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How the Constitution Shall Not Be Construed

Lochlan F. Shelfer

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How the Constitution Shall Not Be Construed

*Lochlan F. Shelfer**

The dominant historical narrative of the Ninth Amendment views the Clause as an exclusively “Federalist” provision with one purpose: to protect against the fear among Federalists that the very enumeration of any rights in a Constitution would imply that the universe of unenumerated natural rights was left unprotected, or that federal power would be expanded by implication.

This narrative of the Ninth Amendment, however, is incomplete in that it ignores the Clause’s Anti-Federalist side. This Article argues that the Ninth Amendment was proposed and ratified partly in response to the Anti-Federalist fear that particular rights-guaranteeing provisions of the Constitution could be used, by means of negative implication, to deny the existence of analogous or functionally similar rights. Thus, the Ninth Amendment instructs readers not to interpret particular words or clauses in the Constitution to imply that similarly situated, analogous, or functionally similar rights are therefore left unprotected. This history suggests that, contrary to the arguments of a number of Ninth Amendment scholars, the Ninth Amendment applies to procedural and positive rights, in addition to natural rights, and the Ninth Amendment instructs readers how to interpret particular words of the Constitution, and not just the fact of the enumeration of rights.

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*Associate Fellow, Constitutional Law Center, Stanford Law School. I am indebted to many people for their helpful conversations, comments, and recognition, especially Akhil Amar, Randy Barnett, Christian Buset, Andrew Tutt, and the participants of the Junior Scholars Colloquium. All mistakes are, of course, my own.

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I. INTRODUCTION

Can negative inferences be drawn from constitutional rights?

The First Amendment prohibits *Congress* from making a *law* violating particular rights. Should this language be construed as proof that the Constitution does not prohibit the *President* from violating those rights?¹

1. GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY* 42 (2004) (“[That the First Amendment does not apply to any governmental actor other than Congress] is as textually certain as is anything in the Constitution. . . . The President and Senate are not Congress, and the First Amendment by its unmistakable terms applies only to Congress. . . . To read the First Amendment to apply to entities other than Congress is simply to abandon the enterprise of textual interpretation.”); Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 *STAN. L. REV.* 1209, 1253–54, 1266 (2010) (arguing that “as a matter of text and grammar, there is only one possible answer [to the question of who can violate the First Amendment]: Congress,” that to apply the First Amendment to governmental actors other than Congress “seems particularly hard to defend when the text is so clear,” and that “the President (and his . . . agents) cannot violate” the First Amendment); *see also infra* text accompanying notes 177–80; *cf.* *Lamont v. Postmaster Gen.*, 381 U.S. 301, 306 (1965) (“Here the Congress—expressly restrained by the First Amendment from ‘abridging’ freedom of speech and of press—is the actor.”).

Does the existence of the Bill of Attainder Clause demonstrate that the Constitution does *not* prohibit any *other* sort of individualized legislation?²

The Constitution prohibits *ex post facto* laws, which, the Supreme Court has held, refer to retroactive *criminal* laws.³ Does this mean that therefore the Constitution does *not* prohibit any retroactive *civil* laws?⁴

Over the centuries, interpreters have construed the wording of particular constitutional rights to deny the existence of analogous but unarticulated rights by negative implication.⁵ Such interpretations have used the words of constitutional protections to deny closely related or even implicit protections. The Constitution, however, contains a clause prohibiting narrow constructions of the Constitution's text that abridge rights: the Ninth Amendment.

*The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.*⁶

2. See, e.g., John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1985 n.238 (2011) (“[I]f the Constitution truly embraced a comprehensive separation of powers principle, it is hard to explain why constitutionmakers included the Bill of Attainder Clause.”); cf. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 n.9 (1995) (“Even laws that impose a duty or liability upon a single individual or firm are not on that account invalid—or else we would not have the extensive jurisprudence that we do concerning the Bill of Attainder Clause.”).

3. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390–91, 397, 400 (1798).

4. See, e.g., *Watson v. Mercer*, 33 U.S. (8 Pet.) 88, 98 (1834) (“It is true, a state cannot pass an ex post facto law which is a retrospective *criminal* law, but it can a retrospective *civil* law. Expressum facit cessare tacitum, says a maxim of the law.”); *id.* at 104–06 (Court’s discussion); cf. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 143 n.157 (2010) (“*Calder v. Bull* put to rest arguments that the Ex Post Facto Clauses applied to civil, as well as to criminal, cases. The only constitutional protection against ex post facto laws in civil cases comes from the Contracts Clause.” (citation omitted)); see also *infra* text accompanying notes 181–87.

5. See, e.g., *Rice v. Cayetano*, 528 U.S. 495, 539 (2000) (Stevens, J., dissenting) (arguing that a Hawaiian statute limiting certain elections to those with native Hawaiian heritage did not violate the Constitution because the Fifteenth Amendment prevents states from abridging the right to vote “on account of race” and “ancestry was not included by the Framers in the Amendment’s prohibition”); *Graham v. Connor*, 490 U.S. 386, 395 (1989) (“Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of ‘substantive due process,’ must be the guide for analyzing these claims.”); *Whitley v. Albers*, 475 U.S. 312, 327 (1986) (same for the Eighth Amendment).

6. U.S. CONST. amend. IX. The most prominent treatments of the Ninth Amendment from the past three decades are as follows: AKHIL REED AMAR, *AMERICA’S UNWRITTEN*

Although this intuitive, textual use of the Ninth Amendment has recently been endorsed by a few scholars,⁷ it has not pervaded the literature on the Clause. Instead, most Ninth Amendment scholars interpret the Clause either as applying only to unenumerated “natural rights,”⁸ or as preventing the federal government’s powers from being

CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 95–138 (2012) [hereinafter AMAR, UNWRITTEN CONSTITUTION]; AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 119–33 (1998) [hereinafter AMAR, BILL OF RIGHTS]; RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 54–60, 224–69 (2004) [hereinafter BARNETT, LOST CONSTITUTION]; CHARLES L. BLACK, JR., DECISION ACCORDING TO LAW (1981) [hereinafter BLACK, DECISION]; DANIEL A. FARBER, RETAINED BY THE PEOPLE: THE “SILENT” NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON’T KNOW THEY HAVE 6–44 (2007) [hereinafter FARBER, RETAINED BY THE PEOPLE]; KURT T. LASH, THE LOST HISTORY OF THE NINTH AMENDMENT (2009) [hereinafter LASH, LOST HISTORY]; Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1199–1201 (1991) [hereinafter Amar, *Bill of Rights*]; Randy E. Barnett, *Kurt Lash’s Majoritarian Difficulty: A Response to A Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 937 (2008) [hereinafter Barnett, *Majoritarian Difficulty*]; Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1 (2006) [hereinafter Barnett, *It Means What It Says*]; Kurt T. Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 895 (2008) [hereinafter Lash, *Textual-Historical Theory*]; Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331 (2004) [hereinafter Lash, *Lost Original Meaning*]; Thomas B. McAffee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215 (1990) [hereinafter McAffee, *Original Meaning*]; Michael W. McConnell, *Natural Rights and the Ninth Amendment: How Does Lockean Legal Theory Assist in Interpretation*, 5 N.Y.U. J.L. & LIBERTY 1 (2010) [hereinafter McConnell, *Natural Rights*]; Michael W. McConnell, *The Ninth Amendment in Light of Text and History*, 2010 CATO SUP. CT. REV. 13 (2010) [hereinafter McConnell, *Text and History*]; Ryan C. Williams, *The Ninth Amendment as a Rule of Construction*, 111 COLUM. L. REV. 498 (2011) [hereinafter Williams, *Rule of Construction*]; John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967 (1993) [hereinafter Yoo, *Declaratory*].

7. See, e.g., AMAR, UNWRITTEN CONSTITUTION, *supra* note 6, at 99 (“The Ninth Amendment, after all, instructs us precisely *not* to read the Sixth Amendment (or any other constitutional listing of rights, for that matter) in a stingy, negative-implication, rights-denying fashion.”); WILLIAMS, *Rule of Construction*, *supra* note 6, at 501 (arguing that the Ninth Amendment precludes the argument that “because some particular right or set of rights is mentioned in the Constitution, some other claimed right or set of rights should either be ‘denied’ (i.e., assumed either not to exist or to have been delegated to the federal government) or ‘disparaged’ (i.e. accorded a diminished level of protection or respect)”; see also BLACK, DECISION, *supra* note 6, at 48–50 (arguing the Ninth Amendment protects against haphazardly applied “petty literalness”); *infra* notes 43–47 and accompanying text.

8. See, e.g., BARNETT, *It Means What It Says*, *supra* note 6, at 13–15; MCCONNELL, *Natural Rights*, *supra* note 6; MCCONNELL, *Text and History*, *supra* note 6; see also *infra* text accompanying notes 28–34.

enlarged by implication,⁹ but not as providing guidance on how to interpret the Constitution's text.¹⁰

This paper argues that the reason most interpreters of the Ninth Amendment ignore its use as a canon of textual interpretation and reject its application outside of the “natural rights” or federalism contexts is because the dominant historical narrative of the Ninth Amendment sees the Clause as an exclusively Federalist amendment, in contrast to the first eight “Anti-Federalist” amendments. According to this theory, the Ninth Amendment was meant only to protect against the very *enumeration of any rights* in the Constitution implying that the universe of unenumerated rights was left unprotected.¹¹

This narrative of the Ninth Amendment, however, is incomplete. In particular, it fails to recognize that the Ninth Amendment also responded to Anti-Federalist¹² concerns that particular rights-granting provisions would be read in a narrowly restrictive fashion. This Article

9. See, e.g., LASH, LOST HISTORY, *supra* note 6; Lash, *Textual-Historical Theory*, *supra* note 6; Lash, *Lost Original Meaning*, *supra* note 6; McAfee, *Original Meaning*, *supra* note 6.

10. See, e.g., Lash, *Textual-Historical Theory*, *supra* note 6, at 908 (“Neither unduly narrow nor excessively broad interpretations of enumerated rights violate the Ninth Amendment, as long as the fact of enumeration is not relied upon to suggest the necessity or superiority of enumeration.”); see *infra* text accompanying notes 48–52; cf. Louis Michael Seidman, *Our Unsettled Ninth Amendment: An Essay on Unenumerated Rights and the Impossibility of Textualism*, 98 CALIF. L. REV. 2129, 2146 (2010) (arguing that the word “other” in the Ninth Amendment means “other than the rights enumerated in the Constitution. . . . [Unenumerated rights] are other than—different from—constitutional rights”).

11. See *infra* notes 53–62 and accompanying text.

12. In this paper, I use the terms “Anti-Federalist” and “Federalist” generally to refer to opponents and proponents of the Constitution, respectively. It is important to remember that these were not political parties, and the Anti-Federalists in particular did not always speak with one voice, nor did they always desire the same ends. Some, like Patrick Henry and Luther Martin, were most interested in avoiding any consolidated government at all, and thus sought to scuttle the project at all costs. Others, like George Mason, Elbridge Gerry, and the Federal Farmer supported ratification of the proposed Constitution if certain guarantees were added to it. Finally, others, such as Edmund Randolph, supported ratification but wanted to propose amendments to the document for the First Congress to consider. Still other opponents of the Constitution occupied interstices between these positions. Moreover, citizens often changed their minds during the ratification debates and moved from one mindset to another, such as Randolph, who did not sign his name to the proposed Constitution, but by the Virginia ratification was a supporter. See generally PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION 1787–1788* (2010) (making this point throughout the work). Nevertheless, it is helpful in this context to use the shorthand term “Anti-Federalist” or “Opponent of the Constitution” because, at least for those debates that this Article discusses, those who were not in favor of the unamended Constitution all generally deployed the same arguments.

documents the historical underpinnings of this Anti-Federalist perspective of the Ninth Amendment, which renders illegitimate textual constructions that narrow particular rights by means of negative implication.¹³

Part II describes the state of Ninth Amendment scholarship, noting that several Ninth Amendment scholars argue that the provision applies exclusively to natural rights and not to procedural or positive rights. Other Ninth Amendment scholars suggest that the provision applies only to the fact of enumeration of rights and does not provide rules for how particular words in the Constitution are to be construed.

Part III begins by outlining the dominant historical narrative of the Ninth Amendment. According to that narrative, when James Madison introduced the Bill of Rights to quell Anti-Federalist disquiet, he also included the Ninth Amendment to allay Federalist worries that the enumeration of rights would imply the loss of the universe of unenumerated natural rights.¹⁴ Part III then supplements this account with the Anti-Federalist history of the Ninth Amendment. The Ninth Amendment allayed Anti-Federalist fears by instructing readers how not to interpret the individual provisions of the Constitution and by addressing the Anti-Federalist fear of narrow legal maxims such as the *expressio unius* canon.¹⁵

The most influential interpretive debate during the ratification period was that over civil juries.¹⁶ The Constitution's express protection for juries in criminal trials in Article III raised an obvious question in the minds of the Anti-Federalists: "What about juries in civil trials?" This conspicuous silence raised the specter of the *expressio*

13. Such narrow legal arguments go by the Latin name *expressio unius est exclusio alterius*, "the expression of one thing is the exclusion of the other." Other versions of the maxim include *designatio unius est exclusio alterius*, *inclusio unius est exclusio alterius*, *admissio unius est exclusio alterius*, and *expressum facit cessare tacitum*. This rule works by way of negative implication: legal texts are interpreted so that when something is expressly mentioned, its analogue or analogues are by implication not included. For a discussion of the history and use of this maxim, see 2A NORMAN J. SINGER & SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION §§ 47:23–24, at 406–37 (7th ed. 2014); WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 854–56 (4th ed. 2007).

14. See *infra* Section III.A.

15. See *infra* Section III.B.

16. See *infra* Section III.B.1.

unius maxim. Fear that this canon of narrow construction might endanger other rights helped to spawn the Ninth Amendment.¹⁷

The potential for such negative implication was palpable to the framers of the Constitution, as they had seen the danger of clever negative-implication arguments first hand. During the prelude to the Revolution in the 1760s, two prominent *causes célèbres*, *Forsey v. Cunningham* and the dispute over the Henry VIII Treason Statute, featured British authorities narrowly construing legal texts in order to deprive colonists of their beloved juries. These constitutional crises helped propel America into rebellion and continued to tug at the popular imagination two decades later during the constitutional ratification debates. The Anti-Federalists sought to ensure that they never again would relive these paradigm cases¹⁸ of negative implication.¹⁹

The Anti-Federalist history of the Ninth Amendment that this paper presents also suggests two conclusions: First, the dominance of civil juries as the paradigm *expressio unius* case indicates that the Ninth Amendment is not limited to protecting “natural rights,” as some have argued, but applies also to positive rights. Second, the importance of textual interpretation in the Ninth Amendment’s history suggests that the Clause does in fact tell readers how to interpret particular provisions of the Constitution.

Part IV considers three case studies: (1) the First Amendment, (2) the *Ex Post Facto* Clause, and (3) the exclusive natural rights theory of the Ninth Amendment. It argues that the Ninth Amendment offers judges an interpretive tool, allowing them to dismiss as constitutionally illegitimate negative inferences drawn from particular articulations of constitutional rights.²⁰

II. NINTH AMENDMENT SCHOLARSHIP

Until the late 1980s, there was only sporadic scholarship on the original meaning of the Ninth Amendment. Then, a 1987 statement

17. See *infra* Sections III.B.1–2.

18. For a discussion of the way historical “paradigm cases” influenced particular rights-guaranteeing provisions enumerated in the Constitution, see JED RUBENFELD, *REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW* (2005).

