

**What Does History Have to Say About the Ninth Amendment?**

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## **I. Introduction**

The Ninth Amendment's meaning has been subject to great debate. Ultimately, the schools of thought surrounding its original meaning can be categorized into five schools of thought. The first, prominently advocated by Russell Caplan, is the states' right model. He argues by looking at the framers' intent and legislative history of the Ninth Amendment, it is clear that the amendment was included in the Constitution to ensure the unenumerated rights mentioned are secured by state constitutions. The second theory, prominently argued by Thomas McAfee, holds that the meaning of the Ninth Amendment was to secure the unenumerated rights residually. In other words, the Ninth Amendment acts as a guard against any inference that those rights not expressly granted in the Bill of Rights were relinquished to the federal government. The third theory, known as the collective rights theory, asserts that all rights mentioned in the constitution, even those which are unenumerated are held collectively by the people. The next is the rule of construction theory. This view holds that the Ninth Amendment is best understood as a constitutional rule by which to read the liberty bearing provisions of the Constitution. Ninth Amendment theorists have also put forth the federalism theory. This theory holds that the purpose of the Ninth Amendment, coupled with the Tenth Amendment, was to secure the ideal of federalism. The last theory, the individual natural rights theory, urges that the Ninth Amendment was included in the constitution as a 'catch all' provision to ensure that just because a right was not enumerated it would not receive protection. Common to all the aforementioned schools of thought is that the Ninth Amendment does protect unenumerated rights. Moreover, each theory relies on the same basis of assertion – the history of the amendment. However, each school of thought draws differing conclusions from the legislative history of the amendment. Thus, it will be my overall aim to demonstrate that while the various

models share some common ground – the legislative history of the Ninth Amendment lends itself to mostly supporting the individual natural rights theory.

I will proceed by first situating the Ninth Amendment in historical context, namely the debate between federalists and antifederalist. Then I will survey the history specific to the Ninth Amendment. In this section I will not only survey the specific legislative history of the Ninth Amendment but also other historical documents that may help shed light on its meaning. Then I will put forth various theories of the Ninth Amendment and demonstrate that while some are wholly incorrect others are only incorrect. Ultimately, I will conclude that the best theory in which to understand the Ninth Amendment is the individual natural rights theory.

## **II. Putting the Ninth Amendment in Context**

The Ninth Amendment was dormant from 1791 to 1965.<sup>1</sup> Thus, to properly understand the history of the Ninth Amendment, it is necessary to situate the ratification of the bill of rights in historical context. During the debate of constitutional ratification many framers “believed that the national government created by the Constitution would be a government of specific enumerated powers.”<sup>2</sup> The newly constructed government would not have “implied powers to limit or otherwise infringe upon the basic and fundamental personal rights.”<sup>3</sup> This is evidenced by Alexander Hamilton’s statement that enumerating rights was “not only unnecessary in the proposed Constitution but would even be dangerous.”<sup>4</sup> James Wilson further argued that “if we attempt an enumeration, everything that is not enumerated is presumed to be given.”<sup>5</sup> However,

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<sup>1</sup> LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 242 (2001).

<sup>2</sup> Sol Wachtler, *Judging the Ninth Amendment*, 59 *FORDHAM L. REV.* 597, 600 (1991).

<sup>3</sup> *Id.*

<sup>4</sup> THE FEDERALIST NO. 84 at 433 (Alexander Hamilton) (Ian Shapiro ed., 2009).

