id. The proposed amendment in question provided that “every reserve of the rights of individuals” in the various state constitutions “shall,
B. *State Law Rights and the Supremacy Clause*

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

remain inviolate, except so far as they are expressly and manifestly yielded or narrowed by the national Constitution." *Proceedings of the Meeting at Harrisburg, Pennsylvania* (Sept. 3, 1788) [hereinafter *Harrisburg Proceedings*], in 2 *Elliot's Debates*, *supra* note 19, at 545. The Pennsylvania Ratifying Convention did not propose any amendments to the Constitution. The proposed declaration to which he refers was drafted in September of 1788, almost a year after Pennsylvania ratified the Constitution, and was adopted by a "convention" comprised of antifederalist opponents of the Constitution. See *id.* at 542 (proposing twelve amendments to Constitution). In addition to adopting a specific list of proposed amendments, a number of which contemplated significant structural changes reflecting fundamental objections to the Constitution as adopted, this convention also proposed a second general convention for the purpose of revising the Constitution. See *id.* at 544-46 ("[I]t is necessary to obtain a speedy revision of said Constitution, by a general convention."). The work of this particular convention was not, in short, of a nature to have been a likely source to which Madison would have looked in drafting his proposed bill of rights. Considering that the Ninth Amendment, especially as drafted and proposed by Madison, closely tracks with language actually adopted by the Virginia Ratifying Convention, there is no reason to think that this "Harrisburg" amendment influenced the drafting at all. See *McAffee, Original Meaning*, *supra* note 15, at 1278-82 ("Virginia’s seventeenth proposal, on the other hand, spoke more directly to the Federalist argument that enumerating rights would threaten the principle of limited powers.").

Moreover, it is extremely unlikely that even the Harrisburg amendment was intended to have the effect that Massey attributes to it. The amendment does not by its terms purport to give state constitutional rights priority over the exercise of federal powers, but to preserve them "except as they are expressly and manifestly yielded or narrowed by the national Constitution." *Harrisburg Proceedings*, *supra*, at 545. There is every reason to think that the Constitution’s express and unqualified grant of power to Congress to raise and support an army, to use a prominent example from the ratification debates, would be understood as trumping state constitutional limits on the creation of standing armies in peacetime even under the "Harrisburg" amendment. Although this proposed amendment could potentially have suggested a strict construction of federal powers, it is a virtual certainty that such a proposal received serious consideration the requirement that state constitutional provisions be "expressly or manifestly" yielded to the nation would have been eliminated for the same reasons that the word "expressly" was eliminated from the Tenth Amendment over the objections of the antifederalists. See *The Federalist* No. 44, *supra* note 107, at 303-04 (stating reasons that Framers did not track article II’s use of term "expressly" in stating principle of reserved sovereignty); cf. *Massey, supra* note 16, at 310 n.27 (explaining change in Ninth Amendment language away from focus on power to focus on rights as decision against restricting congressional power to "the express grant of the Constitution," which reflected "Madison’s commitment, at the time, to a strong federal system").

477. See *Massey, supra* note 445, at 1231 (suggesting that Ninth Amendment together with rest of Bill of Rights should be viewed as part of "Anti-federalist constitution" that was "concerned with preserving the states as autonomous units of government and as structural bulwarks of human liberty"). In support of this conclusion, he mainly relies on the antifederalist demands for a bill of rights during the debate over ratification, as well as the close historical association of the Ninth
federalists were adamant that federal supremacy over the limited objects of national power would have been implicit, even without an express clause stating the principle of supremacy,\(^{478}\) and that such supremacy was absolutely essential to the achievement of the goals of establishing a new constitution with enlarged powers.\(^{479}\) Given that Massey sees the Ninth Amendment as reflecting "a desire to retain for the states maximum flexibility in defining the content of retained rights," he is not troubled by the prospect that federal laws within the scope of the powers granted by the Constitution could be valid in some states but not in others.\(^{480}\) James

Amendment with the Tenth Amendment—a provision universally demanded by antifederalist critics of the Constitution. See id. at 1233-38 (finding support through textual origins of Ninth Amendment and evident connection between that Amendment and Tenth Amendment). Although it is true that without the pressures generated by the antifederalist demands that the Constitution more adequately secure traditional rights we may not have obtained a Bill of Rights, it does not follow that the meaning of crucial provisions is to be sought in antifederalist political and constitutional philosophy.