19. See *infra* Section III.B.3.

20. See *infra* Part IV.

by Judge Robert Bork to the Senate Judiciary Committee during his confirmation hearings prompted a generation of scholars to delve into the Clause's history in an effort to divine its scope and meaning. Prompted by a question regarding Justice Goldberg's concurrence in *Griswold v. Connecticut*,²¹ several senators asked Bork what he thought the Ninth Amendment means.²² Judge Bork stated that he “kn[e]w of only one historical piece” on the Ninth Amendment's original meaning and that the Ninth Amendment cannot be used “unless you know something of what it means.”²³ According to Judge Bork, interpreting a constitutional provision without knowing its historical meaning would be akin to interpreting an “ink blot.”²⁴ Judge Bork concluded: “I do not think the court can make up what might be under the ink blot if you cannot read it.”²⁵

The Academy immediately responded to Judge Bork's words,²⁶ with most theories regarding the Ninth Amendment's original meaning falling into one of two camps: “natural rights” theories and “federalism” theories.²⁷

Natural rights theories interpret the Ninth Amendment's reference to “other [rights] retained by the people” as protecting the universe of unenumerated natural rights. Randy Barnett, for instance, argues that the “unenumerated rights” of the Ninth Amendment encompass the universe of “individual natural rights” that predate the Constitution. Positive rights, on the other hand, such as the trial by jury, do not predate the Constitution, and thus, according to Barnett, are not protected by the Ninth Amendment.²⁸ Moreover, Barnett

21. 381 U.S. 479, 492 (1965) (Goldberg, J., concurring) (“[T]he Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive.”).

22. *Nomination of Robert H. Bork To Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 117–18 (1987) (statement of Sen. Biden); *id.* at 130 (statement of Sen. Thurmond); *id.* at 248–49 (statement of Sen. DeConcini).

23. *Id.* at 248–49 (statement of Judge Bork).

24. *Id.* at 249.

25. *Id.*

26. *See supra* note 6.

27. *See, e.g.*, Lash, *Lost Original Meaning*, *supra* note 6, at 343–47 (organizing theories of the Ninth Amendment's meaning into these two categories); Seidman, *supra* note 1, at 2131 (same); Williams, *Rule of Construction*, *supra* note 6, at 506–07 (same).

28. Barnett, *It Means What It Says*, *supra* note 6, at 13–15.

posits that courts should accord these unenumerated individual natural rights the same status as the Constitution's enumerated rights. He argues that the text of the Ninth Amendment "strongly suggests that unenumerated rights deserve no less protection from courts than those that were enumerated."²⁹

Other scholars have also espoused an exclusive natural-rights view of the Ninth Amendment. Daniel Farber, for instance, has argued that the Ninth Amendment concerns the natural law that is not created by positive law, but predates positive law and is inalienable.³⁰ Similarly, Michael McConnell argues that the term "retained" as used in the Ninth Amendment "is the language of Lockean social compact theory."³¹ According to McConnell, the rights retained by the people in the Ninth Amendment are "those natural rights that are not relinquished, but retained by the people under the social compact. . . . This set does not include positive rights, which are not 'retained,' but rather created by the social compact."³² Thus, the Ninth Amendment, according to McConnell, is exclusively concerned with natural rights, not positive rights, and thus does not encompass jury trials.³³ Its

29. *Id.* at 78.

30. FARBER, RETAINED BY THE PEOPLE, *supra* note 6, at 6–13, 21–28. For other examples of the exclusively-natural-rights reading of the Ninth Amendment, see Eugene M. Van Loan, III, *Natural Rights and the Ninth Amendment*, 48 B.U. L. REV. 1, 13 (1968) ("Madison could not have been concerned with unenumerated procedural rights."); Yoo, *Declaratory*, *supra* note 6, at 979–86; Suzanna Sherry, *The Ninth Amendment: Righting an Unwritten Constitution*, 64 CHL.-KENT L. REV. 1001, 1002–14 (1988).

31. McConnell, *Natural Rights*, *supra* note 6, at 15; McConnell, *Text and History*, *supra* note 6.

32. McConnell, *Natural Rights*, *supra* note 6, at 17; *see id.* at 14 ("The category of 'retained rights,' by definition, does not include 'positive' rights, which are the product of the civil society."). Natural rights, as defined by Locke, are the pre-civil, pre-political rights that humans possess in the state of nature. *Id.* at 2. When people enter into a social compact, some of those natural rights are given up, in order to protect the ones that are kept. *Id.* at 2 (citing JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 111, 156 (Ian Shapiro ed. 2003); *see id.* at 11–12 ("[I]t was necessary that a certain portion of natural liberty should be surrendered, in order, that what remained should be preserved.") (citing BRUTUS, ESSAY OF BRUTUS II (1787), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 373 (Herbert J. Storing ed., 1981)); McConnell, *Text and History*, *supra* note 6, at 15.

33. In support of this conclusion, McConnell adduces Madison's Speech in the First Congress introducing his first draft of the Bill of Rights. Two primary purposes of the bill, Madison explained, were, first, to "specify those rights which are retained when particular powers are given up to be exercised by the Legislature" and, second, to "specify positive rights" such as "[t]rial by jury, which 'cannot be considered as a natural right.'" McConnell, *Natural Rights*, *supra* note 6, at 12 (citing 1 ANNALS OF CONG. 437 (1789) (Joseph Gales ed., 1834)).

purpose is to maintain the universe of unenumerated natural rights in the same legal position they held prior to the ratification of the Constitution.³⁴

The “federalism” interpretation of the Ninth Amendment, meanwhile, assumes that the Clause works in conjunction with the Tenth Amendment to limit the powers of the federal government vis-à-vis state governments. Thomas McAfee, for instance, argues that the Ninth Amendment limits implied expansion of congressional power based on particular express rights.³⁵ The “federalism” thesis defines the Ninth Amendment as precluding inferences of enlarged congressional power from the enumeration of particular rights. According to McAfee, this interpretation is the full extent of the Ninth Amendment’s meaning and application.³⁶

Akhil Amar’s federalism thesis of the Ninth Amendment focuses on popular sovereignty. He argues that one of the primary purposes of the Ninth Amendment was to protect collective rights and popular sovereignty, stating that the “core meaning” of the phrase “the people” in “the Ninth Amendment is collective,” and that “the most obvious and inalienable right underlying the Ninth Amendment is the collective right of We the People to alter or abolish government.”³⁷

Kurt Lash goes further, arguing that the main purpose of the Clause was to protect the collective rights of the people to govern themselves. According to Lash, “the Ninth [Amendment is] a judicially enforceable rule of construction limiting the power of the federal government to interfere with the retained right of the people to local self-government.”³⁸ For Lash, these “collective majoritarian rights” are “on an equal ground with” any individual rights protected

34. *Id.* at 19–20. McConnell argues that this does not mean that judges should strike down federal statutes that violate unenumerated natural rights, as Barnett argues, but rather that judges should equitably construe statutes under the assumption that legislatures intend to avoid violating the universe of unenumerated natural rights. *See id.* at 20–29; McConnell, *Text and History*, *supra* note 6, at 18.

35. McAfee, *Original Meaning*, *supra* note 6; *see also* AMAR, BILL OF RIGHTS, *supra* note 6, at 123–24; Philip A. Hamburger, *Trivial Rights*, 70 NOTRE DAME L. REV. 1, 31 (1994) (“Although many modern scholars have understood the unenumerated rights of the Ninth Amendment to be vague, unwritten rights, the unenumerated rights were none other than those reserved by the grant of powers in the U.S. Constitution.”).

36. McAfee, *Original Meaning*, *supra* note 6, at 1300 n.325.

37. AMAR, BILL OF RIGHTS, *supra* note 6, at 120.

38. Lash, *Lost Original Meaning*, *supra* note 6, at 346.

by the Constitution.³⁹ Lash has criticized Barnett and other proponents of an exclusive natural rights thesis, arguing that the evidence in favor of the collective rights/popular sovereignty Ninth Amendment denies such a narrow reading.⁴⁰ Lash marshals historical evidence to argue that the Ninth Amendment responded to state-level fears that Congress's powers would be construed too broadly and impinge upon the state-level majorities' rights to govern themselves without federal interference.⁴¹

Although most research on the Ninth Amendment has focused on understanding the language "other[] [rights] retained by the people,"⁴² several scholars have recently begun to examine the Clause's textual mandate that the Constitution's listing of particular rights "shall not be construed" to deny or disparage other rights. Amar, for instance, states that the Ninth Amendment prohibits reading particular rights-guaranteeing provisions "to negate closely related rights that were merely *implied*."⁴³ As an example, he examines the text of the Sixth Amendment: "[T]he Sixth Amendment's enumerated right of the accused to enjoy the assistance of counsel should not be read to negate his unenumerated right to represent himself, given that this latter right was implicit in the Sixth Amendment's general logic."⁴⁴ Similarly, just because the Sixth Amendment guarantees a right to compel *witnesses* does not negate their right to compel *physical evidence*.⁴⁵ "The Ninth Amendment, after all, instructs us precisely *not* to read the Sixth Amendment (or any other constitutional listing of rights, for that matter) in a stingy, negative-implication, rights-denying fashion."⁴⁶

39. Lash, *Textual-Historical Theory*, *supra* note 6, at 933.

40. Lash, *Lost Original Meaning*, *supra* note 6, at 394–99. Lash does not, however, deny that the Ninth Amendment may extend to protect unenumerated individual rights, although he does argue that protecting the collective majoritarian rights is the core purpose of the amendment. Kurt T. Lash, *On Federalism, Freedom, and the Founders' View of Retained Rights: A Reply to Randy Barnett*, 60 STAN. L. REV. 969, 969–77 (2008).

41. Lash, *Lost Original Meaning*, *supra* note 6, at 360–94.

42. See, e.g., Lash, *Lost Original Meaning*, *supra* note 6, at 341 ("Debates over the meaning of the Ninth Amendment generally focus on the 'other rights' retained by the people."); Williams, *Rule of Construction*, *supra* note 6, at 504–08.

43. AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 327 (2005) [hereinafter AMAR, BIOGRAPHY] (emphasis added).

44. *Id.* at 328.

45. AMAR, *UNWRITTEN CONSTITUTION*, *supra* note 6, at 99.

46. *Id.*

Ryan Williams also argues in favor of this textual reading of the Ninth Amendment. He argues that the Ninth Amendment prevents the conclusion

that because some particular right or set of rights is mentioned in the Constitution, some other claimed right or set of rights should either be “denied” (i.e., assumed either not to exist or to have been delegated to the federal government) or “disparaged” (i.e., accorded a diminished level of protection or respect).⁴⁷

The textual theory of the Ninth Amendment, however, has yet to influence the wider scholarly debate on the Ninth Amendment, likely because the textual theory fits imperfectly with the Clause’s dominant historical narrative. It is, perhaps, for this reason that judges, lawyers, and the majority of scholars working on the Ninth Amendment do not consider the Clause when interpreting particular provisions of the Constitution despite the Ninth Amendment’s direction not to make a particular interpretive move.

Indeed, some scholars have suggested that the Ninth Amendment says nothing at all about how to interpret particular words of the Constitution. As Kurt Lash has stated, “it matters nothing to the Ninth Amendment how broadly or narrowly enumerated rights are read, only that they not be construed to deny or disparage other rights retained by the people.”⁴⁸ Louis Seidman likewise argues that the word “other” in the Ninth Amendment means “other than the rights enumerated in the Constitution. . . . [Unenumerated rights] are other than—different from—constitutional rights.”⁴⁹ These scholars instead focus solely on how the Ninth Amendment tells us to construe *the fact*

47. Williams, *Rules of Construction*, *supra* note 6, at 501. Moreover, Williams goes further, arguing that this is the “sole function” of the Ninth Amendment and rejecting theories of the Ninth Amendment that would give judges any basis to protect unenumerated rights. *Id.* at 509. This paper does not go so far as to assert that the textual reading of the Ninth Amendment is its *only* meaning.

48. Lash, *Textual-Historical Theory*, *supra* note 6, at 908; *see id.* at 906 (“[T]he Ninth has nothing to say about how enumerated rights ought to be construed beyond forbidding a construction that denies or disparages *nonenumerated* rights.”); *id.* at 895 (stating in the abstract to the article that “the text of the Ninth says nothing about how to interpret enumerated rights such as those contained in the Fourteenth”).

49. Seidman, *supra* note 10, at 2146.

of enumeration itself.⁵⁰ As Lash states, “Neither unduly narrow nor excessively broad interpretations of enumerated rights violate the Ninth Amendment, as long as the *fact of enumeration* is not relied upon to suggest the necessity or superiority of enumeration.”⁵¹ In the words of McAfee, the Ninth Amendment “indicates only that no inference about [congressional] powers should be drawn from the *mere fact that rights are enumerated* in the Bill of Rights.”⁵²

However, as Part III below will argue, the dominant historical narrative is incomplete and should be supplemented with the Ninth Amendment’s Anti-Federalist history. This history supports the use of the Ninth Amendment to interpret the Constitution’s individual words and the application of the Ninth Amendment to all rights, including positive and procedural rights.

III. THE HISTORICAL BACKGROUND OF THE NINTH AMENDMENT

A. The Dominant Historical Narrative of the Ninth Amendment

Most Ninth Amendment historians rely on a single historical narrative to explain the Ninth Amendment. The Ninth Amendment, this narrative runs, responded exclusively to Federalist concerns about including a bill of rights in the Constitution. Accordingly, it had nothing to say to Anti-Federalists who feared that particular rights would be read in a narrowly restrictive fashion.

This narrative begins with James Wilson addressing the anxieties voiced since the end of the Philadelphia Convention, namely that the Constitution lacked a bill of rights.⁵³ Wilson replied that it was unnecessary to have a bill of rights because the Federal Constitution, unlike state governments, prescribed a government of limited powers

50. Lash, *Textual-Historical Theory*, *supra* note 6, at 907 (“[T]he fact of enumeration to deny the existence of other rights retained by the people . . . violates the Ninth Amendment’s rule of construction.”).

51. *Id.* at 908 (emphasis added).

52. McAfee, *Original Meaning*, *supra* note 6, at 1300 n.325 (emphasis added).

53. George Mason, Edmund Randolph, and Elbridge Gerry all refused to sign the completed Constitution, at least in part because it lacked a bill of rights. See Warren M. Billings, “*That All Men Are Born Equally Free and Independent*,” *Virginians and the Origins of the Bill of Rights*, in *THE BILL OF RIGHTS AND THE STATES: THE COLONIAL AND REVOLUTIONARY ORIGINS OF AMERICAN LIBERTIES* 335, 359 (Patrick T. Conley & John P. Kaminski eds., 1992).

and the structure of the system would itself be a sort of bill of rights.⁵⁴ A bill of rights would merely restate what was already true and confuse the issue.

Wilson went on to argue that it would actually be dangerous to include a bill of rights. The presence of a bill of rights might subvert the system of limited powers, by implying that such an enumeration was necessary. It could be argued that the list was finite and that the universe of unenumerated rights not included in the list was given up by the people. “A bill of rights,” he declared, “is an enumeration of the powers reserved. If we attempt an enumeration, everything that is not enumerated is presumed to be given.” Therefore, he concluded, “an imperfect enumeration would throw all implied power into the scale of the government; and the rights of the people would be rendered incomplete.”⁵⁵ This “danger” thesis framed the debate over a bill of rights and was repeated by Federalists throughout the ratification debate.⁵⁶

Anti-Federalists responded that this argument did not make sense because the Constitution already contained a proto-bill of rights protecting, for instance, the right to a criminal jury and prohibiting bills of attainder and *ex post facto* laws.⁵⁷ As Kurt Lash states, “Caught

54. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 167–68 (Merrill Jensen ed., 1976) [hereinafter 2 DHRC]. James Wilson stated that the people granted to the state governments “every right and authority which they did not in explicit terms reserve.” *Id.* For the federal government, however,

the congressional authority is to be collected, not from tacit implication, but from the positive grant expressed in the instrument of union. Hence, it is evident, that in the former case everything which is not reserved is given, but in the latter the reverse of the proposition prevails, and everything which is not given, is reserved.

Id.

55. *Id.* For another example of this argument, see James Wilson’s remarks in the Pennsylvania ratification convention on November 28, 1787. *Id.*

56. For example, see James Madison’s remarks in the Virginia ratification debates on June 24, 1788. 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1502 (John P. Kaminski et al. eds., 1993) [hereinafter 10 DHRC] (“If an enumeration be made of our rights, will it not be implied, that everything omitted, is given to the General Government?”).