<sup>5</sup> James Wilson, *Pennsylvania Ratifying Convention* (Nov. 28, 1787), [https://archive.csac.history.wisc.edu/3\\_James\\_Wilson\\_Speech.pdf](https://archive.csac.history.wisc.edu/3_James_Wilson_Speech.pdf).

not all framers shared this sentiment. George Mason argued, “there is no Declaration of Rights; and the Laws of the general Government being paramount to the Laws and Constitutions of the several States, the Declaration of Rights in the separate States are no security.”<sup>6</sup> Summarily, the antifederalists offered two counter points to federalist arguments. The first was to question the “effectiveness of enumerated powers as a limitation of federal power.”<sup>7</sup> With respect to the ‘danger of enumerating rights’ antifederalists argued that enumerated rights were already protected in Article I, Section 9 – thus, “this very short list invited the same danger.”<sup>8</sup> At an impasse “Madison switched to the cause of adding amendments to the Constitution that would protect individual liberties and allay the fears of people who would likely support the Constitution, if given a sense of security about their rights.”<sup>9</sup>

Subsequently, on May 4, 1789, Madison gave notice to the House of Representatives that he intended to submit the resolutions (amendments).<sup>10</sup> After the amendment was submitted, the House of Representative “formed a select committee, of which Madison was a member, to review the proposals.”<sup>11</sup> During this time the committee decided to revise the amendment. On July 28, 1789, the House, with changes to Madison’s original proposal, approved the fourth resolution, which is now known as the Ninth Amendment.<sup>12</sup> However, as noted earlier, Ninth Amendment scholars disagree as to both Madison’s intent for incorporating the Ninth

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<sup>6</sup> George Mason, *Objections to the Constitution of Government Formed by the Convention*, in 2 THE COMPLETE ANTI-FEDERALIST 11 (H. Storing ed., 1981).

<sup>7</sup> Barnett, *supra* note 3, at 8.

<sup>8</sup> *Id.*

<sup>9</sup> Levy, *supra* note 1, at 246.

<sup>10</sup> The last clause of the fourth resolution, the Ninth Amendment, read: “The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.” 1 ANNALS 451-52.

<sup>11</sup> James F. Kelley, *The Uncertain Renaissance of the Ninth Amendment*, 33 UNI. OF CHI. L. REV. 814, 821 (1966).

<sup>12</sup> *Id.* at 754. The approved version stated, “The enumeration in this Constitution of certain rights shall not be Constitution of certain rights, shall not be construed to deny or disparage other retained by the people.”

Amendment and the meaning of the amendment. In the next section, I will put forth the legislative history of the Ninth Amendment and other documents that have been utilized by Ninth Amendment scholars to ascertain the meaning of the amendment.

### III. History of the Ninth Amendment

Provided the general context under which the Ninth Amendment was ratified, I will now explore Madison's specific comments on the amendment. While these were given at various times, ultimately, I will argue that a specific theme emerges – namely a concern for individual rights.

To ascertain the meaning of the Ninth Amendment, it is necessary to begin with Madison's speech in the House defending the Bill of Rights.<sup>13</sup> Madison, in response to objections of the Bill asserted, that those "arguments [against the Bill of Rights] are not entirely without foundation" as the government has "discretionary powers with respect to the means, which may admit of abuse to a certain extent."<sup>14</sup> But, he argued, "I have attempted it, as gentlemen may see by turning to the last clause of the 4th resolution," which states that the Constitution "shall not be so construed as to diminish the just importance of other rights retained by the people."<sup>15</sup> This seems to suggest that Madison intended unenumerated rights to "limit the means by which federal powers are exercised."<sup>16</sup> Moreover, in defending this provision, Madison argued that to ensure "the tranquility of public mind," the convention should incorporate the 4th resolution "as a

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<sup>13</sup> Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 25 (2006).

<sup>14</sup> 5 JAMES MADISON, THE WRITINGS OF JAMES MADISON: COMPRISING HIS PUBLIC PAPERS AND HIS PRIVATE CORRESPONDENCE, INCLUDING NUMEROUS LETTERS AND DOCUMENTS 383 (Gaillard Hunt ed. 2015) [hereinafter *The Writings of James Madison*].