Massey's analysis ignores the work of constitutional historians showing that the federalist supporters of the Constitution dominated the amendment process, consistently supporting Madison's fixed determination to insert only the amendments that secured long-established fundamental rights that would not be controversial. See Letter from James Madison to Edmund Randolph, supra note 363, at 219 (explaining that under his proposed amendments "the structure & stamina of the Govt. are as little touched as possible," and that proposed amendments would be limited to those "which are important in the eyes of many and can be objectionable in those of none"); see also Finkelman, supra note 430, at 368-78 (describing how Madison and his federalist counterparts in Congress systematically supported well-established individual rights guarantees while rejecting proposed amendments that "sounded in structure" and were viewed as posing threat to powers established by Constitution); Donald S. Lutz, The States and the U.S. Bill of Rights, 16 S. Ill. U. L.J. 251, 258 (1992) (arguing careful review of state proposals and Madison's proposed amendments confirms that Madison "avoided any alteration in the institutions defined by the Constitution, largely ignored specific prohibitions on national power, and opted instead for a list of rights that would clearly connect with the preferences of state governments, but would not increase state power vis-à-vis the national government defined in the Constitution"). Similarly, the Tenth Amendment was drafted to reaffirm the assumptions implicit in Article I without suggesting a rule of strict construction of national power, and antifederalist attempts to insert the word "expressly" were defeated. See House Committee Report, supra note 384, at 33 n.33 (noting that on August 18 and 21, 1789 Committee of the Whole in House rejected proposal to insert word "expressly" in proposed reserved powers amendment); House Resolution and Articles of Amendment, supra note 365, at 41 n.21 (recording that on Sept. 7, 1789, Senate rejected motion to insert "expressly").

\(^{478}\) See, e.g., The Federalist No. 33, supra note 107, at 204 (stating that Supremacy Clause "would have resulted by necessary and unavoidable implication from the very act of constituting a federal government, and vesting it with certain specified powers").

\(^{479}\) See, e.g., The Federalist No. 44, supra note 107, at 306 (stating attack on Supremacy Clause reflects "indiscreet zeal" because without it, Constitution "would have been evidently and radically defective" and arguing "saving clause" in favor of state constitutions would have reduced new national government to impotence).

\(^{480}\) See Massey, supra note 16, at 134 (describing advantages to approaching Ninth Amendment rights as varying with differing state constitutions because
Madison, however, saw it as a fatal objection to any attempt to preserve state powers against federal supremacy that “a treaty or national law of great and equal importance to the States would interfere with some and not with other constitutions, and would consequently be valid in some of the States at the same time that it would have no effect in others.”

Moreover, considering the vagueness and generality of the Ninth Amendment, especially when read as a guarantee of affirmative limitations on government in favor of rights rather than as a clause securing the rights implicit in the original federal structure, the first Congress would have viewed a reverse preemption purpose, had it actually been proffered, as a rule lacking any sort of meaningful limits. Nothing in the Amendment’s text suggests any possible limiting principle by which to judge the potential scope and implications of a provision guaranteeing state constitutional rights. One consequence of this lack of a limiting principle would be that preexisting state constitutional rights that the Framers had purposefully rejected would properly be held to limit federal power. For example, we have seen that the Framers of the Constitution granted Congress an unqualified power to raise standing armies. This was true even though opposition to peacetime standing armies, as a threat to liberty, had deep roots in English constitutionalism, and several state declarations of rights had stated limitations on the use of standing armies.

Considering that limits on standing armies were viewed as essential guarantees of liberty, particularly by the antifederalists to whom Massey attributes the Ninth Amendment, these provisions would logically be included among the retained rights under Massey’s theory, and would not give way to con-

Ninth Amendment rights have their origin in state constitutions, find that “Ninth Amendment decisional law would develop a richly variegated pattern.”; see also id. at 135 (acknowledging that many would be troubled “that some Americans would enjoy more individual liberty than others,” but arguing that this sort of outcome is implicit in federal system in any event).

481. The Federalist No. 44, supra note 107, at 306.

482. See Malcolm, supra note 348, at 155-56 (discussing difficulty of preserving liberties where numerous standing armies are kept).

483. See Reid, supra note 346, at 49 (stating that there were “few principles better established in eighteenth-century law than that a standing army was unconstitutional”).