57. See LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 28–30 (2008); Randy E. Barnett, *A Ninth Amendment for Today’s Constitution*, 26 VAL. U. L. REV. 419, 420 (1991). James Wilson had argued against including prohibitions on *ex post facto* laws and bills of attainder. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 376 (Max Farrand ed., 1911) (“Mr. Wilson was against inserting anything in the Constitution as to *ex post facto* laws. It will bring reflect[ions] on the Constitution-and proclaim that we are ignorant of the first principles of Legislation, or are constituting a Government which will be so . . . Mr. Wilson. If

on the hooks of their own argument[,] . . . James Madison and other Federalists ultimately agreed to propose a bill of rights in the First Congress.”⁵⁸

In the First Congress, after having received proposed amendments to the Constitution from the states, Madison composed a series of rights-guaranteeing provisions to be added to the Constitution. In introducing them to Congress, Madison stated that he tried to respond to the Federalist concern with his first draft of what would become the Ninth Amendment:

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in 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 [g]eneral [g]overnment, and were consequently insecure.⁵⁹

Madison called this “one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system.”⁶⁰ He stated that his early draft of the Ninth Amendment was his attempt to guard against this objection.⁶¹

Thus, many historians of the Ninth Amendment assume that the Clause is exclusively a Federalist provision, in contradistinction to the first eight “Anti-Federalist” amendments. As Barnett has stated, “While the rest of the Bill of Rights was a response to Anti-Federalist objections *to the Constitution*, the Ninth Amendment was a response to Federalist objections *to the Bill of Rights*.”⁶²

these prohibitions [i.e. against ex post facto laws and bills of attainder] in the State Constitutions have no effect, it will be useless to insert them in this Constitution. Besides, both sides will agree to the principle & will differ as to its application.”). Thus, for him his objection was perfectly consistent. Because the Philadelphia Convention’s proceedings had been secret, however, the disconnect between the Federalist argument and the text of the proposed Constitution did not seem reconcilable to the Anti-Federalists.

58. LASH, *LOST HISTORY*, *supra* note 6, at 14.

59. 1 ANNALS OF CONG. 439 (1789) (Joseph Gales ed., 1834) (emphasis added).

60. *Id.*

61. *Id.* Recently, Kurt Lash has enhanced this traditional view of the Ninth Amendment’s history by noting that the Ninth Amendment also responds to states that called for guarantees of their rights to collective self-government against implied expansions of federal power. LASH, *LOST HISTORY*, *supra* note 6, at 343–60.

62. Barnett, *It Means What It Says*, *supra* note 6, at 17.

This narrative of the Ninth Amendment, however, is incomplete. The Ninth Amendment also responded to an Anti-Federalist concern.

B. The Ninth Amendment's Anti-Federalist Dimension

Anti-Federalists were troubled that the *expressio unius* maxim would mean that particular rights might be put at risk when put into writing. Many scholars for the past two centuries have acknowledged that the Ninth Amendment, at least in part, was meant to preclude the application of the *expressio unius* maxim to enumerated rights.⁶³ But what, precisely, does this mean? The ratification debates regarding the potentially pernicious deployment of this maxim worked at two different levels of generality. Federalists feared that the maxim could be applied to the Constitution's enumeration of any rights at all and could result in the loss of the universe of unenumerated natural rights.⁶⁴ Most scholars have focused on this level of generality when discussing the Ninth Amendment.

The *expressio unius* maxim, however, more commonly works at a lower level of generality and a higher level of specificity: at the level of particular words and phrases. Indeed, this lower level of generality was the most common way that participants of the ratification debates

63. EDWARD DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 63 (1979) (“[T]he Ninth Amendment was designed to obviate the possibility of applying the maxim *expressio unius est exclusio alterius* in interpreting the Constitution.”); THOMAS B. MCAFFEE ET AL., *POWERS RESERVED FOR THE PEOPLE AND THE STATES: A HISTORY OF THE NINTH AND TENTH AMENDMENTS* 236 (2006) (“[T]hat the Ninth Amendment []‘was added to the Bill of Rights to ensure that the maxim *expressio unius est exclusio alterius* would not be used at a later time to deny fundamental rights merely because they were not specifically enumerated in the Constitution’ . . . is accurate.”) (internal citations omitted); 3 JOSEPH L. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1898 (1833) (“[The Ninth Amendment] was manifestly introduced to prevent any perverse or ingenious application of the well-known maxim, that an affirmation in particular cases implies a negation of all others; and *e’converso*, that a negation in particular cases implies an affirmation in all others.”); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 480 (1994) (“The . . . Ninth Amendment would explicitly confirm the silliness of reading Bills of Rights in narrow *expressio unius* fashion.”); Raoul Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1, 6–7 (1980); Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 HASTINGS L.J. 305 (1986); McConnell, *Natural Rights*, *supra* note 6, at 25 (“This distinction supports a reading of the Ninth Amendment under which rights arising from natural law or natural justice are not abrogated on account of the *expressio unius* effect of incomplete enumeration . . .”).

64. *See supra* notes 55–56 and accompanying text.

feared the maxim would be used.⁶⁵ The Anti-Federalists worried that the *expressio unius* canon would be applied to the precise words of the Constitution as an interpretive scalpel on each articulated right, implying that everything outside of the bare, literal text was consequently unprotected. The Anti-Federalists' fear was that the text of a particular guarantee would be narrowly construed and twisted into positive evidence that analogous and similar rights were meant to be left entirely unprotected. Thus, if the Constitution mentioned only the right to *criminal* juries, the *civil* jury trial would be lost forever. If the Constitution enumerated only *particular* persons who could not be forced to take a religious test, *everyone else could* be made to take such a test. As the pseudonymous author Federal Farmer contended, *each* enumeration of a right in the Constitution implied a denial of analogous "similarly circumstanced" rights.⁶⁶ After all, the Latin phrase, *expressio unius est exclusio alterius* does not literally mean, as it is sometimes translated, "the expression of one is the exclusion of *all others*" or "*the others*." Instead, it means "the expression of one thing is the exclusion of *the other thing*" (*i.e.*, the analogous counterpart to what was expressed).

Anti-Federalists pointed to this canon of construction and warned that clever interpreters might transform the bare text of the Constitution into positive evidence that analogous rights just outside the literal text were necessarily unprotected. Such lawyerly legerdemain might paradoxically turn rights-guaranteeing provisions into rights-denying provisions. As one anonymous author stated, "the least ambiguity is dangerous, as this is in the nature of a grant and is, as all other grants, to be taken strongest against us the grantors."⁶⁷ The author went on to call for eliminating anything in the Constitution that could be so construed against the people: "We

65. See *infra* notes 105–09 and accompanying text.

66. FEDERAL FARMER: AN ADDITIONAL NUMBER OF LETTERS TO THE REPUBLICAN (1788), reprinted in 17 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 346 (John P. Kaminski & Gaspare J. Saladino eds., 1995) [hereinafter 17 DHRC] ("Further, the people, thus establishing some few rights, and remaining totally silent about others *similarly circumstanced*, the implication indubitably is, that they mean to relinquish the latter, or at least feel indifferent about them.") (emphasis added).

67. *The People: Unconstitutionalism*, MIDDLESEX GAZETTE, December 10, 1787, reprinted in 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 494 (Merrill Jensen ed., 1978).

therefore hold that if there is anything that may be made an ill use of, it should be corrected.”⁶⁸

In Anti-Federalist writings of the ratification period, this fear continually arose in the context of several rights, such as the Religious Test Clause, which provides that “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”⁶⁹ The pseudonymous Anti-Federalist writer Cincinnatus—most likely the Virginian lawyer Arthur Lee, who penned his editorials as rejoinders to James Wilson⁷⁰—warned that the *expressio unius* canon could be applied to religious tests. Cincinnatus argued that the enumeration of specific religious test prohibitions endangered the liberty of conscience more generally. “This exception implies, and necessarily implies, that in all other cases whatever liberty of conscience may be regulated.”⁷¹ Thus, paradoxically, by protecting one religious right, the Constitution could equip the enemies of the people with the opportunity to curtail another religious right.

Federalists responded to this implication by arguing that the presence of a prohibition on religious tests implied very little. James Madison stated as much in a letter to Edmund Randolph. Madison wrote, “As to the religious test, I should conceive that it can imply at most 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.”⁷² Nevertheless, Anti-Federalists continued to comb the Constitution’s guarantees for hidden traps. The Anti-Federalist fear of the *expressio unius* canon flared up most violently in the debate over the Constitution’s failure to guarantee the right to a jury in civil trials.

68. *Id.*

69. U.S. CONST. art. VI, cl. 3.

70. 19 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 160 (John P. Kaminski et al. eds., 2003) [hereinafter 19 DHRC].

71. *Cincinnatus I: To James Wilson, Esquire*, NEW YORK J., Nov. 15, 1787, reprinted in 19 DHRC, *supra* note 70, at 258. Cincinnatus went on to say,

For, though no such power is expressly given, yet it is plainly meant to be included in the general powers, or else this exception would have been totally unnecessary—For why should it be said, that no religious test should be required as a qualification for office, if no power was given or intended to be given to impose a religious test of any kind?

Id.

72. Letter from James Madison to Edmund Randolph (April 10, 1788), in 17 DHRC, *supra* note 66, at 63.

1. Civil juries

The most prominent example of this fear of negative implication is the public furor that arose over the Constitution's failure to explicitly protect the right to a civil jury. It may seem odd, considering the status that the Seventh Amendment occupies today in discussions on constitutional rights, but the issue of civil juries was the single most debated right in the ratification period. Although scholars have noted the importance of civil juries to the debate on the Constitution more generally,⁷³ the impact that the debate over civil juries had on the Ninth Amendment in particular has not yet been recognized.

a. Civil juries were one of the most widely debated issues during ratification. No delegate at the Philadelphia Convention broached the subject of juries in civil cases until the final week. On September 12, 1787, Hugh Williamson of North Carolina "observed to the House that no provision was yet made for juries in civil cases and suggested the necessity of it."⁷⁴ Nathaniel Gorham of Massachusetts objected to such a guarantee in the Constitution, explaining that "[i]t is not possible to discriminate equity cases from those in which juries are proper. The Representatives of the people may be safely trusted in this

73. Storing, for example, stated that "The most important [demand], and one of the most widely uttered objections against the Constitution was that it did not provide for (and therefore effectively abolished) trial by jury in civil cases." HERBERT J. STORING, *WHAT THE ANTI-FEDERALISTS WERE FOR* 64 (Murray Dry ed. 1981). Similarly, McAfee wrote that the omission of a right to trial by jury in civil cases from the Constitution "was one of the most oft-cited specific complaints of its critics." Thomas B. McAfee, *The Federal System as Bill of Rights: Original Understandings, Modern Misreadings*, 43 VILL. L. REV. 17, 105–06 (1998); *see also* CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 547 (1993) ("The lack of such a provision [protecting civil juries] became one of the chief sources of attack on the Constitution in the debates over its adoption . . ."); Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 295 (1966) ("[T]he lack of provision for civil juries was a prominent part of [the Anti-Federalist's argument]" on "the almost complete lack of any bill of rights."). Amar, further, has noted that, "the entire debate at the Philadelphia convention over whether to add a Bill of Rights was triggered when George Mason picked up on a casual comment from another delegate that 'no provision was yet made for juries in civil cases.'" Amar, *Bill of Rights*, *supra* note 6, at 1183; *see also* Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 657 (1973) ("[T]he absence of a bill of rights was precipitated at the Philadelphia Convention by an objection that the document under consideration lacked a specific guarantee of jury trial in civil cases.").

74. 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 197 (John P. Kaminski et al. eds., 1981) [hereinafter 13 DHRC].

matter.”⁷⁵ Elbridge Gerry, also of Massachusetts, conversely, “urged the necessity of Juries to guard [against] corrupt judges.”⁷⁶ George Mason of Virginia acknowledged the difficulty of specifying all the cases in which a jury trial would be required.⁷⁷ Nevertheless, he thought that a general statement would be sufficient and expressed his desire that the Constitution be “prefaced with a Bill of Rights.”⁷⁸ Gerry concurred, but the motion to create a committee to draft a bill of rights was defeated and the point was dropped.⁷⁹ The point was raised once more on September 15, only two days before the end of the convention, but was again quickly dropped.⁸⁰

The issue of civil juries was one of the three main reasons⁸¹ Elbridge Gerry gave for withholding his name at the end of the Constitutional Convention.⁸² Gerry stated that the people’s rights were “rendered insecure . . . by the general power of the Legislature . . . to establish a tribunal without juries, which will be a Star-Chamber as to Civil cases.”⁸³ The “civil star chamber” metaphor became an Anti-Federalist specter, oft-repeated in broadsides, editorials, and convention speeches.⁸⁴

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. On September 15, Gerry, along with Charles Pinckney of South Carolina, again raised the issue. They proposed the insertion of the words “[a]nd a trial by jury shall be preserved as usual in civil cases” at the end of Article 3 Section 2. Again, Gorham objected. “The constitution of [j]uries is different in different states and the trial itself is *usual* in different cases in different states[.]” The motion was defeated without objection. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 628 (Max Farrand ed., 1911).

81. The others were the Necessary and Proper Clause and the absence of a congressional limit on raising armies and money. 13 DHRC, *supra* note 74, at 199.

82. He was one of three. The others, Edmund Randolph and George Mason, were both from Virginia. *Id.* at 198–99.

83. *Id.* at 199. Gerry later published his objection as follows, stating that he “contended for jury trials in civil cases, and declared his opinion, that a federal judiciary with the powers abovementioned, would be as oppressive and dangerous, as the establishment of a Star-Chamber.” *Elbridge Gerry Responds to Maryland “Landholder” X*, AMERICAN HERALD, Apr. 18, 1788, *reprinted in* 7 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1751 (John P. Kaminski et al. eds., 2001).

84. *See, e.g., Ship News*, INDEP. CHRON., Nov. 1, 1787, *reprinted in* 4 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 90 (John P. Kaminski et al. eds., 1997); *Cincinnati I: To James Wilson, Esquire*, N.Y. J., Nov. 1, 1787, *reprinted in* 19 DHRC, *supra* note 70, at 164; *Portius*, MASS. GAZETTE, Feb. 8, 1788, *reprinted in* 5 THE

Gerry's "civil star chamber" metaphor must be unpacked to understand how Gerry's objection interacted with the text of the Constitution. Other delegates had objected to Gerry's proposal for a civil jury guarantee because not every civil trial required a jury. In both chancery and admiralty, for instance, civil cases regularly proceeded without a jury. But Gerry was not worried that chancery or admiralty cases would be heard without a jury as they always had been. Instead, he worried that manipulative constitutional interpreters would read the Constitution's criminal jury guarantee as preventing a criminal star chamber, but allowing a *civil* star chamber; all government officials needed to do was to convert all punishments into civil penalties.

During the ratification debates over the next year, Anti-Federalists repeated Gerry's arguments that the enumeration of the criminal jury guarantee without the corollary protection of the civil jury could be narrowly construed and manipulated in such a way as to endanger the criminal jury itself. After Pennsylvania ratified the Constitution, those members of the convention that had voted against it wrote "The Dissent of the Minority," which outlined their opposition to the proposed Constitution. In it, they echoed Gerry's reasoning and argued as follows: Congress could interpret the Constitution to mean that because the criminal jury right is expressed, there is no civil jury right. Congress could then legislate its criminal law with a civil system and thereby avoid a criminal jury. As the document stated, "Trial by jury in criminal cases may also be excluded by declaring that the libeler, for instance, shall be liable to an action of debt for a specified sum, thus evading the common law prosecution by indictment and trial by jury."⁸⁵

DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 882 (John P. Kaminski & Gaspare J. Saladino eds., 1998); *The Federalist's Political Creed*, PHILA. INDEP. GAZETTEER, May 10, 1788, *reprinted in* 18 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 6 (John P. Kaminski & Gaspare J. Saladino eds., 1995); *New York Convention Debates and Proceedings*, July 5 1788, 22 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 2101 (John P. Kaminski et al. eds., 2008). In many ways, Gerry's final speech at the Philadelphia Convention, which prominently discussed the lack of a provision protecting civil juries, formed the strategy for the Anti-Federalist attack on the proposed Constitution, an attack that would flare for the next year. *See* Wolfram, *supra* note 73, at 662 ("Even before the Philadelphia Convention adjourned, plans were being laid to attack the Constitution that was eventually proposed because of the absence of any guarantee of civil jury trial in the new federal courts.").