<sup>15</sup> *Id.*

<sup>16</sup> Barnett, *supra* note 13, at 25.

declaration of the rights of the people.”<sup>17</sup> However, Madison’s speech is not the only historical source shedding important light on Ninth Amendment. Roger Sherman served on the Select Committee with Madison. It was discovered, in the 1980s, that some of draft papers of the Bill of Rights that were originally attributed to Madison, actually belonged to Sherman.<sup>18</sup> Sherman wrote, that “the people have certain natural rights which are retained by them when they enter into Society” and these “rights . . . Shall not be deprived by the Government of the United States.”<sup>19</sup> As Barnett argued, Sherman’s draft “strongly supports an individual natural rights reading of the words retained rights.”<sup>20</sup>

The information pre-ratification lightly illuminates the meaning of the Ninth Amendment. But “if Madison’s explanation of the purpose of the Ninth Amendment in his Bill of Rights speech is the most important information,” then how he utilized the Ninth Amendment in “constitutional argument” is not far behind.<sup>21</sup> Madison, utilizing the Ninth Amendment against establishing a national bank, argued the Ninth Amendment “as guarding against a latitude of interpretation [of the constitution].”<sup>22</sup> Moreover, Madison would “again argue in Congress that the unenumerated rights retained by the people directly constrained congressional power.”<sup>23</sup> In his Whiskey Rebellion Speech, he argued “when the people have formed a Constitution, they retain those rights which are not expressly delegated.”<sup>24</sup> “You animadvert on the abuse of reserved rights: how far will this

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<sup>17</sup> 5 Madison, *supra* note 14, at 385.

<sup>18</sup> Barnett, *supra* note 13, at 38 (citing Scott D. Gerber, *Roger Sherman and the Bill of Rights*, 28 POLITY 521, 521, 528 (1996)).

<sup>19</sup> Roger Sherman, Draft of the Bill of Rights, in 1 THE RIGHTS RETAINED BY THE PEOPLE 351, 351 (Randy E. Barnett ed., 1989)

<sup>20</sup> Barnett, *supra* note 13, at 39.

<sup>21</sup> *Id.* at 55.

<sup>22</sup> 2 Annals of Cong. 1944 (1791).

<sup>23</sup> Barnett, *supra* note 13, at 62.

<sup>24</sup> 4 Annals of Cong. 934 (1794).

go?”<sup>25</sup> Here, akin to above, Madison is concerned with the protection of unenumerated rights.

However, this raises the question – *what enumerated rights were intended to be protected?*<sup>26</sup> As Daniel Farber noted, “one thing we have inherited from the Framers is a belief in inalienable rights.”<sup>27</sup> Otherwise stated, we have adopted and integrate conception a belief in natural rights in our legal system. This is evidenced by a plethora of our founding documents. One general example is the Declaration of Independence. It states that all men “are endowed by their Creator with certain unalienable Rights.” But in the context of the Ninth Amendment, when James Madison was giving his speech in defense of incorporating the Bill of Rights, he stated, it “is as essential to secure the liberty of the people as any one of the pre-existent rights of nature.”<sup>28</sup> Moreover, Madison referenced natural rights when putting forth a right for people to alter government.<sup>29</sup> Furthermore, if the proposals from state conventions for the Ninth Amendment are surveyed, it then becomes abundantly clear that the public understanding was that the Ninth Amendment was intended to protect natural rights not enumerated in the Constitution.<sup>30</sup> Thus, it is

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<sup>25</sup> *Id.*

<sup>26</sup> I will only partially answer this question here. I will be concerned with natural rights and not whether individual or collective rights were intended to be protected.

<sup>27</sup> DANIEL A. FARBER, *RETAINED BY THE PEOPLE: THE ‘SILENT’ NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON’T KNOW THEY HAVE* 21 (2007).

<sup>28</sup> 5 Madison, *supra* note 14.

<sup>29</sup> *Id.* Madison put forth “that the people have an *indubitable, unalienable, and indefeasible right* to reform or change their Government, whenever it be found adverse or inadequate to the purposes of its institution” (emphasis added).

