OUR DECLARATORY NINTH AMENDMENT

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Ironically, debate over the Ninth Amendment seeks to fix into place a static vision of the Amendment's meaning. One approach sees the Ninth Amendment primarily as a rule of construction for interpreting the Constitution's enumerated grants of power. Another approach construes the Amendment as a repository for judicially enforceable, unenumerated individual rights, such as the right to privacy. However, the very text of the amendment, which is often overlooked by scholars, announces that: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[1] Such language, if anything, suggests that the Ninth Amendment is perhaps the most dynamic and open-ended of the Constitution's provisions, and one whose meaning should not be cemented into place by either of the two approaches.

Looking to new sources and to old ones in a different way leads to a more robust, dynamic vision of our Ninth Amendment. First, we will examine the Ninth within the context of the Constitution's emphasis on majoritarian rights of the people against an abusive federal government. Second, we will look at 1791 as the beginning of historical analysis into the meaning of the Ninth, not as the end point. Significant developments in constitutional thought after the framing of the Bill of Rights—particularly among the states and anti-slavery leaders—led to a re-declaration of the Ninth's meaning.

Together, these two new methods of analysis produce a *declaratory* model of the Ninth Amendment. Unlike other provisions of the Bill of Rights, the Ninth neither acts solely as a limitation on the federal government nor creates new rights through positive enactment. Rather, the Ninth declared the Framers' understanding of what rights already existed,

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[1] U.S. CONST. amend. IX.

both in other parts of the Constitution and outside the Constitution altogether. A declaratory vision of the Ninth Amendment is a dynamic one; it anticipates that future amenders of the Constitution may re-declare their interpretation of constitutional rights. Thus, the Framers of the Reconstruction Amendments could fundamentally expand the Ninth Amendment's meaning by declaring that it includes individual rights.

This Article will proceed in three parts. Part I will discuss the understanding of the Ninth Amendment at the time of its framing. This Part will place the ongoing scholarly debate over the Ninth's meaning within the context of the language and purposes of the Bill of Rights and of the Constitution. Examining the provisions of the Bill of Rights and the constitutional goal of effectuating popular sovereignty will reveal that the Ninth is much more than a rule of construction.[2] Moreover, the Ninth's text and history suggest that it does more than reserve individual civil rights, as scholars often argue today.[3] Rather, the Ninth Amendment was intended primarily to protect majoritarian rights that the people collectively could assert against the federal government.

Part II will examine the meaning of the Ninth Amendment from the framing to the dawn of Reconstruction. It will examine what I will call "baby Ninths"—Ninth Amendment analogues in state constitutions—and state court decisions construing their language.[4] The presence of these provisions in state constitutions undermines the reading of the Ninth Amendment as a rule of construction. Part II will also show how the baby Ninths became tied to natural rights arguments over property and due process, and it will suggest linkages between those rights and the debate over slavery.

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[2] A recent work on the Ninth Amendment argues that its Framers intended it to serve as a rule of construction regarding the extent of the Constitution's enumerated powers. *See* Thomas B. McAffee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215 (1990).

[3] For example, in a recent symposium on the Ninth Amendment, most authors agreed that the Ninth Amendment safeguarded certain unenumerated individual rights. *See* Randy E. Barnett, *Foreword: The Ninth Amendment and Constitutional Legitimacy*, 64 CHI.-KENT L. REV. 37, 56 (1988); Sotirios A. Barber, *The Ninth Amendment: Inkblot or Another Hard Nut to Crack?*, 64 CHI.-KENT L. REV. 67, 76 (1988); Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 CHI.-KENT L. REV. 131, 141 (1988); Lawrence G. Sager, *You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth, But What on Earth Can You Do with the Ninth Amendment?*, 64 CHI.-KENT L. REV. 239, 240-41 (1988).

[4] I adopt this term from the "baby" Federal Trade Commission (FTC) acts, which state governments passed to mimick the FTC's governing statute.

Finally, Part III will examine Reconstruction's reconceptualization of the Ninth Amendment. In framing the Privileges and Immunities Clause of the Fourteenth Amendment,[5] the Thirty-Ninth Congress intended to enforce the first eight amendments of the Bill of Rights against the states.[6] In so doing, the Thirty-Ninth Congress reconceived the rights guaranteed by those amendments as individual and civil, rather than as majoritarian and political.[7] The Ninth Amendment played a crucial role in the Republicans' plans to amend the Constitution. They believed the Ninth allowed them to extend the protections of the Privileges and Immunities Clause *beyond* those rights guaranteed in the first eight amendments. As historical evidence shows, the Framers of the Fourteenth Amendment saw the Ninth as a clause that could affirmatively protect unenumerated individual rights from government interference. They sought to *declare* in the Fourteenth Amendment that both the Privileges and Immunities Clause (as applied against the states) and the Ninth Amendment (as applied against the federal government) protected unenumerated civil rights.[8]

I will argue that the Framers of the Fourteenth Amendment could reorient the Ninth Amendment because the Ninth was *declarative* in nature. Scholars today discuss whether the Framers intended the Ninth Amendment to be a rule of construction for limiting federal powers or a source of unenumerated, affirmative individual rights. Both claims are merely manifestations of a Ninth Amendment which *declares* not only that the people have certain unenumerated majoritarian rights, but that they also may declare and enforce new rights as well. Thus, the Fourteenth Amendment's framers could, in effect, re-declare and add to those rights belonging to the people when they passed Section One of the Fourteen Amendment.

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[5] *See* U.S. CONST. amend. XIV, § 1.

[6] *See generally* MICHAEL K. CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986).

[7] Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992).

[8] *See* Howard J. Graham, *Our "Declaratory" Fourteenth Amendment*, 7 STAN. L. REV. 3 (1954).

I. THE ORIGINAL UNDERSTANDING OF THE NINTH AMENDMENT

A reconstructed understanding of the Ninth Amendment must start with its framing. Both those who read the Ninth as a rule of construction and those who view it as a repository of unenumerated individual rights seek ultimate support from the historical background of the period between 1787 and 1791. The rule-of-construction supporters place great importance upon the Federalist-Antifederalist debates over the ratification of the Constitution. Their opposite numbers seek vindication in the Lockean natural rights political philosophy of the late eighteenth century. However, both approaches pass too quickly over the text, structure, legislative history, and legal context of the Ninth Amendment. Careful consideration of these sources shows that the Ninth Amendment declares a constitutional structure designed to protect the people from an abusive central government by securing majoritarian rights.

A. The Text

When interpreting the Ninth Amendment, both the unenumerated rights and the rule-of-construction camps often follow a prevalent, but mistaken, rule of construction: when the legislative history is unclear, it is permissible to consult the text. Scholars usually bypass the text of the Ninth Amendment and its context within the Bill of Rights to begin a search of the Amendment's legislative history. They hope to place the Amendment "in its historical setting"[9] or in the "inherited traditions" of a natural law philosophy.[10] However, the text of the Amendment and its relationship to both the Bill of Rights and the Constitution provides important, often overlooked, clues about the Ninth's popular sovereignty meaning.[11]

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[9] McAffee, *supra* note 2, at 1238.

[10] Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1128 (1987).

[11] There is strong evidence that the Framers of the Constitution would have wanted us to read the Constitution this way. *See* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (arguing that the framers wanted future interpreters to ignore their subjective intent and to focus on constitutional text). At the very least, the Framers were intimately familiar with, and commonly employed, rules of construction that focused on the text, structure, and legal context of ambiguous legal instruments. John C. Yoo, Note, *Marshall's Plan: The Early Supreme Court and Statutory Interpretation*, 101 YALE L.J. 1607 (1992).

1. The Enumeration in the Constitution

The Ninth begins with: "The enumeration in the Constitution of certain rights." This first clause notifies the reader of its important connection to the body of the Constitution. It does not merely say "the enumeration in the first eight amendments," nor does it say "the enumeration in the amendments to the Constitution." Instead, the Ninth's text creates bonds at the outset with the entire Constitution and the rights of the people contained therein. Thus, the Ninth applies not only to the rights enumerated in the first eight amendments, but also to those listed in Article I, Section 9 and Article I, Section 10, which Chief Justice Marshall declared "may be deemed a bill of rights for the people of each state."[12] As Publius noted: "The truth is, after all the declamations we have heard, that the constitution is itself in every rational sense, and to every useful purpose, A BILL OF RIGHTS."[13]

Importantly, this language indicates that the entire Constitution, as well as the Bill of Rights, contains provisions that protect "certain rights" of "the people." As James Bowdon told the Massachusetts ratifying convention: "With regard to rights, the whole Constitution is a declaration of rights."[14] The Constitution creates more than the structural relationships between the federal and state governments. As a product of popular sovereignty,[15] the Constitution defines the relationship between the government and the people. Some of the rights created by the body of the Constitution include Article V's procedures for altering the government through amendment,[16] and the restrictions of Article I, Section 9 forbidding the suspension of the writ of habeas corpus[17] and the passage of bills of attainder or ex post facto laws.[18] In addition, as will be discussed shortly, the Constitution enforced majoritarian rights of the people against self-dealing and misrule by the federal government. Most importantly, the

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[12] Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138 (1810).

[13] THE FEDERALIST No. 84, at 515 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[14] James Bowdon, Speech to the Massachusetts Ratifying Convention (Jan. 23, 1788), *in* 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 686 (1971) [hereinafter BILL OF RIGHTS].

[15] *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776-87, at 344 (1969).

[16] U.S. CONST. art. V.

[17] U.S. CONST. art. I, § 9, cl. 2.

[18] U.S. CONST. art I, § 9, cl. 3.

Ninth declares that we should look for the rights of the people inside the Constitution first, not outside it.

2. *Certain Rights . . . of the People*

This brings us to the core of the Ninth Amendment: the "certain rights" which are "retained by the people." "Right" as used by the Framers of the Bill of Rights did not always connote individual rights as we conceive of them today.[19] Instead, rights often referred to the political rights of the collective majority ("the people") essential to the functioning of a republican government. The Framers of the Bill of Rights regularly used the word "right" in conjunction with "the people" when enumerating popular sovereignty rights.[20] Hence, the First Amendment refers to the "right of the people" to assemble and to petition,[21] and the Second refers to "the right of the people to keep and bear Arms."[22]

Of course, this does not mean that the Ninth Amendment protects only majoritarian rights. Certainly the term "right" as employed in 1791 also referred to individual rights. However, the Ninth Amendment's central preoccupation is with majoritarian rights. Indeed, James Madison's unadopted First Amendment emphasized the popular sovereignty meaning of political "rights" and "the people": "[T]he people have an indubitable, unalienable, and indefeasible right to reform or change their Government."[23] These rights reflected concern with protecting the people from

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[19] Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1146-57 (1991) (arguing that the First Amendment protects majoritarian political rights). Note that the only use of the word "right" in the original Constitution came in Article I, § 8, which gave Congress the power to create copyright and patent laws that secured to authors and inventors "the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. 1, § 8.