85. 2 DHRC, *supra* note 54, at 634.

The Constitution's lack of a safeguard for civil juries became the most discussed rights issue during the ratification debate.⁸⁶ The sheer number of sources touching on the civil jury discussion during ratification reveals how successfully the Anti-Federalists defined the terms of the debate. Civil juries were furiously discussed by Anti-Federalists and Federalists in personal letters, in public print, and in state ratification assemblies. Some, like Alexander Hamilton, saw the issue as one of the chief impediments to the constitutional project, writing that "The objection to the plan of the convention, which has met with most success" was "that relative to *the want of a constitutional provision* for the trial by jury in civil cases."⁸⁷ Hamilton said that the Anti-Federalist fear of the *expressio unius* canon "has been repeatedly adverted to and exposed; but continues to be pursued in all the conversations and writings of the opponents of the plan."⁸⁸

Similarly, Joseph Story, in his *Commentaries on the Constitution of the United States*, called the issue of civil juries "one of the strongest points of attack upon the constitution."⁸⁹ As Story stated, the Anti-Federalist argument that the right to civil juries would be disparaged by the Constitution "was at once seized hold of by the enemies of the constitution; and it was pressed with an urgency and zeal, which were well nigh preventing its ratification."⁹⁰

86. Specifically, there are 174 broadsides, pamphlets, and newspaper articles that discuss civil juries or the danger in which the Constitution places the general right to a jury trial. There are also thirty-five personal letters that discuss the civil juries or the danger in which the Constitution places the general right to a jury trial. By contrast, together there are only 173 broadsides, pamphlets, and newspaper articles and only twenty-seven personal letters that discuss any of the First Amendment rights. This point is also evident in Cogan's work *The Complete Bill of Rights*. Among other primary sources, Cogan collates the newspaper articles, pamphlets, and personal letters that contain the most important discussions for each of the rights of the original ten amendments. In that work, Cogan reproduces sixty-nine newspaper articles and pamphlets and twenty-nine personal letters and diary entries that discuss civil juries. *THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS* xl–xlii (Neil H. Cogan ed., 1997). By contrast, he reproduces twenty-six newspaper articles and pamphlets and twenty-two personal letters and diary entries that discuss *any* of the six rights contained in the First Amendment. *Id.* at xii–xvii.

87. THE FEDERALIST NO. 83, at 430 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

88. *Id.*

89. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1762, at 633 (Boston: Hilliard, Gray, and Co. 1833) (1991).

90. *Id.* § 1757, at 628. See 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES app. at 351 (1803) ("[M]ore solid objections seemed to arise from the want of a sufficient security for the liberty of the citizen in criminal prosecutions; *the defect of an adequate provision for the*

A guarantee for civil juries was also the amendment the states most commonly proposed to Congress after ratification, save for the Tenth Amendment. Nine of the thirteen states developed amendments to send to the First Congress for consideration in 1789.⁹¹ South Carolina proposed only a single amendment that was eventually adopted in the Bill of Rights, namely the reservation of powers to the states, which eventually became the Tenth Amendment; the other eight joined South Carolina in proposing this amendment.⁹² The next most popular proposal, and the only other suggested amendment garnering the support of more than seven states, was an amendment guaranteeing civil juries, supported by eight states.⁹³ The next most popular rights were religious freedom (seven states), freedom of the press (six states), right to bear arms (six states), the prohibition on quartering soldiers (six states), and the prohibition of unreasonable searches and seizures (six states). No other right was proposed by more than four of the nine states.⁹⁴

trial by jury in civil cases; and the burthens and mischiefs which might arise from the re-examination of facts, upon an appeal.” (emphasis added).

91. Seven states sent proposed amendments: Massachusetts, New Hampshire, New York, North Carolina, Pennsylvania, South Carolina, and Virginia. Additionally, two states, Maryland and Rhode Island, developed proposed amendments, although those proposals did not reach Congress before the first ten amendments were composed. DUMBAULD, *supra* note 63, at 11 & n.7.

92. BERNARD SCHWARTZ, 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 983, 1167.

93. Maryland: “[T]hat in all actions on debts or contracts and controversies respecting property, trial of the facts shall be by jury if either party chooses” DUMBAULD, *supra* note 63, at 18; Massachusetts: “[T]hat every issue of fact in civil actions at common law shall be tried by jury upon request of any party” *Id.* at 16; New Hampshire: [identical to Massachusetts’s proposal], *id.* at 20; New York: “That the trial by jury, in the extent that it obtains by the common law of England, is one of the greatest securities to the rights of a free people, and ought to remain inviolate.” 18 DHRC, *supra* note 84, at 299; Virginia: jury trials in civil cases are “sacred and inviolable,” DUMBAULD, *supra* note 63, at 22; Pennsylvania: “[T]hat in controversies about property and between man and man trial by jury shall remain as heretofore, in federal courts and in those of the several states” *Id.* at 12; Rhode Island: “That in controversies respecting property, and in suits between man and man the ancient trial by jury, as hath been exercised by us and our ancestors, from the time whereof the memory of man is not to the contrary, is one of the greatest securities to the rights of the people, and ought to remain sacred and inviolable.” *Id.* at 313; North Carolina: [identical to Virginia’s], DUMBAULD, *supra* note 63, at 30–31.

94. SCHWARTZ, *supra* note 92, at 983, 1167.

b. The Federalist reaction: “But, why this outcry about juries?” The popular reaction to the absence of a civil jury guarantee surprised many Federalists. Noah Webster, the Federalist lexicographer, writing under the pseudonym “America,” was perplexed: “But, why this outcry about juries? If the people esteem them so highly, why do they ever neglect them, and suffer the trial by them to go into disuse?”⁹⁵ James Wilson, as the first prominent Federalist to discourse publicly about the new Constitution, took the opportunity to attack these Anti-Federalist arguments. Speaking before the Pennsylvania Convention on October 6, 1787, only a few weeks after the completion of the Constitutional Convention, James Wilson said, “I know in every part, where opposition has risen, what a handle has been made of this objection; but I trust upon examination it will be seen that more could not have been done with propriety.”⁹⁶ He then waxed splenetic: “Gentlemen talk of bills of rights! What is the meaning of this continual clamor . . . ?”⁹⁷

The public outcry over civil juries blindsided the Federalists, who never expected it to become such a barrier to ratification, for during the summer of 1787, the topic of civil juries was swiftly dismissed if mentioned at all. The objection to the Constitution’s lack of a guarantee for civil juries apparently seemed like much ado about nothing, much as it might to many in the modern world, where the Seventh Amendment is rarely extolled as the palladium of liberty. Hamilton himself expressed wonder at the popular outrage: “But I must acknowledge, that I cannot readily discern the inseparable

95. *America*, N.Y. DAILY ADVERTISER, Dec. 31, 1787, reprinted in 19 DHRC, *supra* note 70, at 484–93.

96. 2 DHRC, *supra* note 54, at 516.

97. *Id.* Indeed, some Federalists were dismissive of civil juries altogether. Letter from the Honorable William Pierce to St. George Tucker, GAZETTE ST. GA., September 28, 1787, reprinted in 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 296 (Merrill Jensen ed., 1978). (“I ask if the trial by jury in civil cases is really and substantially of any security to the liberties of a people. In my idea the opinion of its utility is founded more in prejudice than in reason. I cannot but think that an able Judge is better qualified to decide between man and man than any twelve men possibly can be. The trial by jury appears to me to have been introduced originally to soften some of the rigors of the feudal system, . . . [B]ut applied to us in America, where every man stands upon a footing of independence . . . [the trial by jury] is useless, and I think altogether unnecessary; and, if I was not in the habit of respecting some of the prejudices of very sensible men, I should declare it ridiculous.”).

connexion between the existence of liberty, and the trial by jury, in civil cases.”⁹⁸

As detailed above, the framers rejected the addition of a clause regarding civil juries because the variety of practices in different states precluded a national consensus.⁹⁹ As Charles Pinckney, the South Carolina lawyer and major general of the Revolutionary War, noted during the Philadelphia Convention, “such a clause in the Constitution would be pregnant with embarrassments” because whatever civil jury system the Constitution might guarantee, it would conflict with the practice of one state or another.¹⁰⁰ The Federalists repeated these arguments during the ratification period,¹⁰¹ but to no avail. The absence of an explicit clause in the Constitution guaranteeing civil juries continued to provoke mass discontent.

c. Deployment of the expressio unius canon during the civil jury debate. There are several possible reasons for the prominence of civil juries in the popular discussion of the Constitution. The Anti-Federalists may have merely been pandering to popular fears in an effort to subvert the constitutional project.¹⁰² Alternatively, the prominence of civil

98. Hamilton, *supra* note 87, at 433.

99. See *supra* text accompanying notes 72–73.

100. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 628 (Max Farrand ed., 1911).

101. Perhaps the most notable example was James Wilson’s speech in the state house yard in Philadelphia on October 6, 1787. *James Wilson’s Speech in the State House Yard*, PA. HERALD, Oct. 9, 1787, reprinted in 2 DHRC, *supra* note 54, at 168–69 (“The cases open to a trial by jury differed in the different states, it was therefore impracticable on that ground to have made a general rule. . . . Besides, it is not in all cases that the trial by jury is adopted in civil questions, for causes depending in courts of admiralty, such as relate to maritime captures, and such as are agitated in courts of equity, do not require the intervention of that tribunal.”). Another notable example appears in the anonymous article, *An Independent Freholder*, WINCHESTER VA. GAZETTE, Jan. 18, 1788, reprinted in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 310, 312–13 (John P. Kaminski & Gaspare J. Saladino eds., 1988) (“What would you have done in such an instrument of government with regard to civil causes? Would you say the trial by jury shall be in all cases? Is the court of chancery an institution to be abolished?”).

102. Wolfram, *supra* note 73, at 668–69. Wolfram insists, however, that such motives do not diminish the strength of the general public’s desire to preserve civil juries. See LEVY, *supra* note 57, at 30–31, (arguing that Anti-Federalist calls for a bill of rights were largely intended to defeat the Constitution as a whole). As Henderson argues, Anti-Federalist discussions of civil juries were not very sophisticated, and did not attempt to articulate a theory of how to phrase such a guarantee, or how it would work in practice. Henderson, *supra* note 73, at 299 (“It appears, therefore, that a general guarantee of the civil jury as an institution was widely desired,

juries may also be explained by the general centrality of juries to the Bill of Rights.¹⁰³ Another reason for the popular anxiety might have been a fear that the “appeal” was a civil (as opposed to common) law device for reviewing juries’ factual determinations.¹⁰⁴

But perhaps the foremost reason for the prominence of civil juries in the ratification debates was the popular fear of narrow legal maxims. Civil juries were conspicuously absent from Article III, Section 2, Clause 3: “Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.” The obvious question that occurred to many readers upon first encountering this provision must have been, “It says crimes, but what about civil trials?” When a provision discusses an obverse with

but that there was no consensus on the precise extent of its power. On the contrary, no one discussed that question in any detail.”). Indeed, as noted by Wolfram, Oliver Ellsworth, a fellow participant in the Constitutional Convention, criticized George Mason with such allegation. Writing under the pseudonym “The Landholder,” Ellsworth criticized Mason for making arguments in opposition to the Constitution, including those concerning civil juries, that the Virginian had refrained from making during the convention, thus suggesting a calculated move to sabotage the ratification. See Wolfram, *supra* note 73, at 668 n.80; *Landholder VI*, CONN. COURANT, Dec. 10, 1787, reprinted in 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 398, 399 (John P. Kaminski & Gaspare J. Saladino eds., 1983) [hereinafter 14 DHRC] (“His reasons . . . are most of them *ex post facto*—have been revised in New-York by R. H. L. [Richard Henry Lee] and by him brought into their present artful and insidious form.”).

103. As Amar has noted, “[g]uaranteed in no less than three amendments, juries were at the heart of the Bill of Rights.” AMAR, BILL OF RIGHTS, *supra* note 6, at 1183. Amar argues that civil juries were essential to the operation of the First and Fourth Amendments, in addition to the Seventh Amendment. *Id.* at 1150–52 (noting the historic link between the Freedom of Speech and Press and both civil and criminal jury trials, as well as the modern link via “community standards”), 1179–80 (arguing that the “reasonableness” prong of the Fourth Amendment was meant to be determined by civil juries). Indeed, the issue of juries was one of the colonists’ grievances in the Declaration of Independence. THE DECLARATION OF INDEPENDENCE para. 18 (U.S. 1776) (arguing that British legislation “depriv[ed] us in many cases, of the benefits of Trial by Jury”).

104. Some Anti-Federalists interpreted Article III, Section 2, Clause 2, which stated that the Supreme Court would have “appellate Jurisdiction, both as to Law and Fact,” to mean that appellate bodies would be able to overturn the findings of juries, or even completely retry the case at the appellate level. For a discussion of the Seventh Amendment’s relationship to the Reexamination Clause, see Ian Ayres, *Pregnant with Embarrassments: An Incomplete Theory of the Seventh Amendment*, 26 VAL. U. L. REV. 385, 395–402. This fear was echoed in many Anti-Federalist writings. See, e.g., THE DISSENT OF THE MINORITY OF THE PENNSYLVANIA CONVENTION, PA. PACKET, Dec. 18, 1787, reprinted in 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 27 (John P. Kaminski & Gaspare J. Saladino eds., 1984) (“The judicial power, under the proposed constitution, is founded on the well-known principles of the civil law, by which the judge determines both on law and fact, and appeals are allowed from the inferior tribunals to the superior, upon the whole question; so that facts as well as law, would be reexamined, and even new facts brought forward in the court of appeals.”).

a logical converse, a reader's mind naturally wonders about the analogue.

The pseudonymous author Cincinnatus, in a letter responding to James Wilson's speech of October 6, 1787, outlined the Anti-Federalist argument that civil juries were endangered by the proposed constitution via this legal maxim: "It is a law maxim, that the expression of one part is an exclusion of the other. In legal construction therefore, the reservation of trial by jury in criminal, is an exclusion of it in civil cases." Therefore, Cincinnatus concluded, "either we must suppose the Convention did a nugatory thing; or that by the express mention of jury in criminal, they meant to exclude it in civil cases."¹⁰⁵

The fear of the *expressio unius* canon continued to be voiced by prominent Anti-Federalists throughout the rest of 1787 and into 1788. As the pseudonymous author Gentleman in New York put it, "securing jury trial in criminal, is, according to all legal reasoning, an exclusion of it in civil matters."¹⁰⁶ Doesn't every lawyer know, the Anti-Federalist author A Farmer asked, "that in the interpretation of all . . . laws, this fundamental maxim must be observed, [t]hat where there are two objects in contemplation of any legislature, the express adoption of one is the total exclusion of the other[?]" Therefore, he concluded, "the adoption of juries in criminal cases, in every legal interpretation, amounts to be an absolute rejection in civil cases."¹⁰⁷ Anti-Federalists made this argument continually in the press.¹⁰⁸

105. *Cincinnatus II: To James Wilson, Esquire*, N.Y. J., Nov. 8, 1787, reprinted in 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 13 (John P. Kaminski & Gaspare J. Saladina eds., 1983) [hereinafter 14 DHRC].