484. See, e.g., Virginia Declaration of Rights, supra note 347, at 3814 (providing “that standing armies, in time of peace, should be avoided, as dangerous to liberty”). Pennsylvania and North Carolina also had provisions against standing armies in peacetime. See North Carolina Declaration of Rights, reprinted in 5 Federal and State Constitutions, supra note 140, at 2788 (stating that “the people have a right to bear arms, for the defense of the State; and, as standing armies, in time of peace, are dangerous to liberty, they ought not to be kept up . . . .”); Pennsylvania Declaration of Rights, reprinted in 5 Federal and State Constitutions, supra note 140, at 3083 (same). Several other states had provisions recognizing the danger of standing armies, but only requiring the consent of the legislature. See, e.g., New York Declaration of Rights, reprinted in 5 Federal and State Constitutions, supra note 140, at 2673 (differing from previous state constitutions); New Jersey Declaration of Rights, reprinted in 5 Federal and State Constitutions, supra note 140, at 2600 (same).
flicting federal law. Thus the deliberate decision to extend this very power by the Federal Constitution—a decision that engendered great controversy, but which was fiercely defended by the Constitution's proponents—could be effectively nullified by the state-rights aspect of the Ninth Amendment.\footnote{See The Federalist No. 44, supra note 107, at 305 (discussing invasion of rights of states). Indeed, this power of Congress fits into Madison's criticism that any system of exemption of fundamental state law could rob essential federal laws of critical uniform application. See id. at 306. It is not even clear how such a state-law right could be enforced, whether by a prohibition of the state's citizens from service in such a standing army or a ruling that the army could not be stationed within the boundaries of the state protecting this right. Although Massey might suggest that this prohibition is not the sort of liberty-bearing individual right contemplated by his understanding of the Ninth Amendment, given that it secures liberty for the collective citizenry by a structural limitation on power, it would be difficult to build a case that the founding generation would have relied upon any such distinction. Both the First Amendment right to assemble and petition and the Second Amendment declaration of the importance of a well-regulated militia, supported by the people's right to keep and bear arms, constitute guarantees that run in favor of the people collectively as much as to individuals. If guarantees of liberty, rights retained by the sovereign people of the several states, are not to be "disparaged" because of the Ninth Amendment, it is difficult to provide a principled ground for rejecting a right many Americans deemed among the most fundamental.} Such a result, however, is simply not plausible.

Similarly, the text of the Ninth Amendment provides no clue as to how to resolve the conflicts among rights that such a regime would inevitably give rise to. For example, Massey assumes that the Supremacy Clause dictates that a right "with its substantive source in federal law," such as one of the rights enumerated in the Bill of Rights, prevails over a state constitutional guarantee with which it conflicts.\footnote{See Massey, supra note 445, at 1255 ("[I]f one right must yield, the supremacy clause appears to dictate that the right with its substantive source in federal law should prevail.").} But if state constitutional rights might prevail over enumerated federal powers, notwithstanding the Supremacy Clause, as Massey's theory posits, it is not clear why state-law rights might not also prevail over rights rooted substantively in federal law. In fact, Massey does not explain how to reconcile this priority for rights rooted in federal law with the Ninth Amendment's asserted purpose to establish that "[t]he citizens of each state would be entitled to define their relationship with all of their governmental agents."\footnote{See id. at 1248 (describing "legacy of a system of dual sovereignty" and probable intention of Ninth Amendment). Massey even relies on this Supremacy Clause technique to resolve the conflict between a hypothetical state constitutional "right to life" guarantee and Roe v. Wade, 410 U.S. 113 (1973).} Nor does he at-
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tempt to explain how giving priority to enumerated federal rights fits together with the argument that the Ninth Amendment itself prohibits disparaging the unenumerated retained rights. Thus, Massey's own Supremacy Clause appears to give the unenumerated retained rights the lesser status he elsewhere rejects.