[20] But compare the Fourth Amendment, which qualifies its use of "people," with two mentions of the word "persons." U.S. CONST. amend. IV.

[21] U.S. CONST. amend. 1.

[22] *Id.* amend. 2. In emphasizing these collective rights of the people, James Wilson asked in the Pennsylvania Ratifying Convention: "Have we a single right separate from the rights of the people?" James Wilson, Speech to the Pennsylvania Ratifying Convention (Dec. 11, 1787), *in* 2 BILL OF RIGHTS, *supra* note 14, at 636.

[23] 1 ANNALS OF CONG. 451 (Joseph Gales ed., 1789). This was also the thrust of the proposed First Amendment recorded in Roger Sherman's July 1789 draft of the Bill of Rights, which declared that "the people . . . have an inherent and unalienable right to change or amend their political Constitution." Roger Sherman's Draft of the Bill of Rights (1789), *in* THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 351 (Randy E. Barnett ed., 1989) [hereinafter RIGHTS RETAINED BY THE PEOPLE].

oppression by the central government, rather than with protecting minorities from the majority.[24]

To effectuate the intent and meaning behind the Ninth Amendment, we must read it in harmony with the rest of the Bill of Rights and the Constitution. As Chief Justice Marshall said, a "cardinal rule of construction" is that "the whole law is to be taken together, and one part expounded by any other, which may indicate the meaning annexed . . . to ambiguous phrases."[25] Accordingly, the rights the Framers protected in the Ninth seek to guard majoritarian political rights which check the central authorities and allow the people to engage in republican self-government. The following rights are illustrative: the First Amendment preserves the *people's* right to engage in political discourse; the Second protects the *people's* right to participate in a militia, one of the important institutions of republican self-government; and Article I, Section 2 assures the *people's* power to elect the members of the House of Representatives.[26]

Significantly, similar use of the "people-rights" terminology also occurred in documents which should aid us in reading the Constitution. The Declaration of Independence, for example, boldly proclaimed that "whenever any Form of Government becomes destructive of these ends [of government], it is the *Right* of *the People* to alter or to abolish it, and to institute new Government."[27] Publius also viewed rights as majoritarian and political even though he opposed the inclusion of a Bill of Rights: "Is it [not] one object of a bill of rights to declare and specify the political privileges of the citizens in the structure and administration of the government?"[28] Thus, we should conclude that the Ninth, like the rest of the Bill of Rights, is principally concerned with majoritarian rights. Furthermore, the text of the Ninth Amendment gives us no reason to think otherwise. Instead, it invokes the touchstone behind the Bill of Rights: the people.

This popular sovereignty reading of the Ninth Amendment finds support in state constitutions, which were the other significant legal enactments of the time. Before ratification of the Constitution, several state con-

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[24] Amar, *supra* note 19, at 1177.

[25] Post Master General v. Early, 25 U.S. (12 Wheat.) 136, 152 (1827).

[26] *See generally* Amar, *supra* note 19.

[27] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

[28] THE FEDERALIST No. 84, at 515 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

stitutions contained bills of rights which were usually entitled a "declaration of rights." When these declarations used the terms "rights" held by "the people," or by the "community," they referred specifically to popular sovereignty rights to alter government and to engage in republican self-rule. Pennsylvania declared: "[T]he *community* hath an indubitable, unalienable and indefeasible *right* to reform, alter or abolish government."[29] Vermont and Virginia proclaimed the same concept in almost identical words.[30] Furthermore, Massachusetts declared that "the *people* alone have an incontestible, unalienable, and indefeasible *right* to institute government; and to reform, alter, or totally change the same."[31] Likewise, Maryland declared that "whenever the ends of government are perverted . . . the *people* may, and of *right* ought, to reform the old or establish a new government."[32] Delaware similarly proclaimed that "whenever the ends of government are perverted, and public liberty manifestly endangered by the Legislative singly, or a treacherous combination of both [Legislature and Executive], the *people* may, and of *right* ought to establish a new, or reform the old government."[33] Connecticut also established that "[t]he *People* of this State . . . have the sole and exclusive *Right* of governing themselves."[34] New Hampshire declared that "[t]he *people* of this state, have the sole and exclusive *right* of governing themselves as a free, sovereign, and independent state."[35] North Carolina declared "[t]hat all political power is vested in and derived from the *people* only."[36]

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[29] PA. DECLARATION OF RIGHTS art. V (1776), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 265 (emphasis added).

[30] VT. DECLARATION OF RIGHTS art. VI (1777), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 323; VA. DECLARATION OF RIGHTS § 3 (1776), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 234.

[31] MASS. DECLARATION OF RIGHTS art. VII (1780), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 341 (emphasis added).

[32] MD. DECLARATION OF RIGHTS art. IV (1776), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 280 (emphasis added).

[33] DEL. DECLARATION OF RIGHTS § 5 (1776), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 277 (emphasis added).

[34] CONN. DECLARATION OF RIGHTS (1776), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 289 (emphasis added); *see also* WILLI P. ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 137-39 (1980) (positing that the right of resisting or abolishing government is a collective, not an individual, right under state constitutions).

[35] N.H. BILL OF RIGHTS art. VII (1783), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 376 (emphasis added).

[36] N.C. DECLARATION OF RIGHTS, art. I (1776), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 286 (emphasis added).

Examining what the state constitutions included as rights of the people can provide clues as to what rights the Framers of the Ninth Amendment had in mind because the state declarations provided the operative legal context for the Bill of Rights and the Constitution.[37] Beyond the right to alter and abolish government, these rights embraced other political rights the Framers deemed necessary for the exercise of popular sovereignty, such as the right to bear arms.[38] The revolutionaries believed that this right was critical for resisting an oppressive government and, through the militias, for the republican education of the citizenry.[39] Other rights of the people found in the state constitutions also focused on their powers of self-government. They declared the right of the people to instruct the legislature,[40] to assemble and consult upon the common good,[41] to seek redress from the legislature via petition,[42] to govern and regulate the internal po-

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[37] Professor Massey similarly argues that interpreters of the Ninth Amendment should look for a source of unenumerated rights in state common law, constitutional law, and statutory law, as it existed before the adoption of the Constitution. However, Professor Massey fails to see the important distinction made in the texts of the federal and state bills of rights between rights held by the people and rights held by individuals. Moreover, Professor Massey's approach is over-inclusive because it includes common law and statutory law as sources of unenumerated rights, instead of just state constitutional law and other conceded "higher" law. Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 HASTINGS L.J. 305 (1987).

[38] "That the people have a right to bear arms, for the defense of the State." N.C. DECLARATION OF RIGHTS art. XV (1776), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 287; PA. DECLARATION OF RIGHTS art. XIII (1776), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 266; VT. DECLARATION OF RIGHTS art. XV (1777), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 324; *see also* MASS. DECLARATION OF RIGHTS art. XVII (1780), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 342 ("The *people* have a *right* to keep and to bear arms for the common defence) (emphasis added).

[39] *See* David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991).

[40] MASS. DECLARATION OF RIGHTS art. XIX (1780), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 343; N.H. BILL OF RIGHTS art. XXXII (1783), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 379; N.C. DECLARATION OF RIGHTS art. XVIII (1776), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 287; PA. DECLARATION OF RIGHTS art. XVI (1776), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 266; VT. DECLARATION OF RIGHTS art. XVIII (1777), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 324.

[41] MASS. DECLARATION OF RIGHTS art. XIX (1780), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 343; N.H. BILL OF RIGHTS art. XXXII (1783), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 378-79; N.C. DECLARATION OF RIGHTS art. XVIII (1776), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 287; PA. DECLARATION OF RIGHTS art. XVI (1776), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 266; VT. DECLARATION OF RIGHTS art. XVIII (1777), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 324.

[42] *See supra* note 40.

lice,[43] to require the legislators and magistrates to "a due and constant regard" toward "fundamental principles" of free government,[44] to freedom of speech, of writing, and of the press,[45] to participate in the legislature,[46] to recall public officers,[47] and to freedom from taxation without representation.[48] Like the Ninth, by connecting the words "people" and "right," these state provisions had at their heart the purpose of declaring the "political privileges of the citizens in the structure and administration of the government."[49] The main purpose of these provisions was not to protect the rights of the individual, but to allow the people of the states to monitor and control their own governments. Thus the provisions constantly declare the people's power over state officials and legislatures.

The state declarations emphatically linked these rights to the people's right to create, reform, or abolish their government—to engage in republican self-government. Most state constitutions declared, as did Virginia in 1776, that "all power is vested in, and consequently derived from, the People; that magistrates are their trustees and servants, and at all times amenable to them."[50] Thus, these rights of the people were explicitly linked to the fundamental declaration of popular sovereignty. Publius ob-

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[43] DEL. DECLARATION OF RIGHTS § 4 (1776), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 277; MD. DECLARATION OF RIGHTS art. II (1776), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 280; N.C. DECLARATION OF RIGHTS art. II (1776), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 286; PA. DECLARATION OF RIGHTS art. III (1776), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 264; VT. DECLARATION OF RIGHTS art. IV (1777), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 322.

[44] PA. DECLARATION OF RIGHTS art. XIV (1887), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 266; VT. DECLARATION OF RIGHTS, art. XVI (1777), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 324; *see also* MASS. DECLARATION OF RIGHTS art. XVIII (1780), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 343 (using almost identical language).

[45] PA. DECLARATION OF RIGHTS art. XII (1776), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 266; VT. DECLARATION OF RIGHTS art. XIV (1777), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14 at 324.

[46] MD. DECLARATION OF RIGHTS art. V (1776), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 281; DEL. DECLARATION OF RIGHTS § 6 (1776), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 277.

[47] MASS. DECLARATION OF RIGHTS art. VIII (1780), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 341; VT. DECLARATION OF RIGHTS art. VII (1777), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 323.

[48] N.C. DECLARATION OF RIGHTS art. XVI (1776), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, 287.

[49] THE FEDERALIST No. 85, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[50] VA. DECLARATION OF RIGHTS § 2 (1776), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 234.

served a similar connection between popular rights, which in his opinion the Constitution should leave unenumerated, and the preamble's initial and central declaration of the power of the people. Publius quoted the preamble: "WE, THE PEOPLE of the United States, to secure the blessings of liberty to ourselves and our posterity, do *ordain* and *establish* this Constitution for the United States of America."[51] He then noted that "[h]ere is a better recognition of the popular rights than volumes of . . . aphorisms."[52]

The state declarations of rights further confirm this reading by carefully distinguishing between rights of the "people" and rights of the "individual," the "freeman," the "person," the "man," or the "citizen." For example, the states invariably declared that criminal procedure rights—such as the right of the defendant to know the accusation, to confront witnesses, to call for evidence, to have counsel, to not be compelled to incriminate one's self, or to a speedy jury trial—belonged to individuals only.[53] States also recognized that the right of due process—that "no man" be deprived of life, liberty, or property without due process or except by the law of the land—attached only to individuals.[54] These rights regulated how the government could treat individuals, rather than how the people could control their government. If the Framers had intended their Ninth Amendment to include only the former, then they could easily have protected "certain rights . . . retained by all persons" rather than

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[51] U.S. CONST. pmbl.