106. VA. INDEP. CHRON., Nov. 14, 1787, reprinted in 14 DHRC, *supra* note 105, at 103.

107. *A Farmer IV*, MD. GAZETTE, Mar. 21, 1788, reprinted in 5 THE COMPLETE ANTI-FEDERALIST 37 (Herbert J. Storing ed., 1981) (emphasis omitted)

108. For other examples, see *Federal Farmer: An Additional Number of Letters to the Republican XVI*, Jan. 20, 1788, reprinted in 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1055–56 (John P. Kaminski et al. eds., 2004) ("[T]he constitution expressly establishes this trial in criminal, and wholly omits it in civil causes [T]he people, thus establishing some few rights, and remaining totally silent about others similarly circumstanced, the implication indubitably is, that *they mean to relinquish the latter, or at least feel indifferent about them.*") (emphasis added); *Federal Farmer: Letters to the Republican III*, Oct. 10 1787, reprinted in 19 DHRC, *supra* note 70, at 229 ("The trial by jury is secured only in those few criminal cases, to which the federal laws will extend . . . but the jury trial is not secured at all in civil causes."); *Federal Farmer: Letters to the Republican IV*, Oct. 12, 1787, reprinted in 19 DHRC, *supra* note 70, at 235 ("The establishing of one right [i.e. criminal juries] implies the necessity of establishing another and similar one [i.e. civil juries]."); *Timoleon*,

Anti-Federalists also raised fears of the *expressio unius* canon in state conventions as well. On December 6, 1787, in the Pennsylvania state ratification convention, for instance, Robert Whitehill, one of the opponents of the Constitution who would help pen the Dissent of the Minority, stated, “The trial of *crimes* is to be by jury; therefore the trial of civil causes is supposed not to be by jury.”¹⁰⁹

The Federalists responded in the same vein, defending the Constitution by arguing that the *expressio unius* maxim did not apply, and that the silence of the Constitution on the topic of civil juries did nothing to endanger it. James Wilson also attacked this Anti-Federalist argument: “It is very true, that trial by jury is not mentioned in civil cases; but I take it, that it is very improper to infer from hence, that it was not meant to exist under this government.”¹¹⁰

Alexander Hamilton, in Federalist 83, gave the most sustained and powerful refutation of the Anti-Federalist fear that the *expressio unius* canon would obliterate the right to civil juries. He called the Anti-Federalist fear that the Constitution would be read in a narrow, rights-abridging way a “subtlet[y] almost too contemptible for refutation.” He went on to describe “the inventors of this fallacy [who] have attempted to support it by certain legal maxims of interpretation, which they have perverted from their true meaning.” The Anti-

N.Y. J., Nov. 1, 1787, *reprinted in* 19 DHRC, *supra* note 70, at 168 (“[T]he Constitution in the 2d section of the 3d article, by expressly assuming the trial by jury in criminal cases, and being silent about it in civil causes, evidently declares it to be unnecessary in the latter.”); *Centinel I*, INDEP. GAZETTEER, Oct. 5, 1787, *reprinted in* 2 DHRC, *supra* note 54, at 166 (“[J]ury trial in criminal cases is expressly stipulated for, but not in civil cases.”).

109. 2 DHRC, *supra* note 54, at 513.

110. 2 DHRC, *supra* note 54, at 516. For other Federalist responses to the *expressio unius* argument, see *A Freeholder*, VA. INDEP. CHRON., Apr. 9, 1788, *reprinted in* 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 723 (John P. Kaminski & Gaspare J. Saladino eds., 1990) (mocking the Anti-Federalist suspicion that “because trial by juries in criminal matters is expressly secured to the states by the constitution, it took that mode of trial away in civil cases, by saying nothing about such cases.”); *A Citizen of New-York: An Address to the People of the State of New York*, Apr. 15, 1788, *reprinted in* 17 DHRC, *supra* note 66, at 112 (“We are told that [the proposed Constitution] deprives us of trial by jury, whereas the fact is, that it expressly [sic] secures it in certain cases, and takes it away in none—it is absurd to construe the silence of this, or of our own Constitution, relative to a great number of our rights, into a total extinction of them—silence and blank paper neither grant nor take away any thing.”); *One of the People*, PA. GAZETTE, Oct. 17, 1787, *reprinted in* 2 DHRC, *supra* note 54, at 190 (“[The] trials by jury are not infringed on. The Constitution is silent, and with propriety too, on these and every other subject relative to the internal government of the states. These are secured by the different state constitutions.”).

Federalists, Hamilton explained, relied on maxims such as “‘a specification of particulars, is an exclusion of generals;’ or, ‘the expression of one thing is the exclusion of another.’”¹¹¹ (*i.e.*, *expressio unius est exclusio alterius*). Hamilton, who had taught himself law and practiced in New York over the previous five years,¹¹² took the Constitution’s opponents to task for not comprehending the purpose and application of legal maxims. “The rules of legal interpretation,” he wrote, “are rules of common sense The true test, therefore, of a just application of them, is its conformity to the source from which they are derived.”¹¹³

The Federalists, though spending considerable time responding to the *expressio unius* argument, scoffed at the fears of the Constitution’s opponents, confident that the Anti-Federalists were plainly misapplying the limited canon of construction. Nevertheless, despite speaking from the vantage of superior legal training, their arguments did not allay popular fears, and the concerns over the *expressio unius* canon raged on.

There was, moreover, widespread confusion and imprecision about precisely what conclusions followed from applying the *expressio unius* maxim to the criminal juries guarantee. Some Anti-Federalists argued that the Constitution implied Congress could decide whether or not to include juries in civil cases held in federal tribunals. Of course, the suspicious Anti-Federalists concluded that Congress would not include any.¹¹⁴ Some worried that it might mean that Congress itself was without the power to establish juries for civil cases in federal

111. Hamilton, *supra* note 87, at 430.

112. RON CHERNOW, *ALEXANDER HAMILTON* 169 (2004).

113. Hamilton, *supra* note 87, at 431 (emphasis omitted).

114. As the Anti-Federalist pseudonymously-named writer Wat Tyler warned, “because the federal representation of the people will possess the power to declare in what civil cases the trial shall be by jury, *therefore* the trial by jury is abolished in all civil cases.” Wat Tyler, *A Proclamation*, PA. HERALD, Oct. 24, 1787, *reprinted in* 2 DHRC, *supra* note 54, at 203; *see Cumberland County Petition to the Pennsylvania Convention*, Dec. 5, 1787, *reprinted in* 2 DHRC, *supra* note 54, at 310 (“[The Necessary and Proper Clause] submits every right of the people of these states, both civil and sacred to the disposal of Congress, who may exercise their power to the expulsion of the jury-trial in civil causes.”). Federalists thought this very unlikely. James Wilson, for instance, in the Pennsylvania ratification debates argued that the people could trust their representatives to establish juries in federal courts because they had nothing to gain from withholding civil juries: “[T]he legislature will not do wrong in an instance, from which they can derive no advantage.” 2 DHRC, *supra* note 54, at 516.

courts.¹¹⁵ Many of these arguments might be interpreted as hysterical or perhaps even disingenuous. Nevertheless, the Anti-Federalist fears persisted and led right to Madison's composition of the Ninth Amendment.

2. From distrust of narrow legal maxims to the Ninth Amendment

As with all of the first ten amendments, there is very little extant history detailing the composition or ratification of the Ninth Amendment, especially compared to the wealth of private and public documents that preserve the history of the Constitution. The extant evidence of the Ninth Amendment is largely limited to the amendments proposed by the states to Congress, Madison's personal correspondence, the debates in the House of Representatives, and Virginia's ratification of the Bill of Rights preserved in the Virginia Legislative Journal and a series of personal letters. Each of these sources tends to emphasize the concerns of a particular institution or faction. The state legislatures' debates and proposed amendments emphasize their concern that Congress's powers not be expanded by construction, and the House of Representatives' debates focus on Federalist concerns. Nevertheless, despite the Anti-Federalists' lack of an institutional force pushing for their interests, their concern that particular texts might be construed narrowly and negatively remains evident.

For instance, the states proposed amendments to Congress that encapsulated the federalism spirit of the Ninth Amendment, a spirit also found in the Tenth Amendment. The proposals clarified that particular limitations on governmental powers do not themselves imply additional Congressional powers. As the New York Convention stated as one of their proposed amendments:

[T]hose clauses in the said Constitution, which declare that Congress shall not have or exercise certain powers, do not imply that Congress is entitled to any powers not given by the said Constitution; but such

115. This appears to be one of the sentiments against which Hamilton was arguing when he asked whether it was "consistent with common sense to suppose that a provision obliging the legislative power to commit the trial of criminal causes to juries, is a privation of its right to authorize or permit that mode of trial in other cases?" Certainly not, he concluded. Such a conclusion would "[n]ot be rational." Hamilton, *supra* note 87, at 431.

clauses are to be construed either as exceptions to certain specified powers, or as inserted merely for greater caution.¹¹⁶

The state resolutions have not traditionally been read as relating to the narrower Anti-Federalist concern that the text of particular rights-preserving provisions might be stingily interpreted. Nevertheless, it should be noted that the danger articulated by the states revolved not around how the structure of the Constitution would work, but how particular clauses would be construed. This was the Anti-Federalist fear: that particular words would be strictly and stingily interpreted as positive evidence denying analogous rights or limits on government.

James Madison's statements in Congress introducing the Bill of Rights also reflect this Anti-Federalist concern. Although most interpret Madison's words as addressing only state and Federalist concerns about federalism and unenumerated natural rights, Madison emphasized the construction of particular provisions of the Constitution. For example, when he explained the reasons for including the Ninth Amendment, Madison stated, "It has been objected also against a bill of rights, that, by enumerating *particular exceptions* to the grant of power, it would disparage those rights which were not placed in that enumeration[.]"¹¹⁷ As with the states' proposed amendments, Madison spoke about the dangers of how "particular" provisions of the Constitution would be narrowly interpreted. Madison's proposed Ninth Amendment would also assuage Anti-Federalist concerns about how individual provisions of the Constitution would be construed.

Madison's first draft of the Ninth Amendment, moreover, evinced the amendment's application to particular constitutional provisions:

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

116. 1 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS 327 (1836) (emphasis added); *see id.* at 334 (Rhode Island's almost identical proposal); 4 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS 246 (1836) (showing North Carolina's proposal, which began: "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") (emphasis added); 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS 661 (1836) (showing Virginia's proposal, which is identical to North Carolina's).

117. 1 ANNALS OF CONG. 439 (1789) (Joseph Gales ed., 1834) (emphasis added).

the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.¹¹⁸

Madison's fourth resolution did more than merely allude to the fact of enumeration. It referred to rights articulated "here [in the proposed Bill of Rights] or elsewhere in the [original] Constitution." It was appropriate for Madison to specify that the proposed amendment applied to provisions of the Constitution beyond the Bill of Rights because it instructed interpreters how (not) to construe particular provisions located in various parts of the Constitution, not just the very fact of enumeration.

In his private correspondence with Jefferson, Madison made these concerns explicit. Madison listed the potential dangers of enumerating rights in the Constitution. The first reason he gave was the federalism account, that enumerating rights in the Constitution might by implication upset the structure of the Constitution itself, which protects rights by its system of separation of powers and vertical federalism. "[B]ecause I conceive that in a certain degree, though not in the extent argued by Mr. Wilson, the rights in question are reserved by the manner in which the federal powers are granted."¹¹⁹ This was a reference to James Wilson's speech to the Pennsylvania Convention on October 6, 1787, in which he outlined the Federalist objections to a bill of rights.¹²⁰

Madison went on, however, to discuss the Anti-Federalist opposition to enumerating particular rights in the Constitution. "[B]ecause there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude."¹²¹ Madison gave a particular example of his concern, focusing on religious rights. "I am sure that the rights of Conscience in particular, if submitted to public definition would be narrowed much more than they are likely ever to be by an assumed power." Madison then focused on concerns raised in ratification conventions,

118. *Id.* at 435 (emphasis added).

119. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 THE PAPERS OF JAMES MADISON 297 (Robert A. Rutland & Charles F. Hobson eds., 1977) (emphasis added). For further discussion of the passage, see JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 36 (1980).

120. *See supra* text accompanying note 54.

121. Letter from Madison to Jefferson, *supra* note 119.

namely that the prohibition against religious tests for officers would allow adherents of all faiths to serve in the federal government. “One of the objections in New England was that the Constitution by prohibiting religious tests opened a door for Jews Turks & infidels.”¹²²

The objection that Madison expressed in this passage is, first, that it would be difficult to pass amendments in anything but very narrowly worded language, and, second, that the articulation of any particular right, especially in such narrow wording, would be construed in the narrowest possible manner. Madison’s worry was that the right of conscience would mention only Christians. By implication, he feared, a guarantee for Christians would actually endanger non-Christians by being used as evidence that the latter’s rights were not protected. This was the Anti-Federalist objection that had been enunciated countless times during the previous twelve months.

The persistence of the Anti-Federalist fear also appeared in the Virginia Assembly when it was debating whether to ratify the Bill of Rights. This account is extant in the narratives detailed in several personal letters between notable Virginians and in the Virginia Legislative Journal. It is the only account we have of any state ratifying the Bill of Rights. The Virginia Assembly, in ratifying the Bill of Rights, took every opportunity to point out the narrow-interpretation danger lurking behind every clause and word. As Edmund Randolph wrote in a letter to George Washington, the Virginia Assembly even worried that the text of the Ninth and Tenth Amendments would be narrowly construed to deny rights, even though those texts themselves embodied anti-narrow interpretation principles. “[The Tenth] amendment does not appear to me to have any real effect, unless it be to excite a dispute between the United States, and every particular state, as to what is *delegated*. . . . [I]t may produce new matter for the cavils of the designing.”¹²³ The “cavils of the designing” was the precise fear that had haunted Anti-Federalists during the ratification debates. The Virginia Assembly feared that in the hands of clever officials, even the Tenth Amendment could be read as evidence that rights that were functionally similar or identical to those “delegated” were necessarily left unprotected.

122. *Id.*

123. Letter from Edmund Randolph to George Washington (Dec. 6, 1789), in 5 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 223 (1901) [hereinafter DOCUMENTARY HISTORY].

The Virginia Assembly, dominated by former Anti-Federalists, even worried that the Ninth Amendment could be read as a rights-limiting provision.

[A]s [the Ninth Amendment] respects personal rights, [it] might be dangerous, because, should the rights of the people be invaded or called into question, they might be required to sh[o]w by the constitution what rights they have *retained*; and as such as could not from that instrument be proved to be retained by them, they might be denied to possess.¹²⁴

Edmund Randolph also objected to the language of the Ninth Amendment in the Virginia Assembly, focusing on “the word *retained* in the [Ninth A]mendment arguing that] . . . there was no criterion by which it could be determined wh[e]ther any other particular right was retained or not”¹²⁵

James Madison, in a letter to George Washington, responded to this argument by the Virginia legislatures, stating that the term “retained” should not imply a limiting construction, and “the distinction . . . [is] altogether fanciful.”¹²⁶ Randolph’s objection must have been particularly frustrating for Madison. The Ninth Amendment, as this Article argues, was meant in part to allay the Anti-Federalist fear that each clause and word of the Constitution would be read narrowly in a rights-limiting fashion. And here, in the Virginia Assembly, the Anti-Federalist fear had become so pervasive that the Virginia legislators even feared that the Ninth Amendment itself would be narrowly construed.

3. The popular fear of narrow legal maxims and its historical basis

As demonstrated above, Anti-Federalists insisted that narrow legal maxims lurked around the corner of every text, waiting to twist the words into dispositive evidence that analogous rights were left unprotected. Indeed, as we have seen, Federalists pointed out that these were misapplications of limited legal principles.

124. Entry of Dec. 12, 1789, in JOURNAL OF THE SENATE OF THE COMMONWEALTH OF VIRGINIA 63–64 (Richmond, Thomas W. White 1827) [hereinafter JOURNAL OF THE SENATE].

