COMMENT

DENIED AND DISPARAGED: APPLYING THE “FEDERALIST” NINTH AMENDMENT

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† J.D. Candidate, 2011, University of Pennsylvania Law School; B.A., 2008, The Ohio State University. I would like to thank Professors Seth Kreimer, Catherine Struve, Frank Goodman, and Saul Cornell for their ideas at various stages throughout the drafting of this Comment. I also would like to thank Brandon Tuck, Jennifer Sabin, Lindsey Freeman, Amy Vegari, and the staff of the University of Pennsylvania Law Review for their hard work and creative suggestions. Finally, this Comment would not have been possible without my family’s constant support.
In 1987, Robert Bork testified before the Senate as a nominee for the Supreme Court.\footnote{Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 100th Cong. (1989) [hereinafter Nomination of Robert H. Bork] (statement of Robert H. Bork, Judge, United States Court of Appeals for the District of Columbia Circuit).} Time and again, he defended his views about the Constitution by invoking its original meaning.\footnote{See, e.g., Dennis Patterson, Conscience and the Constitution, 93 COLUM. L. REV. 270, 296 (1993) (reviewing Philip Bobbitt, Constitutioonal Interpretation (1991)) (remarking that Bork “staunchly defended” originalism “before, during, and after the hearings on his confirmation” (footnote omitted)).} When asked about the Ninth Amendment,\footnote{“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX.} however, Bork was at a loss:

I do not think you can use the [N]inth [A]mendment unless you know . . . what it means. For example, if you had an amendment that says “Congress shall make no” and then there is an ink blot and you cannot read the rest of it and that is the only copy you have, I do not think the court can make up what might be under the ink blot . . . .

\footnote{Nomination of Robert H. Bork, supra note 1, at 249.}
After the Bork hearings, Randy Barnett began a study of the Ninth Amendment. He concluded that it protected individual rights not listed in the Constitution. According to Barnett, the Ninth Amendment created a “presumption of liberty,” which placed the burden on the government to justify its infringements on individual liberties.

One scholar, however, recently challenged Barnett’s work as anachronistic and incomplete. In 2004, Kurt Lash claimed to have uncovered “lost history” of the Ninth Amendment. He produced historical evidence that the Ninth and Tenth Amendments were intended to work together to protect state powers, rather than individual rights. Whereas the Tenth Amendment reserved powers to the states, the Ninth prohibited interpretations of enumerated power that disparaged those states’ rights. The debate between Lash and Barnett is ongoing, yet it has attracted little attention until now. Lash’s “federalism model” could have far-reaching consequences for federalism jurisprudence; its potential lies in linking the Ninth and Tenth Amendments. Indeed, the Supreme Court often has been criticized for invoking the Tenth Amendment to protect state sovereignty. The Tenth Amendment, critics say, is just a “truism,” declaring that states retain all powers not ceded to the federal government.

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5 See generally Randy E. Barnett, Reconceiving the Ninth Amendment, 74 CORNELL L. REV. 1, 2 (1988) (aiming to “clear a path for a more fruitful and faithful interpretation of the Ninth Amendment”).
6 See infra Section I.B.
8 See infra Section I.C.
9 See, e.g., Kurt T. Lash, The Lost Original Meaning of the Ninth Amendment, 83 TEX. L. REV. 331, 336 (2004) (“[I]t was no accident that the Ninth Amendment was placed alongside the Tenth. Both provisions originally guarded the federalist structure of the Constitution.”).
10 See U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).
11 See, e.g., Lash, supra note 9, at 336 (“[T]he purpose of the Ninth Amendment was to ‘[guard] against a latitude of interpretation’ while the Tenth Amendment ‘exclud[ed] every source of power not within the constitution itself.’” (alteration in original) (quoting James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791), in JAMES MADISON, WRITINGS 489 (Jack N. Rakove ed., 1999))).
12 I borrow the term “federalism model” from Barnett; see Randy E. Barnett, The Ninth Amendment: It Means What It Says, 85 TEX. L. REV. 1, 3 (2006). However, as I continue to use the term throughout this Comment, it is informed by my own analysis and understanding of Lash’s position. See infra Section I.C.
13 The “truism” label was coined by Justice Stone in United States v. Darby, 312 U.S. 100, 124 (1941), and was later quoted with approval by several Justices on the Court,
fore, the argument goes, the Tenth Amendment cannot limit the power that was delegated to the federal government.

Despite that criticism, the Court has invoked the Tenth Amendment’s “spirit” on a number of occasions. In the 1970s and 1980s, it struck down statutes that interfered with “traditional” state functions. In the 1980s and 1990s, it protected state sovereign immunity in cases where the Eleventh Amendment’s text seemed not to apply. Finally, in 1995, the Court limited the commerce power for the first time in sixty years. In citing the Tenth Amendment, however, the Court consistently came under fire, from both academics and some of its own members, for protecting state sovereignty without textual or historical support.

including Stewart, Brennan, and O’Connor. For these examples, see infra notes 34, 294, 323, and accompanying text.

14 For a more detailed analysis of the information presented in this paragraph, see infra Part III.


16 Throughout the last four decades, the Court has been criticized for eschewing both text and history in favor of imposing its own principle of federalism. See, e.g., Frank B. Cross & Stefanie A. Lindquist, The Scientific Study of Judicial Activism, 91 MINN. L. REV. 1752, 1757-58 (2007) (recounting historical charges of judicial activism, particularly against conservative Rehnquist Court Justices); Christopher E. Smith & Avis Alexandria Jones, The Rehnquist Court’s Activism and the Risk of Injustice, 26 CONN. L. REV. 53, 75-76 (1993) (arguing that the Rehnquist Court was an activist court, despite the fact that its members “made their names as advocates of judicial restraint”); Edward Walsh, An Activist Court Misses Its High-Profile Messages, WASH. POST, July 2, 2000, at A6 (accusing the Rehnquist Court of having “become one of the most activist courts in American history” (quoting Steven R. Shapiro, National Legal Director for the ACLU)). See generally Brannon P. Denning & Glenn Harlan Reynolds, Comfortably Penumbral, 77 B.U. L. REV. 1089, 1090 (1997) (arguing that the Rehnquist Court engaged in “‘penumbral reasoning’ in federalism and sovereign immunity cases (quoting Glenn H. Reynolds, Penumbral Reasoning on the Right, 140 U. PA. L. REV. 1333, 1333 (1992))); William L. Taylor, Racial Equality: The World According to Rehnquist (noting that the Rehnquist Court was “inventing whole new doctrines under the Commerce Clause [and] the Eleventh Amendment”), in THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT 39, 42 (Herman Schwartz ed., 2002).

Immediately after deciding Lopez (where the Court struck down the Gun-Free School Zones Act of 1990), the Court came under heavy fire for upsetting decades of precedent with little constitutional authority to do so. See, e.g., Donald H. Zeigler, The New Activist Court, 45 AM. U. L. REV. 1367, 1389 (1996) (characterizing Lopez as “another striking example of judicial activism”). Many also have argued that the Court’s Tenth Amendment jurisprudence was merely rooted in the Court’s policy preferences. See, e.g., Martin S. Flaherty, Are We to Be a Nation? Federal Power vs. “States’ Rights” in Foreign Affairs, 70 U. COLO. L. REV. 1277, 1289 (1999) (“[H]istory has become the first refuge of the judicial activist. . . . [T]he Court has had little difficulty finding that the past yields crisp and clear Founding attitudes that provide a basis for denying Congress
In this Comment, I explore how Lash’s “federalism model” of the Ninth Amendment might be applied to the Supreme Court’s federalism jurisprudence. My aims are twofold: first, to provide an objective summary of Barnett and Lash’s recent debate to discern exactly what their two “models” of the Ninth Amendment entail; and second, to demonstrate how the lack of a federalist Ninth Amendment might have forced the Court to stretch the scope of the Tenth and Eleventh Amendments beyond their text, inviting charges of judicial activism.

In Part I, I trace the Ninth Amendment’s history by focusing on Lash’s and Barnett’s developing scholarship. In Part II, I explain how Barnett’s “individual rights model” already has been applied, albeit unsuccessfully, over the last fifty years. Finally, in Part III, I apply the “federalism model” to Commerce Clause, Tenth Amendment, and Eleventh Amendment jurisprudence. I argue that the Court struggled in each instance to protect states from expanding federal power partly because the Ninth Amendment’s federalist history had not yet been uncovered. To prevent broad interpretations of federal power as it powers it might otherwise exercise.


I borrow the term “individual rights model” from Barnett, who uses the label “individual natural rights model.” See Barnett, supra note 12, at 3. Like my use of the term “federalism model,” my use of this term is informed by my understanding of the broader debates between Lash and Barnett. See infra Section I.E (summarizing these two primary “models” of the Ninth Amendment).
did, the Court needed a rule of construction that the Tenth Amendment’s text could not supply. Under the “federalism model,” however, the Ninth Amendment would provide such a rule. Therefore, the Court could have answered charges of judicial activism by citing the Ninth Amendment in addition to the Tenth. Ultimately, I conclude that, if Lash’s historical analysis proves correct, then the Ninth Amendment could provide a check on federal power that is more rooted in constitutional text than are existing protections of federalism.

I. A BRIEF HISTORY OF THE NINTH AMENDMENT

Since ratification, the Ninth Amendment’s history has been subject to numerous interpretations. By the middle of the twentieth century, scholars and judges had concluded that the Amendment’s past was “forgotten.” After Bork compared the Ninth Amendment to an “ink blot,” however, Randy Barnett demonstrated that it was a response to the federalist challenge that a bill of rights would be dangerous because it implied that the people’s rights were only those enumerated in the Constitution. Barnett concluded that the Ninth Amendment was originally intended to protect unenumerated, individual rights. A decade later, Kurt Lash claimed to have uncovered some parts of the “lost history” of the Ninth Amendment, concluding that it was actually intended to protect powers that were reserved to the states. Barnett and Lash now agree that the Ninth Amendment eventually came to be understood as a protection of reserved state powers and that the Amendment’s federalist history was later “forgotten” by the courts. Yet they still disagree about whether the Ninth Amendment

18 I outline much of this history in my undergraduate History thesis. See Seth Rokosky, Denied and Disparaged: Madisonian Federalism and the Original Meaning of the Ninth Amendment (Feb. 2008) (unpublished History Thesis, The Ohio State University), available at http://kb.osu.edu/dspace/handle/1811/31866. This Comment only briefly outlines the development of Ninth Amendment scholarship and jurisprudence. For a fuller understanding, the reader should review Randy Barnett’s and Kurt Lash’s scholarship as discussed in this Part.

19 See infra Section I.E (summarizing Lash’s and Barnett’s competing views); see also, e.g., infra notes 51-56 and accompanying text (outlining the three views expressed in Griswold v. Connecticut, 381 U.S. 479 (1965)); infra note 106 (discussing three more views).

20 See infra Section I.A.

21 See infra notes 48-51 and accompanying text.

22 Id.

23 See infra Section I.C.

24 See infra notes 107-11 and accompanying text (explaining that Barnett concedes that nineteenth-century courts came to view the Ninth Amendment as a protection of
Amendment, as originally adopted, protected individual rights of the people or collective powers of the states. Therefore, Lash and Barnett continue to endorse two distinct models of the Ninth Amendment.

A. “Forgetting” the Ninth Amendment

In 1791, the states ratified the Ninth Amendment, ensuring that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” Throughout a century and a half of scholarship and judicial use, the Ninth Amendment was consistently cited alongside the Tenth, which provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” By 1955, one scholar had concluded that there were “a number of cases which briefly mention the Ninth Amendment by grouping it with the Tenth Amendment. However, these decisions do not actually discuss the Ninth Amendment, but actually discuss the Tenth . . . .” The relationship between the two was puzzling: why were the Ninth and Tenth Amendments nearly always paired together if the former protected rights of the people, while the latter only reserved powers to the states?

Ten years later, the Supreme Court debated the Ninth Amendment’s meaning in *Griswold v. Connecticut*, which considered a state ban on contraceptives. Concurring with the majority that the Ninth Amendment supported a right to privacy, Justice Goldberg argued that “[t]he Ninth Amendment simply shows the intent of the Constitution’s authors that other fundamental personal rights should not state powers, but continues to maintain that the *original* meaning of the Ninth Amendment was to protect individual rights).

In this Part, I seek to provide an objective account of the models Lash and Barnett endorse. Though I speak positively of Lash’s “federalism model” both in my own undergraduate history thesis, see supra note 18, and later in this Comment, see infra Part III, this Comment should not be construed as a repudiation of Barnett’s “individual rights model.” Instead, I leave the question of historical accuracy to further scholarship and merely hope to show how the “federalism model” might be applied.

See generally *Lash*, supra note 9, at 394-99 (chronicling early views of the Ninth Amendment among the Founders and early treatise writers).


U.S. CONST. amend. IX.

U.S. CONST. amend. X.


31 381 U.S. 479 (1965).
be denied . . . simply because they are not specifically listed in the first eight constitutional amendments."  

He concluded that the Ninth Amendment required invalidation of state laws that violated unenumerated rights. By contrast, Justice Stewart recited the popular view that "[t]he Ninth Amendment, like its companion the Tenth . . . 'states but a truism that all is retained which has not been surrendered.'" According to Stewart, the Ninth and Tenth Amendments stood for the principle that the states retain all powers not delegated to the federal government, and "to say that the Ninth Amendment ha[d] anything to do with th[e] case [was] to turn somersaults with history." Unlike Stewart’s passive view, Justice Black argued that the Ninth Amendment preserved an active rule of federalism, protecting state powers against federal expansion. In short, Justices Goldberg, Stewart, and Black had very different views of the Ninth Amendment.

By 1987, the Amendment was a mystery. Robert Bork had been nominated to the Supreme Court and had compared the mysterious text to an “inkblot." The Senate then rejected his confirmation partly because he refused to endorse Griswold’s individual rights interpretation. As the decade drew to a close, Bork’s “inkblot” continued to baffle historical and legal scholars.

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32 Id. at 492 (Goldberg, J., concurring).
33 See id. at 499 (describing the “right of privacy in the marital relation [as] fundamental and basic—a personal right ‘retained by the people’ within the meaning of the Ninth Amendment”).
34 Id. at 529 (Stewart, J., dissenting) (quoting United States v. Darby, 312 U.S. 100, 124 (1941)).
35 Id.
36 Id. at 520 (Black, J., dissenting) ("[T]he Ninth Amendment [was] enacted to protect state powers against federal invasion . . . .").
37 Nomination of Robert H. Bork, supra note 1, at 249.
38 See COMM. ON THE JUDICIARY, NOMINATION OF ROBERT H. BORK TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT, S. EXEC. REP. NO. 100-7, at 30-36 (1987) (recommending that Bork not be confirmed partly because he did not recognize the Ninth Amendment as protecting the right to privacy).
39 Because scholars had already concluded that the Ninth Amendment was “forgotten,” see PATTERSON, supra note 30 and accompanying text, and because Bork’s confirmation did little to change that perception, they remained baffled. The state of play before Barnett, then, was relatively uncontroversial. See Barnett, supra note 7, at 419 ("Judge Bork [in comparing the Ninth Amendment to an 'ink blot'] was, unfortunately, well within the mainstream of constitutional thought.").
B. Randy Barnett’s Early Work

After Bork’s confirmation hearings, Randy Barnett tried to remove the “inkblot” from the Ninth Amendment and uncover its original meaning. He concluded that it protected individual rights that were not listed in the Constitution.