[52] THE FEDERALIST No. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[53] DEL. DECLARATION OF RIGHTS §§ 14-15 (1776), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 277; MD. DECLARATION OF RIGHTS arts. XIX & XX (1776), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 277; MASS. DECLARATION OF RIGHTS art. XII (1780), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 342; N.H. BILL OF RIGHTS art. XV (1776), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 280; N.J. CONST. art. XVI (1776), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 386; N.Y. CONST. art. XXXIV (1777), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 310; N.C. DECLARATION OF RIGHTS arts. VII-IX (1783), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 376; PA. DECLARATION OF RIGHTS art. IX (1776), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 265; VT. DECLARATION OF RIGHTS art. X (1777), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 324; VA. DECLARATION OF RIGHTS § 8 (1776), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 235.

[54] DEL. DECLARATION OF RIGHTS § 10 (1776), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 277; MASS. DECLARATION OF RIGHTS art. X, (1780), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 342; N.C. DECLARATION OF RIGHTS art. XII (1776), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 286; VT. DECLARATION OF RIGHTS art. IX (1777), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 324; VA. DECLARATION OF RIGHTS § 8 (1776), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 254.

"certain rights . . . retained by the people." By using the phrase "*rights* of the *people*," the Framers of the Ninth Amendment adopted the legal terminology of their state constitutions, which used that phrase to refer to majoritarian rights.

3. Shall Not Be Construed To Deny or Disparage

Immediately following "certain rights" in the Ninth Amendment's text is the phrase "shall not be construed." Scholars who argue that the Ninth Amendment is only a rule of construction must rely on this language as the core of the Amendment.[55] Indeed, "shall not be construed" seems to refer directly to the process of interpretation. However, comparing the Ninth to other constitutional provisions that employ identical language suggests a different meaning. As the only other constitutional provision in the Constitution that adopts the "shall not be construed" language,[56] the Eleventh Amendment helps inform our reading of the Ninth.[57]

Although at first glance "shall not be construed" suggests a rule of construction, the Ninth's use of the phrase signifies more. If "shall not be construed" was only a rule of construction added on later in the lifespan of a document, it would only govern prospectively. In that respect, a rule of construction would operate as a legislative act of the people which passed along, through positive law, their instructions to future interpreters. If this reading of "shall not be construed" is correct, then one would expect the Eleventh Amendment to apply only prospectively as well. If so, then the Eleventh Amendment, which states in part that "the Judicial power of the United States shall not be construed to extend to any suit . . . commenced or prosecuted against one of the United States, by citizens of

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[55] More specifically, the rule of construction argument maintains that the Ninth Amendment is just the constitutionalization of the *expressio unius* maxim, to the effect that the enumeration of rights in the Bill of Rights does not imply federal power over rights left unenumerated. *See* RAOUL BERGER, GOVERNMENT BY JUDICIARY, THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223 (1983); McAffee, *supra* note 2, at 1218; Michael W. McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 CHI.-KENT L. REV. 89 (1988).

[56] "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

[57] *But cf.* Sager, *supra* note 3, at 239 n.2 (explaining that the limited scope of the Eleventh Amendment eliminates its relevance for Ninth Amendment's meaning).

another state," would bar such suits only after its passage.

However, reading "to be construed" as a declaratory provision produces a different result. If the Eleventh Amendment declared its framers' understanding of the Constitution as it always had been and always would be—rather than adding a new provision via positive law—then it would act retroactively. The Supreme Court came to this exact conclusion in *Hollingsworth v. Virginia*.[58] In *Hollingsworth*, the Court faced the issue whether the Eleventh Amendment and its "to be construed" language extinguished suits filed before the amendment's passage. The Court rejected arguments that such a result would violate the rules for interpreting positive enactments and held that the Eleventh Amendment did act retroactively. In that respect, the Eleventh Amendment operated as a "judicial" act of the people by declaring their understanding of the law as it currently existed. Therefore, we should not read the Ninth Amendment's "to be construed" language merely as a rule of construction. Instead, we should interpret the Ninth's use of the phrase as the Supreme Court interpreted similar language in the Eleventh: as the expression of the people in their judicial capacity. Thus, the Ninth is not merely a legislative enactment, but a judicial declaration of law that previously existed outside the Constitution's express provisions.

The attached phrase, "to deny or disparage," confirms that the Ninth protects rights outside the Constitution's four corners. The very meaning of the words assumes the existence of rights to be protected from denial or disparagement. Moreover, "disparage" implies that the rights left unenumerated operate of their own force; they are not defined residually by the interpretation of the government's enumerated powers. The House of Representative's fleeting consideration of the Ninth evidences that this was the intent of the Framers. Representative Elbridge Gerry, believing that the word "disparage" "was not of plain import," moved unsuccessfully (due to the lack of a seconding motion) to clarify it by changing "deny or disparage" to "deny or impair."[59] Assuming that Gerry believed "impair" only clarified his understanding of "disparage," "impair" then

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[58] 3 U.S. (3 Dall.) 378 (1798).

[59] Elbridge Gerry, Remarks before the House of Representatives (Aug. 17, 1789), *in* 2 BILL OF RIGHTS, *supra* note 14, at 1112. Gerry's remarks bear significance because as an Antifederalist leader, he led efforts which successfully forced the Federalists to include a Bill of Rights in the Constitution.

refers to an interference with the independent operation of some other right. The word "impair" further suggests this understanding when read with Article I, Section 10, which restricts states from passing any "Law impairing the Obligation of Contracts."[60] Although the Contracts Clause protects contracts from state interference, it does not create contracts through positive law. Instead, it declares the Framers' interpretation of the sanctity of contract by immunizing it from state laws. Just as the Contracts Clause would be devoid of meaning without the operation of pre-existing contract rights, the Ninth Amendment would be meaningless without pre-existing popular sovereignty rights.[61] You can't impair a non-existent right.

4. Others Retained by the People

The Ninth Amendment reaches a crescendo at its close. In the world of the Founders, rights "retained by the people" referred to rights with which the government could not interfere. The Framers used a similar phrase in the predecessor to the Constitution, the Articles of Confederation: Article II stated that "[e]very state *retains* its sovereignty, freedom and independence, and every Power, Jurisdiction and right" which are not "expressly delegated" to the United States.[62] Although it belonged to the states, the "right" in Article II of the Articles of Confederation was not defined solely to prevent the enlargement of federal power by implication. Instead, Article II *declares* the existence of state rights and powers that cut across federal powers. Under this system, the rights of the states independently pre-exist the central power and thus would still operate to check the federal government even if Article II did not expressly recognize their existence.[63]

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[60] U.S. CONST. art. 1, § 10.

[61] On the Contracts Clause, see Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810). In *Fletcher*, Chief Justice Marshall suggested that the Contracts Clause did not depend solely on contract rights as enforced by state law for its meaning, but that such rights might derive from the "general principles which are common to our free institutions." *Id.* at 139. Similarly, the Ninth Amendment refers to rights beyond those secured by state law.

[62] ARTICLES OF CONFEDERATION art. II (U.S. 1781) (emphasis added).

[63] Violating the Articles, states flouted treaties entered into by Congress, waged their own wars, ignored decisions of the central judicial authorities, and refused to comply with requisition orders. *See* HAROLD KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 74-75 (1990).

Similarly, the Ninth Amendment sought to accomplish the same purpose by employing the same words. It declares that certain rights preexisted the Constitution's positive enactment. Such rights of the people would act as a check on federal powers, even if the Ninth Amendment had not expressly said so. Like Article II of the Articles of Confederation, the principle of the Ninth Amendment would still have operated even if the Ninth Amendment itself did not exist. While describing early American constitutional thought, Professor Corwin wrote that these principles "owe nothing to their recognition in the Constitution—such recognition was necessary if the Constitution was to be regarded as complete."[64]

Discussions on natural rights at the time of the framing of both the Constitution and the Bill of Rights supports our reading of "retained" as a reference to pre-constitutional rights. According to the natural rights philosophy of the day, all persons possessed certain natural rights which they exercised in a state of nature.[65] Upon entering society, people sacrificed some of their natural rights to secure their enjoyment of the remaining rights.[66] As one Antifederalist writer stated, "A people, entering into society, surrender such a part of their natural rights, as shall be necessary for the existence of that society. . . . They are conveyed by a written compact, expressing those which are given up, and the mode in which those reserved shall be secured."[67] However, the Framers often viewed a portion of these natural rights as inalienable—rights that the people could never give up, even upon entering society from the state of nature. Inalienable rights were carefully distinguished from those rights which were alienable and hence susceptible of infringement. "Of rights, some are natural and unalienable, of which even the people cannot deprive individuals: Some are constitutional or fundamental; these cannot be altered or abolished by the ordinary laws; but the people, by express acts, may alter or

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[64] Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 153 (1928).

[65] *See* BENJAMIN F. WRIGHT, AMERICAN INTERPRETATIONS OF NATURAL LAW: A STUDY IN THE HISTORY OF POLITICAL THOUGHT 6-12 (1931); CHARLES G. HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS (1930); Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907 (1993).

[66] Hamburger, *supra* note 65, at 930-31.

[67] *Essays of John DeWitt*, AM. HERALD (Oct.-Dec. 1787), *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST 21 (Herbert J. Storing ed., 1981) [hereinafter THE COMPLETE ANTI-FEDERALIST].

abolish them."[68]

William Blackstone's *Commentaries* provided the Framers with a model of how the law could protect such natural rights. The Framers held Blackstone in high regard for his attempt to rationalize the English common law. Blackstone based much of the structure of English law upon natural rights:

> This law of nature, being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.[69]

In describing the rights and liberties of Englishmen, Blackstone argued for the existence of "that *residuum* of natural liberty, which is not required by the laws of society to be sacrificed to public convenience," and "civil privileges, which society hath engaged to provide, in lieu of the natural liberties so given up by individuals."[70] Blackstone then went on to describe the three fundamental natural rights as the right to personal security, the right to liberty, and the right to property.[71]

Members of the state conventions called to ratify the Constitution repeatedly referred to inalienable rights as those "retained by the people."[72] As Thomas Hartley told the Pennsylvania Ratifying Convention, "[W]hatever portion of those natural rights we did not transfer to the government, was still reserved and retained by the people."[73] Richard Maclaine asked the North Carolina Ratifying Convention, "If we have this inherent, this unalienable, this indefeasible title to those rights, if they

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[68] Letters from the Federal Farmer (Dec. 25, 1787), *in* 2 THE COMPLETE ANTI-FEDERALIST, supra note 67, at 261.