125. Letter from Hardin Burnley to James Madison (Nov. 28, 1789), in 5 DOCUMENTARY HISTORY, *supra* note 123, at 219–20.

126. Letter from James Madison to George Washington (Dec. 5, 1789), in 5 DOCUMENTARY HISTORY, *supra* note 123, at 221–22.

The revolutionary period, however, had left a populace deeply mistrustful of legal interpretive canons. Massachusetts, for instance, had rejected its proposed constitution of 1778 for, among other reasons, its failure to prevent the judicial department from ingeniously and perniciously deploying interpretive legal maxims. As stated in the Essex County Result, a resolution describing Essex County's negative vote on Massachusetts's proposed constitution, the proposed constitution unwisely blended the executive and judicial departments without curtailing either, which would allow judges to "leap over [the laws] by artful constructions."¹²⁷

In 1774, at the height of the revolutionary fervor, a South Carolina judge summarized the popular feelings against legal maxims in his instruction to a grand jury, contrasting the lawyerly construction of statutes with the jury's honest administration of justice: "[H]appy, thrice happy are that people who cannot be made to suffer under any construction of the law, but by the united voices of twenty[-]four impartial men, having no interest in the cause, but that the laws be executed and justice be administered."¹²⁸

Indeed, those who had been colonists in the 1760s had been the victims of narrow constructions by British authorities. Still vivid in the public memory were *causes célèbres* from the revolutionary period when those in power narrowly interpreted legal texts to find positive evidence that certain rights, in particular the procedural right to jury trial, were no longer in effect. This Article will discuss two particularly notable examples of such cases.

127. OSCAR & MARY HANDLIN, *THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION OF 1780*, at 338 (1966). Even in the first decades of the Republic, worries that the entire constitutional project would be defeated by clever legal constructions continued to arise. Letter from Thomas Jefferson to Wilson C. Nicholas (Sept. 7, 1803), in FRANCIS D. COGLIANO, *REVOLUTIONARY AMERICA, 1763-1815: A SOURCEBOOK* 246 (2010) ("[O]ur peculiar security is in the possession of a written [C]onstitution. [L]et us not make it a blank paper by construction."); see also Edmund Pendleton, *The Danger Not Over*, RICHMOND EXAMINER, Oct. 20, 1801, reprinted in LIBERTY AND ORDER: THE FIRST AMERICAN PARTY STRUGGLE 243 (Lance Banning ed., 2004) (proposing to amend the Constitution so "as to defy the wiles of construction"); see H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 893 & n.40 (1985).

128. *Charge Given by Judge Drayton of South Carolina*, LONDON MAGAZINE, March 1775, at 127, reprinted in THE COLONIAL IDIOM 300 (David Potter & Gordon L. Thomas eds., 1970).

a. Forsey v. Cunningham. One of the most notorious colonial trials of the 1760s leading up to the Revolution involved the proper interpretation of a legal document.¹²⁹ In *Forsey v. Cunningham*, the New York colonists, and eventually all the colonies, confronted powerful examples of legal construction and negative implication. The colonists would reject an attempt to narrowly read a legal text to deny the right under the British constitution to a jury's inviolate factual findings.

The case arose from a violent altercation between Thomas Forsey and Waddell Cunningham, two New York merchants. Forsey owed a debt to certain creditors. Cunningham, who represented the creditors, sought to collect on that debt. On July 28, 1763, their feud erupted into bloodshed—Cunningham stabbed Forsey with a sword, leaving him on the brink of death. Forsey eventually rallied and sued Cunningham.¹³⁰ The jury found for Forsey, and Cunningham appealed.¹³¹

In his appeal, Cunningham proposed interpreting the King's directions to his governors by means of negative implication. Until 1753, the Royal Instructions to the British Colonial Governors instructed "that appeals be permitted to be made in *cases of error*."¹³² "Cases of error" referred to the writ of error. This was an appeal based on an error of law only and did not reexamine the facts tried by the jury. These words were altered in a 1753 royal instruction to the governor of New York, which instructed that governors "permit and allow appeals . . . [and] issue a writ in the manner which has been *usually accustomed*."¹³³ Cunningham's counsel, Robert Waddell, pressed an interpretation from negative implication. Because the

129. See DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664-1830*, at 118–20 (2005).

130. The two parties published their differing accounts of the altercation in the New York Gazette. N.Y. GAZETTE, OR, THE WEEKLY POST-BOY, Aug. 25, 1763; see Thomas E. Carney & Susan Kolb, *The Legacy of Forsey v. Cunningham: Safeguarding the Integrity of the Right to Trial by Jury*, 69 HISTORIAN 663, 664–67 (2007).

131. Herbert A. Johnson, *George Harrison's Protest: New Light on Forsey Versus Cunningham*, 50 N.Y. HIST. 61, 79 (1969).

132. 1 ROYAL INSTRUCTIONS TO BRITISH COLONIAL GOVERNORS 1670-1776, at 321 (Leonard Woods Labarre ed., 1967) (emphasis added).

133. *Id.* at 325 (emphasis added). For background to this instruction, see JOSEPH HENRY SMITH, *APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS* 383–90 (1950).

original instruction had included the words “cases of error,” but the more recent instruction omitted these words, the revised instruction implied that appeals were no longer limited to legal errors but extended also to reexamining the juries’ factual determinations.¹³⁴ When the judges rejected his argument, Waddell took Cunningham’s case directly to the lieutenant governor of New York, Cadwallader Colden.¹³⁵

Colden ordered New York’s Supreme Court judges to explain why the revised instruction did not allow an appeal of fact.¹³⁶ The Chief Justice Daniel Horsmanden responded, “This [construction] seems to be founded upon an Erroneous Interpretation . . . which I could not countenance . . . for the following Reasons. Istly. Because it supposes the Royal Order to Aim at altering the Ancient, and wholesome Laws of the Land.”¹³⁷

Colden then gave his construction of the term “appeal.” He argued that by using “appeal” in the revised instructions without the term “error,” the royal instructions sought to limit the right of inviolate jury factual findings and to expand the power of the governor to examine the facts of a case.¹³⁸ The justices maintained their opposition, and refused to hear an appeal on a factual matter.¹³⁹

Word of the case and the implication stemming from Colden’s interpretive move gripped New York. As one New Yorker put it, “I do not remember any Subject that has so much engaged the public Attention—People in general think their all at Stake.”¹⁴⁰ Popular

134. See Johnson, *supra* note 131, at 79–81.

135. SMITH, *supra* note 133, at 391–92.

136. Carney & Kolb, *supra* note 130, at 673.

137. 7 THE LETTERS AND PAPERS OF CADWALLADER COLDEN 4 (57 Collections of the N.Y. Hist. Soc’y 1923) (spelling modernized).

138. 6 THE LETTERS AND PAPERS OF CADWALLADER COLDEN 380 (56 Collections of the N.Y. Hist. Soc’y 1922).

139. See THE REPORT OF AN ACTION OF ASSAULT, BATTERY AND WOUNDING, TRIED IN THE SUPREME COURT OF JUDICATURE FOR THE PROVINCE OF NEW YORK, IN THE TERM OF OCTOBER 1764, BETWEEN THOMAS FORSEY, PLAINTIFF, AND WADDEL CUNNINGHAM, DEFENDANT (John Holt ed., 1765); see *id.* at iii (“The strange and unnatural Construction which has been lately given to his Majesty’s Royal Order . . . and the dangerous Tendency of such a Construction.”).

140. Letter from William Smith to Governor Robert Monckton (Dec. 3, 1764), in HISTORICAL MEMOIRS OF WILLIAM SMITH 27 (William H.W. Sabine ed., 1956) (spelling modernized); see also Letter from John Watts to Governor Robert Monckton (Nov. 10, 1764), in LETTER BOOK OF JOHN WATTS, MERCHANT AND COUNCILLOR OF NEW YORK 309 (61

discontent with Colden's attempts to constrain the jury was further fanned by rumors of the impending Stamp Act and its curtailment of colonial juries.¹⁴¹

Finally, in 1765, Britain's attorney general issued a report condemning Colden's interpretive move and siding with the New York justices' construction of the royal instructions.¹⁴² By this time, however, Cunningham had already dropped his appeal, the Stamp Act had been passed, and there was no quelling the popular suspicion that the British authorities were maneuvering to limit the power of juries as much as they could, not only through appeals of fact, but also through tribunals that omitted juries altogether.

Two decades later, during the ratification period, opponents of the Constitution continued to discuss the case as an instance of the possible narrow interpretation of the term "appeal" and of the potential for clever construction to subvert the trial by jury. John Smilie, an ardent Anti-Federalist, brought the case up during the Pennsylvania ratification debates on December 8, 1787. He stated that the term "appeal," coupled with the criminal jury guarantee, would be interpreted to deny the civil jury. He then mentioned "[t]he case of *Forsey v. Cunningham*," and described Colden's textual constructions.¹⁴³ He concluded, "Securing the trial by jury in criminal cases is worse than saying nothing."¹⁴⁴ In other words, Smilie's argument ran, the famous case of *Forsey v. Cunningham* offered a warning to the public of the dangers of legal interpretations that could lead to new Coldens waiting to narrowly construe the supposed

Collections of the N.Y. Hist. Soc'y 1928) ("People are extremely incensed & alarmed at [Colden's interpretation of the Royal Instruction] . . . [Colden] was always dislik'd enough, but now they would prefer Beelzebub himself to him.") (spelling modernized).

141. SMITH, *supra* note 133, at 394.

142. Report of the Attorney and Solicitor Generals on Appeals in New York (Nov. 2, 1765), in 7 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 816 (1856) ("[W]e are of the Opinion the Alteration made in the Instruction to the Governor of New York in 1753, did not vary the Sense of them as they stood before that Time—The Words in *Cases of Error* only appear to us to have been struck out of those Instructions, as Superfluous and improper. For how, or in what Cases, can an Appeal lie, but in *Cases of Error only*? [T]hat is, Error in Law.")

143. 2 DHRC, *supra* note 54, at 525–26.

144. *Id.* at 526.

guarantees granted by the proposed Constitution, such as the right to criminal juries.¹⁴⁵

b. The Henry VIII treason statute. At several points in the 1760s and 1770s, Parliament attempted to curtail colonial juries by crafting legislation that cut them out of the procedural picture. Colonial Whiggish juries had already defeated the purposes of several parliamentary statutes by repeatedly acquitting colonial defendants.¹⁴⁶ To combat this phenomenon, laws such as the Stamp Act of 1765 stripped colonial common law courts of jurisdiction over certain prosecutions, bestowing it instead on vice-admiralty courts, which sat without juries.¹⁴⁷ The colonies vigorously opposed the legislation, sending out resolves and petitions to the King alleging the unconstitutionality of the statute.¹⁴⁸

One of the most fiercely opposed examples of Parliament's efforts to circumvent colonial juries was its resurrection of the Treason Act of Henry VIII, a statute from two-and-a-half centuries before that had never actually been enforced. Parliament tried in vain to resurrect this Act against colonists, but instead it provoked an outrage that rippled throughout the colonies. The incident was one of the catalysts for

145. The pseudonymous author Centinel, in an article that was widely republished throughout the states and which generated copious responses, reminded his readers of "[t]he attempt of governor . . . Colden, of New-York, before the revolution to re-examine the facts and re-consider the *damages*, in the case of *Forsey* against *Cunningham*, [which] produced about the year 1764, a flame of patriotic and successful opposition, that will not be easily forgotten." *Centinel II*, PHILA. FREEMAN'S J., Oct. 24, 1787, reprinted in 13 DHRC, *supra* note 74, at 463. This article was widely republished in newspapers in Virginia and New York, as well as in broadsides and pamphlets. Its influence was vast, and it generated numerous responses. *See id.* at 328, 426. For a response to Centinel's discussion of *Forsey v. Cunningham*, see *Uncus*, MD. J., Nov. 9, 1787, reprinted in 14 DHRC, *supra* note 102, at 80. This article was reprinted in the Boston American Herald on December 10, 1787, and in the Providence United States Chronicle on January 10, 1788. *Id.* at 76.

146. For an example of this occurring in the realm of taxes, see JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY TO TAX 49–52 (1987).

147. The Sugar Act of 1764, 4 Geo. 3 c. 15 (Gr. Brit.), had begun the process by giving concurrent jurisdiction over prosecutions to both colonial courts of record and vice-admiralty courts. For a discussion of the Sugar Act, see THOMAS C. BARROW, TRADE AND EMPIRE: THE BRITISH CUSTOMS SERVICE IN COLONIAL AMERICA 1660–1775 (1967); OLIVER M. DICKERSON, THE NAVIGATION ACTS AND THE AMERICAN REVOLUTION 172–89 (1974); ROBERT MIDDLEKAUFF, THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION 1763–1789, at 65 (2005).

148. REID, *supra* note 146, at 48–52.

revolution, was included in the Declaration of Independence, and stood out as one of the most influential events during the period leading up to the revolution.¹⁴⁹ As John Phillip Reid put it, “[I]t would not be an exaggeration to say that the statute of Henry, more than any other issue, except for taxation and the coercive acts, forced Americans to think about the implications of legislative sovereignty.”¹⁵⁰

In 1543, at a time when England possessed no colonies, Parliament enacted a statute mandating that all acts of treason committed outside of England be tried in England, not at the location where the treason occurred.¹⁵¹ The statute, however, was never enforced and lapsed into desuetude. Some members of Parliament reasoned that the solution to colonial juries and their frustration of imperial policy was to resurrect this ancient statute. Hillsborough, the Secretary of State to the Colonies, rose in the House of Lords and construed the law as applying to the colonies and thus as mandating English juries for colonial treason trials. In order to put this Act into effect, he called for the composition of a commission to try Bostonians for treason in England.¹⁵²

A minority in Parliament was opposed to such a construction of the ancient statute and objected to its extension to the contemporaneous circumstances in the colonies.¹⁵³ Captain Constantine John Phipps, a newly elected member of Parliament who had served in the Seven Years’ War,¹⁵⁴ criticized his fellow members of Parliament for strictly construing the treason statute to apply to the colonies when it was passed “long before the colonies existed or were thought of.”¹⁵⁵ The Act, he said, “was calculated to give those privileges to Englishmen, which the present application of it would deprive the Americans of: I mean the advantages of a trial by jury.”¹⁵⁶

149. THE DECLARATION OF INDEPENDENCE para. 23 (U.S. 1776).

150. JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 70 (abr. ed. 1995).

151. 35 Hen. 8 c.2 (1543) (Eng.).

152. 16 Parl. Hist. Eng. (1769) col. 494; see MERRILL JENSEN, THE FOUNDING OF A NATION: A HISTORY OF THE AMERICAN REVOLUTION 1763-1776, at 291-99 (1968).

153. 16 Parl. Hist. Eng. (1769) col. 490.

154. THE DICTIONARY OF NATIONAL BIOGRAPHY: INDEX AND EPITOME 1039 (Sidney Lee ed., 1903).

155. 16 Parl. Hist. Eng. (1769) col. 508.

156. *Id.* In point of fact, the purpose of the Treason Statute more likely was an attempt to deny English residents of Ireland, Wales, Scotland, and France who were indicted for treason

Thus, Phipps argued, a statute that was meant to confer on treason defendants the right to a jury of their peers was being negatively construed to deny colonial defendants the right to a colonial jury. Edmund Burke, who was present that day in the House of Lords, later wrote that Parliament “so construed and so applied [the act of Henry the Eighth that] almost all that is substantial and beneficial in a trial by jury is taken away from the subject in the colonies.”¹⁵⁷

News of Parliament’s plan reached the colonies. The Act was published in its original form in newspapers,¹⁵⁸ and colonists reacted by publicly decrying Parliament’s actions. On August 19, 1769, South Carolina issued resolutions condemning Parliament and its attempts to interpret the ancient statute in such a way as to apply to the American colonists:

*Resolved . . . that the statute made in the thirty-fifth year of King Henry the VIII . . . does not extend, and cannot but by an arbitrary and cruel construction of the said Act, be construed to extend to treasons . . . committed in any of his Majesty’s American colonies.*¹⁵⁹

Parliament only once tried to enforce the treason statute, and even then was unsuccessful.¹⁶⁰ Nevertheless, its attempts to deny colonists’ jury rights through narrow statutory construction of a rights-granting statute remained a rallying point for increasingly rebellious colonists. The New York Assembly, for instance, issued a “Representation and Remonstrance” to the House of Commons in 1775, six years after the attempted resurrection of the Henry VIII treason statute. The assembly “viewed with horror the construction of the Statute . . . advising his Majesty to send for persons guilty of treasons . . . in order

their right to a trial by a jury of the vicinage. See Neil L. York, *Imperial Impotence: Treason in 1774 Massachusetts*, 29 L. & HIST. REV. 657, 662 (2011). Nevertheless, the important point for present purposes was how the Treason Statute was conceived of and characterized by colonists and their proponents.