Barnett began by criticizing the “rights-powers conception” of the Ninth Amendment. That conception began with the Federalist challenge that a bill of rights would be unnecessary because the Constitution granted to the federal government only enumerated powers. Rights and powers, the argument went, were “logically complementary.” Therefore, the Ninth Amendment’s “other rights” began where enumerated federal powers ended.

Barnett rejected that conception because it conflated the Ninth and Tenth Amendments and left the Ninth without a role in protecting “other rights” of “the people.” According to Barnett, the division between enumerated powers and residual rights later became the Tenth Amendment. Instead, Barnett endorsed the “power-constraint conception,” which characterized rights and powers as “functionally complementary.” Ninth Amendment rights, he claimed, “restrained” enumerated powers. The “power-constraint conception” was rooted in a second Federalist challenge that a bill of rights would be “dangerous” because it implied that any right that was not

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40 See Barnett, supra note 5, at 4-9.

41 See Barnett, supra note 7, at 420 (citing Federalist arguments made by Alexander Hamilton and James Wilson “that a bill of rights was unnecessary”); Barnett, supra note 5, at 4 (citing Federalists’ claims regarding the redundancy of a bill of rights in light of the Constitution’s enumerated powers).

42 Barnett, supra note 5, at 5 (emphasis omitted).

43 See Randy E. Barnett, Two Conceptions of the Ninth Amendment, 12 HARV. J.L. & PUB. POL’Y 29, 29 (1989) (“The rights-powers conception stipulates that the rights ‘retained by the people’ are nothing other than the exact converse of the powers granted to the national government.”).

44 See id. at 30-31 (noting the problems of redundancy and superfluity that arise under the “rights-powers conception”); Barnett, supra note 5, at 5-7 (outlining objections to the “rights-powers” model).

45 See Barnett, supra note 5, at 9 (“[T]he theory that the federal government is one of limited and enumerated powers . . . was incorporated in the Tenth Amendment.”).

46 Id.

47 Barnett, supra note 7, at 420 (noting Hamilton’s view that there was no need to “restrain[]” government powers that were not enumerated (quoting THE FEDERALIST NO. 84, at 631 (Alexander Hamilton) (John Hamilton ed. 1873))); Barnett, supra note 5, at 11-12 (“Constitutional rights can be conceived as ‘power-constraints’ that regulate the exercise of power by Congress and the executive branch . . . .”).
enumerated was subject to federal regulation. According to Barnett, James Madison responded to that challenge by proposing the Ninth Amendment. Therefore, when the federal government interpreted its powers, the Ninth Amendment constrained that construction to protect the people’s unenumerated rights. Barnett concluded that the Ninth Amendment limited regulation of individual rights, including natural rights.

C. Uncovering the “Lost History” of the Ninth Amendment

Between 2004 and 2005, Kurt Lash published two articles in the *Texas Law Review* that purported to uncover missing history of the Ninth Amendment. Unlike Barnett, Lash believed that the Ninth Amendment was originally intended to work in conjunction with the Tenth, protecting the rights of the states to govern themselves through popular sovereignty.

Lash’s first article, *The Lost Original Meaning of the Ninth Amendment*, claimed to uncover historical evidence “not discussed, missing, or mislabeled throughout contemporary scholarship.” Lash began where Barnett left off: the Ninth Amendment was a response to challenges that a bill of rights would be dangerous because it implied that unenumerated rights were unprotected. Yet Lash noted that state amendment proposals for the Bill of Rights all paired the Ninth and

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48 See Barnett, *supra* note 5, at 9-10 (“[The Federalists] expressed fear that an incomplete or inaccurate written declaration may well undermine the status of the unwritten retained rights.”).
49 See Barnett, *supra* note 7, at 421-22 (explaining that Madison, in a speech proposing several amendments to the Constitution, “took up the Federalist argument he himself had made” and responded to it with the “precursor of the Ninth Amendment”).
50 See Barnett, *supra* note 43, at 35 (“In short, in addition to reinforcing the limitations on delegated power, constitutional rights are also intended to further restrict the means by which the government may pursue its delegated ends.”); Barnett, *supra* note 5, at 14 (“As the enumerated powers are given an increasingly expanded interpretation . . . constitutional rights assume a greater importance within the constitutional scheme.”).
51 See Barnett, *supra* note 7, at 422 (“[T]he original meaning of the Ninth Amendment is clear: When forming a government the people retained rights in addition to those listed in the Bill of Rights. . . . There is little question that the rights retained by the people refer, at least in part, to what are called ‘natural rights’ . . . .”)
52 Lash, *supra* note 9, at 334-35 (footnotes omitted).
53 See id. at 350 (“Madison, still concerned about the potential misconstruction of such a Bill, added the Ninth Amendment in order to avoid the implication that enumeration of some rights suggested the assignment into the hands of the federal government all unenumerated rights.”).
Tenth Amendments as protections of state powers and rights. The Tenth Amendment reserved unenumerated powers to the states, while the Ninth Amendment was a rule of construction preventing the federal government from interpreting its powers in a way that "denied or disparaged" unenumerated rights of the states. Drafts of both Amendments showed their common roots in the state amendment proposals. To Lash, the evidence seemed clear: the Ninth Amendment protected state powers—not individual rights.

In addition to state amendment proposals, Lash examined legislative history. Virginia Governor Edmund Randolph was concerned that the removal of language prohibiting the expansion of federal power from the final draft of the Ninth Amendment destroyed its purpose by making it seem to protect individual rights. Similarly, the Virginia Senate concluded that the Virginia Ratifying Convention had not proposed anything resembling the final version, implying that the Amendment’s meaning had been changed. Indeed, Virginia ratified the Ninth Amendment only after Madison delivered a speech opposing the Bank of the United States. Supporters argued that the Bank was "necessary and proper to advance Congress’s enumerated power to borrow money." Opponents insisted that Congress could find power to charter a bank only by construing the Necessary and Proper Clause at the expense of state powers. After explaining state federalism concerns prior to ratification of the Bill of Rights, Madison remarked particularly on the 11th and 12th. [T]he former, as guarding against a latitude of interpretation—the latter, as excluding every source of power not within the constitution itself.

In fine, if the power were in the constitution, the immediate exercise of it cannot be essential—if not there, the exercise of it involves the guilt

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54 See id. at 355-58 (discussing how the declarations and proposals of state conventions "focused on controlling the expansion of federal powers and reserving all nondelegated powers and rights to the states").
55 See supra note 11 and accompanying text (discussing the distinct purposes of the two amendments).
56 See Lash, supra note 9, at 360-70 (describing the evolution of the Ninth and Tenth Amendments).
57 See id. at 372-79 (recounting Edmund Randolph’s objection and debates in the Virginia Assembly).
58 See id. at 333 (“The final version of the Ninth, however, looked nothing like the version proposed by Virginia . . . . ”).
59 See Madison, supra note 11, at 480-90.
60 Lash, supra note 9, at 388.
61 See id. at 384-86 (“Madison declared that the [Bank] Bill violated the rights of the states—rights protected against invasion by the Ninth Amendment.”).
of usurpation, and establishes a precedent of interpretation, levelling all the barriers which limit the powers of the general government, and protect those of the state governments.

According to Madison, since the power to charter banks was not enumerated in the Constitution, the “12th Article” reserved that power to the states. The “11th Article” prevented Congress from using its power to do whatever was “necessary and proper” in a way that disparaged states’ rights—such as chartering banks.

Lash argued that Madison was actually discussing the Ninth and Tenth Amendments (as opposed to the Eleventh and Twelfth) because the first two Amendments sent to the states for ratification had not yet been ratified. He explained that the Ninth Amendment protected not only individual rights, but also all rights retained after powers were delegated to the federal government. Ultimately, Lash argued that the “rights-powers conception” was correct after all, since the Ninth Amendment did establish the proper boundary between federal and state power. Yet it was not functionless, as Barnett had argued, because it was intended to play an active role in preserving federalism.

Lash continued his argument in *The Lost Jurisprudence of the Ninth Amendment*, which traced the Ninth Amendment’s evolution beyond the New Deal and claimed to debunk the longstanding assumption that it rarely had been applied by courts. According to Lash, much of the Ninth Amendment’s history had been lost because contempo-

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63 As Lash explains:

By referring to the Ninth according to its position on the original list of twelve proposed amendments, Madison was using a common convention of the early years of the Constitution. As the years went by, and it became clear that the first two proposals would not be ratified, the convention changed and the amendments came to be known as One through Ten.

Lash, supra note 9, at 422-23.

64 See, e.g., id. at 399 (“The text of the Ninth does not limit its application to natural rights. All retained rights, natural or otherwise, were protected from denial or dispragage as a result of the decision to enumerate ‘certain rights.’”).

65 See id. at 345-47 (distinguishing an “active” Ninth Amendment both from Barnett’s “libertarian” view and from “passive” federalist views).

66 See Lash, supra note 28, at 600 (“In fact, there is a surprisingly rich history of legal interpretation and judicial application of the Ninth Amendment prior to Griswold.”); see also infra notes 94-97 and accompanying text (noting that, in Griswold, Justice Goldberg cited scholarship for the proposition that the Court rarely had used the Ninth Amendment).
ary courts had cited the “11th and 12th” Amendments instead of the Ninth and Tenth. 67

Essentially every early case that cited the Ninth Amendment did so as a rule of construction protecting state power.68 After Justice Story cited the “11th Amendment” as a federalist rule of construction in his dissenting opinion in Houston v. Moore,69 Chief Justice Marshall, in Gibbons v. Ogden,70 rejected the idea that the “12th” Amendment limited interpretations of enumerated power, but he completely disregarded the “11th.”71 Despite Marshall’s decision to ignore the Ninth Amendment, members of the Court continued to cite the “11th Amendment” as a federalist rule of construction throughout the ante-bellum era.72 Even in the 1850s and 1860s, courts invoked the Ninth Amendment to protect state powers.73 For example, Justice Campbell, concurring in Dred Scott v. Sandford, noted that “the ninth and tenth amendments to the Constitution were designed to include the reserved rights of the States.”74 Whenever it was cited, the Ninth Amendment protected state powers—not individual rights.

67 See, e.g., Lash, supra note 28, at 614-15, 630 (explaining that Justice Story’s influential dissenting opinion in Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820), was “forgotten” because he referred to the Ninth Amendment as the “eleventh”).
68 See Lash, supra note 28, at 604-09 (demonstrating that the only references to the Ninth Amendment in early jurisprudence concerned the proper scope of federal and state powers).
69 See 18 U.S. at 49 (Story, J., dissenting) (“[I]t seems unquestionable that the States retain concurrent authority with Congress, not only upon the letter and spirit of the eleventh amendment of the constitution, but upon the soundest principles of general reasoning.” (emphasis added)), quoted in Lash, supra note 28, at 617 (adding the emphasis).
70 22 U.S. (9 Wheat.) 1 (1824).
71 Id. at 187-88, 196 (questioning the rule of strict construction of enumerated powers by noting that there is not “one sentence in the constitution, which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule” and noting that Congress’s commerce power is “complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution”), quoted in Lash, supra note 28, at 624-25. For a more detailed discussion of Houston and Gibbons, see Lash, supra note 28, at 617-25. In other work, Lash has provided a specific account of the Tenth Amendment’s history. See generally Kurt Lash, The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and “Expressly” Delegated Power, 83 NOTRE DAME L. REV. 1889 (2008).
73 See id. at 637-42 (tracing the development of Ninth Amendment jurisprudence from 1855 to 1865).
74 60 U.S. (19 How.) 393, 511 (1856) (Campbell, J., concurring) (emphasis added), quoted in Lash, supra note 28, at 642 (adding the emphasis).
Turning to Reconstruction, Lash argued that the Fourteenth Amendment did not incorporate the Ninth against the states. Abolitionists never cited the Ninth Amendment as a source of individual rights, and members of Congress offered only the first eight for incorporation. Moreover, no one ever contends that the Tenth Amendment should be incorporated, because it would be nonsense to apply reserved state powers against the states themselves. Since the Ninth Amendment protected the same “rights,” it would similarly make little sense to incorporate the Ninth. Rather than becoming a limit on state power, the Ninth Amendment continued to protect it.

Prior to the New Deal, the Ninth Amendment still protected states’ rights. Nevertheless, its use diminished as courts mistakenly cited the Tenth Amendment as both a declaratory principle and a rule of construction. After failing to cite the Ninth Amendment, the Court expanded the Tenth Amendment beyond its text to include a rule of construction.

Finally, Lash traced the New Deal’s effect on Ninth Amendment jurisprudence. As he pointed out, with only one exception, federal courts from 1930 to 1936 discussed the Ninth Amendment in the context of federal expansion. In *A.L.A. Schechter Poultry Corp. v. United States*, *Carter v. Carter Coal Co.*, and *United States v. Butler*, the Court struck down interpretations of the Commerce Power by invoking the Tenth Amendment as both a declaration of federalism and a rule of construction. Nevertheless, the Court shifted to interpreting federal

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76 See Lash, *supra* note 28 at 646-52 (discussing the incorporation debates).
77 See id. at 646 (labeling this idea as “logically impossible”).
78 See id. at 646-47.
79 See id. at 669-73 (outlining how courts erroneously conflated the Ninth and Tenth Amendments).
80 See, e.g., id. at 672 (“[C]ases that cite the Tenth Amendment alone as a rule of construction limiting the interpretation of enumerated federal power have cited the Tenth for principles textually expressed by the Ninth.”)
81 Id. at 679-708.
82 Id. at 680 (identifying *In re Guardianship of Thompson*, 32 Haw. 479 (1932), as the exception).
83 See id. (“With a single exception, federal court opinions discussing the Ninth Amendment in the period from 1930 to 1936 focused on the constitutionality of the New Deal.” (footnote omitted)).
84 295 U.S. 495 (1935).
85 298 U.S. 238 (1936).
86 297 U.S. 1 (1936).
87 See Lash, *supra* note 28, at 684-88 (discussing these three cases).
power more expansively soon after President Roosevelt’s reelection in 1936. In United States v. Darby, where the Court held that Congress had power under the Commerce Clause to create and enforce labor standards for the manufacture of goods to be used in interstate commerce, Justice Stone wrote:

Our conclusion is unaffected by the Tenth Amendment . . . . The Amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments . . . .

From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end.90

According to Lash, Justice Stone was “literally correct.”90 The Tenth Amendment did only designate a line between state and federal power. Yet the Ninth Amendment had always done more.91 Regardless, both the Ninth and Tenth Amendments suddenly had become “truisms.” After Darby, the Court no longer would limit constructions of enumerated powers.92

In 1955, Bennett Patterson concluded in The Forgotten Ninth Amendment that few cases cited the Ninth Amendment, and that those few must have meant to cite the Tenth because they involved a construction of federal power, rather than individual rights.93 Justice Goldberg later cited Patterson in Griswold,94 noting that “[t]he [Ninth] Amendment is almost entirely the work of James Madison. It was introduced in Congress by him and passed the House and Senate with little or no debate and virtually no change in language.”95 Further-

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88 312 U.S. 100, 123 (1941).
89 Id. at 123-24 (emphasis added).
90 See Lash, supra note 28, at 692.
91 See id. ("It is the rule of construction represented by the Ninth Amendment that limits the interpreted scope of federal power.").
93 Patterson, supra note 30, construed in Lash, supra note 28, at 708-99.
94 Griswold v. Connecticut, 381 U.S. 479, 490 n.6 (1965) (Goldberg, J., concurring) ("This Amendment has been referred to as 'The Forgotten Ninth Amendment,' in a book with that title by Bennett B. Patterson (1955.).").
95 Id. at 488.
more, he added, “this Court has had little occasion to interpret the Ninth Amendment.” As Lash noted, Goldberg was wrong on every point. The Ninth Amendment arose from state amendment proposals, was the subject of contentious debate, and was changed in a way that made it look like a protection of individual rights. Unlike Justice Goldberg, Justice Stewart endorsed the New Deal-era Court’s view that the Ninth Amendment, like the Tenth, had always been a “truism.” Ultimately, only Justice Black appeared to be correct:

>[A]s every student of history knows, [the Ninth Amendment was passed] to assure the people that the Constitution . . . was intended to limit the Federal Government to the powers granted expressly or necessarily by implication. . . . [F]or a period of a century and a half no serious suggestion was ever made that the Ninth Amendment, enacted to protect state powers against federal invasion, could be used as a weapon of federal power to prevent state legislatures from passing laws they consider appropriate to govern local affairs.

Lash demonstrated that the Ninth Amendment was not originally the passive “truism” that Stewart and the New Deal-era Court had contemplated. Nor was it the “active” protection of individual rights that Goldberg and Barnett endorsed. Instead, it was an active rule of construction that limited interpretations of federal power and protected rights of the states.

D. The Modern Ninth Amendment Debate

A year later, Barnett responded to Lash’s conclusions with yet another article in the *Texas Law Review*. He hoped to “synthesize the developing modern scholarly debate about the original meaning of the Ninth Amendment” by outlining five potential models of the Amendment’s meaning. Barnett believed that history supported

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96 Id. at 490.
97 See Lash, supra note 28, at 710-11 (describing the flaws in Goldberg’s concurring opinion).
98 See supra note 34 and accompanying text.
99 Griswold, 381 U.S. at 520 (Black, J., dissenting).
100 See Lash, supra note 9, at 345-46 (advocating an “active federalist” interpretation of the Ninth Amendment, as distinguished from both a “passive[] federalist” interpretation and an “active Libertarian” one).
101 Barnett, supra note 12.
102 Id. at 3.
103 See infra note 106 (discussing the “state law rights,” “residual rights,” and “collective rights” models); infra Section I.E (discussing the “individual rights” and “federalism” models).
both his “individual natural rights model”\(^{104}\) and Lash’s “federalism model,”\(^{105}\) so their work was not mutually exclusive.\(^{106}\) According to Barnett, the Ninth Amendment was intended to protect state powers and individual rights.

Barnett proposed a compromise with Lash. He argued that because some amendment proposals referred to “rights” instead of “powers” and “people of the several states” rather than “the states,” the Ninth Amendment’s final language, protecting only “rights” of “the people,” was a purposeful protection of individual rights.\(^{107}\) That change explained the Virginia Senate’s protest that the Virginia Ratifying Convention had not proposed the final version.\(^{108}\) Moreover, Barnett attributed early judicial interpretations of the Ninth Amendment as a protector of state powers to the rise of states’-rights philosophy in the antebellum era.\(^{109}\) Because that philosophy dominated constitutional discourse for decades, nineteenth-century cases were

\(^{104}\) See Barnett, supra note 12, at 13-14 (“[T]he Ninth Amendment was meant to preserve the ‘other’ individual, natural, preexisting rights that were ‘retained by the people’ when forming a government but were not included in ‘the enumeration of certain rights.’”). Barnett believed the Ninth Amendment was incorporated by the Fourteenth. See id. at 15 (explaining that the federal government attained jurisdiction to protect unenumerated natural rights from state governments after the Fourteenth Amendment was ratified).

\(^{105}\) See id. at 20 (supporting Lash’s argument that the Ninth Amendment also may have protected a rule of construction that prevented the federal government from “interfer[ing] with the retained right of the people to local self-government” (quoting Lash, supra note 9, at 346)).

\(^{106}\) See id. at 20 (arguing that it is wrong to imply, as Lash suggests, that a “federalist” reading “is inconsistent with a presumption in favor of individual rights” (citing Lash, supra note 9, at 346-47)). Barnett first rejected Russell Caplan’s “state law rights” model and Thomas McAffee’s “residual rights” model because both took more passive views of the Ninth Amendment. See id. at 3, 11-13 (disagreeing with the conclusion of these two models “that the Ninth Amendment is a constitutional truism with no practical significance in constitutional adjudication”). Barnett also rejected Akhil Amar’s “collective rights” model to the extent that it suggested that the only rights the Ninth Amendment protected were collective, rather than individual. Id. at 16.

\(^{107}\) See id. at 44-46 (outlining the differences between the state amendment proposals and suggesting that the difference in wording between Virginia’s proposal, which supposedly embraced the collective rights model, and the “actual wording” “severely undercuts the collective rights model and strongly supports the individual rights model”). For more information on Virginia’s proposal, see supra notes 57-58 and accompanying text.

\(^{108}\) See Barnett, supra note 12, at 46-52 (arguing that the Virginia Senate’s unhappiness was the result of a purposeful change in meaning).

\(^{109}\) See id. at 79 n.336 (“The rise of the Calhounian states’ rights position in the run up to the Civil War makes any effort to discern the original meaning of the Ninth Amendment from antebellum nineteenth century cases and other authorities, as Kurt Lash attempts, likely to be misleading.”).
misleading. Ultimately, Barnett still endorsed his “power-constraint conception,” but he conceded that Lash’s work suggested that the Ninth Amendment also protected state powers.

Lash, however, declined Barnett’s compromise. He rejected Barnett’s distinction between individual and collective rights because, when the Ninth Amendment was ratified, reserving state powers was equivalent to protecting the people’s rights. Variations in state amendment proposals were merely semantic; their ultimate goal was the same—to protect the “rights of the people” by preserving self-government in the states. That explained Randolph’s objection to the Ninth Amendment’s final text: “[I]t would be more safe, & more consistent with the spirit of [Virginia’s] 1st & 17th amendments . . . that this reservation . . . should operate . . . as a provision against extending the powers of Congress . . .”

Moreover, Lash countered that Barnett relied on the same ante-bellum sources that he had previously derided in Lash’s work for being too far removed from the Ninth Amendment’s adoption. But, according to Lash, even if the evidence were limited to 1820 and earlier, it still showed that the Ninth Amendment was intended to protect states’ rights from federal power.

E. Two Models of the Ninth Amendment

This Comment focuses on the two distinct views that have emerged from the Ninth Amendment debate. According to Bar-
nett’s “individual rights model,” Madison drafted the Ninth Amendment in response to the challenge that enumerating rights in the Constitution implied that other rights were not protected from federal regulation. The Ninth Amendment protects “all of the liberties that are retained by the people.” Moreover, states cannot infringe on those “other” rights because the Fourteenth Amendment incorporated the Ninth. In the end, the Ninth Amendment puts “the burden on the government to justify its laws as necessary and proper when a law affects [a natural right].”

By contrast, according to Lash’s “federalism model,” Madison drafted the Ninth Amendment as a response to states’ concerns that the federal government would interpret its own powers in a way that would infringe on their rights. The enumeration of matters left to state control did not imply federal power to regulate other concerns “retained by the people” in their state governments (like chartering banks). Contemporary notions of popular sovereignty explained why there was no difference between the Ninth Amendment’s “other” rights retained by “the people” and the Tenth Amendment’s “powers” reserved “to the States respectively, or to the people.”

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119 See supra notes 49-50 and accompanying text.
120 See Barnett, supra note 118, at 898. Barnett seems to have retreated from his earlier concession that the Ninth Amendment also protects reserved powers of the states. See id. at 899 (“My view . . . recognizes all of the individual liberties of the people; however, it does not recognize a collective right that goes beyond that.”).
121 See, e.g., id. at 901-02 (arguing that the Ninth Amendment protects even more than “fundamental” liberties, raising worries that it could “do away with government altogether”); see also supra note 104 (discussing incorporation).
122 Id. at 902.
123 See Kurt T. Lash, Three Myths of the Ninth Amendment, 56 DRAKE L. REV. 875, 880 (2008) (noting that state amendment proposals sought to ensure that states would remain sovereign over “every matter not delegated to the federal government”).
124 Id. at 880-81.
125 See id. at 885 (“Focusing on this neglected declaration of popular sovereignty in both Amendments illustrates the provisions’ common grounding in the principle of limited federal power.”). For a fuller account of Barnett’s and Lash’s critiques of the text of the Ninth and Tenth Amendments, the reader should look to their colloquy in the Stanford Law Review. See Kurt T. Lash, A Textual-Historical Theory of the Ninth Amendment, 60 STAN. L. REV. 895 (2008) (using a text-based analysis to “reconcile[]...
over, the Fourteenth Amendment, according to Lash, did not incorporate the Ninth.\textsuperscript{126} Instead, it limited the Ninth Amendment only insofar as it precluded states from infringing on rights that were incorporated.\textsuperscript{127} Therefore, the Ninth Amendment “requires a narrow construction of federal power” to safeguard rights left to the states by the Tenth Amendment.\textsuperscript{128}

II. APPLYING THE “INDIVIDUAL RIGHTS MODEL”

Barnett has explained how the “individual rights model” could be applied in practice.\textsuperscript{129} In addition, as this Part will describe, scholars, litigants, and judges have tried to apply the Ninth Amendment as a source of individual rights. Nevertheless, efforts to apply the “individual rights model” have been largely unsuccessful.

In \textit{Griswold v. Connecticut},\textsuperscript{130} the Supreme Court applied a form of the “individual rights model” to a state ban on contraceptives. Justice Douglas considered the Ninth Amendment to be one source of the “penumbras” giving rise to a zone of privacy.\textsuperscript{131} Concurring, Justice Goldberg added “words to emphasize the relevance of that Amendment”:\textsuperscript{132}

\textsuperscript{126} See supra notes 75-78 and accompanying text (discussing Lash’s argument against incorporation).
\textsuperscript{127} Lash, supra note 123, at 890.
\textsuperscript{128} Id. at 882. For a more detailed example of how Lash explains the text of the Ninth and Tenth Amendments, the reader should consult Lash’s treatment of the subject in \textit{The Lost Jurisprudence of the Ninth Amendment}, supra note 28. See also Lash, supra note 123, at 883-87 (explaining that “the people” and “the states” were equivalent); supra note 114 and accompanying text (discussing the role of popular sovereignty at the time of the Founding).
\textsuperscript{129} Barnett has argued that unenumerated rights can be enforced in the same way as enumerated rights. First, the burden is on the government to justify its exercise of power as necessary and proper. It may then regulate the time, place, and manner in which the right is enjoyed to ensure that the exercise of that right does not interfere with others’ liberties. See Barnett, supra note 118, at 902-03 (comparing an analysis of the natural right to freedom of speech under the First Amendment with an analysis of other “prohibitions and regulations of liberty”).
\textsuperscript{130} 381 U.S. 479 (1965).
\textsuperscript{131} Id. at 484 (including the Ninth Amendment with the First, Third, Fourth, and Fifth).
\textsuperscript{132} Id. at 487 (Goldberg, J., concurring).
To hold that a right . . . so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever. . . . [T]he Ninth Amendment . . . is surely relevant in showing the existence of other fundamental personal rights, now protected from state, as well as federal, infringement.

To determine which rights the Ninth Amendment protected, Justice Goldberg directed the Court to "look to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] . . . as to be ranked as fundamental.'"

Justice Douglas later argued for expanding the Ninth Amendment to protect rights to style one's hair and to have personal tastes. He also provided a list of Ninth Amendment rights in Doe v. Bolton, a companion case to Roe v. Wade:

[A] catalogue of these rights includes customary, traditional, and time-honored rights, amenities, privileges, and immunities that come within the sweep of "the Blessings of Liberty" . . . .

First is the autonomous control over the . . . expression of one's intellect, interests, tastes, and personality . . . .

Second is freedom of choice in . . . one's life respecting marriage, divorce, procreation, conception, and the education and upbringing of children . . . .

Third is the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, or loaf.

Scholars also have invoked the Ninth Amendment as a source of individual liberties. In 2000, Mark Niles argued that the Ninth Amendment would protect unenumerated personal freedoms better

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133 Id. at 491-93.
134 Id. at 495 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).
135 See Freeman v. Flake, 405 U.S. 1032, 1032 (1972) (Douglas, J., dissenting from denial of certiorari) ("I can conceive of no more compelling reason to exercise our discretionary jurisdiction than a conflict of such magnitude, on an issue of importance bearing on First Amendment and Ninth Amendment rights.").
136 See Off v. E. Side Union High Sch. Dist., 404 U.S. 1042, 1044 (1972) (Douglas, J., dissenting from denial of certiorari) (applying the "liberty" of the Ninth Amendment to "one's taste for food, or one's liking for certain kinds of music, art, reading, [and] recreation").
139 Doe, 410 U.S. at 210-13 (Douglas, J., concurring) (emphasis omitted).
than substantive due process does. The Ninth Amendment has been applied to support individual rights to parenting styles, reputation, medical marijuana, drug use, and refusal to testify against family members. Nevertheless, as Barnett once quipped: “A word for all you future litigators out there: the Ninth Amendment is not something you can really argue in court.” Douglas’s and Goldberg’s interpretations of the Ninth Amendment never commanded a majority, and the Supreme Court has never exclusively relied on the Ninth Amendment as a source of individual rights. Despite the popularity of the “individual rights model” throughout the last fifty years, the Court

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143 See Andrew King, Comment, What the Supreme Court Isn’t Saying About Federalism, the Ninth Amendment, and Medical Marijuana, 59 Ark. L. REV. 755, 779 (2006) (arguing that the use of medical marijuana by “citizens of a state that has authorized its use” should be a constitutionally protected right under the Ninth Amendment).