<sup>30</sup> New York submitting: “That the enjoyment of Life, Liberty, and the pursuit of Happiness are essential rights which every government ought to respect and preserve.” *THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS* 1041 (Neil H. Cogan ed., 2015) [hereinafter *The Complete Bill of Rights*].

North Carolina submitting: “That there are certain natural rights of which men, when they form a social compact, cannot deprive or divest their posterity, among which are the enjoyment of life, and liberty, with the means of acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.” *Id.* at 1042.

more than likely that the rights Madison intended to protect were natural rights, above and antecedent to the constitution.<sup>31</sup>

However, while most Ninth Amendment scholars concede that Madison was concerned about unenumerated rights, they differ on two important points. The first is how such rights were to be understood. Namely, were they individual rights or collective rights. The second is how these rights were to be protected. In the following section, I will put forth six theories regarding the meaning of the Ninth Amendment. However, I will conclude that the individual natural rights theory best captures the meaning and intent of the Ninth Amendment.

#### **IV. Various Theories of the Ninth Amendment**

##### **A. State Law Rights Theory**

The earliest theory on the Ninth Amendment can be described as the state law rights theory. Russell Caplan, the biggest proponent of this theory, argued that Madison incorporated the Ninth Amendment to maintain the “rights guaranteed by the law of the states.”<sup>32</sup> In other words, Caplan argued that the Ninth Amendment meant “rights contained in state law are to continue in force” until they were “modified or eliminated by state enactment, by federal preemption,” or deemed unconstitutional by the judiciary.<sup>33</sup> However, as John Ely correctly argued, such an inference is “silly.”<sup>34</sup> This is because the Constitution was originally only intended to restrict the powers of the federal

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<sup>31</sup> See James Masnov, *The Power of Nine: Federalists, Antifederalists, and Natural Law Synthesis in the Ninth Amendment* (Western Oregon University working paper) (2017).

<sup>32</sup> Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 227 (1983).

<sup>33</sup> *Id.* at 228

<sup>34</sup> JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 37 (1980).



government, not state governments.<sup>35</sup> However, even putting such an error aside, the legislative history of the Ninth Amendment simply does not lend itself to such a view.

If Madison's speech, in defense of the addition of the Bill of Rights, is recalled, Madison responded to the federalist objection that by "enumerating particular exceptions to the grant of power, it would disparage those rights which were not enumerated."<sup>36</sup> Moreover, and imperative in Madison's recognizing the objection, is that the rights would be "assigned into the hands of the general government,"<sup>37</sup> not the state governments. Additionally, Madison's usage of the Ninth Amendment in his speech opposing a national bank seems to undercut the state law rights theory. Madison implies that the Ninth Amendment asserts individual rights which 'guard against a latitude of interpretation.' If understood in the state law rights theory, the Ninth Amendment "concerns the rights of individuals as protected by the state bill of rights."<sup>38</sup> Thus, Madison's usage of the Ninth Amendment would have little bearing on his argument.

## **B. Residual Rights Theory**

The second theory can be adequately labeled as the residual rights theory. Thomas McAfee argued that the Ninth Amendment ensures "reserved rights" "against any adverse inference that might be drawn from the addition of a bill of rights."<sup>39</sup> He argued that the Ninth Amendment "reads entirely as a hold harmless provision: it thus says nothing about how to construe the powers of Congress or how broadly to read the

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<sup>35</sup> See *id.*: Norman Redlich, *Are There Certain Rights . . . Retained by the People*, 37 N.Y.U. L. REV. 787, 805-06 (1962).

<sup>36</sup> 5 Madison, *supra* note 14, at 385.

<sup>37</sup> *Id.*

<sup>38</sup> Barnett, *supra* note 13, at 56.