157. Letter from Edmund Burke to John Farr and John Harris (Apr. 3, 1777), in 2 THE WORKS OF RIGHT HONORABLE EDMUND BURKE 192 (Henry Rogers ed., Fb & C Limited 2017) (1887).

158. See, e.g., N.Y. GAZETTE, July 17, 1769, at 1.

159. South Carolina Resolutions (Aug. 19, 1769), in 9 ENGLISH HISTORICAL DOCUMENTS: AMERICAN COLONIAL DOCUMENTS TO 1776, at 724 (Merrill Jensen ed., 1955) (emphasis added).

160. See MIDDLEKAUFF, *supra* note 147, at 214; JENSEN, *supra* note 152, at 425–31; BRIAN F. CARSO, JR., “WHOM CAN WE TRUST NOW?”: THE MEANING OF TREASON IN THE UNITED STATES, FROM THE REVOLUTION THROUGH THE CIVIL WAR 52–54 (2006).

to be tried in England.”¹⁶¹ Other resolutions followed, each one decrying Parliament’s narrow construction of the treason statute.¹⁶² Newspaper opinion pieces did the same.¹⁶³

As the Revolution gathered momentum, the colonists remained mindful that a maxim of negative construction had been used to try to deny them their right to local juries. Jefferson immortalized the incident by including it in the Declaration of Independence’s list of grievances against particular pieces of legislation:

[The King] has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation: . . . *For transporting us beyond Seas to be tried for pretended offences.*¹⁶⁴

* * *

These two cases stood among the foundations of the Revolution, and continued to exert influence over the inhabitants of the new world, even as their colonies transformed into sovereign states. They help to explain why, a decade after the Revolution, there remained a pervasive fear of narrow legal maxims and clever lawyerly constructions. This fear, indeed, was addressed not only by the Ninth Amendment, but in a sense by the Bill of Rights as a whole.

161. The Representation and Remonstrance of the General Assembly of the Colony of New York to the House of Commons (Mar. 25, 1775), *in* 1 HISTORY OF NEW YORK DURING THE REVOLUTIONARY WAR 541 (Thomas Jones ed., 1968)) (spelling modernized).

162. Other examples of resolutions include: Proceedings and Votes on the Report on the Grievances of the Colony (Mar. 4, 1775), *in* 1 HISTORY OF NEW YORK DURING THE REVOLUTIONARY WAR 516–17 (Thomas Jones ed., 1879) (“[T]he construction of the Statute of 35th Henry the Eighth . . . recommending the issuing a special commission for inquiring of Treasons . . . in order to have the offenders, if any there were, tried in Great Britain, is a grievance.”); Address to the People of Great Britain (Oct. 21, 1774), *in* 1 JOURNALS OF THE CONTINENTAL CONGRESS 13, 85 (“[B]y the construction of some, . . . offenders are to be taken by force . . . and carried to England, there to be tried in a distant land, by a *jury* of strangers, and subject to all the disadvantages that result from want of friends, want of witnesses, and want of money.”).

163. *See* Atticus, THE GENTLEMEN’S MAGAZINE, July 1769, at 338 (“Statutes of treason are to be extended by construction, contrary to the known maxims of law and justice; which will render every man’s life as in[s]ecure, as his property already is.”).

164. THE DECLARATION OF INDEPENDENCE para. 23 (U.S. 1776) (emphasis added); *see* Willard Hurst, *Treason in the United States*, 58 HARV. L. REV. 226, 251 (1944).

4. The Ninth Amendment's interpretive principle embedded in the structure of the Bill of Rights

The fear of narrow interpretation that the Ninth Amendment combatted is also evident in the relationship between particular rights guaranteed in the Constitution and those guaranteed in the Bill of Rights. Many of the amendments to the original, unamended Constitution did not enumerate completely new and unrelated rights. Instead, they textually expanded the scope of already enumerated rights, including analogous and functionally equivalent rights. This act of broadening rights may be interpreted as responding to the Anti-Federalist critique that particular guarantees could be too narrowly construed. Consider three forerunners to rights enshrined in the first two amendments. First, the Constitution ensures that members of Congress possess the right to free speech and debate in either House.¹⁶⁵ Is this evidence that they have no speech rights outside of Congress? That state legislatures have no speech rights? In fact, that no one has any speech rights, except for members of Congress participating in Congress?¹⁶⁶ Second, the Constitution ensures that no federal employee can be forced to take a religious test as a condition of qualification.¹⁶⁷ Does this mean that everyone who is not a federal employee can be forced to take a religious test? That no one has any other rights to religious liberty? Finally, the Constitution ensures that state governments, not Congress, possess the authority to train the militia and appoint its officers.¹⁶⁸ Does this mean that these are the only privileges that state governments possess against congressional control of the militias? That no immunities exist to prevent Congress from sidestepping these checks and simply disarming the militias?¹⁶⁹

165. U.S. CONST. art. I, § 6, cl. 1.

166. Cf. Amar, *Bill of Rights*, *supra* note 6, at 1150–52 (arguing that the Freedom of Speech Clause was directly related to the Speech and Debate Clause).

167. U.S. CONST. art. VI, cl. 4.

168. U.S. CONST. art. I, § 8, cl. 16.

169. See the remarks of George Mason in the Virginia ratification debates, 3 ELLIOT, *supra* note 116, at 48 (“[Congress] may easily abolish [the militias], and raise a standing army in their stead. . . . The militia may be here destroyed by that method which has been practiced in other parts of the world before. That is, by rendering them useless, by disarming them.”); see AMAR, *BILL OF RIGHTS*, *supra* note 6, at 50 (“Many pointed a suspicious finger at earlier language in clause 16 empowering Congress ‘to provide for organizing, arming, and disciplining, the Militia.’ Might Congress try to use the power granted by these words, they asked darkly, to disarm the militia? The Second Amendment was designed to make clear that any such

Thus, one way of seeing the First and Second Amendments is as broadening the textual scope of rights already listed in the original Constitution, lest they be construed by negative implication to dismiss every other analogous and functionally equivalent right. Many of the other rights secured by the first eight amendments also expand the scope of already enunciated rights. The Sixth Amendment expands the scope of the original Constitution's criminal jury guarantee. The Seventh Amendment can also be seen as expanding the original Constitution's criminal jury guarantee.

The Third Amendment, too, helps illuminate how the Bill of Rights expands upon the *unamended* Constitution's guarantees and congressional limits.¹⁷⁰ The Third Amendment is connected to Article I, Section 8, Clause 12, which imposes a limit on Congress's ability to maintain standing armies by mandating that every army-related appropriations law sunsets after two years.¹⁷¹ But, says the manipulative reader, this textual guarantee implies that there are no other guarantees against standing armies. Therefore, if Congress is unable to renew a military appropriations bill due to budget constraints, the text of the Constitution allows Congress to convert individual property to support standing armies in peacetime. The Constitution prevents perpetual bills for revenue to support standing armies, but it says nothing about mandating civilians to provide room and board to soldiers. Indeed, there was negative precedent for exactly these sorts of laws: Parliament enacted the Quartering Acts as an alternative way for a cash-strapped government to fund troops.¹⁷² As that statute

congressional action was off limits."); see also Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103, 138-40 (2000).

170. There has only been one significant case touching the Third Amendment, *Engblom v. Carey*, 677 F.2d 957 (2d. Cir. 1982). The majority in that case concluded that tenants are included in the Third Amendment's word "owner," and that National Guard troops are included in the Third Amendment's word "soldiers." *Id.* at 970-71.

171. "The Congress shall have Power . . . To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years." U.S. CONST. art. I, § 8, cl. 12.

172. In the colonies, resistance to standing armies ran high. During the French and Indian War, when British military commanders sought leave to construct permanent barracks to house their men, the colonial legislatures bristled. Colonial opposition to permanent barracks reflected the popular distrust of standing armies. See Tom W. Bell, *The Third Amendment: Forgotten but Not Gone*, 2 WM. & MARY BILL RTS. J. 117, 126 (1993); William S. Fields & David T. Hardy, *The Third Amendment and the Issue of the Maintenance of Standing Armies: A Legal History*, 35 AM. J. LEGAL HIST. 393, 415 (1991). In response to colonial resistance to standing barracks,

stated, the soldiers were to be quartered “so as that no expense be brought on the crown.”¹⁷³

Thus, one way to read the Third Amendment is as expanding the scope of the Constitution’s already-existing textual guarantee. The Constitution mandates that the Congress biennially reauthorize appropriations for the army. The Third Amendment widens the scope of this guarantee. It ensures that Congress cannot by implication skirt these textual mandates by forcing individuals to support the standing armies in peacetime as Parliament had done.

But, says our *advocatus diaboli*, what about barns? Does the Third Amendment positively authorize Congress to convert individuals’ outbuildings into barracks?¹⁷⁴ Now it becomes clear that every further enumeration leads to more questions about what else was included or necessarily not included in each particular right. There must be another interpretive principle. The Third Amendment (or any of the amendments) protects the text of the unamended Constitution from being narrowly interpreted to deny analogous or functionally similar rights or congressional limits, but what protects those amendments from this same construction?

It is here that the principle articulated by the Ninth Amendment steps in to cut off further negative implication, which otherwise could spin off *ad infinitum*. The Ninth Amendment instructs our devil’s advocate that his argument is illegitimate, and he must look elsewhere for arguments to support his position. This deployment of the Ninth Amendment does not necessarily decide the issue, but it does exclude certain arguments from the discussion.

Parliament passed the Quartering Act of 1765, which required colonists to provide shelter and provisions for the British soldiers. 5 Geo. 3, c. 33 (1765) (Gr. Brit.). The Act met with furious resistance, and contributed to the increasing tensions between government and governed in the New World. Fields & Hardy, *supra*, at 415–16. The tensions came to a head with Parliament’s passage of the so-called “Intolerable Acts” of 1774, one of which was an expanded Quartering Act. 14 Geo. 3, c. 54 (1774) (Gr. Brit.). This new version widened the scope of possible places of lodging to include private residences. The issue of quartering became closely connected with that of standing armies. Fields & Hardy, *supra* note 172, at 416.

173. 9 Geo. 3, c. 18 (1769) (Gr. Brit.) (spelling modernized). The colonies recognized the first Quartering Act, with its requirements to provision the troops as well as house them, as “still another attempt by Parliament at taxing the colonies.” MIDDLEKAUFF, *supra* note 147, at 150.

174. The *a fortiori* principle does not help in this situation, because houses are the more extreme example.

IV. APPLYING THE NINTH AMENDMENT'S TEXTUAL INTERPRETIVE RULE

This paper has highlighted the Anti-Federalist historical background of the “textual” Ninth Amendment. Under this reading, the Ninth Amendment applies to all rights, including procedural and positive rights, and instructs its readers not to narrowly interpret the text of constitutional guarantees and draw conclusions, by means of negative implication, that analogous rights are necessarily left unprotected. Although the Clause is not regularly invoked today by judges or attorneys, this interpretive move offered by the Anti-Federalist Ninth Amendment is useful on a day-to-day level for anyone engaging in constitutional adjudication. Especially today, when an emphasis on textualism is ascendant in constitutional interpretation, there is a concomitant danger in this method of interpretation if it is unchecked by the Ninth Amendment. Ever more exquisite interpretations of particular rights-guaranteeing clauses might be seen by some as evidence that an analogous right therefore does not exist. The Anti-Federalist Ninth Amendment that this Article explores warns readers to avoid negative-implication constructions of the Constitution’s text.

The precise textual use of the Ninth Amendment articulated in this Article, however, does not by itself guarantee analogous unenumerated rights. Thus, if there were no Seventh Amendment, the Ninth Amendment alone would not guarantee civil juries in cases at law. Similarly, in our Constitution as amended, the Ninth Amendment does not extend the Seventh Amendment’s guarantee to encompass analogous trials in equity or admiralty. Instead, the Ninth Amendment principle highlighted in this paper declares a particular textual move to be illegitimate: just because the original Constitution guaranteed criminal juries does not by itself mean that no civil juries are guaranteed. Instead, opposing sides must make use of other modalities to prove their point.¹⁷⁵ It may well be that the original Constitution allowed the federal system to run without any civil juries. On the other

175. Some Federalists even interpreted the Constitution’s text to read into it at least a limited guarantee of civil juries. As Judge Thomas Dawes stated at the Massachusetts ratification convention, implicit in the very term “Court” is both a judge and a jury for those cases that historically have used a jury. 6 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1369 (John P. Kaminski et al. eds., 2000).

hand, imagine a Congress that never passed a criminal law and instead created a byzantine code of draconian civil penalties. Imagine further that the federal government enforced these laws in juryless “civil star chambers,” as the Anti-Federalists feared.¹⁷⁶ If a defendant contested the constitutionality of this system, the Ninth Amendment principle prevented the government from arguing that it was authorized to set up these tribunals by an *expressio unius* interpretation of the Constitution’s criminal jury guarantee. The defendant, meanwhile, could plausibly argue that the system violated her constitutional rights.

This section explores examples of how to apply this Ninth Amendment rule. It revisits some of the questions posed at the beginning of the paper, concerning the First Amendment, the *Ex Post Facto* Clause, and the “*exclusive* natural rights” thesis of the Ninth Amendment. It will argue that the amendment itself instructs interpreters not to view constitutional provisions as narrow and exclusive in meaning, but rather to consider how the Constitution might or might not protect analogous rights lying just beyond the bare text.

A. *The First Amendment*

The doctrinal interpretation of the First Amendment does not limit its applicability to Congress, but instead concludes that it also constrains the President and the Courts.¹⁷⁷ In the Pentagon Papers case, for instance, the Court held that the First Amendment prohibited the President from using his executive authority to block *The New York Times* from publishing classified information.¹⁷⁸

176. See *supra* text accompanying notes 82–85.

177. See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 326 (2010) (“Courts, too, are bound by the First Amendment.”); AMAR, BIOGRAPHY, *supra* note 43, at 316 (“[W]hile the Bill of Rights plainly limited Congress, it applied against other branches of the federal government as well. Even the First Amendment, which began by proclaiming that ‘Congress shall make no law’ of a certain sort, has properly come to be construed more broadly. In essence, the amendment . . . implicitly applies against all federal branches (not just Congress) and all federal action (not just laws).”); LAWSON & SEIDMAN, *supra* note 1, at 42 (“Modern law, of course, applies the First Amendment to the President, the courts, and the states”); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1240 n.60 (1995) (“The First Amendment explicitly limits only Congress, not other branches of the federal government, yet it has been understood to restrict the executive and judicial branches as well.”).

178. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

Over the past decade, however, a number of scholars have argued, in the name of textualism, that the First Amendment imposes limits on “Congress” alone, and not on any coordinate branch.¹⁷⁹ The text of the First Amendment, these scholars have argued, explicitly prohibits only “Law[s]” enacted by “Congress.” By means of the *expressio unius* canon, they conclude, the First Amendment positively does *not* prohibit acts by other branches, such as the President.