144 See Kevin S. Toll, Comment, The Ninth Amendment and America’s Unconstitutional War on Drugs, 84 U. DETROIT MERCY L. REV. 417, 419 (2007) (“[A]ll laws that regulate private behavior, including those criminalizing the use of drugs by adults that cause no harm to others, violate the right of autonomy to self, and, as a result, are unconstitutional under the Ninth Amendment . . . .”).


146 Barnett, supra note 118, at 904.
has proven unwilling to accept the Ninth Amendment as a protector of individual liberties.

III. APPLYING THE “FEDERALISM MODEL”

Like the “individual rights model,” the Supreme Court never has specifically applied the “federalism model” in its modern jurisprudence. Nevertheless, as will be discussed in this Part, the Court repeatedly has cited the Tenth and Eleventh Amendments for the rule of construction that Lash argues was preserved in the Ninth. Ultimately, the “federalism model” not only could be applied in practice today but may already have been applied under the guise of the Tenth and Eleventh Amendments.

In the early twentieth century, the Court began to ignore the Ninth Amendment in favor of an expanded interpretation of the Tenth. Conflating the Ninth and Tenth Amendments led the Court to assume that only a “truism” stood in the way of expanding federal power. Accordingly, the Court concluded that Congress could use all appropriate means to carry out legitimate ends. For forty years, the Court continued to expand federal power by construing it broadly. When it finally began to reverse that expansion, however, it failed to cite the Ninth Amendment. Instead, the Court stretched the Tenth and Eleventh Amendments to supply the necessary rule of construction.

Alternatively, the Court could have applied the “federalism model” articulated by James Madison in his speech against the Bank of the United States. First, according to this approach, we look to whether a power is so “great and important” that the Framers would have

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117 See supra notes 79-80 and accompanying text.
118 See supra note 89 and accompanying text.
119 See, e.g., Lash, supra note 28, at 692 (“[T]he Court [in Darby] declared that it would uphold federal regulation of purely intrastate commerce if Congress reasonably concluded that the activity in question affected interstate commerce.” (citing Darby, 312 U.S. 100, 119 (1941))). The Court’s deference to federal authority actually began in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), and Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), two cases in which Justice Marshall ignored Ninth Amendment challenges. See Lash, supra note 28, at 625. Commentators, however, criticized Marshall for his failure to address those challenges. See, e.g., id. (“In fact, during his entire tenure on the Supreme Court, Marshall never once referred to the Ninth Amendment, despite repeated references to it by bench and bar as a rule prohibiting expansive readings of federal power.”).
120 See Madison, supra note 11, at 480-90; GAZETTE OF THE UNITED STATES, Feb. 23, 1791, supra note 62, at 367-75.
enumerated it had they wished it to be delegated.151 If the power is found to meet this criteria, then it is not merely “accessory or subaltern” to an enumerated power, and granting it to the federal government “would directly interfere with the rights of the States, to prohibit as well as to establish [the regulation in question].”152 According to Madison, those rights are protected by the Ninth and Tenth Amendments, “the former as guarding against a latitude of interpretation—the latter, as excluding every source of power not within the constitution itself.”153 Under the “federalism model,” construing the enumerated powers to include powers so “important” as not to be “evidently and necessarily involved in an express power”154 would violate the Ninth Amendment.

Following Madison’s approach, the remainder of this Comment seeks to illustrate how a federalist Ninth Amendment might be applied to three constitutional doctrines. First, the Court could cite the Ninth Amendment as a limit on the commerce power. The “substantial effects” test155 for analyzing exercises of power pursuant to the Commerce Clause would be inconsistent with a federalist Ninth Amendment because that test abandons all inquiries into whether a power is “accessory” to interstate commerce on the one hand, or reserved to the states on the other. Second, the Court could cite the Ninth Amendment where it references the “spirit of the Tenth Amendment” because it invokes that “spirit” when limiting interpretations of federal power that disparage traditional functions of the states. Finally, the Court could cite the Ninth Amendment as a protection of state sovereign immunity. The Court’s expansion of state sovereign immunity beyond the Eleventh Amendment’s text is consistent with the federalism model because the Court considers state sovereign immunity to be a reserved state right. Ultimately, the Court’s repeated application of a federalist rule of construction provides examples of how the “federalism model” might be applied in modern constitutional litigation.

151 See GAZETTE OF THE UNITED STATES, Feb. 23, 1791, supra note 62, at 373, quoted in Lash, supra note 9, at 389 (discussing Madison’s method of “identifying implied powers”).
152 Id. at 373, quoted in Lash, supra note 9, at 389.
153 Id. at 370 (emphasis omitted), quoted in Lash, supra note 9, at 388.
154 Madison, supra note 11, at 489, quoted in Lash, supra note 9, at 392.
155 GAZETTE OF THE UNITED STATES, Feb. 23, 1791, supra note 62, at 373, quoted in Lash, supra note 9, at 389.
156 See infra note 191 and accompanying text (quoting Wickard v. Filburn, 317 U.S. 111, 125 (1942)).
A. The Commerce Power

The Court could apply a federalist Ninth Amendment when Congress uses the commerce power to regulate intrastate activity. Chief Justice Marshall first ignored Ninth Amendment challenges to the commerce power in *Gibbons v. Ogden.*\(^{157}\) As discussed in this Section, a century later the Court limited the commerce power with a federalist rule of construction, but it cited the Tenth Amendment in lieu of the Ninth. Yet the Tenth Amendment’s text does not actually contain a rule of construction, a fact that led the New Deal–era Court to insist that there was no textual support for such a rule. Citing Marshall, it fashioned a “substantial effects” test\(^ {158}\) that was inconsistent with the “federalism model” because it abandoned all consideration of whether a regulated activity is interstate in nature. When the Rehnquist Court finally limited the “substantial effects” test, it too applied a federalist rule of construction without citing the Ninth Amendment. With the Ninth Amendment’s “lost history” not yet uncovered, the Court struggled to prevent the commerce power from expanding into areas that it felt were more properly under state control.

1. Before the New Deal

By 1935, the Court already had conflated the Ninth and Tenth Amendments into a single principle of federalism.\(^ {159}\) As demonstrated below, it then applied the Tenth Amendment to limit interpretations of the Commerce Clause.

In *A.L.A. Schechter Poultry Corp. v. United States,*\(^ {160}\) the Court considered the constitutionality of a provision of the National Industrial Recovery Act that allowed Congress to authorize the President to pass the Live Poultry Code, which fixed wages and hours in the poultry industry.\(^ {161}\) When poultry companies argued that Congress lacked the power to do that, they were met with two responses. First, Congress claimed to have the power to regulate during a “grave national cri-

\(^{157}\) See supra notes 70-71 and accompanying text (explaining Marshall’s treatment of the Ninth Amendment).

\(^{158}\) See infra note 182 and accompanying text.

\(^{159}\) See supra note 79 and accompanying text.

\(^{160}\) 295 U.S. 495 (1935).

\(^{161}\) See National Industrial Recovery Act, ch. 90, § 3, 48 Stat. 195, 196 (1933) (allowing the President to “approve a code or codes of fair competition for the trade or industry”), invalidated by *Schechter Poultry*, 295 U.S. at 541-42; see also *Schechter Poultry*, 295 U.S. at 521-26 (describing the code).
sis. “162 But the Court held that the Tenth Amendment precluded such an argument because that power was not enumerated in the Constitution. 163 The government also pointed to the Commerce Power, arguing that higher hours and lower wages would, in the aggregate, demoralize the “price structure” within the industry. 164 The problem, the Court noted, was that “persons employed in slaughtering and selling in local trade are not employed in interstate commerce.” 165 Accordingly, the Court held that the Code was unconstitutional because to hold otherwise would be to recognize no limit to Congress’s interpretation of its power:

If the federal government may determine the wages and hours of employees in the internal commerce of a State, because of . . . their indirect effect upon interstate commerce, it would seem that a similar control might be exerted over . . . the number of employees, rents, advertising, methods of doing business, etc. . . . If the cost of . . . intrastate business is in itself the permitted object of federal control, . . . regulation of cost would be a question of discretion and not of power. 166

Under the “federalism model,” the Ninth Amendment was ratified to address the Court’s concern: with no check on interpretations of enumerated power, there was no end to federal expansion. Broad constructions of delegated power (as in the Commerce Power) in the absence of enumerated rights (as in intrastate regulation) lead to the disparagement of those rights. Thus, Congress could not argue merely that the Constitution delegates the Commerce Power while reserving no state right to regulate hours and wages. That argument would lead to an ever-expanding federal power and, in turn, would violate the Ninth Amendment.

Madison might well have recognized Schechter Poultry as an application of the Ninth Amendment because the Court in that case reasoned that delegation of the Commerce Power was not to be construed as a denial of states’ rights to regulate intrastate activities. 167 But the Court unfortunately found no authority for its rule of construction because it assumed that the Ninth Amendment was no dif-
Ultimately, it rejected an interpretation of the Commerce Power by applying the Tenth Amendment and a rule of construction that functioned like the Ninth. In other words, it applied the “federalism model” without citing the Ninth Amendment.

2. The New Deal

The Court abandoned its rule of construction during the New Deal. Finding no textual limit on constructions of enumerated power, as this subsection explains, the Court cited Chief Justice Marshall and adopted an interpretation of the Commerce Clause that was inconsistent with the “federalism model.”

In *Ashwander v. Tennessee Valley Authority*, the Court assessed the validity of the Tennessee Valley Authority Act of 1933, which authorized a federal agency to purchase property for a dam. The Court noted that Congress had the power to pass the Act under Article IV of the Constitution, which allows Congress to “make all needful Rules and Regulations respecting . . . Property belonging to the United States.” The Court reasoned that the Tenth Amendment did not apply because Congress relied on an enumerated power. It then went on to reject the Ninth Amendment as a limit on that power:

And the Ninth Amendment (which petitioners also invoke) in insuring the maintenance of the rights retained by the people does not withdraw the rights which are expressly granted to the Federal Government. The question is as to the scope of the grant and whether there are inherent limitations which render invalid the disposition of property with which we are now concerned.

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168 See *supra* note 79 and accompanying text (discussing how the Ninth and Tenth amendments were mistakenly conflated). The Court later expanded that rule of construction to encompass labor provisions in the coal industry, where interstate commerce had not yet begun. See *Carter v. Carter Coal Co.*, 298 U.S. 238, 309 (1936) (“The only perceptible difference between that case and this is that in the *Schechter* case the federal power was asserted with respect to commodities which had come to rest after their interstate transportation . . . .”).

169 297 U.S. 298 (1936).


171 Id. at 330 (quoting U.S. CONST. art. IV, § 3) (internal quotation marks omitted).

172 See id. (“To the extent that the power of disposition is thus expressly conferred, it is manifest that the Tenth Amendment is not applicable.”).

173 Id. at 330-31.
Under the “federalism model,” of course, the “scope of the grant” of federal power is exactly what the Ninth Amendment’s rule of construction was intended to constrain. In *Ashwander*, plaintiffs had argued that the Ninth Amendment prevented an interpretation of Article IV that disparaged rights of the states, but the Court nonetheless upheld the Act. It concluded that no constitutional provision limited the Property Clause’s scope.

Having rejected a limiting rule of construction like Chief Justice Marshall had done a century before, the Court began expanding the commerce power. In *United States v. Darby*, it considered the Fair Labor Standards Act (FLSA), which prohibited interstate shipment of goods produced under certain labor conditions. Plaintiffs argued that the Act infringed on the police power of the states by regulating in an area where states had decided not to. Paralleling Marshall’s reasoning in *Gibbons* and *McCulloch*, the Court articulated a very broad view of federal power:

[The commerce power] extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.
In *McCulloch*, Marshall had ignored the Ninth Amendment and held that the Tenth did not limit interpretations of delegated power.\(^{183}\) The Court in *Darby* now echoed his reasoning:

> Our conclusion is unaffected by the Tenth Amendment . . . .

From the beginning and for many years the Tenth Amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end.\(^{184}\)

The Court also noted that any doubts about its reading were resolved in *Ashwander*, where it abandoned its federalist rule of construction for want of textual support.\(^{185}\)

The Court correctly reasoned that the Tenth Amendment does not prevent Congress from resorting to “all means for the exercise of a granted power.” Yet Madison argued in his Bank Speech that the Ninth Amendment precluded the government from expanding “granted power” to include those that are “important,” rather than “accessary.”\(^{186}\) Without a federalist rule of construction, the Tenth Amendment appeared to the *Darby* Court to be only “declaratory” and did not limit the FLSA.

Once the Court adopted a passive view of the Ninth and Tenth Amendments, it abandoned all consideration of whether the right to regulate should be reserved to the states. In *Wickard v. Filburn*,\(^{188}\) the Court considered the Agricultural Adjustment Act of 1938, which established quotas on intrastate production of wheat that was intended solely for consumption.\(^{189}\) Plaintiff argued that the Act was unconstitutional because it regulated local activities, rather than interstate commerce.\(^{190}\) Yet instead of addressing the Ninth and Tenth Amendments, the Court declined to consider whether the activity was interstate, and thus delegated to the federal government, or whether

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185 See id. at 124.

186 See supra notes 149-53 and accompanying text.

187 *Darby*, 312 U.S. at 124.

188 317 U.S. 111 (1942).


190 See *Wickard*, 317 U.S. at 119.
it was local, and therefore reserved to the states. It reasoned: “[E]ven if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . . .”

Under the “federalism model,” the Court’s new “substantial effects” test would have puzzled Madison, whose Bank Speech focused upon a narrow construction of federal power in an effort to protect the states. Wickard eliminated any consideration of whether power was “directly” related to interstate commerce or instead was a “police power . . . essential to the preservation of the autonomy of the States as required by our dual form of government.” By disregarding whether activities were truly intrastate, the Court avoided any limit on constructions of the Commerce Clause. The commerce power had been freed from the Tenth Amendment, and now it could be construed to include any power reserved to the states, so long as it regulated activities with “substantial effects” on interstate commerce. In short, under the “federalism model,” the “substantial effects” test, in Madison’s words, “establish[ed] a precedent of interpretation[] leveling all the barriers which limit the powers of the general government[,] and protect those of the state governments.”

3. Expanding the “Substantial Effects” Test

The commerce power continued to expand after the New Deal-era Court abandoned its rule of construction. Following Chief Justice Marshall’s approach, the Court denied any external limit on interpretations of the commerce power.