[69] 1 WILLIAM BLACKSTONE, COMMENTARIES *41.

[70] *Id.* at *125 (emphasis added).

[71] *Id.* at *125-36. Blackstone's definition of natural rights will become extremely important for this study, as the Reconstruction Congress consistently used it to define the rights secured by the Privileges and Immunities Clause of the Fourteenth Amendment and by the Ninth Amendment. *See infra* text accompanying notes 248-52.

[72] Jeff Rosen, Note, *Was the Flag Burning Amendment Unconstitutional?*, 100 YALE L.J. 1073, 1074-81 (1991).

[73] Thomas Hartley, An Address Before the Pennsylvania Ratifying Convention (Nov. 30, 1787), *in* 2 BILL OF RIGHTS, *supra* note 14, at 654.

are not given up, are they not retained?"[74] Samuel Spencer of North Carolina added, "[T]hose inalienable [rights] . . . ought not to be given up to any government."[75] What were these rights? Consistently throughout the ratifying conventions, speakers referred to fundamentally unalienable natural rights as the rights of expression and conscience, the right to defend life and liberty, and the right to alter and abolish government.[76]

By declaring that the rights of the people are "retained," the Framers designed the Ninth Amendment to protect these inalienable, natural rights. In fact, Roger Sherman's draft of the Bill of Rights stated that both majoritarian natural rights and certain individual natural rights were both inalienable and inviolate from government interference:

> 1. The powers of government being derived from the people, ought to be exercised for their benefit, and they have an inherent and unalienable right to change or amend their political Constitution, when ever they judge such change will advance their interest & happiness.
> 2. The people have certain natural rights which are retained by them when they enter into Society, such are the rights of Conscience in matters of religion; of acquiring property and of pursuing happiness & Safety; of Speaking, writing and publishing their Sentiments with decency and freedom; of peaceably assembling to consult their common good, and of applying to Government by petition or remonstrance for redress of grievances. Of these rights therefore they Shall not be deprived by the Government of the united states.[77]

The Framers deemed these individual rights important enough to enshrine explicitly in the Bill of Rights. They included the Ninth Amendment primarily to protect the inalienable rights not included in the Bill of Rights' enumeration: the "inherent and unalienable right [of the people] to change or amend their political Constitution."[78] The Ninth Amendment's textual focus on "the people," which emphasizes collective rights,

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[74] Richard Maclaine, An Address Before the North Carolina Ratifying Convention (July 28, 1788), *in* 2 BILL OF RIGHTS, *supra* note 14, at 948.

[75] Samuel Spencer, An Address Before the North Carolina Ratifying Convention (July 28, 1788), *in* 2 BILL OF RIGHTS, *supra* note 14, at 937.

[76] *See, e.g.*, *Essays of Brutus*, N.Y.J. (Oct. 1787-Apr. 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 67, at 373.

[77] Roger Sherman's Draft of the Bill of Rights (1789), *in* RIGHTS RETAINED BY THE PEOPLE, *supra* note 23, at 351.

[78] *See supra* text accompanying note 77.

confirms this reading.

Supporters of an individual rights-based reading of the Ninth Amendment, however, might claim that "rights retained" refers to both individual and collective rights. Certainly the language of Roger Sherman's draft Bill of Rights might imply that retained rights—as referred to by the Ninth Amendment—include an individual right to property in addition to a collective right to reform the government. Aside from the implications of the Ninth Amendment's use of the "people-rights" vocabulary, it is possible that when the framers of the Ninth Amendment focused on majoritarian rights, they also intended to protect individual rights peripherally. However, contextual evidence hints that the Ninth Amendment would play only a minimal role in protecting individual rights. The Framers appeared to envision a hierarchy of rights with three tiers.[79] First were the inalienable natural rights which could not be surrendered to government and which were necessary to form a society. Second were the natural rights which people could choose to give up in exchange for society's protection of their remaining rights. Finally, there were civil or legal rights, which the people create by acting through their government.[80] The Framers explicitly included all of the rights they considered inalienable—such as speech, press, and religion—in the first eight amendments. Any unenumerated individual rights would have to fall into the second category of alienable natural rights, those which people could surrender to the government.

While not dispositive, I think that the use of the word "retained" might make some difference here. The Framers usually chose the word "re-

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[79] *See generally* Hamburger, *supra* note 65, at 918-44.

[80] As Brutus, an Antifederalist writer, noted:

> But it is not necessary . . . that individuals should relinquish all their natural rights. Some are of such a nature that they cannot be surrendered. Of this kind are the rights of conscience, the right of enjoying and defending life, etc. Others are not necessary to be resigned, in order to attain the end for which government is instituted, these therefore ought not to be given up. To surrender them, would counteract the very end of government, to wit, the common good. From these observations it appears, that in forming a government on its true principles, the foundation should be laid in the manner I before stated, by expressly reserving to the people such of their essential natural rights, as are not necessary to be parted with.

Essays of Brutus, N.Y.J. (Oct. 1787-Apr. 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 67, at 373; *see also* Letters from the Federal Farmer (Dec. 25, 1787), *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 67, at 262.

tained" when referring to *inalienable* rights. Hence, Sherman says that "the people have certain natural rights [such as speech] which are retained by them when they enter into Society."[81] In the notes to his speech introducing the Bill of Rights in Congress, Madison said that the Bill of Rights contains "natural rights . . . retained as speach [sic]."[82] These rights are retained precisely because the people could not surrender them to the government, even if they so desired.

In contrast, when the Framers discussed rights that could be alienated, they said the people ought to "reserve" them by an explicit contract or constitutional provision, if possible. As the Antifederalist writer, Brutus, wrote: "[I]n forming a government on its true principles . . . by expressly *reserving* to the people such of their essential natural rights, as are *not necessary* to be parted with."[83] Implicit in such declarations is that individuals could part with "reserved"—as opposed to "retained"—rights if they so desired. However, distinguishing between "retained" unalienable rights and "reserved" alienable individual rights cannot lead one at this point to conclude that individual rights are completely excluded from the Ninth Amendment. Such a reading perhaps demands an amount of precision in the use of language that all of the Framers may not have intended,[84] although one can assume that *repeated* use of the words "peo-

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[81] Roger Sherman's Draft of the Bill of Rights (1789), *in* RIGHTS RETAINED BY THE PEOPLE, *supra* note 23, at 351.

[82] James Madison's Notes for Amendments Speech (1789), *in* 2 BILL OF RIGHTS, *supra* note 14, at 1042.

[83] *Essays of Brutus*, N.Y.J. (Oct. 1787-Apr. 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 67, at 373 (emphasis added); *see also Essays of John DeWitt*, AM. HERALD (Oct.-Dec. 1787), *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 67, at 21 ("A people, entering into society, surrender such a part of their natural rights, as shall be necessary for the existence of that society. . . . They are conveyed by a written compact, expressing those which are given up, and the mode in which those *reserved* shall be secured.") (emphasis added); *Essays of an Old Whig*, INDEP. GAZETTER (Oct. 1787-Feb. 1788), *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 67, at 33.

[84] For example, James Madison appeared to use "retained" to refer both to natural rights in general and to delegated powers. In introducing his draft of the Bill of Rights in Congress, he said:

> In some instances [state constitutions] assert those rights which are exercised by the people in forming and establishing a plan of government. In other instances, they specify those rights which are retained when particular powers are given up to be exercised by the legislature. In other instances they specify positive rights, which may seem to result from the nature of the compact. . . . In other instances they lay down dogmatic maxims with respect to the construction of the government.

James Madison, Speech in House of Representatives (June 8, 1789), *in* CREATING THE BILL OF RIGHTS 81 (Helen E. Veit et al. eds., 1991). In this passage, Madison appears to refer to all natural

ple" and "rights" in the Bill of Rights signifies a clearer understanding. Still, it does suggest that perhaps individual rights find a better home in the Tenth Amendment, where the text does speak about powers "reserved to the States respectively, or to the people,"[85] in much the same way Madison did.

Furthermore, our analysis of the phrase "rights retained by the people" belies an interpretation of the Ninth Amendment as a rule of construction. Instead, the language appears to declare the existence of fundamental, unalienable rights which predate the Constitution. Of course, when the Framers discussed natural rights and social contract theory, they referred both to rights thought of as personal and individual and to collective and popular rights. Inclusion of one type of right in the Ninth does not necessarily exclude the other type. Indeed, the Framers viewed certain individual and collective rights in a similar manner. For instance, they saw the right to property, life, and liberty as fundamental, inalienable, and preexisting the Constitution.[86] Similarly, they believed that the majoritarian right to abolish and alter government is a fundamental one that exists outside the reach of government. Nonetheless, the plain meaning of the Ninth's text—especially its use of the "people" and "rights" language—leads to the conclusion that the Ninth Amendment put primary emphasis on collective rights which are unenumerated in the Constitution but still retained and exercised by the people.

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rights, even those beyond the collective rights of establishing government, as retained ones. But in the same speech, Madison also uses "retained" to describe powers not granted to the federal government:

> It has been said that in the federal government [a bill of rights is] unnecessary, because the powers are enumerated, and it follows that all that are not granted by the constitution are retained: that the constitution is a bill of powers, the great residuum being the rights of the people; and therefore a bill of rights cannot be so necessary as if the residuum was thrown into the hands of the government.

Id. at 82. In this passage, Madison seems to view retained powers as those which the people chose not to give to the government, although they could have done so.

However, Madison's view of retained rights and retained powers may not have represented the understanding that won the day in Congress or among the states. As shown later, Congress substantially reworked Madison's original drafts of the Ninth and Tenth Amendments to make clearer the difference between rights and powers that were retained or reserved.

[85] U.S. CONST. amend. X.

[86] *See generally* Rosen, *supra* note 72.

B. Structure and Legislative History

Opponents of a declaratory reading of the Ninth Amendment rely exclusively on legislative history to defend their positions. Such arguments claim that the historical background of the Amendment shows the Ninth "to be an allusion to the general reservation of rights embodied in the system of enumerated powers made explicit in the [T]enth [A]mendment."[87] However, this rule of construction argument fails to consider more reliable legislative history concerning the structure and text of the Amendment. By emphasizing the actual changes made by the states and Congress to the texts of what became the Ninth and Tenth Amendments, we can perceive more clearly the significant distinctions between the two. While the Tenth Amendment may be solely a rule of construction, the Ninth emerges from this analysis as it did from the textual examination: a declaration in favor of unenumerated, majoritarian rights.

1. Structure of the Bill of Rights

Traditionally, the Ninth Amendment has been read to limit the federal government's powers to those enumerated in the Constitution.[88] According to this reading, the Ninth and Tenth Amendments are almost identical attempts to prevent expansion of federal power by express reservation of all undelegated powers to the states or to the people. This reading seeks support from the Federalists' objections to a Bill of Rights and their reliance on the Ninth and Tenth Amendments as "an historical face-saving" device allowing the Federalists to agree to the Bill of Rights.[89]

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[87] McAffee, *supra* note 2, at 1225.