The inference that because the First Amendment mentions only “Congress,” its limits therefore do not apply to the executive or judicial branches, however, is illegitimate. The interpretive move these scholars perform in the name of textualism violates the very text they

179. See, e.g., LAWSON & SEIDMAN, *supra* note 1, at 42 (“[That the First Amendment does not apply to any governmental actor other than Congress] is as certain as is anything in the Constitution. . . . The President and Senate are not Congress, and the First Amendment by its unmistakable terms applies only to Congress. . . . To read the First Amendment to apply to entities other than Congress is simply to abandon the enterprise of textual interpretation.”); Jay S. Bybee, *Common Ground: Robert Jackson, Antonin Scalia, and a Power Theory of the First Amendment*, 75 TUL. L. REV. 251, 326 (2000) (“[T]he First Amendment applies, by its terms, to Congress alone. . . . [This] may suggest nothing more than that the Framers did not fear the power of the President or the federal courts. Or, it may suggest that the Framers’ principal concern was legislative prior restraints.”); Mark P. Denbeaux, *The First Word of the First Amendment*, 80 NW. U. L. REV. 1156, 1158 (1986) (“Article I, section 1 of the Constitution states: ‘All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.’ If this is the ‘Congress’ intended by the framers of the Bill of Rights, then the first amendment clearly prohibits the legislative branch of the federal government from making laws that abridge freedom of speech and press and just as clearly places no prohibitions upon either the judicial or executive branches.”); Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1253–54, 1266 (2010) (arguing that “[a]s a matter of text and grammar, there is only one possible answer [to the question of who can violate the First Amendment]: Congress,” that to apply the First Amendment to governmental actors other than Congress “seems particularly hard to defend when the text is so clear,” and that “the President (and his . . . agents) cannot violate” the First Amendment); see also Daniel J. Hemel, *Executive Action and the First Amendment’s First Word*, 40 PEPP. L. REV. 601 (2013) (tempering Rosenkranz’s conclusions, and arguing that even reading the First Amendment in this narrow *expressio unius* fashion may still restrict some executive action when the action is (a) authorized by statute or (b) *ultra vires* and therefore violates the Due Process Clause of the Fifth Amendment, but acknowledging that textualism might still mean that the terms of the First Amendment do not apply to any branches other than Congress); cf. John Harrison, *The Free Exercise Clause as a Rule About Rules*, 15 HARV. J. L. & PUB. POL’Y 169, 169–70 (1992) (“[T]he question under the Free Exercise Clause has to do with the law in the abstract—with the content of the rule it adopts—and not with the law’s application in any particular case. If the Free Exercise Clause means what it says, it prohibits the enactment of certain kinds of laws. Because the Clause is a rule for legislatures, we can ask the right questions under the Clause by putting ourselves in the position of the legislature and asking whether the statute in *Smith* was a law prohibiting the free exercise of religion.”) (emphasis added).

seek to construe. As noted by several scholars,¹⁸⁰ the Ninth Amendment forecloses applying the *expressio unius* canon to the word “Congress” in the First Amendment. Interpreters cannot use the right preventing Congress from curtailing certain privileges as evidence that no analogous rights exist to constrain the President and the courts.

B. *The Ex Post Facto Clause*

In its first decade, the Supreme Court interpreted the *Ex Post Facto* Clauses to apply only to criminal laws.¹⁸¹ The Connecticut legislature passed a law that retroactively set aside a probate court’s ruling on a will and ordered a new trial. Justice Chase’s opinion, which is generally cited as the case’s holding, concluded that the term “*ex post facto*” must refer exclusively to criminal laws, because otherwise, the Contracts Clause, which prohibits one type of retroactive civil law, would be superfluous.¹⁸² Chase read the list of rights in Article I, Clause 10 so that no right intruded upon the other.

180. PHILIP BOBBITT, *CONSTITUTIONAL FATE* 101 (1982) (“The Ninth Amendment itself exists as a rebuke to anyone who argues for such limitations. It would be intolerable if a President could use means to restrict a free press that Congress plainly could not.”); AMAR, *UNWRITTEN CONSTITUTION*, *supra* note 6, at 100; BLACK, *supra* note 6, at 48–49 (arguing that the Ninth Amendment forbids the following sorts of inferences: “Take the First Amendment. What if ‘Congress’ did not ‘make’ the ‘law’ you are talking about, and it isn’t even a law—say, a judge’s overbroad gag order, or a lawless police chief’s turning his dogs loose on demonstrators?”).

181. *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798).

182. *Id.* at 390 (“If the prohibition against making ex post facto laws was intended to secure personal rights from being affected, or injured, by” the same laws prohibited by the Contracts Clause, and if the Ex Post Facto Clause “is sufficiently extensive for that object,” then “the other restraints, I have enumerated, were unnecessary, and therefore improper; for both of them are retrospective.”); *see also id.* at 393 (“If the prohibition to make no ex post facto law extends to all laws made after the fact, the two prohibitions, not to make any thing but gold and silver coin a tender in payment of debts; and not to pass any law impairing the obligation of contracts, were improper and unnecessary.”). Justice Paterson gave a similar rationale. *Id.* at 397 (“Where is the necessity or use of the latter words, if a law impairing the obligation of contracts, be comprehended within the terms ex post facto law?”). Justice Johnson more than two decades later criticized the Court’s ex post facto jurisprudence. *Satterlee v. Mathewson*, 27 U.S. (2 Pet.) 380, 387 (1829) (Johnson, J., concurring) (“[B]y placing ‘*ex post facto* laws’ between bills of attainder, which are exclusively criminal, and laws violating the obligation of contracts which are exclusively civil, it would rather seem that ex post facto laws partook of both characters, was common to both purposes.”). Thus, as Justice Johnson notes, it is just as easy to see the *Ex Post Facto* Clause as relating equally to the two rights that flank it on either side as it is to see it as relating only to one of them.

There are two problems with Justice Chase's argument. First, Chase himself had argued that the *Ex Post Facto* Clause was declaratory.¹⁸³ Similarly, a bill of attainder itself is a retrospective criminal law in that it punishes someone for a preexisting circumstance,¹⁸⁴ so the Contracts Clause would be no more redundant than the Bill of Attainder Clause if the *Ex Post Facto* Clause applied also to civil laws.

The second and more relevant problem with Chase's argument, however, is that it is illegitimate under the textual Ninth Amendment principle that this Article has articulated. The Contracts Clause may not be used to narrow the scope of another enumerated right, the *Ex Post Facto* Clause, by implication. Although arguments like this may seem logically sensible, the Ninth Amendment steps in to say that this particular argument is not valid.

Moreover, even if the *Ex Post Facto* Clause does apply only to criminal cases, the Ninth Amendment would again step in to say that this is not dispositive evidence that there are no constitutional immunities against any retrospective laws that are technically civil and not criminal in nature. Although numerous counsel made such an *expressio unius* argument to the Supreme Court in the ante-bellum period,¹⁸⁵ Justice Marshall followed the Ninth Amendment principle by rejecting such arguments in dicta in *Fletcher v. Peck*. The fact that the *Ex Post Facto* Clause applies only to criminal cases, Marshall

183. *Calder*, 3 U.S. at 398 (stating that the *Ex Post Facto* Clause "was introduced for greater caution, and very probably arose from the knowledge, that the Parliament of Great Britain claimed and exercised a power to pass such laws, under the denomination of bills of attainder, or bills of pains and penalties").

184. Indeed, Blackstone himself saw bills of attainder as a form of ex post facto law. See 1 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 46 n.e (1775) (offering, as an example of an ex post facto law, the Roman *privilegia*, which correspond to our bills of attainder).

185. The defendant in *Livingston's Lessee v. Moore*, an 1833 case, for instance, made this same argument. "It is no objection, founded in the constitution, that laws are retrospective. The constitution itself is decisive of this. The express prohibition of *ex post facto* laws, meaning retrospective criminal laws, is an admission that retrospective civil laws may be made. *Expressio unius [est] exclusio [] alterius*." *Livingston's Lessee v. Moore*, 32 U.S. (7 Pet.) 469, 537 (1833) (emphasis added). The defendant in *Watson v. Mercer* also explicitly made this *expressio unius* argument, citing another Latin version of the maxim. "It is true, a state cannot pass an ex post facto law which is a retrospective *criminal* law, but it can a retrospective *civil* law. *Expressum facit cessare tacitum*, says a maxim of the law." Because of this exclusive interpretation, the defendant's attorney argued, the law "has nothing to do with the constitution of the United States." *Watson v. Mercer*, 33 U.S. (8 Pet.) 88, 98 (1834) (emphasis added).

concluded, does not mean that all retrospective civil laws are therefore constitutional:

This rescinding act would have the effect of an ex post facto law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased. This cannot be effected in the form of an ex post facto law, or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant?¹⁸⁶

The Supreme Court eventually embraced Marshall's position from *Fletcher v. Peck*: civil laws that are analogous and functionally similar to criminal laws are prohibited by the *Ex Post Facto* Clause. As the Court stated in *Burgess v. Salmon* in 1878, "the *ex post facto* effect of a law cannot be evaded by giving a civil form to that which is essentially criminal."¹⁸⁷ Thus, the Court eventually resisted *expressio unius* arguments applied to its understanding of the *Ex Post Facto* Clause. The Court did not invoke the Ninth Amendment in this line of cases. Nevertheless, it manifested the Ninth Amendment's interpretive meaning.

C. The Exclusive-Natural-Rights Theory of the Ninth Amendment

This Article has identified the debate over civil jury trials as one of the engines of the Ninth Amendment. This historical context offers a rejoinder to those who interpret the Ninth Amendment as referring exclusively to "natural rights." The very definition of *natural* rights is in opposition to "positive rights," such as jury trials. If, however, as this Article has argued, the debate over civil juries was one of the influences over the composition of the Ninth Amendment, then the amendment should be understood as encompassing civil juries and, therefore, positive and procedural rights in addition to natural rights. Thus, this Article suggests that the Ninth Amendment does not exclusively refer to natural rights.

The "natural rights" theory is based largely on the word "retained" in the Ninth Amendment.¹⁸⁸ In particular, when Madison proposed a draft Bill of Rights in Congress, he distinguished between natural rights, "which are *retained* when particular powers are given

186. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138–39 (1810).

187. *Burgess v. Salmon*, 97 U.S. 381, 385 (1878).

188. McConnell, *Natural Rights*, *supra* note 6, at 13–20.

up to be exercised by the Legislature[.]” and “positive rights, which may seem to result from the nature of the compact.”¹⁸⁹ “Trial by jury,” Madison continued, “cannot be considered as a natural right, but a right resulting from a social compact[.]” While Madison here distinguished jury trial and other positive rights from natural rights, he called the jury trial “as essential to secure the liberty of the people as any one of the pre-existent rights of nature.”¹⁹⁰ McConnell and Barnett argue that the presence of the word “retained” in the Ninth Amendment limits its application to natural rights.

The problem with this narrow construction of the Ninth Amendment, beyond its opposition to the Ninth Amendment’s inclusionary meaning, and the major influence that the debate over civil juries had on the amendment, is that it was considered and rejected by Madison himself during the ratification of the Bill of Rights. As discussed above,¹⁹¹ Edmund Randolph and other members of the Virginia Assembly expressed the fear that future interpreters would construe the text of the Ninth Amendment in just this narrow fashion.

The Virginia Assembly worried that the term “retained” would be narrowly construed to refer only to a small subset of possible rights. As the assembly stated, if they adopted this language, then “they might be required to shew by the constitution what rights they have *retained*.”¹⁹² Edmund Randolph also objected to the language of the Ninth Amendment. As Hardin Burnley stated in a letter to James Madison, Randolph’s “principal objection was pointed against the word *retained* in the” Ninth Amendment. Randolph’s argument was “that there was no criterion by which it could be determined wh[e]ther any other particular right was retained or not.”¹⁹³ James Madison, in a letter to George Washington, responded to this argument by the Virginia Assembly. Madison thought that the term “retained” should not imply a limiting construction. As he stated, “the

189. 1 ANNALS OF CONG. 437 (1789) (Joseph Gales ed., 1834) (emphasis added).

190. *Id.*

191. *See supra* text accompanying notes 122–124.

192. JOURNAL OF THE SENATE, *supra* note 124.

193. Letter from Hardin Burnley to James Madison (Nov. 28, 1789), in DOCUMENTARY HISTORY, *supra* note 123, at 219–20.

distinction . . . [is] altogether fanciful.”¹⁹⁴ Madison’s response overcame Randolph’s concerns, and Virginia proceeded to ratify the entire Bill of Rights.

There is, indeed, very little extant evidence for the ratification of the Bill of Rights in general and the Ninth Amendment in particular. But the evidence that exists suggests that attempts to limit the scope of the Ninth Amendment by narrowly construing the word “retained” may conflict with its own ratification history and poorly fit its anti-exclusionary meaning.¹⁹⁵

V. CONCLUSION

The Ninth Amendment renders illegitimate a particular sort of negative-implication argument: the presence of one textual right in the Constitution does not imply that similarly situated, analogous, or functionally similar rights are therefore left unprotected.

The dominant historical narrative of the Ninth Amendment sees it as a solely Federalist amendment, in contrast to the first eight “Anti-Federalist” amendments. The Ninth Amendment, this theory runs, was meant to protect against the fear that the fact of enumeration of any rights in a Constitution would imply that the universe of unenumerated rights was left unprotected. Stemming from this traditional historical narrative are the two main interpretations of the Ninth Amendment: the “natural rights” theory that the Ninth Amendment assures that the universe of the unenumerated natural rights are also protected, and the federalism thesis, that the enumeration of rights does not upset the federalism-based limitations on the federal government, nor does it abridge the rights of local popular sovereignty.

This Article does not deny or disparage any of these interpretive theories of the Ninth Amendment (except to the extent any of them claims to be exclusive). It asserts, however, that they are incomplete because they ignore the Anti-Federalist side of the Ninth Amendment, which instructs readers how to interpret the text of the Constitution.

The Ninth Amendment responded to the Anti-Federalist fear that particular rights-guaranteeing provisions of the Constitution could be

194. Letter from James Madison to George Washington (Dec. 5, 1789), *in* DOCUMENTARY HISTORY, *supra* note 123, at 221–22.

195. *See* AMAR, UNWRITTEN CONSTITUTION, *supra* note 6, at 108–09 (arguing against a narrow interpretation of the term “retained” in the Ninth Amendment).

used, by means of negative implication, to actually deny the existence of analogous or functionally similar rights. The most often raised fear was that the guarantee of criminal juries would be read narrowly and that it could be used as positive evidence that civil juries were meant to be left unprotected. This in turn could be used to subvert the criminal jury guarantee by converting all federal criminal law into a civil star chamber.

This fear extended beyond civil juries and became an oft-repeated objection among Anti-Federalists. It was founded on a series of *causes célèbres* from the revolutionary era, when British authorities employed narrow constructions of negative implication to deny colonists their rights to jury trial. The principle that individual guarantees or governmental limits should not be read narrowly is evident in the way many of the first eight amendments expand the scope of rights that the original Constitution already mentioned. Indeed, even in the sparse ratification history of the Bill of Rights, one can perceive the Ninth Amendment's role in instructing readers how (not) to interpret individual textual provisions of the Constitution. This constitutional history also strongly suggests that the Ninth Amendment applies not just to natural rights but also to procedural and positive rights.

It is important to understand the limits of this method of interpretation. The Ninth Amendment on its own does not detail which unenumerated rights are protected or to what extent they are protected. Had there never been a Seventh Amendment, the Ninth Amendment on its own would not protect all civil juries, nor should it. Instead, it renders illegitimate a certain sort of argument that interprets a particular enumeration as positive evidence that all rights lying just outside the bare words are necessarily left unprotected. After dismissing such arguments, constitutional interpreters still must make use of all the remaining modalities to come to a conclusion.

Adjudicators and commentators would do well to internalize this principle embodied in the Ninth Amendment. Advocates make use of all arguments at their disposal, and truth-seekers must sift among them to extract the valid reasoning and dismiss the invalid. The Ninth Amendment stands ready to assist.