In Heart of Atlanta Motel, Inc. v. United States, the Court upheld Title II of the 1964 Civil Rights Act, which the plaintiff had violated by refusing to provide lodging to African Americans. It concluded that Title II could regulate motel management “of a purely local cha-

191 Id. at 125 (emphasis added).
193 Carter v. Carter Coal Co., 298 U.S. 238, 301 (1936) (quoting United States v. E.C. Knight Co., 156 U.S. 1, 13 (1895)).
194 Gazette of the United States, Feb. 23, 1791, supra note 62, at 375, quoted in Lash, supra note 9, at 392.
197 See id. at 249 (“It is admitted that . . . appellant refused to provide lodging for transient Negroes because of their race or color and that it intends to continue that policy unless restrained.”).
racter” because “[i]f it is interstate commerce that feels the pinch, it
does not matter how local the operation which applies the squeeze.”\textsuperscript{198} Again, it cited Marshall and reaffirmed the “substantial effects” test.\textsuperscript{199} Going even further than \textit{Wickard}, however, it moved from asking whether regulated activity has a substantial effect on interstate commerce to asking whether Congress \textit{rationally believed} that it does and, if so, whether the means used are “reasonable and appropriate.”\textsuperscript{200}

The “federalism model” would conflict with the Court’s conclusion that the “\textit{only}” questions are whether Congress had a rational basis and used reasonable means.\textsuperscript{201} Instead, according to that model, we first must ask, as Madison argued in his speech against the Bank, whether the power would have been enumerated had the Framers wished it to be de-

legated.\textsuperscript{202} We then must determine whether the power is “accessory” to the commerce power or violates the Ninth Amendment.\textsuperscript{203} Nevertheless, the Court followed Marshall and assumed that there was no external lim-

it to the commerce power’s scope.

The Court further explained its reliance on Marshall in \textit{Katzenbach v. McClung}, in which it considered Title II’s regulations in the context of a restaurant that “refused to serve Negroes in its dining accommodations” but imported food through interstate commerce.\textsuperscript{204} Holding that Congress rationally believed that the restaurant’s activities had a “substantial effect” on interstate commerce in this context,\textsuperscript{205} the Court emphasized the importance of congressional findings.\textsuperscript{206} The rule that Congress could regulate activities that are entirely within the purview of the states was “as good today as it was when Chief Justice Marshall laid it down almost a century and a half ago.”\textsuperscript{207}

\begin{footnotes}
\item[198] Id. at 258 (quoting United States v. Women’s Sportswear Mfrs. Ass’n, 336 U.S. 460, 464 (1949)).
\item[199] See id. at 253-54, 258 (noting that the meaning of the Commerce Clause was “first enumerated 140 years ago by the great Chief Justice John Marshall” and holding that Congress’s power over interstate commerce “includes the power to regulate the local incidents . . . which might have a substantial and harmful effect upon that commerce”).
\item[200] Id. at 258-59.
\item[201] Id.
\item[202] See supra notes 150-55 and accompanying text.
\item[203] See id.
\item[204] 379 U.S. 294, 297-98 (1964).
\item[205] Id. at 304.
\item[206] See id. at 303-04 (“But where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.”).
\item[207] Id. at 302 (referring to Marshall’s opinion in \textit{Gibbons v.Ogden}, 22 U.S. (9 Wheat.) 1 (1824)).
\end{footnotes}
discretion had become nearly unlimited: “The power of Congress in this field is broad and sweeping; where it keeps within its sphere and violates no express constitutional limitation it has been the rule of this Court, going back almost to the founding days of the Republic, not to interfere.” Of course, if Lash is correct, “going back . . . to the founding days of the Republic,” the Ninth Amendment guarded against such a broad interpretation of enumerated power. By following Marshall, the Warren Court repudiated the Ninth Amendment’s rule of construction.

4. Limiting the “Substantial Effects” Test

By the 1990s, the Rehnquist Court had begun to place a renewed emphasis on federalism. Turning to the Commerce Clause, as discussed below, it refused to apply the “substantial effects” test to regulations of noneconomic activity. It argued that expansive interpretations of the commerce power threatened states’ rights to regulate areas of traditionally local concern. Like the Court had done before the New Deal, the Rehnquist Court applied the “federalism model” but failed to cite the Ninth Amendment.

In United States v. Lopez, the Court struck down the Gun-Free School Zones Act, which made it a federal offense “for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.” Chief Justice Rehnquist noted that the Court had found a “substantial effect” only where regulated activity was economic. But the Act was “a criminal statute that by its terms had nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.” Accordingly, the Court held that the Act did not regulate interstate commerce.

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208 Id. at 305.
211 Id. at 551 (quoting 18 U.S.C. § 922(q)(1)(A) (1994)).
212 See id. at 560 (“Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.”).
213 Id. at 561.
214 See id. (finding that the Gun-Free School Zones Act could not be “sustained” because it was “not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated”).
In striking down the Act, the Court followed the approach Madison took in his Bank Speech. Because the Act was not “accessory” to the commerce power, it was “important” and needed to be supported by a different power. The government argued that the Court could have found a substantial effect on commerce because firearms in school zones would result in higher insurance premiums, reduce travel, and produce a less productive citizenry. But the government’s interpretation made it “difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.”

The Court’s worry was the same as that which, according to Lash, gave rise to the Ninth Amendment. The Tenth Amendment reserved to the states the right to educate their people. The Ninth Amendment prevented constructions of the enumerated powers that infringed on that right. The Court emphasized the threat that the government’s interpretation posed to state powers:

To uphold the Government’s contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. . . . To do so would require us to conclude that the Constitution’s enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between [the] truly national and . . . truly local . . . .

Like Madison, Rehnquist was concerned that the federal government would interpret the Commerce Clause to regulate powers reserved to the states.

Concurring, Justices Kennedy and O’Connor focused on the traditional right of the states to regulate education:

[I]t is well established that education is a traditional concern of the States. . . .

The statute now before us forecloses the States from experimenting . . . in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce . . . . [S]chool officials would find their own programs for

\[215\] See infra notes 150-53 and accompanying text (outlining how Madison applied a federalist Ninth Amendment interpretation in his speech against the Bank of the United States).
\[216\] Lopez, 514 U.S. at 563-64.
\[217\] Id. at 564.
\[218\] See infra Section I.C (discussing The Lost History of the Ninth Amendment).
\[219\] Lopez, 514 U.S. at 567-68 (citation omitted).
Kennedy and O’Connor applied the “federalism model” by identifying a reserved state right and then rejecting an interpretation of the Commerce Power that infringed on it. Because the Tenth Amendment reserved a police power over education, the commerce power could not be construed to deny or disparage that right.

Justice Thomas went even further and criticized the entire “substantial effects” test by invoking the same worry that motivated states to propose the Ninth Amendment: “Our case law could be read to reserve to the United States all powers not expressly prohibited by the Constitution. Taken together, these fundamental textual problems should, at the very least, convince us that the ‘substantial effects’ test should be reexamined.”

According to Thomas, the “substantial effects test” itself violated the rule of construction that would be protected by a federalist Ninth Amendment. States proposed the Ninth Amendment to prevent the dispute that all rights not expressly delegated to the states were transferred to the federal government. But the “substantial effects” test had eliminated inquiries into the nature of regulated activity and substituted an inquiry into its effects.

_Lopez_ was a clear, albeit misarticulated, application of the “federalism model.” Without mentioning the Ninth Amendment, the Court refused to apply the “substantial effects” test to regulations of non-economic activity because it was concerned that such an expansive construction would infringe on the reserved rights of states to regulate areas of local concern. Unfortunately, because the Ninth Amendment’s “lost history” had not yet been uncovered, the Court never even had a chance to cite it.

The Court again limited the commerce power in _United States v. Morrison_. In that case, the Court considered the constitutionality of a provision of the Violence Against Women Act (VAWA), which provided a civil remedy for victims of gender-motivated violence. The Court held that, because those crimes were not economic in nature, _Lopez_ precluded the Commerce Clause from supporting the VAWA.

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220 Id. at 580, 583 (Kennedy, J., concurring).
221 Id. at 589 (Thomas, J., concurring).
223 Id. at 589 (Thomas, J., concurring).
224 Id. at 580, 583 (Kennedy, J., concurring).
226 _Morrison_, 529 U.S. at 613 (“Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity.”).
2010] Denied and Disparaged 309

The Court unknowingly relied on the principle of federalism that would be protected by a federalist Ninth Amendment:

If accepted, petitioners’ reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption. Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence . . . .

According to the Court, law enforcement against violent crimes was a traditional police power reserved to the states, and applying the “substantial effects” test to such noneconomic activity would expand enumerated power to disparage that reserved state right. It also would disparage other rights: “Petitioners’ reasoning, moreover, will not limit Congress to regulating violence but may . . . be applied . . . [to] other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant.”

Without citing the Ninth Amendment, the Court again applied the “federalism model.” It clearly was concerned that interpretations of the commerce power could infringe on the reserved rights of the states to govern their affairs. Justice Thomas concurred yet again, arguing that “[u]ntil this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce.” Perhaps the Ninth Amendment could have provided that standard.

5. Reaffirming the “Substantial Effects” Test

After expanding the commerce power for decades, the Court could have abandoned the “substantial effects” test. Though Lopez and Morrison rested on a distinction between economic and noneconomic activity, both seemed applicable to all regulations of intrastate activity. In Gonzalez v. Raich, however, the Court reaffirmed the “substantial effects test” and once again rejected a federalist rule of construction.

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225 Id. at 615.
226 See id. at 618 (“Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.”).
227 Id. at 615-16.
228 Id. at 627 (Thomas, J., concurring).
229 545 U.S. 1 (2005).
Raich involved the Controlled Substances Act (CSA), which was part of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (CDAPCA). The CSA classified drugs into five categories and listed marijuana as a Schedule I drug, thus making its “manufacture, distribution, or possession . . . a criminal offense.” Respondents challenged the constitutionality not of the CDAPCA or the CSA, but rather only of their prohibition on the “manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes.” Because California law exempted physicians and patients who possessed marijuana for medical purposes, respondents argued that the commerce power did not support the federal prohibition on medical marijuana and that the prohibition violated the Ninth and Tenth Amendments.

The Court began by emphasizing the case’s resemblance to Wickard. In both Wickard and Raich, “the regulation [was] squarely within Congress’s commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, had a substantial effect on supply and demand in the national market for that commodity.” Congress “had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA.” Therefore, the Court concluded, the CSA’s prohibition was a valid exercise of the commerce power.

The Court distinguished Lopez and Morrison because they involved challenges to entire statutes, while the plaintiffs in Raich challenged the CSA’s application to only one activity. Furthermore, the regu-
lated activities in *Lopez* and *Morrison* were noneconomic, while the activities the CSA as a whole regulated were “quintessentially economic” because the CSA regulated the “production, distribution, and consumption of commodities for which there is an established... interstate market.”  

By upholding an interpretation of the Commerce Clause that not only disparaged but also *denied* a police power that California had exercised, *Raich*, like *Wickard* before it, was a clear example of the inconsistency of the “substantial effects” test and the “federalism model.” Like the Bank of the United States, the CSA extended into an area that states had long claimed to have an interest in regulating.  

Therefore, regulation of intrastate marijuana cultivation was not “accessory” to interstate commerce, but rather was “important” enough that the Framers would have delegated it had they wished to divest “the people” of states (like California) of that right. By relying on *Wickard*, *Raich* was inconsistent with a federalist Ninth Amendment.

Concurring, Justice Scalia cited Chief Justice Marshall, who, as discussed earlier, had completely ignored the Ninth Amendment whenever it was raised. Scalia argued that activities that have “substantial effects” on interstate commerce are regulated pursuant to both the Commerce Clause and the Necessary and Proper Clause, because “[w]here necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.” Regulating marijuana cultivation for medical purposes was necessary for the CSA to function effectively. Citing *McCulloch*, Scalia reasoned that restraints on the Necessary and Proper Clause limited constructions of the commerce power.

Like Marshall, who argued in *Gibbons* that there was no limit on constructions of enumerated power except that they be “necessary

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240 *Id.* at 25-26.

241 See *id.* at 5 (calling California “a pioneer in the regulation of marijuana”).

242 *Id.* at 39 (Scalia, J., concurring) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421-22 (1819)); see also *supra* note 149 and accompanying text (discussing Marshall’s disregard for the Ninth Amendment).

243 *Raich*, 545 U.S. at 35 (Scalia, J., concurring).

244 See *id.* at 36 (Scalia, J., concurring) (explaining the need for broad regulatory schemes).

245 See *id.* at 39 (“As Chief Justice Marshall wrote in *McCulloch v. Maryland*, even when the end is constitutional and legitimate, the means must be ‘appropriate’ and ‘plainly adapted’ to that end.” (quoting *McCulloch*, 17 U.S. at 421)).
and proper,“246 Scalia believed that interpretations of the commerce power were constitutional so long as they were “necessary and proper” to a regulatory scheme.247 But Madison’s Bank Speech was an argument against interpretations of both the Necessary and Proper Clause and an enumerated power, which supporters of the Bank cited together.“ In short, Scalia’s argument conflicted with Madison’s articulation of the “federalism model.”

Dissenting in Raich, Justice O’Connor249 adhered to her reasoning in Lopez and Morrison.250 She protested that the majority had declined “to protect historic spheres of state sovereignty from excessive federal encroachment.”251 States’ police powers “always included authority to define criminal law and to protect the health, safety, and welfare of their citizens.”252 Now Congress had ended California’s exercise of those powers.253 According to Justice O’Connor, Raich was like Lopez and Morrison because intrastate marijuana cultivation was a non-economic activity.254

Justice O’Connor then applied a form of the “federalism model.” In determining the relevant activity, Justice O’Connor looked to rights reserved to the states by the Tenth Amendment.255 She examined whether Congress’s interpretation of the Commerce Power disparaged those rights. Instead of a finding that the CSA affects interstate

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246 See Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 187-88 (1824) (explaining that the “necessary and proper” requirement is a “limitation on the means which may be used” but “is not extended to the powers which are conferred; nor is there one sentence in the constitution, which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule.”).

247 Raich, 545 U.S. at 36 (Scalia, J., concurring) (“Though the conduct in Lopez was not economic, the Court nevertheless recognized that it could be regulated as ‘an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.’” (quoting United States v. Lopez, 514 U.S. 549, 561 (1994))).

248 See supra notes 60-62 and accompanying text.

249 Justice O’Connor was joined by Chief Justice Rehnquist and Justice Thomas in all but one part of her dissent.

250 See supra notes 229, 224-27 and accompanying text (discussing Justice O’Connor’s reasoning in Lopez and Morrison).

251 Raich, 545 U.S. at 42 (O’Connor, J., dissenting).

252 Id.

253 See id. at 43 (arguing that the Court “extinguish[ed] [California’s] experiment”).

254 See id. at 45 (“In my view, the case before us is materially indistinguishable from Lopez and Morrison when the same considerations are taken into account.”).