<sup>39</sup> Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1221 (1990).

doctrine of implied powers.”<sup>40</sup> However, to argue if rights are defined residually, then they play no role in limiting congressional powers is simply false. If a right is ‘carved out,’ then it would follow that a congressional power may only be defined as broadly as the limit of said right. If congressional power is construed as to encompass the right, then the right ceases to exist. Moreover, Madison himself utilized the Ninth Amendment in arguing that Congress was acting outside of its limitations. As mentioned previously, Madison in his Whiskey Rebellion speech, used the Ninth Amendment to make the point “it is a question whether what is thus retained can be legislated upon.”<sup>41</sup> Thus, he made the rhetorical point that retained rights help shape and define congressional power. It is also noteworthy that the reporter noted that Madison “wished it to be considered how extremely guarded the Constitution was in respect to cases not within its limits.”<sup>42</sup>

### C. Collective Rights Theory

The collective rights theory, primarily advocated by Kurt Lash and Akhil Amar, asserts that the purpose of the Ninth Amendment was to “emphasis the collective rights of the people of the several states . . . to local self-government.”<sup>43</sup> Thus, rights are retained collectively in contrast to individually. Amar, however, goes further by arguing that “the most obvious and inalienable right underlying the Ninth Amendment is the collective right of We the People.”<sup>44</sup> But Lash and Amar must overcome two key pieces of historical evidence, namely the comparison of Virginia’s constitutional proposal and St. George commentary on Blackstone. Lash argues that Virginia’s proposed

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<sup>40</sup> *Id.* at n. 325.

<sup>41</sup> 4 ANNALS, *supra* note 24, at 934.

<sup>42</sup> *Id.*

<sup>43</sup> Kurt T. Lash, *The Lost Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331, 362 (2004).

<sup>44</sup> AKHIL REED AMAR, THE BILL OF RIGHTS 120 (1998)

amendment's, namely the 17th article, sheds light on the meaning of the Ninth Amendment.<sup>45</sup> However, during the Virginia debates concerning the ratification of the amendments, it was stated that if the proposed Ninth Amendment was to “guard against the extension of the powers of Congress by implication, it is greatly defective.”<sup>46</sup> Virginia “by no means comprehend[s] the idea expressed in the 17th article of amendments proposed by Virginia.”<sup>47</sup> And it could “not find [*sic*] the 11th article,” as it was “so different from anything proposed”<sup>48</sup> but found it “highly exceptionable.”<sup>49</sup> Additionally, St. George Tucker, provides useful information in refuting the claim that the Ninth Amendment was solely concerned with collective rights. As a “leading judge of the General Court of Virginia” and “editor of Blackstone’s Commentaries,”<sup>50</sup> Tucker noted, “every man . . . may learn his own rights and know when they are violated.”<sup>51</sup> Furthermore, he wrote “every power which concerns the right of the citizen, must be strictly construed, where it may operate to infringe or impair his liberty.” It is important to note the singular tense in which Tucker is writing. From this, one may reasonably infer that the Constitution, and specifically the Ninth Amendment, was thought to protect individual rights, not merely collective rights. However, it is further imperative to note,

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<sup>45</sup> Virginia’s 17th proposal stated, “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 what they may be construed either as making exceptions to the specified powers where this shall be the case, or otherwise as inserted merely for greater caution.” Amendments Proposed by the Virginia Convention

<sup>46</sup> Entry of Dec. 12, 1789, in JOURNAL OF THE SENATE OF THE COMMONWEALTH OF VIRGINIA 60, 63 (1828) [hereinafter VIRGINIA SENATE JOURNAL]. The objection stated: “We do not find that the 11th article is asked for by Virginia or any other State; we therefore conceive that the people of Virginia should be consulted with respect to it, even if we did not doubt the propriety of adopting it; but it appears to us highly exceptionable.”

<sup>47</sup> *Id.*

<sup>48</sup> Barnett, *supra* note 13, at 49.

<sup>49</sup> VIRGINIA SENATE JOURNAL, *supra* note 45, at 63.

<sup>50</sup> Barnett, *supra* note 13, at 70.