[88] "[The Ninth] Amendment was passed not to broaden the powers of this Court or any other department of 'the General Government,' but, as every student of history knows, to assure the people that the Constitution in all its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication." Griswold v. Connecticut, 381 U.S. 479, 520 (1965) (Black, J., dissenting). This position clumps together the Ninth and Tenth Amendments. *See also* Roth v. United States, 354 U.S. 476, 492-93 (1957); United Public Workers v. Mitchell, 330 U.S. 75, 96 (1947) (referring to rights "reserved by the Ninth and Tenth Amendments"); Ashwander v. TVA, 297 U.S. 288, 330-31 (1935); Hoke v. United States, 227 U.S. 308, 320-21 (1913); BERGER, *supra* note 55, at 23; *see generally* McAffee, *supra* note 2.

[89] *Id.* at 1226.

Professor McAffee collects considerable pre-ratification evidence demonstrating this link between retained rights and a government of limited powers. Put briefly, he argues that the Federalists believed a bill of rights unnecessary because the Constitution established a government of enumerated, and hence, limited powers. Moreover, the Federalists argued that a bill of rights would prove down-

However, the structure and more specific legislative history of the Ninth Amendment militate against this conclusion. This is demonstrated by a simple comparison of the Ninth and Tenth Amendments. As several scholars have noted,[90] the Tenth Amendment serves the function usually imputed to the Ninth. The Tenth Amendment states: "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."[91] Such language shows that the Framers knew perfectly well how to express themselves when they wanted to reserve all powers not enumerated. If the Ninth and Tenth are read as expressing identical propositions, the Ninth would be mere surplusage. Moreover, a reading of the Ninth Amendment merely as a redundant copy of the Tenth would violate Chief Justice Marshall's great directive that "[i]t cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissable, unless the words require it."[92]

Thus, the Ninth Amendment must mean something different than the Tenth Amendment. One possible reading is that the Ninth Amendment protects affirmative rights while the Tenth guards against the inference of undelegated powers. Professor McAffee proposes a more subtle thesis at odds with the reading of the Ninth Amendment as a declaration of

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right dangerous because it would imply that the government exercised general power over all areas not prohibited by the enumerations in the bill of rights. When faced with overwhelming Antifederalist demands for a bill of rights, the Federalists found they could accept a list of enumerated rights by inserting the Ninth and Tenth Amendments. These Amendments specifically prohibited any inference that the bill's specific limitations on federal powers permitted more general governmental powers. Thus, McAffee can conclude that the Ninth Amendment, like the Tenth, serves only as a rule of construction, and not as an affirmative protector of unenumerated rights. *Id.*

It is important to note that most of Professor McAffee's historical evidence comes before the actual drafting and ratification of the Bill of Rights. As a result, he does not place much reliance on the textual development of the Ninth Amendment as it reached its final form, nor does he even engage in a textual examination of the Amendment's meaning. Instead, he relies on speeches and letters made during the constitutional ratifying conventions to carry the weight of his argument. Of course, legislators' speeches should be used carefully in interpretation due to their unreliability and our ignorance of the speaker's motives.

[90] JOHN H. ELY, DEMOCRACY AND DISTRUST 34-35 (1980); LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 280-81 (1988); Randy E. Barnett, *Introduction: James Madison's Ninth Amendment*, *in* RIGHTS RETAINED BY THE PEOPLE, *supra* note 23, at 6-8; Knowlton H. Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L.J. 309, 310 (1936); Sager, *supra* note 3, at 246.

[91] U.S. CONST. amend. X.

[92] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).

unenumerated rights. He argues that the Ninth Amendment repudiates the implication that the federal government would have broad power to violate the rights protected by the Bill of Rights if the Bill of Rights had not enumerated them.[93] According to this interpretation, the Ninth Amendment prevents an overbroad reading of the powers granted to the government under Article I, Section 8, and thus the Ninth Amendment would not necessarily be redundant with the Tenth Amendment. McAffee sees the Tenth as an explicit reaffirmation that the Constitution created a government of limited, enumerated powers.[94] Thus, the two Amendments act as complementary rules of construction that safeguard the Constitution's design of limited federal powers.

Our reading suggests a different role for the Ninth Amendment. Although the Ninth does limit the federal government, it primarily checks federal power by declaring that unenumerated rights of the people exist, rather than by strictly construing grants of enumerated powers. In other words, the Ninth Amendment recognizes that unenumerated rights, like those enumerated in the first eight amendments, implicitly constrain all federal powers by cutting across them. Even if the Ninth Amendment did not exist, these unenumerated rights would still limit the government because they are inherent in the sovereignty of the people.

2. *Legislative History*

The legislative history further confirms the different roles played by the Ninth and Tenth Amendments in the minds of the Framers. An examination of the evolution of the Ninth Amendment's *text* will make this clear. The chronology of the Ninth Amendment's drafting is well known. During the ratifying conventions in 1788, several states demanded that Congress pass a Bill of Rights as its first order of business.[95] Several states, most prominently Virginia and New York, even submitted proposed amendments for a Bill of Rights. On June 8, 1789, James Madison presented to Congress his own draft, including what would become the Ninth Amendment. A select committee in the House considered the proposed amendments and made some significant alterations. During the

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[93] McAffee, *supra* note 2, at 1265-67.

[94] *Id.* at 1307.

[95] LEVY, *supra* note 90, at 163-67.

House's consideration of the future Ninth Amendment, Elbridge Gerry sought to substitute the word "impair" for "disparage," but was not seconded. The *Annals of Congress* then simply record that the Ninth Amendment "passed in the affirmative." There is no record of the Senate's consideration because its proceedings were secret in 1789.[96]

Those who interpret the Ninth Amendment as a rule of construction trace its antecedents to the amendments proposed by the state ratifying conventions. According to these scholars, amendments proposed by the Virginia state convention show that the Framers were chiefly worried that the enumeration of rights would threaten the principle of limited powers.[97] Even supporters of an individual rights reading of the Ninth mistakenly find the Amendment's origins in these state proposals. Virginia's seventeenth proposal provided:

> That those clauses which declare that Congress shall not exercise certain powers, be not interpreted, in any manner whatsoever, to extend the powers of Congress; but that they be construed either as making exceptions to the specified powers where this shall be the case, or otherwise, as inserted merely for greater caution.[98]

New York's convention also proposed:

> [T]hat every Power, Jurisdiction and right, which is not by the said Constitution clearly delegated to the Congress of the United States, or the departments of the Government thereof, remains to the People of the several states, or to their respective State Governments to whom they may have granted the same; And that those Clauses in the said Constitution, which declare, that Congress shall not have or exercise certain Powers, do not imply that Congress is entitled to any Powers not given by the said Constitution; but such Clauses are to be construed either as exceptions to certain specified Powers, or as inserted merely for greater Caution.[99]

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[96] *See* Leslie W. Dunbar, *James Madison and the Ninth Amendment*, 42 VA. L. REV. 627, 632-33 (1956).

[97] McAffee, *supra* note 2, at 1278.

[98] Virginia Ratifying Convention (1788), *in* 2 BILL OF RIGHTS, *supra* note 14, at 844.

[99] New York Proposed Amendments (1788), *in* 2 BILL OF RIGHTS, *supra* note 14, at 911-12. Rhode Island proposed a similar amendment to forestall future attempts to construe the enumeration of rights as an end-run around limited government. *See* 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONVENTION 334 (Jonathan Elliot ed., 2d ed. 1866). However, its proposals could not have influenced the drafting of the Bill of Rights, because the

Again, those who rely on these amendments mistake the Tenth for the Ninth. These proposals have little relevance to the concept of popular sovereignty underlying the Ninth Amendment and the Bill of Rights as a whole. The Virginia amendment does not even use the "people-rights" terminology which is so crucial for enforcing majoritarian rights throughout the Bill of Rights. The New York proposal is more relevant to popular sovereignty rights, but it speaks only of "the People of the several states" and not of the people—reflecting a greater emphasis on states' rights, not on the sovereignty of the people. Both proposals clearly announce that their chief concern is the delegation of powers to the central government, not the rights of the people. In fact, New York's proposal bears a striking resemblance to Article II of the Articles of Confederation, which stated that "[e]ach state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States."[100] Article II of the Articles of Confederation was the precursor of the Tenth Amendment, not the Ninth, because the Articles served only as a treaty between the states rather than an instrument of popular sovereignty.[101] Thus, the New York proposal, like Virginia's, expressed state attempts to protect their own sovereignty from the newly-powerful federal government. This attempt ultimately became the Tenth, not the Ninth Amendment.

When James Madison proposed his twelve amendments to Congress on June 8, 1789, he introduced a text very different from the state proposals limiting delegated powers. His amendment read:

> The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, *or* as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.[102]

The second part of the proposal about delegated powers obviously bor-

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proposals came after Congress had submitted the Bill of Rights for ratification by the states. McAffee, *supra* note 2, at 1236 n.80.

[100] ARTICLES OF CONFEDERATION art. II (U.S. 1781).

[101] "The confederation was, essentially, a league; and Congress was a corps of ambassadors, to be recalled at the will of their masters," John Marshall noted. John Marshall, *A Friend of the Constitution*, ALEXANDRIA GAZETTE (June 30-July 16, 1819), *reprinted in* JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 155, 199 (Gerald Gunther ed., 1969).

[102] 1 ANNALS OF CONG. 435 (Joseph Gales ed., 1789).

rowed language from the New York and Virginia proposals. However, Madison's inclusion of the phrase "shall not be so construed as to diminish the just importance of the rights retained by the people" was without precedent.[103] Madison probably borrowed this language from the state bills of rights which strongly outlined the rights of the people.[104] Madison also connected the delegation language with the rights language by using a crucial "or." This suggests that the two clauses operated differently: the first by protecting rights and the second by preventing overbroad readings of delegated powers. Moreover, Madison's Ninth introduced popular sovereignty into the equation by using the words "people" and "rights," something that was sorely lacking in the state proposals.

Although few records exist concerning congressional adoption of the Ninth Amendment, the changes made to the text strongly support a reading of the Amendment as a declaration of majoritarian rights. During the legislative process, Congress removed the "states" and "delegated powers" language from the amendment, leaving only the "people" and their "rights" in the text. In reformulating Madison's proposals, a House select committee composed of representatives from each state (Madison represented Virginia) dropped the reference to enlarged powers. They left the language as: "The enumeration in this Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."[105] Meanwhile, the committee left unchanged Madison's proposal for what would become the Tenth Amendment: "The powers not delegated by this Constitution, nor prohibited by it to the States, are reserved to the States respectively." Apparently the Framers believed that the second phrase of Madison's proposed Ninth Amendment—"the exceptions . . . shall not be so construed . . . as to enlarge the powers delegated by the Constitution"—was unnecessary given the Tenth Amendment's warning against inferring a grant of undelegated powers.