255 Id. at 52 (reasoning that “Congress must exercise its authority under the Necessary and Proper Clause in a manner consistent with basic constitutional principles,” including state sovereignty under the Tenth Amendment).
commerce, she argued, the Court needed to find that intrastate marijuana cultivation itself substantially affects interstate commerce, because California had chosen to “distinguish the regulation of medicinal marijuana.” Therefore, O’Connor felt that any constitutional justification would have to examine “the personal cultivation, possession, and use of marijuana for medicinal purposes.”

Nevertheless, like the Court prior to the New Deal, Justice O’Connor cited the Tenth Amendment for a federalist rule of construction. She rejected interpretations of the commerce power that infringed on reserved powers of the states:

> Congress cannot use its authority under the [Necessary and Proper] Clause to contravene the principle of state sovereignty embodied in the Tenth Amendment. Likewise, that authority must be used in a manner consistent with the notion of enumerated powers—a structural principle that is as much part of the Constitution as the Tenth Amendment.

O’Connor believed that the Tenth Amendment precluded Congress from using the “substantial effects” test to regulate intrastate, noneconomic activity. She unknowingly applied the rule of construction that would be protected by a federalist Ninth Amendment. Unfamiliar with the Ninth Amendment’s “lost history,” O’Connor admonished that “[w]e would do well to recall how James Madison, the father of the Constitution, described our system of joint sovereignty.”

Though O’Connor invoked a rule of construction to limit the “substantial effects” test, Justice Thomas still urged the Court to abandon it entirely as an infringement on states’ rights:

> The majority’s . . . substantial effects test is rootless, because it is not tethered to either the Commerce Clause or the Necessary and Proper Clause. . . . [T]he Federal Government may now regulate quilting bees, clothes drives, and potluck suppers throughout the 50 States. This makes a mockery of Madison’s assurance . . . that the “powers delegated” to the Federal Government are “few and defined,” while those of the States are “numerous and indefinite.”

Thomas lamented that the Court was “willing neither to enforce limits on federal power, nor to declare the Tenth Amendment a dead let-

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256 Id. at 48.
257 Id.
258 Id. at 52.
259 Id. at 58.
260 Id. at 67, 69 (Thomas, J., dissenting) (quoting THE FEDERALIST NO. 45, at 313 (James Madison) (Jacob E. Cooke ed., 1961)).
ter." Under the “federalism model,” however, the Tenth Amendment did not limit the CSA because Congress had exercised an enumerated power. The Ninth Amendment, though, precluded the majority’s construction. While Thomas’s reasoning was most consistent with the “federalism model,” he also failed to cite the Ninth Amendment.

6. The “Federalism Model” and the Commerce Clause

When Chief Justice Marshall ignored the Ninth Amendment challenge in Gibbons, he sparked an expansion of the commerce power that continues today. The Supreme Court first conflated the Ninth and Tenth Amendments at the end of the nineteenth century, leading the New Deal–era Court to cite Marshall in denying limits on the Commerce Clause. If Lash is correct, the New Deal–era Court relied on inaccurate history when it adopted the “substantial effects” test. Even when the Rehnquist Court applied a federalist rule of construction, it failed to cite the Ninth Amendment because its “lost history” had not yet been uncovered. A federalist Ninth Amendment would provide both textual and historical support for Justice Thomas’s suggestion that the “substantial effects” test be abandoned.

B. The “Spirit” of the Tenth Amendment

By the 1930s, the Court already had conflated the Ninth and Tenth Amendments. As a result, as this Section will discuss, the Court eventually concluded that the Tenth Amendment’s “spirit” provided an active rule of construction that protected state functions. But under the “federalism model,” it was the Ninth Amendment that provided such a rule. Over the next seven decades, the Court sought to limit federal expansion into areas of traditional state control. A federalist Ninth Amendment would provide textual support for the Court’s approach in those cases.

261 Id. at 71.
262 See supra note 79 and accompanying text.
263 See supra note 199 and accompanying text.
264 See supra note 79 and accompanying text.
265 Under the “federalism model,” we first look to whether a power is “great and important” (a “traditional state function”). If it is, then we examine whether that function is protected by the Tenth Amendment. The Ninth Amendment prevents the federal government from construing enumerated powers in a way that would “disparage” that function. See supra notes 150-53 and accompanying text.
1. Early References to an Active Tenth Amendment

During the New Deal, the Court rejected the Tenth Amendment as a limit on constructions of enumerated power. Nevertheless, it implied that the Tenth Amendment might protect certain “traditional” state functions. Ultimately, its view of the Tenth Amendment suggests that the Court would have embraced a form of the “federalism model” in some cases, though it no longer looked to the Ninth Amendment for the necessary rule of construction.

In the same year as *Ashwander*, where it first declined to limit interpretations of enumerated powers, the Court similarly rejected a rule of construction that would have protected particular state functions. In *United States v. California*, the United States sued California for operating a railroad with defective cars in violation of the Federal Safety Appliance Act. California argued that the Act did not apply to the states. Despite conceding that California had exercised a power reserved to it by the Tenth Amendment, the Court held that state powers presented no limit on interpretations of enumerated powers. Because the Court had stopped citing the Ninth Amendment for its rule of construction, it concluded that only a “mere truism” divided federal power from states’ rights.

The Tenth Amendment again posed no limit in *New York v. United States*, where New York challenged a federal act taxing the public collection and sale of mineral water. Nevertheless, the Court conceded that the Tenth Amendment might provide a limiting rule of construction where states are deprived of their ability to perform traditional public functions. Dissenting, Justices Douglas and Black believed

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267 See *supra* notes 169-73 and accompanying text.
266 297 U.S. 175 (1936).
270 *United States v. California*, 297 U.S. at 183.
271 *Id.*
272 See *id.* at 184 (“The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government . . . .”).
274 *Id.* at 573-74. The statute being challenged was the Revenue Act of 1932, ch. 209, § 615(a)(5), 47 Stat. 169, 265.
277 New York argued that the Act violated the Tenth Amendment because the state “was engaged in the exercise of a usual, traditional and essential governmental function.” *New York v. United States*, 326 U.S. at 574. The principal opinion held that bottling mineral water was not an essential state function, but it conceded that the federal government could not have taxed it if it were. See *id.* at 582 (“There are, of course, State activities and
that state functions could not be taxed regardless of whether or not they were traditionally public. They argued that all state functions should be immune from federal taxation lest the people be deprived of state services. In doing so, the dissent invoked the Tenth Amendment but failed to cite the Ninth.

The principal opinion was consistent with the “federalism model.” It relied on the Tenth Amendment to derive state functions that were immune from federal taxation. Then it argued that the federal government could not construe its power in a way that prevented states from performing traditional state functions. Though it ultimately upheld the use of federal power, the principal opinion, using the “federalism model,” applied the Tenth Amendment and the rule of construction embodied by the Ninth.

By contrast, and perhaps ironically, the dissent was inconsistent with the “federalism model.” It argued that no state functions may be taxed. Under the “federalism model,” the dissent would contend that the Ninth Amendment does not protect merely powers traditionally reserved to the states, but rather all powers left to the states after others were delegated. Yet Madison argued that the Ninth Amendment protects only state powers that are “great and important.” Without that distinction, it would be impossible to determine what was “accessory” to enumerated powers on the one hand, and “retained by the people” on the other.

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State-owned property that partake of uniqueness . . . . These could not be included for purposes of federal taxation in any abstract category of taxpayers without taxing the State as a State.”. Chief Justice Stone argued for an even broader rule of construction focusing on whether state sovereignty as a whole was frustrated. See id. at 587 (Stone, C.J., concurring) (“[A] federal tax which is not discriminatory as to the subject matter may nevertheless so affect the State, merely because it is a State that is being taxed, as to interfere unduly with the State’s performance of its sovereign functions . . . .”)

See id. at 591 (Douglas, J., dissenting) (“A State’s project is as much a legitimate governmental activity whether it is traditional, or akin to private enterprise, or conducted for profit.”).

See id. at 593 (“If the federal government can place the local governments on its tax collector’s list, their capacity to serve the needs of their citizens is at once hampered or curtailed.”).

See id. at 595 (“If the power . . . to tax the States is conceded, the reserved power of the States guaranteed by the Tenth Amendment does not give them the independence which they have always been assumed to have.”).

See supra notes 150-55.
2. Resurrecting the “Spirit” of the Tenth Amendment

After United States v. California and New York v. United States, the Tenth Amendment essentially disappeared. In the 1970s and 1980s, however, as discussed below, the Rehnquist Court invoked it to prevent federal regulation in areas of traditional state concern. In the end, the Court’s use of the Tenth Amendment as an active rule of construction failed partly because it lacked textual support that the Ninth could have provided.

In National League of Cities v. Usery, the Court protected traditional state functions for the first time in nearly forty years. Congress had extended the FLSA (upheld in Darby) to mandate minimum wage and maximum hour requirements for public employees, and the Court held that the extension violated the Tenth Amendment. It began by noting that the Constitution protects state sovereignty from enumerated power. It then identified regulation of public wages as a traditional state function. The FLSA infringed on “important” state functions because it raised the costs of police and fire protection, reduced training for Highway Patrol, limited affirmative action programs, and “displace[d]” state employment policies. It also threatened state sovereignty by forcing states to restructure employee relationships: “For even if we accept appellee’s assessments concerning the impact of the amendments, their application will nonetheless significantly alter or displace the States’ abilities to structure employer-employee relationships in such areas as fire prevention, police protec-

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281 See supra notes 179-84 and accompanying text.
283 See id. at 852 (“We hold that insofar as the challenged [FLSA] amendments operate to directly displace the States’ freedom to structure integral operations in areas of traditional government functions, they are not within the authority granted Congress . . . .”)
284 See id. at 845 (“We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.”).
285 See id. (“One undoubted attribute of state sovereignty is the States’ power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions . . . .”).
286 See id. at 846-47 (describing the FLSA as a “forced relinquishment of important governmental activities”).
tion, sanitation, public health, and parks and recreation.” Ultimately, “[t]he [Tenth] Amendment expressly declare[d] the constitutional policy that Congress may not exercise power in a fashion that impairs the States’ integrity or their ability to function effectively in a federal system.” In other words, the Court applied the Tenth Amendment as a federalist rule of construction.

Under the “federalism model,” however, it was not the Tenth Amendment that protected state functions from interpretations of the commerce power. Rather, it was the Ninth that provided the necessary rule of construction. Despite conflating the Ninth and Tenth Amendments, the Court applied the “federalism model” just as Madison would have done.

Yet failing to cite the Ninth Amendment exposed the Court to charges of judicial activism. Justices Brennan, White, and Marshall complained in dissent that the Court had discarded “[Chief Justice John Marshall’s] postulate that the Constitution contemplates that restraints upon exercise by Congress of its plenary commerce power lie in the political process and not in the judicial process.” Like Marshall, they denied any limit on the commerce power: “But there is no restraint based on state sovereignty requiring or permitting judicial enforcement anywhere expressed in the Constitution; our decisions over the last century and a half have explicitly rejected the existence of any such restraint on the commerce power.”

Chief Justice Marshall ignored the Ninth Amendment whenever it was raised. Therefore, under the “federalism model,” it was Justice Brennan—not the majority—who was endorsing an extratextual interpretation of the Constitution. Unfortunately, because the Ninth Amendment was still “forgotten” in 1976, it seemed as if the majority merely had “manufactured an abstraction without substance, founded neither in the words of the Constitution nor on precedent.”

Understandably, the Court’s reliance on the Tenth Amendment puzzled Brennan:

The reliance of my Brethren upon the Tenth Amendment as “an express declaration of [a state sovereignty] limitation” not only suggests that they overrule governing decisions of this Court that address this

287 Id. at 851.
288 Id. at 843 (quoting Fry v. United States, 421 U.S. 542, 547 n.7 (1975)).
289 Id. at 857 (Brennan, J., dissenting).
290 Id. at 858.
291 See supra note 149 and accompanying text.
question but must astound scholars of the Constitution. . . . Not only early decisions . . . hold that nothing in the Tenth Amendment constitutes a limitation on congressional exercise of powers delegated by the Constitution to Congress.\textsuperscript{293}

Instead, Brennan quoted Darby for the proposition that the Tenth Amendment did not provide a rule of construction: “The [A]mendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments . . . .”\textsuperscript{294} Of course, Brennan was correct. The Tenth Amendment was a mere “truism” dividing federal and state. Like the Court in Darby, Brennan missed the Ninth Amendment’s rule of construction that had, for a hundred years, transformed the Tenth into an active rule of federalism. Brennan noted that the Court had returned to its view of the Tenth Amendment from pre–New Deal–era cases such as Carter Coal.\textsuperscript{295} Under the “federalism model,” however, those cases erred not in their conclusions, but only in their conflation of the Ninth and Tenth Amendments.\textsuperscript{296}

Nine years later, the Court reversed course in a ruling that was completely inconsistent with the “federalism model.” In Garcia v. San Antonio Metropolitan Transit Authority, Justice Blackmun joined the dissenters to overrule National League of Cities.\textsuperscript{297} Writing for the Court, he reasoned that National League of Cities’ distinction between “traditional” and “non-traditional” state functions was unworkable.\textsuperscript{298} He rejected any judicial role in protecting particular state functions.

Blackmun acquiesced in the face of having to determine which rights were “accessary” to enumerated power on the one hand, and which the Tenth Amendment reserved to the states on the other. But under the “federalism model,” the difficulty of determining which

\textsuperscript{293} Id. at 861-62 (footnote omitted) (citations omitted) (quoting the majority opinion).
\textsuperscript{294} Id. at 862 (quoting United States v. Darby, 312 U.S. 100, 124 (1941)).
\textsuperscript{295} Id. at 868.
\textsuperscript{296} See supra notes 159-65 and accompanying text.
\textsuperscript{297} 469 U.S. 528, 531 (1985).
\textsuperscript{298} See id. at 531 (“[T]he attempt to draw the boundaries of state regulatory immunity in terms of ‘traditional governmental function’ is not only unworkable but is also inconsistent with established principles of federalism . . . .”). After National League of Cities, district courts had found that regulating ambulance services, licensing drivers, operating airports, disposing waste, and operating highways were traditional functions. Others had held that the issuance of industrial revenue bonds, regulation of intrastate natural gas sales, traffic regulation, operation of phone systems, leases and sales of natural gas, and operation of health facilities were not. See id. at 538-39 (cataloguing district court opinions).
powers would have been “great and important” enough to have been enumerated was not enough for the Court to abstain from protecting rights “retained by the people.” A federalist Ninth Amendment would require courts to prohibit disparagement of traditional state functions. Courts cannot completely disregard a state’s right without violating the Ninth Amendment.