<sup>51</sup> 1 WILLIAM BLACKSTONE, BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA (St. George Tucker ed.) (reprint) (1996) [hereinafter Blackstone Commentaries].

that collective rights and individual rights are not necessarily at odds. Rather, in the context of Lash and Amar's assertions, the Ninth Amendment does not *only* protect collective rights.

#### **D. Rule of Construction Theory**

Another view of the Ninth Amendment is the rule of construction theory. It holds that the Ninth Amendment is a “meta-constitutional rule” for interpreting the entire Constitution.<sup>52</sup> “It points to other parts of the Constitution . . . as the context within which unenumerated rights are to be determined, and the means” by which to protect them.<sup>53</sup> This view holds that there are no Ninth Amendment rights in the same way there are other rights listed in the Constitution. Rather, one must look to the ‘liberty’ bearing provisions of the Constitution and broadly interpret them. While this view is partially correct in asserting that one of the functions of the Ninth Amendment is construction, as evidenced by Madison’s speeches,<sup>54</sup> it also fails to provide the protection of said rights that Madison intended. Madison just after speaking on the Ninth Amendment stated, that if such was incorporated into the Constitution, “independent tribunals of justice . . . will consider themselves guardians of those rights” and “be an impenetrable bulwark against every assumption of power.”<sup>55</sup> Such a sentiment was also shared by Alexander Hamilton in advocating for a permanent judiciary.<sup>56</sup> Thus, it may reasonably be inferred that Madison intended that those unenumerated and unalienable rights not listed in the

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<sup>52</sup> Laurence H. Tribe, *Contrasting Constitutional Visions: Of Real and Unreal Differences*, 22 HARV. C.R.-C.L.L. REV. 95, 100 (1987).

<sup>53</sup> Kelley, *supra* note 11, at 815.

<sup>54</sup> See 4 Annals of Cong., *supra* note 24, at 934; 2 Annals of Cong., *supra* note 22, at 1944.

<sup>55</sup> The Writings of James Madison, *supra* note 14, at 383.

<sup>56</sup> Alexander Hamilton, Federalist Paper No. 78 (reprinted in Barnes & Noble 2012).

Constitution be strongly and fiercely protected by the judiciary. This would seem to conflict with the assertion that the Ninth Amendment is not a source of rights.

Each theory I have explored thus far has at least one deficiency. This poses an issue if we are to compose a theory concerning the meaning of the Ninth Amendment. But there is one last theory that seems rather promising, namely the individual natural rights theory. Primarily authored by Randy Barnett, the individual natural rights theory seems to capture Madison's intent in drafting the Ninth Amendment.

### **E. Federalism Model**

The next theory of understanding the Ninth Amendment is the federalism theory. This theory holds that "the Ninth [Amendment] explicitly sought to protect liberty by preventing Congress from going beyond its enumerated powers."<sup>57</sup> It "justifies a strict or narrow construction of federal powers."<sup>58</sup> This view is somewhat supported by Madison's usage of the Ninth Amendment in his Whiskey Rebellion speech in which he argued that the powers of Congress were constrained by the rights of the people.<sup>59</sup> This view is further supported by Madison's bank speech in which he argues that the Ninth Amendment guards "against a latitude of interpretation [of the constitution]."<sup>60</sup> Lastly, this view is also supported by Tucker's commentary. If recalled, Tucker stated that "every power which concerns the right of the citizen, must be construed strictly"<sup>61</sup> and

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<sup>57</sup> Amar, *supra* note 43, at 123-24.

<sup>58</sup> Lash, *supra* note 42, at 355.

<sup>59</sup> See 4 Annals of Cong, *supra* note 244, at 934.

<sup>60</sup> See 2 Annals of Cong., *supra* note 22, at 1944.

<sup>61</sup> Blackstone Commentaries, *supra* note 50.