Recognizing that the Supremacy Clause and structural analysis cannot do all the work required to avoid unwelcome outcomes of his state-law rights thesis, Massey eventually comes down to simply delegating to the Supreme Court the task of preventing potential state abuses that such a guarantee might permit. The Supreme Court thus would determine whether particular state constitutional guarantees were truly designed "to limit the ability of any government—state or federal—to invade the individual rights the sovereign people deem precious," or merely to "frustrate national policies squarely within the legitimate powers of the national government." Ultimately, even as to state guarantees reflecting a bona fide theory of individual liberty, the Court would be empowered "to limit putative ninth amendment rights to those that do not significantly impair other existing and recognized fundamental rights." Although Massey offers an extensive analysis as to how the Court might go about the task of balancing fundamental rights and federalism values and prioritizing fundamental rights, the suggested approach reads like a rescue operation designed to avoid the clear implications of granting

Supreme Court's view of unenumerated rights should prevail over the views of the sovereign people of a particular state—especially given the purpose attributed to the Ninth Amendment in the statement quoted above in text. Can there be any doubt, after all, how the antifederalists would have resolved such a conflict if they were choosing between rights deemed fundamental by the people of the individual states and the United States Supreme Court?

488. See Massey, supra note 445, at 1256 ("Some judicial good sense would be necessary to sort the 'liberty-bearing norms' from the purely administrative ones.").

489. See id. at 1256-57 (describing "proper structural function" of Ninth Amendment).

490. See id. at 1256, 1263-65 (suggesting also that Court might invalidate state-law guarantees that threaten "the kind of economic or social balkanization that the original Constitution was designed to prevent" along lines of modern dormant commerce clause doctrine).

491. See id. at 1257 (giving example of how expanding fundamental rights under Ninth Amendment limits rights held by other people by stating "if the right to speak includes the right to hurl racial insults, there is a corresponding reduction in another's claimed right to be free of racial harassment [sic]."). Once again, however, Massey offers no reconciliation between his own apparent preference for fundamental rights carved from the text of the Federal Constitution and his historical claim that a purpose of the Ninth Amendment was to empower citizens of each state to order their relationship with all levels of government. In fact, the only logical explanation for the preference for court-created unenumerated rights over fundamental state-law rights is the familiar modern distrust of states as historical sources of oppression, a concern that cuts sharply against Massey's state-law rights thesis.
subordinate units the power to create rights that trump federal power.\textsuperscript{492} Apart from Massey's failure to link any of this more extended analysis to any plausible theory of the text and history of the Ninth Amendment, these qualifications substitute unbridled judicial discretion to balance national interests with state constitutional rights for what would otherwise be a states' rights guarantee that would have supplied the means of sabotaging the federal system established by the unamended Constitution.

V. Conclusion

What all these commentators share is an unwillingness to accept the straightforward understanding that the federal structure as originally conceived served in part to secure popular rights, and that it was the device of enumerated powers that the Ninth and Tenth Amendments were intended to preserve. One obvious reason for this is because, although these proponents of expansive readings of the Ninth Amendment refer to restoring our federal system as a guarantee of liberty, they are more friends of expansive national power to secure fundamental rights than of federalism as it was originally conceived. If we want the Ninth and Tenth Amendments to serve the cause of liberty, while remaining true to the Constitution as it was drafted and understood, our best bet may be to look more sympathetically at the Supreme Court's decisions in \textit{New York v. United States}\textsuperscript{493} and \textit{United States v. Lopez}\textsuperscript{494}

Another implication is that we might be forced to acknowledge that we have come to value other goals above those of the liberties secured by our federal system. One simple lesson is that perhaps the antifederalists were right, and it is a good thing we included a federal bill of rights. If the rights we obtained in the Bill of Rights as supplemented by the subsequent amendments, are insufficient, Article V of the Constitution sets forth a method for adding additional rights. The one thing we should not do is misread the Constitution and its history to justify informally amending the Constitution to secure limits on government that the Framers never conceived of and would never have adopted, or to empower the judiciary in ways that the Framers, with good reason, would never have thought acceptable.

\textsuperscript{492} See, e.g., \textit{Massey}, supra note 16, at 148-73 (discussing balancing of fundamental rights and federalism values). Massey commented that "the positive aspect of the Ninth Amendment was designed to preserve state-sourced fundamental liberties but was rooted in an attempt to strike a balance between federal power and the individual liberties of citizens whom that power could affect." \textit{Id.} at 152.

\textsuperscript{493} 434 U.S. 159 (1977) (limiting federal power to dictate affirmative action by state governments based on assumptions underlying federal scheme).

\textsuperscript{494} 514 U.S. 549 (1995) (recognizing, for first time in 60 years, limits on regulatory powers of Congress under Commerce Clause).