If there were any doubt that the majority’s reasoning was inconsistent with the “federalism model,” Blackmun then argued that all powers not specifically reserved to the states are delegated to the federal government: “The States unquestionably do ‘retai[n] a significant measure of sovereign authority.’ They do so, however, only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.” If Lash’s historical analysis is correct, Blackmun’s argument was precisely what the Ninth Amendment was intended to prevent. The Ninth Amendment’s purpose is to ensure that courts cannot presume that powers are delegated simply by construing a lack of enumerated states’ rights as a “transfer” to the federal government. Moreover, Madison never conceded in his Bank Speech that courts should abstain if it is difficult to determine whether chartering banks is a reserved state right. The Ninth and Tenth Amendments admitted no such exception.

Dissenting, Justices Powell, Rehnquist, and O’Connor insisted that there were limits on constructions of enumerated powers. Without a federalist Ninth Amendment, however, their argument lacked textual support. They concluded that the majority’s “decision effectively reduces the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the Commerce Clause.” They traced the Tenth Amendment’s history and the “integral role of the Tenth Amendment in our constitutional theory.” They then echoed the

299 Id. at 549 (quoting EEOC v. Wyoming, 460 U.S. 226, 269 (1983) (Powell, J., dissenting)).

300 See supra Section I.C (discussing Lash’s two Texas Law Review articles).

301 See supra notes 150-55 and accompanying text (recounting Madison’s speech against the Bank of the United States).

302 Garcia, 489 U.S. at 567 (Powell, J., dissenting) (“[T]hat federal political officials, invocationg the Commerce Clause, are the sole judges of the limits of their own power…, is inconsistent with the fundamental principles of our constitutional system.”).

303 Garcia, 489 U.S. at 570; see also id. at 568-69 (recounting the history of the Tenth Amendment and the importance of federalism).
popular-sovereignty principle underlying the “lost history” of the Ninth and Tenth Amendments: “It is at these state and local levels—not in Washington as the Court so mistakenly thinks—that ‘democratic self-government’ is best exemplified.”

But these dissenters never cited the Ninth Amendment’s rule of construction, its integral role in the history of the Tenth Amendment, or its connection to popular sovereignty. Instead, they warned, “The Court’s action reflects a serious misunderstanding, if not an outright rejection, of the history of our country and the intention of the Framers of the Constitution.” Had the Ninth Amendment’s “lost history” been available, it would have offered even more support for their case.

Writing separately, Justice O’Connor noted that only the principle animating the Tenth Amendment provided textual support for the dissent’s federalism argument. She began by stating that “[t]he text of the Constitution does not define the precise scope of state authority other than . . . in the Tenth Amendment.” She then continued, “The spirit of the Tenth Amendment, of course, is that the States will retain their integrity in a system in which the laws of the United States are nevertheless supreme.” Moved by that “spirit,” O’Connor refused to “shirk the duty acknowledged by National League of Cities and its progeny.” Had O’Connor been familiar with the “federalism model” of the Ninth Amendment, she could have cited it instead of the “spirit” of the Tenth.

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306 Id. at 577.
307 Id.
308 Id. at 582 (O’Connor, J., dissenting).
309 Id. at 585.
310 Id. at 589. O’Connor was particularly critical of the Court’s willingness to abstain from federalism issues: “That the Court shuns the task [from National League of Cities] today by appealing to the ‘essence of federalism’ can provide scant comfort to those who believe our federal system requires something more than a unitary, centralized government.” Id.
311 The “federalism model” of the Ninth Amendment may also be applicable to cases relying upon Garcia insofar as it suggests that the Ninth Amendment, rather than the Tenth, provides a rule of construction protecting reserved state powers. See, e.g., Gregory v. Ashcroft, 501 U.S. 452, 461 (1991) (explaining that the plain-statement rule for determining the propriety of Congressional abrogation of state-office requirements necessitates “that the states retain substantial sovereign powers”); South Carolina v. Baker, 485 U.S. 505, 527 (1988) (holding that the Tenth Amendment does not prohibit Congress from compelling states to issue bonds in registered form).
3. The Tenth Amendment as a Limit on Federal “Commandeering”

After Garcia, the Court abandoned the Tenth Amendment as a complete protection of particular state functions in favor of limiting the means by which Congress regulated those functions. In the end, the “federalism model” could have provided a textual basis for the Court’s limits on federal “commandeering.”

In South Dakota v. Dole, the Court considered the constitutionality of a statute that directed the Secretary of Transportation to withhold federal highway funds from any state with a drinking age below twenty-one. South Dakota argued that the statute violated the Twenty-first Amendment. Yet the Court held that the measure was constitutional because neither the Twenty-first nor the Tenth Amendment barred conditional federal grants in the absence of coercion.

In her dissent, Justice O’Connor again applied a form of the “federalism model.” She argued that the Twenty-first Amendment reserved to the states the power to establish a minimum drinking age. As a result, Congress could not rely on the Commerce Power to support the statutory provision because to do so would infringe on a reserved state right. Justice Brennan agreed in a separate dissent. Under the “federalism model,” of course, the Ninth Amendment provided the rule of construction that both Brennan and O’Connor applied. Lacking textual support, however, no constitutional provision seemed to preclude interpretations of the commerce power that pressured states to comply with federal regulations.

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314 23 U.S.C. § 158 (2006); see also Dole, 483 U.S. at 205 (describing the statute).
315 The Twenty-first Amendment repealed the Eighteenth Amendment’s prohibition on alcohol. See U.S. CONST. amend. XXI.
316 See Dole, 483 U.S. at 210 (citing previous cases in which the Court “held that a perceived Tenth Amendment limitation on congressional regulation of state affairs did not concomitantly limit the range of conditions legitimately placed on federal grants”).
317 See id. at 218 (O’Connor, J., dissenting) (“[T]he regulation of the age of the purchasers of liquor . . . falls squarely within the scope of those powers reserved to the States by the Twenty-first Amendment.”).
318 See id. (“Congress simply lacks power under the Commerce Clause to displace state regulation of this kind.”).
319 See id. at 212 (Brennan, J., dissenting) (“Since States possess this constitutional power, Congress cannot condition a federal grant in a manner that abridges this right.”).
O’Connor again employed the Tenth Amendment in yet another case—New York v. United States. In that case, the Court addressed the constitutionality of the Low-Level Radioactive Waste Policy Amendments Act of 1985, which provided monetary and access incentives, as well as a take-title provision, to induce states to provide for disposal of their waste. Plaintiffs contended that the Act violated, among other provisions, the Guarantee Clause and the Tenth Amendment.

Writing for the majority, O’Connor began with the “passive” view of the Tenth Amendment that had been accepted since the New Deal:

If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.

It is in this sense that the Tenth Amendment “states but a truism that all is retained which has not been surrendered.”

O’Connor was correct that the Tenth Amendment is a “truism.” Under the “federalism model,” the Tenth Amendment simply reserves nondelegated powers to the states. But O’Connor again stretched the Tenth Amendment beyond its text:

The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. . . . The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power.

Like in Garcia, O’Connor invoked the “spirit” of the Tenth Amendment for a federalist rule of construction. But Madison believed in no such “spirit.” Under the “federalism model,” he proposed the Ninth specifically to ensure such a rule.
Nevertheless, consistent with her interpretation of the Tenth Amendment as a “truism,” O’Connor treated enumerated powers as the logical opposite of reserved states’ rights. She argued that because monetary and access incentives, unlike the take-title provision, were not “coercive,” they fell within the legitimate scope of delegated power and did not violate the Tenth Amendment.\(^{327}\) On the other hand, because the take-title provision essentially required New York to implement legislation mandated by Congress, it was “coercive” and fell outside Congress’s enumerated powers, violating the Tenth Amendment.\(^{328}\)

Under the “federalism model,” however, an act can infringe on reserved states’ rights even if it is an exercise of enumerated powers. It is the Ninth Amendment that prevents expansive constructions of that power. Therefore, O’Connor could have cited the Ninth Amendment instead of relying on the Tenth. She could have argued that because the monetary and access incentives did not “commandeer” state processes, they were merely “accessary” to a delegated power and did not “deny or disparage” rights retained by the states.\(^{329}\) On the other hand, the right of states to implement legislation might be an “important” power that would have been enumerated had the Framers wished.\(^{330}\) Because the take-title provision “commandeered” that legislative process, it “denied” rights retained by the people of New York.

Invoking the “spirit” of the Tenth Amendment again exposed O’Connor to the criticism that she had invented a federalist rule of construction. Citing \textit{Darby}, Justice Stevens insisted that “[t]he Tenth Amendment surely does not impose any limit on Congress’ exercise of the powers delegated to it by Article I. Nor does the structure of the constitutional order or the values of federalism mandate such a for-

\(^{327}\) New York v. United States, 505 U.S. at 173-74 (holding that because the incentives were conditional exercises of Congressional power, they did not violate the Tenth Amendment).

\(^{328}\) As the Court explained:

A choice between two unconstitutionally coercive regulatory techniques is no choice at all... No other federal statute has been cited which offers a state government no option other than that of implementing legislation enacted by Congress. Whether one views the take title provision as lying outside Congress’ enumerated powers or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the Constitution.

\(^{329}\) \textit{Id.} at 176-77.

\(^{330}\) See supra notes 150-55 and accompanying text (discussing the “federalism model” as typified by Madison).

\(^{331}\) See id.
mal rule."^{331} Had O’Connor cited the Ninth Amendment, perhaps she could have avoided the familiar protest that there was no textual limit on interpretations of enumerated power.

Finally, in Printz v. United States,^{332} the Court again summoned the “spirit” of the Tenth Amendment instead of relying on the Ninth. In Printz, the Court assessed the constitutionality of certain provisions of the Brady Handgun Violence Prevention Act, which required states’ chief law enforcement officers to conduct background checks on prospective purchasers of firearms.^{333} Justice Scalia began by noting that no particular constitutional provision applied:

> Petitioners . . . contend that congressional action compelling state officers to execute federal laws is unconstitutional. Because there is no constitutional text speaking to this precise question, the answer . . . must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court.  

Scalia then discussed, at length, why constitutional history, structure, and precedent precluded the commandeering of state executives.^{335} By contrast, in their concurring opinions, Justices O’Connor and Thomas emphasized that the Act violated the Tenth Amendment.^{336} If Justices Scalia, O’Connor, and Thomas had been familiar with the Ninth Amendment’s “lost history,” they could have cited the Ninth Amendment in addition to the Tenth.\footnote{337}

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\footnote{331}{Id. at 211 (Stevens, J., concurring in part and dissenting in part) (footnotes omitted).}  
\footnote{332}{521 U.S. 898 (1997).}  
\footnote{333}{18 U.S.C. § 922(s)(1)(A)(i)(III),(IV), § 922(s)(2) (2006)) invalidated by Printz, 521 U.S. at 933; see also Printz, 521 U.S. at 902-05 (outlining the Act).}  
\footnote{334}{Printz, 521 U.S. at 905.}  
\footnote{335}{See id. at 906-35.}  
\footnote{336}{See id. at 935-36 (O’Connor, J., and Thomas, J., concurring) (explicitly emphasizing the Tenth Amendment’s importance to the Court’s holding).}  
\footnote{337}{The Court limited its “commandeering doctrine” in Reno v. Condon by holding that the Driver’s Privacy Protection Act of 1994, 18 U.S.C. §§ 2721-2725 (2006), which prohibited states from disclosing the information that people provide when obtaining driver’s licenses, did not violate the Tenth Amendment because it did not require states to enact any laws, nor did it commandeer their officials. Reno v. Condon, 528 U.S. 141, 151 (2000). By assuming that the Tenth Amendment might in some cases bar federal laws from commandeering state officials, the Court, once again, assumed that the Tenth Amendment, by implication, could provide a rule of construction limiting interpretations of delegated power.}
4. The “Federalism Model” and the “Spirit” of the Tenth Amendment

Beginning in the 1930s, the Court suggested that the Tenth Amendment might protect traditional state functions from certain interpretations of enumerated powers.\(^{338}\) It cited the Tenth Amendment instead of the Ninth because earlier cases had conflated the two.\(^{339}\) After five decades of federal expansion, the Court returned to summoning the “spirit” of the Tenth Amendment in defense of reserved state powers. Applying the Ninth Amendment instead of the “spirit” of the Tenth would have avoided criticisms that the Constitution contained no express limit on enumerated power. Ultimately, therefore, the “federalism model” would provide an alternative, textually supported framework for the Supreme Court’s Tenth Amendment jurisprudence.

C. The Eleventh Amendment

In addition to the Court’s Commerce Clause and Tenth Amendment jurisprudence, the Ninth Amendment might support the Court’s extra-textual reading of the Eleventh Amendment. The Eleventh Amendment is the only rule of construction in the Constitution other than the Ninth Amendment. It provides that “[t]he Judicial power of the United States shall not be construed to extend to any suit . . . against one of the United States by citizens of another State, or by citizens or subjects of any Foreign State.”\(^{340}\) Yet, as explained below, the Court has interpreted the Eleventh Amendment to protect state sovereign immunity in cases where the amendment’s text does not apply. The “federalism model” would provide an alternative framework for the Court’s expansion of the Eleventh Amendment because the Court has rejected constructions of federal power that abrogate sovereign immunity, a traditional state right.

1. Expanding the Eleventh Amendment

The Court’s expansion of the Eleventh Amendment began in 1890. That expansion was consistent with the “federalism model”

\(^{338}\) See supra subsection III.B.1.
\(^{339}\) See supra note 79 and accompanying text.
\(^{340}\) U.S. CONST. amend. XI.
because the Court considered state sovereign immunity to be a reserved state right. \(^{341}\)

In *Hans v. Louisiana*, \(^{342}\) a Louisiana citizen brought an action against his state under federal question jurisdiction, \(^{343}\) claiming that Louisiana’s failure to pay bond interest violated the Contracts Clause. \(^{344}\) The Court began by conceding that the language of the Eleventh Amendment does not extend to suits against states by their own citizens. \(^{345}\) Nevertheless, it held that the Eleventh Amendment barred the suit. \(^{346}\)

The Court’s account of the Eleventh Amendment connects it with the “federalism model.” According to the Court, states initially could not be sued. \(^{347}\) When the Constitution was ratified, however, Article III granted diversity jurisdiction over states in federal court. \(^{348}\) An out-of-state plaintiff later sued a state in *Chisholm v. Georgia*, and the Court in that case construed Article III to give itself jurisdiction. \(^{349}\) But the case caused such an uproar that Congress proposed the Eleventh Amendment to overrule it. \(^{350}\) Congress granted federal question jurisdiction in 1875, allowing citizens to sue their own states in federal court. \(^{351}\) While the Eleventh Amendment’s text continued to prohibit only suits against states by citizens of other states, it was originally understood to protect state sovereign immunity in all cases. \(^{352}\)

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\(^{341}\) Lash has suggested that the histories of the Ninth, Tenth, and Eleventh Amendments are connected. See Kurt T. Lash, *Leaving the Chisholm Trail: The Eleventh Amendment and the Background Principle of Strict Construction*, 50 WM. & MARY L. REV. 1577, 1696-98 (2009) (positing that all three amendments were rooted in notions of popular sovereignty and protected the same sort of rights, though the Ninth and Tenth Amendments were too “broad”).