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[103] LEVY, *supra* note 90, at 272.

[104] Evidence that Madison actually based his proposed amendment on the Virginia and New York proposals is inconclusive. In the words of one who makes it an important link in his argument for a Ninth Amendment as a rule of construction, such evidence is "circumstantial" at best. McAffee, *supra* note 2, at 1279. However, several scholars have ignored the text of the amendment and assumed that Madison's version of the Ninth derived from these state proposals. *See, e.g.*, Pennsylvania Frame of Government (1682), *in* 1 BILL OF RIGHTS, *supra* note 14, at 144; Caplan, *supra* note 55, at 250-52; Dunbar, *supra* note 96, at 631-32. Circumstantial evidence should not outweigh significant changes in the text, especially at so critical a juncture.

[105] Dunbar, *supra* note 96, at 632.

This conclusion receives further confirmation from the notes of Connecticut's Roger Sherman, who was a member of the House Select Committee. Sherman's draft of the Bill of Rights shows that the committee divided Madison's Ninth Amendment into a state sovereignty provision and a people's rights provision. The predecessor to the Tenth spoke openly about limiting the federal government to its enumerated powers:

> And the powers not delegated to the Government of the united states by the Constitution, nor prohibited by it to the particular States, are retained by the States respectively, nor shall the exercise of power by the Government of the united states particular instances here in enumerated by way of caution be construed to imply the contrary.[106]

In contrast, Sherman's notes on what would become the Ninth Amendment not only focus on rights but also discuss some of the people's protected rights:

> The people have certain natural rights which are retained by them when they enter into Society, such are the rights of Conscience in matters of religion; of acquiring property and of pursuing happiness & Safety; of Speaking, writing and publishing their Sentiments with decency and freedom; of peaceably assembling to consult their common good, and of applying to Government by petition or remonstrance for redress of grievances. Of these rights therefore they Shall not be deprived by the Government of the united states.[107]

Admittedly, Sherman's draft includes both individual, personal rights, such as rights of conscience, and majoritarian rights, such as speech, assembly, and petition. However, Sherman's draft suggests that the Framers intended to protect both types of rights in the Bill of Rights and in the Ninth Amendment. Furthermore, Sherman's draft, like the Ninth Amendment in its final form, employed the important "people-rights" terminology whose core meaning emphasizes majoritarian, popular rights.

Thus, judging by the texts, the Framers designed the Tenth Amendment to protect state sovereignty and to defeat the inference of enlarged federal powers. They left the Ninth Amendment for the protection of the people's rights. Of course, this reading does not deny or disparage the

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[106] Roger Sherman's Draft of the Bill of Rights (1789), *in* RIGHTS RETAINED BY THE PEOPLE, *supra* note 23, at 351-52.

[107] *Id.*

interpretation of the Amendment as a rule of construction. Rather, reading the Ninth as a declaration that unenumerated majoritarian rights exist supports the rule of construction thesis. If we accept that the Ninth does protect the people's majoritarian rights, a chief way to enforce this declaratory principle would be to interpret other constitutional provisions to avoid encroaching on those rights. However, interpretation still would require us to refer to the unenumerated rights. Otherwise, there would be no standard against which to measure the exercise of the constitutional provisions.[108]

C. A Declaratory Ninth Amendment

A declaratory reading of the Ninth Amendment provides a different view of the relationship between rights and the written Constitution. Current scholarship has attributed to the Framers an intent to create our modern system of judicially enforceable individual rights.[109] Although such may have been the intent of the Framers of the Fourteenth Amendment, this was not the intent of the Framers of the first ten amendments. Under our interpretation, the Framers intended the Ninth Amendment to be declarative of existing majoritarian rights and of the structure of the government, of the relationship between federal and state law, and of the future of the Constitution.

Neither the Ninth Amendment nor the Bill of Rights as a whole simply granted rights. Instead, they declared the Framers' understanding of already existing rights. Many of these rights were understood to be inalienable and inherent, and therefore not dependent upon a grant from the government. In declaring "these truths to be self-evident," the Declaration of Independence proclaimed that certain fundamental rights existed independent of government and of positive enactment.[110] The common law

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[108] This last point raises two questions about the Ninth Amendment that have frustrated arguments in support of an affirmative rights reading. First, how do courts decide which rights are "retained by the people" and which ones are not? Second, how do courts enforce such provisions? These questions are discussed in the conclusion of this Article. *See infra* part IV.

[109] *See generally* Charles L. Black, Jr., *On Reading and Using the Ninth Amendment, in* POWER AND POLICY IN QUEST OF LAW: ESSAYS IN HONOR OF EUGENE ROSTOW 187 (Myres S. McDougal & W. Michael Reisman eds., 1985); Massey, *supra* note 37, at 343-44; Sager, *supra* note 3, at 250-53; Sherry, *supra* note 10.

[110] THE DECLARATION OF INDEPENDENCE (U.S. 1776). Of course, the Declaration of Rights contained not only popular rights, but rights gained by custom and individual rights as well.

was another declaration of the existence of such rights. Naturally, there were individual rights aspects to these declarations of law as well, but most importantly these rights included the majoritarian right to self-government.[111]

Similarly, "We the People" declared fundamental rights in the Constitution, but we did not intend them to be the only rights retained by the people. During the ratifying conventions, the Federalists strenuously argued against attempts to enumerate rights. They feared a Bill of Rights would imply that the federal government was a government of general powers rather than of limited, enumerated powers.[112] The Federalists also argued that an incomplete list of rights would be dangerous because it would imply federal power over rights not specified.[113] Finally, the Federalists simply doubted that all fundamental rights could be enumerated. James Iredell challenged the North Carolina convention: "Let any one

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[111] I do not claim that all the rights contained in the Bill of Rights and other documents were popular sovereignty rights inherent in the people. Certainly, some rights were either granted by custom, adhered to individuals, or were waivable. For example, the Seventh Amendment right to jury trial in civil cases probably constitutes as much an individual right as a popular right because the parties can waive it.

[112] As James Wilson said during the Pennsylvania Ratifying Convention:

> In all societies, there are many powers and rights which cannot be particularly enumerated. A bill of rights annexed to a constitution is an enumeration of the powers reserved. If we attempt an enumeration, every thing that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete.

James Wilson, An Address Before the Pennsylvania Ratifying Convention (Nov. 28, 1787), *in* 2 BILL OF RIGHTS, *supra* note 14, at 632.

[113] In *The Federalist Papers*, Alexander Hamilton wrote:

> I go further and affirm that bills of rights, in the sense and in the extent in which they are contended for, are not only unnecessary in the proposed Constitution but would even be dangerous. They would contain various exceptions to powers which are not granted; and, on this account, would afford a colorable pretext to claim more than granted.

THE FEDERALIST NO. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Madison made a similar argument before the House of Representatives upon presenting his version of the Ninth Amendment:

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against.

1 ANNALS OF CONG. 456 (Joseph Gales ed., 1789).

make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it."[114] Professor McAffee places great reliance on these Federalist statements to support the thesis that the Federalists intended the Ninth Amendment as a rule of construction to cabin federal powers with rights defined "residually" by the definition of such power.[115]

One problem with the residual rights thesis is that it ignores the declarative nature of the Ninth Amendment. The Ninth Amendment declared that the rights left unenumerated were not without force; it declared that unmentioned rights could be enforced by the People. As we have seen, such rights include the right of the People to change and abolish their government.[116] The Antifederalists ratified the Constitution in exchange for a Bill of Rights, and they certainly understood the entire Bill of Rights to be declarative. For example, in the Virginia Ratifying Convention, Patrick Henry considered "essential to liberty and happiness" a "declaration of rights containing those fundamental, inalienable privileges."[117] Elbridge Gerry wrote in Massachusetts that "[t]he rights of individuals ought to be the primary object of all government, and cannot be too securely guarded by the most explicit declarations in their favor."[118] Because the Antifederalists believed the entire Bill of Rights to be a declaration of rights, we should assume that the Ninth Amendment was also intended as declarative of a fundamental principle.

The Antifederalists saw the federal government as a government of unenumerated, general powers, much like the state governments.[119] The state constitutions contained enumerations of fundamental rights, but no

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[114] James Iredell, An Address Before the North Carolina Convention Debates (July 29, 1788), *in* 2 BILL OF RIGHTS, *supra* note 14, at 951.

[115] McAffee, *supra* note 2, at 1249-77.

[116] Indeed, John Smilie of the Pennsylvania Ratifying Convention argued that "the whole plan of government is nothing more than a bill of rights—a declaration of the people in what manner they choose to be governed." John Smilie, An Address Before the Pennsylvania Convention Debates (Nov. 27, 1787), *in* 2 BILL OF RIGHTS, *supra* note 14, at 643.

[117] Patrick Henry, An Address Before the Virginia Ratifying Convention (June 24, 1788), *in* 2 BILL OF RIGHTS, *supra* note 14, at 819.

[118] ELBRIDGE GERRY, OBSERVATIONS ON THE NEW CONSTITUTION AND THE FEDERAL AND STATE CONVENTIONS (1788), *reprinted in* 1 BILL OF RIGHTS, *supra* note 14, at 481, 489.

[119] Letters from the Federal Farmer (Dec. 25, 1787), *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 67, at 80; *Essays of Brutus*, N.Y.J. (Oct. 1787-Apr. 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 67, at 372.

one understood those declarations to list the exclusive rights of the people. In fact, Thomas Jefferson hoped that declaring certain rights in the federal Constitution would convince states that had failed to explicitly provide for those rights to recognize their existence. The Ninth Amendment essentially embodied the Antifederalist understanding of the state constitutions: that even in a government of general powers, the people still possessed unenumerated rights. The Federal Farmer, the pseudonym for an influential Antifederalist writer, clearly expressed this point:

> People, and very wisely too, like to be express and explicit about their essential rights, and not to be forced to claim them on the precarious and unascertained tenure of inferences and general principles, knowing that in any controversy between them and their rulers, concerning those rights, disputes may be endless, and nothing certain: —But admitting, on the general principle, that all rights are reserved of course, which are not expressly surrendered, the people could with sufficient certainty assert their rights on all occasions, and establish them with ease, still there are infinite advantages in particularly enumerating many of the most essential rights reserved in all cases; and as to the less important ones, we may declare in general terms, that all not expressly surrendered are reserved.[120]

The Antifederalists were not troubled by the Federalists' concerns because they thought the Ninth Amendment declared that the people retained unenumerated rights. Thus, responding to Madison's apprehension that "[a] positive declaration of some essential rights could not be obtained in the requisite latitude," Thomas Jefferson joked: "Half a loaf is better than no bread. If we cannot secure all our rights, let us secure what we can."[121] Jefferson could make such an argument because the Antifederalists understood that a declaration of the rights retained by the people would allow them to declare their bread and eat it too.