“every power which has been carved out of the states . . . is in like manner to be construed strictly.”<sup>62</sup>

But while the historical sources seem to support the federalism theory, it does not provide “the original meaning of the text.”<sup>63</sup> Otherwise stated, the federalism model seems to identify the *effect* of the Ninth Amendment, namely construing the constitution in a manner which reinforces the principle of federalism. This is evident when Lash stated that the Ninth and Tenth Amendment both limited federal powers.<sup>64</sup> However, it does not provide the meaning of the amendment. As Barnett aptly notes, the Amendment does not “purport to tell us what the text originally and literally said to a member of the general public.”<sup>65</sup> Rather, this theory only seems to provide the coupled effects of the Ninth Amendment and Tenth Amendment.

#### **F. Individual Natural Rights Theory**

As Barnett states, “the individual natural rights model . . . was meant to preserve the ‘other’ individual, natural, preexisting rights” that were retained by the people at the time of the formation of government.<sup>66</sup> Furthermore, as Barnett stresses, “the individual natural rights model does not claim the Ninth Amendment to be a ‘source’ of independent rights.”<sup>67</sup> This theory correctly incorporates the conception of natural rights that Madison was trying to protect. Again, this is evidenced not only by the Framers’ belief that natural

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<sup>62</sup> *Id.*

<sup>63</sup> Barnett, *supra* note 13, at 18.

<sup>64</sup> Lash, *supra* note 42, at 399.

<sup>65</sup> Barnett, *supra* note 13, at 18.

<sup>66</sup> *Id.* at 13.

<sup>67</sup> *Id.* at 14.

rights were paramount and above and antecedent to the constitution but the founding documents as well.<sup>68</sup>

Moreover, if St. George Tucker's commentary on Blackstone is recalled, it becomes clear that the Bill of Rights was meant to protect individual rights.<sup>69</sup> If we return to Roger Sherman's draft Bill of Rights, "the people have certain natural rights which are retained by them," it then becomes even more clear that the Framers were concerned about those rights which could not be delegated to government.<sup>70</sup> However, it is important to note that as with the collective model – the individual rights model does not preclude that some natural rights may be collective or collectively exercised. Again, if the Whiskey Rebellion speech is also recalled, it is clear that Madison used the Ninth Amendment to rebut that argument that Congress had the power to censure opinions.<sup>71</sup> Thus, the best theory of the Ninth Amendment so far is the individual natural rights theory.

## **V. Conclusion**

A cursory glance of historical evidence of the Ninth Amendment reveals that the Ninth Amendment was concerned with the protection of unenumerated rights. However, upon closely examining documents from Madison, the drafter of the Ninth Amendment, and other documents, history lends itself to the conclusion that the Ninth Amendment is concerned with protecting both individual and collective unenumerated natural rights.

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<sup>68</sup> See Declaration of Independence; Blackstone Commentaries, *supra* note 50.

<sup>69</sup> See Blackstone Commentaries, *supra* note 50.

<sup>70</sup> Sherman, *supra* note 19.

<sup>71</sup> See 4 Annals of Cong., *supra* note 24.

This conclusion is important because it serves to undercut various Ninth Amendment theories that have been put forth.

For example, while the rule of construction is correct in stating that the Ninth Amendment is not ‘itself’ a source of rights, the implication that one must look to other liberty bearing provisions of the constitution is incorrect. The Ninth Amendment while not a source of rights can be asserted by itself to protect those rights that are above and antecedent to the Constitution. This is evidenced by Madison’s statement directly after defending the Ninth Amendment that the Courts are to consider themselves guardians, against general government, in protecting our rights. Additionally, it is clear that the state law rights theory is incorrect as the historical evidence does not support its proposition. Neither Madison nor the Framers believed that the Bill of Rights would be applied to state governments and thus, the Ninth Amendment was not concerned with securing rights at a state level. Moreover, the residual rights model, as put forth by McAfee does not stand in light of the historical evidence discussed. As discussed previously, Madison himself used the Ninth Amendment to construe the powers of Congress in the Whiskey Rebellion speech. But as the collective rights theory and rule of construction only partly correctly construe the Ninth Amendment – the best contender for understanding the Ninth Amendment is the individual unenumerated rights theory.