\(^{342}\) 134 U.S. 1 (1890).

\(^{343}\) Id. at 9-10.

\(^{344}\) Id. at 1-3 (statement of the case).

\(^{345}\) Id. at 11 (majority opinion) (“[The Eleventh Amendment] did not in terms prohibit suits by individuals against the States, but declared that the Constitution should not be construed to import any power to authorize the bringing of such suits.”).

\(^{346}\) Id. at 20-21.

\(^{347}\) Id. at 10.

\(^{348}\) Id. at 9-10.

\(^{349}\) 2 U.S. (2 Dall.) 419, 430-31 (1793), superseded by constitutional amendment, U.S. CONST. amend. XI, as recognized in *Hans*, 134 U.S. at 11.

\(^{350}\) See *Hans*, 134 U.S. at 11 (recounting that at the first meeting of Congress after *Chisholm*, the Eleventh Amendment was “almost unanimously proposed” and adopted shortly thereafter).


\(^{352}\) See id. at 15 (“Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own state
The *Hans* Court concluded by arguing that the Eleventh Amendment was enacted specifically to prevent an interpretation of Article III that abrogated state sovereign immunity:

[Article III] is appealed to now, as [in *Chisholm*], as a ground for sustaining a suit brought by an individual against a State. The reason against it is as strong in this case as it was in that. It is an attempt to strain the constitution and the law to a construction never imagined or dreamed of. 353

As read by the Court, the Eleventh Amendment provided a rule of construction preventing expansive interpretations of federal power. States retained their state sovereign immunity after the Constitution was ratified. Article III could not be construed, as it had been in *Chisholm*, to deny that immunity. Thus, if the Ninth Amendment originally protected reserved states’ rights, then the Eleventh Amendment simply emphasized the Ninth’s protection of a particular right—sovereign immunity. In response to *Chisholm’s* “disparagement” of state sovereign immunity, the Eleventh Amendment was necessary to reaffirm the Ninth Amendment’s rule of construction.

2. Questioning the Eleventh Amendment’s Expansion

In a pattern parallel to its Tenth Amendment jurisprudence, the Court first focused on federalism in the 1970s, then limited protections of state sovereignty, and finally settled on an approach that was consistent with the “federalism model.” Like its approach in other areas, the Court looked beyond the Ninth Amendment for a protection of states’ rights.

Two years before *National League of Cities*, where the Court first invoked the Tenth Amendment to protect traditional state functions, it reaffirmed *Hans* in *Edelman v. Jordan*. The Court employed a federalist rule of construction in both *National League of Cities* and *Edelman*, but it relied on the Tenth and Eleventh Amendments instead of citing the Ninth.

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353 Id.
354 See supra subsections III.B.2 and III.B.3 (describing the revival and use of the Tenth Amendment to protect traditional state functions and as a source of the commandeering doctrine).
355 See supra notes 280-88 and accompanying text.
A decade later, members of the Court began to question protections of state sovereignty. In *Garcia*, Justice Blackmun reversed course and overturned *National League of Cities*.\(^{357}\) He cited the lack of textual limitations on constructions of enumerated power.\(^{358}\) In the same term, Justice Brennan criticized the Court’s Eleventh Amendment jurisprudence. In *Atascadero State Hospital v. Scanlon*,\(^{501}\) he argued in dissent that the Eleventh Amendment overruled *Chisholm* only insofar as it subjected states to suit in diversity cases.\(^{560}\) According to Brennan, states were subject to suit in federal question cases because they forfeited their immunity by ratifying the Constitution.\(^{561}\)

Brennan’s account of *Chisholm* may have been correct. If it was, then the Court’s interpretation of the Eleventh Amendment was anachronistic and unfounded. But the *Ninth* Amendment contains no distinction between diversity and federal question jurisdiction. If the Eleventh Amendment was simply a restatement of the Ninth in a particular context, then the Ninth Amendment would protect state sovereign immunity even where the Eleventh Amendment’s text does not apply.

Nonetheless, Justice Brennan failed to persuade the Court. By the 1990s, the Court was back to reaffirming *Hans*.\(^{362}\) In *Seminole Tribe of Florida v. Florida*,\(^{363}\) the Court held that the Eleventh Amendment prohibited courts from construing Article I power to abrogate state sovereignty.\(^{364}\) Like in both its Commerce Clause and Tenth Amendment jurisprudence,\(^{365}\) the Court continued to prevent interpretations of enumerated power from infringing on states’ rights.

\(^{357}\) See supra notes 297-99 and accompanying text.

\(^{358}\) Id.


\(^{360}\) See id. at 282-83 (Brennan, J., dissenting) (“*Chisholm* did not present the question whether a State could be sued in federal court where the cause of action arose under federal law.”).

\(^{361}\) See id. at 277 (“The States retained their full sovereign authority over state-created causes of action . . . . On the other hand, where the Federal Government, in the [Constitution] had substantive lawmaking authority, the States no longer retained their full sovereignty and could be subject to suit in federal court.” (footnote omitted)).


\(^{364}\) See id. at 72-73 (“The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.”).

\(^{365}\) See supra subsections III.A.4 and III.B.3.
3. Combining the Eleventh Amendment with the Tenth

After Seminole Tribe, the Court, as illustrated below, derived a federalist rule of construction from both the Tenth and Eleventh Amendments and the Constitution’s structure. The Court had to rely on the Tenth and Eleventh Amendments because the federalist history of the Ninth had not yet been “uncovered.”

In 1999, the decision in Alden v. Maine expanded the Eleventh Amendment still further when the Court held that it barred a plaintiff from suing his own state in state court. This time, it was not just the Eleventh Amendment that protected the states:

“Eleventh Amendment immunity[] . . . is . . . a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution’s structure, its history, and the authoritative interpretations by this Court make clear, the States’ immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution . . . .”

According to the Court, states retained their sovereign right to immunity from private suits. That right was derived from the structure of the Constitution, which ensured their “status as residuary sovereigns and joint participants in the governance of the Nation.” Finally, the Court argued that sovereign immunity in state courts was more of a traditional state right than immunity in federal courts because the “power to press a State’s own courts into federal service . . . is the power . . . to commandeer the entire political machinery of the State.” Once again, federal “commandeering” threatened a right that was reserved to the states.

The Court based its decision not merely on the Eleventh Amendment, but also on the “structure” of the Constitution and on traditional state sovereignty. Read in conjunction with the Court’s Commerce Clause and Tenth Amendment cases, Alden’s connection to the Ninth Amendment is familiar. According to the Court, sovereign

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357 See id. at 754 (“In light of history, practice, precedent, and the structure of the Constitution, we hold that the States retain immunity from private suit in their own courts . . . .”).
358 Id. at 713.
359 See id. at 715 (“The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity.”).
360 Id. at 748.
361 Id. at 749.
immunity is a traditional right reserved to the states. Federal power cannot be construed to “deny or disparage” that right. Yet again, though the Court did not cite the Ninth Amendment, the Court’s reasoning was consistent with the “federalism model.” It could have relied on the Constitution’s text, rather than on its “structure,” if it had been aware of the Ninth Amendment’s “lost” history.

Dissenting, Justice Souter returned to the familiar refrain that the Tenth Amendment did not protect any particular state rights: “I know of no reason to suppose that every legal advantage a State might have enjoyed at common law was assumed to be an inherent attribute of all sovereignties, or was constitutionalized wholesale by the Tenth Amendment, any more than the Ninth Amendment constitutionalized all common law individual rights.” Of course, once Justice Souter assumed that the Ninth Amendment protected only individual rights, the Tenth Amendment did not protect any rights at all. It was merely a “truism” marking the boundary between state and federal authority. Under the “federalism model,” however, the Ninth Amendment works with the Tenth to protect states’ rights. Though the Court in *Alden* seemed to err by giving constructions to the Tenth and Eleventh Amendments that their texts could not support, the Court could have cited the Ninth Amendment for its approach.

Finally, the Court expanded its protection of state sovereign immunity to administrative proceedings in *Federal Maritime Commission v. South Carolina State Ports Authority*. Because it expanded the Eleventh Amendment to a case that the Framers could not possibly have envisioned, only the Ninth Amendment’s rule of construction could have provided textual support. Writing for the majority, Justice Thomas argued that sovereign immunity was rooted in the “dignity” of the states:

> The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities. “The founding generation thought it ‘neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons.’”

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372 *Id.* at 724 (discussing the “traditional understanding that a State could not be sued in the absence of an express waiver”).
373 *Id.* at 763 n.2 (Souter, J., dissenting).
375 The administrative state essentially did not exist when the Ninth Amendment was ratified.
376 *Id.* at 760 (citation omitted) (quoting *Alden*, 527 U.S. at 748).
In other words, Thomas linked sovereign immunity with reserved states’ rights. Those rights could not be “denied or disparaged” regardless of whether states were subject to suit in judicial or administrative proceedings. As Lash has demonstrated, state ratifying conventions sought to ensure that the federal government could not infringe on their rights through “latitudinous interpretations” of delegated power. Thomas’s account is consistent with that history.

Dissenting, Justice Breyer could find no limit on interpretations of enumerated power:

The Court’s principle lacks any firm anchor in the Constitution’s text. The Eleventh Amendment cannot help. . . .

The Tenth Amendment cannot help. . . .

The Constitution has “delegated to the United States” the power here in question . . . . The Court finds within this delegation . . . . a hidden reservation that . . . . embodies the legal principle the Court enunciates. But the . . . Tenth Amendment says nothing about any such hidden reservation . . . .

Breyer’s objection was neither new nor surprising. It began with Marshall, was resurrected by the New Deal-era Court, was cited with approval by Justice Stewart and Bennett Patterson, and was instrumental in overturning National League of Cities. In fact, critics of the Rehnquist Court’s protection of state powers through the Commerce Clause, Tenth Amendment, and Eleventh Amendment jurisprudence all invoked it. Unfortunately for Justice Thomas and the majority, they once again did not cite the Ninth Amendment. After a hundred years of conflating the Ninth and Tenth Amendments, the Court’s federalist rule of construction continued to invite charges of judicial activism.

377 See supra notes 52-55, 114, and accompanying text (discussing Lash’s historical analysis of state amendment proposals and the historical underpinnings of the Ninth Amendment).

378 Lash, supra note 9, at 393.


380 Id. at 786-87 (Breyer, J., dissenting) (“In its readiness to rest a structural limitation on so little evidence . . . . the majority ignores a historical lesson, reflected in a constitutional understanding that the Court adopted long ago . . . .”); see also Alden v. Maine, 527 U.S. 706, 814 (1999) (Souter, J., dissenting) (“The resemblance of today’s state sovereign immunity to the Lochner era’s industrial due process is striking.”).
4. The “Federalism Model” and the Eleventh Amendment

Under the “federalism model,” both the Ninth and Eleventh Amendments prohibited interpretations of enumerated powers that disparaged rights of the states. The Eleventh Amendment was ratified to ensure that state sovereign immunity would remain intact after the Constitution’s ratification. That does not necessarily mean, however, that the Ninth Amendment became irrelevant in protecting state sovereignty. By failing to cite the Ninth Amendment, which already had begun to lose its original meaning, the *Hans* Court recognized a rule of construction that seemed unsupported by the Constitution’s text. When the Court expanded that rule nearly a century later, it could have cited the Ninth Amendment where the Eleventh’s text did not apply. Instead, with the Ninth Amendment’s history not yet uncovered, the Court again summoned constitutional “spirits” and stretched amendments to create a federalist rule of construction.

CONCLUSION

The Ninth Amendment is no longer just an “inkblot.” After the Bork hearings, Randy Barnett broke new ground by demonstrating that the Ninth Amendment did not have to be the “truism” that many assumed it to be. According to Barnett, the Ninth Amendment had real potential for “constraining” the expansion of federal power. Kurt Lash added to that research by uncovering historical evidence that the Ninth Amendment originally protected state powers, rather than individual rights. Lash’s work is so new that the Court has not yet considered it. Even when it does, however, his work likely will prompt a number of difficult questions in addition to the answers it provides.

381 *See supra* subsection III.C.1 (explaining that the Eleventh Amendment may have emphasized one particular right protected by the Ninth Amendment).

382 *See id.*

383 *See id.* (explaining the Court’s reasoning); *see also supra* note 16 (compiling examples of critics charging the Court’s Eleventh Amendment jurisprudence with being “activist”).

384 For example, how exactly should the Court determine whether a power is “great and important” or “accessory and subaltern?” Moreover, should the Court overrule longstanding precedent on the basis of the Ninth Amendment, given that its history has been “forgotten” for over a century? Perhaps even more critically, how can the Court reconcile a textual rule of construction with the now vastly expanded federal government? Those difficult questions present fascinating areas for future study. Nevertheless, they are beyond the scope of this Comment, which seeks only to identify cases in which the Court already has determined that a federalist rule of construction was necessary, but simply did not cite the Ninth Amendment. Though it might be difficult to
But limiting interpretations of federal power is hardly a revolutionary idea. James Madison understood that enumerating powers would be meaningless if the federal government simply could interpret its powers as broadly as it wished. He made that argument in his speech against the Bank. Years later, Justice John Marshall ignored the Ninth Amendment on his way to expanding federal power and affirming the constitutionality of the Bank. Marshall’s approach became the model for broad interpretations of delegated power.

When the federal government began expanding, the need for a limiting rule of construction became obvious. Indeed, the Court employed such a rule on a number of occasions. First, it cited both the Ninth and Tenth Amendments. By the 1920s, it only used the Tenth. Without the Ninth Amendment to provide textual support, the Court eventually looked to Marshall and concluded that there was no textual limit on constructions of enumerated power.

The effects of those cases still linger today. Beginning in the 1970s, the Court once again felt the need for a federalist rule of construction. Yet in every case, it looked to the past and found only the Tenth Amendment’s “spirit” for textual support. Why had the Framers entrusted a simple “truism” with the crucial task of checking the federal government that many of them feared?

Nevertheless, the Court still applied a rule of construction to limit the Commerce Power, to protect state functions, and to extend state sovereign immunity. In each case, the Court had to expand either the Tenth or Eleventh Amendment to recognize that rule. It was criticized, understandably, for doing so without textual support.

In the end, the “federalism model” not only could be applied to the Court’s jurisprudence—it has been applied, albeit without reference to the Ninth Amendment. Indeed, the Court has felt compelled to apply it even where it could find no constitutional provision to support its approach. Ultimately, should the Court conclude that history supports the “federalism model,” applying it would strengthen protections of state sovereignty and bolster them with text.

“enumerate” unenumerated rights or to come to grips with their effects, this Comment has explored where the Court may already have done so in some cases. Armed with the “federalism model,” perhaps the Court now has a firmer basis for doing so in others.