Declaring rights thus served several important purposes. First, it made enforcement of those rights more effective by explicitly securing them. Second, it announced fundamental rights so that other law-finding institu-

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[120] Letters from the Federal Farmer (Dec. 25, 1787), *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 67, at 323. While the author of the Federal Farmer is not conclusively known, his writings were circulated widely in pamphlet form and considered one of the most effective and intelligent Antifederalist arguments. *Id.* at 214.

[121] Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), *in* 1 BILL OF RIGHTS, *supra* note 14, at 621.

tions, such as state courts and legislatures, would recognize them—much in the way the Magna Charta and the Petition of Right had done. Third, it served to teach the people about their rights. "We do not by declarations change the nature of things, or create new truths, but we give existence, or at least establish in the minds of the people truths and principles which they might never otherwise have thought of, or soon forgot," said the Federal Farmer.[122] The declaration of rights serves republicanism's dual goals of preserving the right of the people to self-government and educating the people for the duty of self-government.

In this system, the declaratory nature of the Ninth Amendment assumes critical importance. First, it declares that the People have not pronounced all of their rights. They have other unenumerated rights left to secure, although they may be "the less important ones," as the Federal Farmer says.[123] Second, the Ninth Amendment teaches the people that they might declare even more rights in the future because they have more rights than those enumerated in the document. As we will see in the next section, they did exactly that. Finally, a declarative Ninth Amendment is not wholly incompatible with a vision of the Amendment as a rule of construction. Construing federal power narrowly to avoid infringement is one way to respect the rights not yet declared by the People but whose existence is recognized by the Ninth Amendment.[124]

An interpretation of the Ninth Amendment as a declaratory provision can exist in both narrow and broad forms. Viewed narrowly, the Ninth Amendment may simply declare the Framers' understanding that the Constitution's limitations on the federal government do not express all of the rights retained by the People. A narrow version of the Ninth proposes

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[122] Letters From the Federal Farmer (Dec. 25, 1787), *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 67, at 324. The Antifederalist writer Agrippa added that because of a declaration of certain rights, "the people know their rights, and feel happy in the possession of their freedom; both civil and political." Letters of Agrippa (Jan. 14, 1788), *in* 1 BILL OF RIGHTS, *supra* note 14, at 515; *see also* Letter from James Madison to Thomas Jefferson (Mar. 15, 1789), *in* 1 BILL OF RIGHTS, *supra* note 14, at 617 ("The political truths declared in that solemn manner [via a Bill of Rights] acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion.").

[123] *See supra* note 120.

[124] Congress recognized this dual role of the Bill of Rights in general, and of the Ninth Amendment in particular, when it called the amendments "declaratory and restrictive clauses" in its message which issued the proposed Bill of Rights to the states for ratification. Senate Journal (Sept. 1789), *in* 2 BILL OF RIGHTS, *supra* note 14, at 1164.

that the rights retained by the People are much broader than those mentioned in the Bill of Rights. While the First Amendment says Congress can make no law abridging the right to free speech, the Ninth Amendment declares the Framers' understanding that the right to free speech is broader than the First Amendment's simple limitation on congressional power to regulate it.

Under a more expansive approach to the declaratory nature of the Ninth Amendment, however, the Constitution does not even mention the many unenumerated rights held by the people. The Ninth Amendment declares the Framers' understanding that the Constitution functions against the background of a natural rights universe that exists outside the power of the Constitution. Under this approach, the Ninth Amendment could require the enforcement of rights, such as a right to privacy, even if it had no textual basis within the Constitution. In both cases, the Ninth Amendment does not create any rights through positive law, but serves as a declaration of the Framers' understanding of current law: that rights exist beyond their literal expression in the Constitutional text.

II. THE ANTEBELLUM NINTH AMENDMENT

Interpretations of the Ninth Amendment between the ratification of the Bill of Rights and Reconstruction provide powerful support for a declarative reading. During the antebellum period, the slavery debate stoked a resurgence of natural rights theories in constitutional thought. During this period, perhaps the most significant developments in the Ninth Amendment's history occurred, but at the *state* level. At the federal level, the Ninth Amendment received little attention, although it arguably became a rule of construction limiting federal power. At the state level, however, courts wielded state analogues to the Ninth Amendment to enforce affirmatively unenumerated rights. When the Reconstruction Congress met in 1866, they sought to include this state understanding of the Ninth in place of the incorrect federalism reading.

A. Natural Rights and the Slavery Debate

Abolitionists made antislavery the burning political and constitutional issue of the antebellum period. In translating their moral arguments against slavery into legal ones, Abolitionists turned to the natural rights

foundations which had appeared during the American Revolution and the founding period.[125] They argued that slavery violated the natural rights of the black slaves, and they urged courts to rely upon such higher laws to resist state and federal laws protecting slavery.[126] Conversely, proslavery arguments relied on the natural right of private property as well as the constitutional limitations on the federal government.[127] As a result, both sides of the slavery debate raised natural rights as the key to interpreting and enforcing the Constitution; they just disagreed over who was entitled to them.

Antislavery thinkers and politicians carried forward the strong natural rights tradition that had infused the American Revolution and the early national period.[128] Influential abolitionist writers such as Lysander Spooner and Joel Tiffany found that this natural rights tradition supported the idea that all men possessed certain rights which no government or person could infringe.[129] Like the Framers, the Abolitionists argued that this concept was embodied in the common law as presented by Blackstone. They quoted Blackstone's passage that natural law "is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this."[130] Abolitionists argued that such natural rights were rooted in the American constitutional system via the Declara-

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[125] The Abolitionists' appeal to a higher law also drew its roots from other strands of American thought, such as evangelical Christianity and transcendentalism. William E. Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 525-27 (1974). Abolitionism also became tied to an ideology of "Free Labor" and "Free Soil" prevalent in the Republican Party. *See generally* ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR (1970).

[126] Professor Cover gives a striking account of how Northern judges rejected such arguments and upheld the Fugitive Slave Acts, which required the return of escaped slaves to their Southern owners, even though they privately held natural rights beliefs. ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 226-56 (1975).

[127] *See* Earl M. Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 AM. J. LEGAL HIST. 305 (1988) (positing that antislavery and proslavery arguments both used common legal concepts to defend their positions).

[128] *See* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 232-46 (1867); EDMUND S. MORGAN, THE BIRTH OF THE REPUBLIC: 1763-89, at 72-77 (1956); WOOD, *supra* note 15, at 259-305.

[129] LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY (1853); JOEL TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY: TOGETHER WITH THE POWERS AND DUTIES OF THE FEDERAL GOVERNMENT, IN RELATION TO THAT SUBJECT 23-27 (1869).

[130] 1 BLACKSTONE, *supra* note 69, at *41; *see* WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848, at 259 (1977) (documenting use of Blackstone by antislavery thinkers).

tion of Independence. They particularly focused on its pronouncement that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."[131]

Under this constitutional theory, the Abolitionists contended that courts could strike down legislation that violated natural rights. In doing so, they struck a chord that had found expression in early Supreme Court opinions. These decisions are important not just because they suggested that unenumerated natural rights could defeat legislative actions,[132] but also because Abolitionists regarded them as ideal examples of judicial action.

For the Abolitionists, the most significant case was *Calder v. Bull*.[133] In *Calder*, Justice Chase argued that any legislative acts which violated natural rights were void: "An act of the legislature (for I cannot call it a *law*) contrary to the *great first principles* of the *social compact*, cannot be considered a *rightful exercise* of *legislative* authority."[134] Chief Justice Marshall echoed this argument in *Fletcher v. Peck*,[135] in which the Court used the Contract Clause to invalidate a Georgia statute which reclaimed lands previously granted by a bribed legislature. Chief Justice Marshall suggested in *Fletcher* that Georgia's statute would also violate "the general principles which are common to our free institutions."[136]

Abolitionists placed similar reliance on cases which struck down state legislation for infringing on property rights. In *Terret v. Taylor*,[137] the Court invalidated a Virginia law which dispossessed the Episcopal church of certain lands. According to Justice Story, the law was "utterly inconsistent with a great and fundamental principle of a republican government, the right of the citizens to the free enjoyment of their property legally

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[131] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[132] Suzanna Sherry uses these cases to argue that the Founders had an "unwritten Constitution" that supplemented the written one. *See* Sherry, *supra* note 10, at 1167-76.

[133] 3 U.S. (3 Dall.) 386 (1798).

[134] *Id.* at 388 (emphasis added). However, Justice Chase did not strike down the statute because he held that it violated neither the plaintiff's vested rights nor the Constitution's prohibition on ex post facto laws. Moreover, Justice Chase suggested that federal courts may be incompetent in defining unenumerated rights and defending them from state action. *Id.* at 393. Justice Chase's argument will be examined in more detail. *See infra* notes 202-11 and accompanying text.

[135] 10 U.S. (6 Cranch) 87 (1810).

[136] *Id.* at 139.

[137] 13 U.S. (9 Cranch) 43 (1815).

acquired."[138] Justice Story expanded his natural rights thoughts in *Wilkinson v. Leland*:[139] "The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred."[140]

Radical abolitionist lawyers continually cited these decisions, especially *Calder*, to support limitations on all government interference with the right to hold property.[141] Antislavery proponents argued that such private property decisions supported their cause because slavery violated the slaves' rights to property and contract.[142] The Republicans believed slaves were entitled to the triad of natural rights recognized by Blackstone and Chancellor Kent: the right of personal security, the right of personal liberty, and the right to acquire and enjoy property.[143] Slavery, of course, denied blacks those rights.

Beyond these basic natural rights, antislavery supporters disagreed over what other rights the slaves were entitled. Several argued that the slaves were entitled to the rights guaranteed in the first eight amendments of the Constitution, which they believed were necessary for the enforcement of the rights to security, liberty, and property.[144] Unfortunately, this idea contradicted Justice Marshall's opinion in *Barron v. City of Baltimore*,[145] which held that the Bill of Rights applied only against the federal government, and not the states, which protected slavery via their local laws. Nonetheless, these "Barron contrarians" believed that the Bill of Rights was a declaratory statement by the People that certain natural or fundamental rights existed against all government.[146] Thus, the Bill of Rights

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[138] *Id.* at 50-51.

[139] 27 U.S. (2 Pet.) 627 (1829).

[140] *Id.* at 657. Justice Story continued:

> At least, no court of justice in this country would be warranted in assuming that the power to violate and disregard them — a power so repugnant to the common principles of justice and civil liberty — lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people.

Id.

[141] WIECEK, *supra* note 130, at 260-61.

[142] Nelson, *supra* note 125, at 532.

[143] 1 BLACKSTONE, *supra* note 69, at *125-34; 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 1 (1884); *see also* Maltz, *supra* note 127, at 307-09.

[144] *See, e.g.*, JACOBUS TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 105-06 (1951); WIECEK, *supra* note 130, at 265-68; Nelson, *supra* note 125, at 536-37.

[145] 32 U.S. (7 Pet.) 243, 248-49 (1833) (holding Bill of Rights inapplicable to states).

[146] Amar, *supra* note 7, at 1203-05.

only declared those natural rights to which all, especially the slaves, were entitled.[147]

Other thinkers were even more expansive. In a manner reminiscent of the Framers of the Ninth Amendment, other Abolitionists defined natural rights as all those rights which were inalienable and could never be surrendered to government. Alvan Stewart, an influential antislavery thinker, defined such rights in a way that resounded with Ninth Amendment-like thinking:

> There is a class of rights of the most personal and sacred character to the citizen, which are a portion of individual sovereignty, never surrendered by the citizen. . . . The legislatures of the States and Union are forbidden by the constitutions of the States and Union from touching those unsurrendered rights; no matter in what distress or exigency a State may find itself, the legislature can never touch those unsurrendered rights as objects of legislation.[148]

Stewart's argument indicates several significant differences between the Framers' approach and the Abolitionists' approach to unenumerated rights. The Framers viewed natural rights, such as those expressed in the Bill of Rights, as majoritarian rights that effectuated popular sovereignty, such as the right to abolish and reform government. For Stewart and the Abolitionists, the most important rights were often ones that effectuated "individual sovereignty." Furthermore, the Framers had envisioned rights as guarding against a self-interested central government's attempts to frustrate popular self-rule. The Abolitionists, however, saw both the central government and the state governments as threats to individual rights. Once Abolitionists gained control over the national government and the Reconstruction process after the Civil War, they reoriented the Ninth Amendment to protect their vision of rights.

B. Natural Rights, the Ninth Amendment, and the Federal Courts

As we have seen, Abolitionists promoted the idea that slavery was inconsistent with mankind's natural rights. It would seem natural for them to add the Ninth Amendment to their arguments. However, most aboli-

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[147] Abolitionists also believed that securing the Bill of Right's guarantees against the states would prevent the South from suppressing antislavery thought among its own citizens. *Id.* at 1216-17.

[148] Alvan Stewart, *Response to Marcy*, *in* WIECEK, *supra* note 130, at 274.

tionist lawyers left the Ninth Amendment behind when appearing before the federal courts. Radical Abolitionists built their constitutional theories primarily upon the Due Process Clause of the Fifth Amendment[149] and the Privileges and Immunities Clause of Article IV[150] instead. This reflected the abolitionist lawyers' recognition that the federal courts would prove hostile to Ninth Amendment arguments. Perhaps it also indicated a more subtle understanding on the part of those lawyers that the Ninth Amendment actually might help proslavery advocates.

It does not appear that those, in the words of Sanford Levinson, "with the greatest incentive to do so," that is, the radical abolitionist lawyers, ever cited the Ninth Amendment as a restriction on the Southern states' power to protect their peculiar institution.[151] Indeed, one radical antislavery lawyer, Gerrit Smith, argued in 1850 that the Bill of Rights applied against the states except for the First, Ninth, and Tenth Amendments.[152] In addition to the natural rights arguments discussed earlier, abolitionist constitutional theory primarily focused on a number of other provisions to show the illegality of slavery. They relied upon Article IV's Privileges and Immunities and Guarantee of Republican Government clauses and the Fifth Amendment's Due Process Clause.[153] In short, radical Abolitionists declared that these provisions required federal intervention against the states to secure blacks' rights to security, liberty, and property, as well as to many of the guarantees of the Bill of Rights.

Although antislavery lawyers did not include the Ninth Amendment in their theories, they did not completely forget the rights retained by the people. In oral argument in *Holmes v. Jennison*,[154] former Vermont governor C.P. Van Ness interpreted the Ninth Amendment much in the way presented here. *Holmes* involved the issue of whether a Canadian fugitive's rights had been violated by the State of Vermont when state officials held him in custody and planned to return him to Canada. Claiming that

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[149] U.S. CONST. amend. V.

[150] U.S. CONST. art. IV, § 2.

[151] Levinson, *supra* note 3, at 144.

[152] WIECEK, *supra* note 130, at 267. Professor McAffee makes much of Smith's comment to show that the post-ratification understanding of the Ninth Amendment remained in line with his rule of construction thesis. McAffee, *supra* note 2, at 1314.

[153] FONER, *supra* note 125, at 73-102; TENBROEK, *supra* note 144, at 32-70; WIECEK, *supra* note 130, at 265-75.

[154] 39 U.S. (14 Pet.) 540 (1840).

the Fifth Amendment's Due Process Clause prohibited Vermont from returning the fugitive, Van Ness urged the Court to overturn *Barron v. Mayor of Baltimore*,[155] which had held the Bill of Rights inapplicable against the states.[156] In doing so, Van Ness expressed a declaratory vision of the Ninth Amendment and of the Bill of Rights as a whole.

Van Ness distinguished between those constitutional provisions that were "limitations of power" and those that were "declarations of rights."[157] He believed that the latter proclaimed rights held by the people against the federal and state governments. Such declarations required the federal government to act affirmatively to enforce those rights. To illustrate his point, Van Ness quoted the Tenth Amendment as an example of a "limitation of power" which was applicable only against the federal government. However, Van Ness called the Ninth Amendment a declaration of rights. His words call for careful attention:

> Here we see that the framers of these amendments had no idea of confounding the limitations of power, and the declarations of rights; but treated each as distinct from the other. If the amendments had treated only of the former, certainly the reservation, both to the states and to the people, in the tenth article, would have answered every purpose. But the ninth article was deemed necessary as it regarded the rights declared to exist, in order to prevent the people from being deprived of others by implication, that might not be included in the enumeration.[158]

Van Ness interpreted the Ninth and Tenth Amendments as any good textualist should. He argued that the textual and structural differences between the Ninth and Tenth indicated that the Ninth declared the existence of unenumerated rights, while the Tenth served as a limitation on federal power. Most importantly, he recognized the popular sovereignty aspects of the Ninth Amendment: it guarded the "rights" of "the people," rather than serving as only a rule of construction. Van Ness remained true to the work of the Framers he cited.

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[155] 32 U.S. (7 Pet.) 243 (1833).

[156] Van Ness also argued that the return of fugitives to other nations lay solely within the federal government's plenary power over foreign affairs. However, this argument was irrelevant to the argument about the Due Process Clause.

[157] 39 U.S. (14 Pet.) at 556.

[158] *Id.* at 557.

Nevertheless, Van Ness lost. His failure to convince the Court provides one compelling reason why the Ninth Amendment was absent from radical antislavery lawyers' briefs. Hostile to such arguments, the federal courts lost sight of the Framers' intent and interpreted the Ninth Amendment as a limitation on the power of the federal government, not a declaration of rights.[159] In fact, the Court soon turned its reading of the Ninth Amendment against the antislavery movement. In *Scott v. Sandford*,[160] the Court held that Congress could not limit slavery in the territories partly because such a limitation would interfere with the slaveowner's property rights under the Fifth Amendment.[161] Concurring, Justice Campbell invoked the Ninth and Tenth Amendments to support the holding that the federal government could not regulate slavery in the territories:

> And the ninth and tenth amendments to the Constitution were designed to include the reserved rights of the States, and the people, within all the sanctions of that instrument. . . . Is it probable, therefore, that the supreme and irresponsible power, which is now claimed for Congress over boundless territories, the use of which cannot fail to react upon the political system of the States, to its subversion, was ever within the contemplation of the statesmen who conducted the counsels of the people in the formation of this Constitution?[162]

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[159] Only three lower court decisions mention the Ninth Amendment. In an 1864 circuit court case, Judge Cadwalader construed the Ninth and Tenth Amendments together to argue that the Constitution did not grant the federal government the power to print paper money. "These two amendments, whether their words are to be understood as restrictive or declaratory, preclude everything like attribution of implied residuary powers of sovereignty, or ulterior inherent rights of nationality, to the government of the United States." Philadelphia & R.R. Co. v. Morrison, 19 F. Cas. 487, 490 (C.C.E.D. Pa. 1864) (No. 11,089). However, Judge Cadwalader withdrew from the case before issuing his opinion, and his thoughts on the matter constituted something of an advisory opinion. The remaining circuit judge held that printing such money did fall within Congress' enumerated powers.

In Society for the Propagation of the Gospel v. Wheeler, 22 F. Cas. 756 (C.C.D. N.H. 1814) (No. 13,156), Justice Story simply ignored arguments that the Ninth Amendment could invalidate a state law for prohibiting writs of seisin after a certain number of years. *Id.* at 766-67.

However, one other case mentions in dicta that the Ninth Amendment, along with Article I, § 9, protects all "personal rights." Magill v. Brown, 16 F. Cas. 408, 428 (C.C.E.D. Pa. 1833) (No. 8,952).

[160] 60 U.S. (19 How.) 393 (1856).

[161] The Court also held that blacks were not citizens under the Constitution, and hence they were not entitled to the rights and privileges of citizenship, such as suing in federal court.

[162] 60 U.S. (19 How.) 511 (1856) (Campbell, J., concurring).

Since such power did not fall within Congress' enumerated powers, Justice Campbell argued, it was reserved to the states and the people. Justice Campbell made no distinction between the Ninth and Tenth, but instead lumped them together as limitations on the federal government. This is done today by those who would read the Ninth as a rule of construction.

Antislavery lawyers' reluctance to add the Ninth to their quiver of constitutional arguments may also have reflected a deeper understanding of the Amendment. As we have seen, the text and legislative history of the Ninth Amendment reveals that it declares the people's majoritarian rights. Chief among these rights was the right to alter, abolish, or reform government. This popular sovereignty meaning rendered the Ninth unsuitable for abolitionist arguments. The Abolitionists were trying to defend a different type of right—that of a minority to be free from the oppression of the majority—which may not have been at the core of the Ninth Amendment. Yet, the Abolitionists themselves remained a minority on the national scale, perhaps until the 1860 election of Abraham Lincoln, when the Republican antislavery platform reached the White House.[163] Until then, the collective people, which *Dred Scott* interpreted to exclude blacks, would have resisted an attempt to abolish slavery.[164]

Although abolitionist lawyers could not have used the Ninth Amendment while in the minority, all that changed once the Republicans captured the White House. With a national majority conceivably at hand, the abolitionists could claim the Ninth Amendment as support for the people's right to limit or even abolish slavery. Seceding southerners recognized this

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[163] Lincoln won with 180 of the 303 electoral votes and a 40% plurality of the popular vote. ALBERT SHAW, ABRAHAM LINCOLN: THE YEAR OF HIS ELECTION 106 (1929). Nevertheless, the South's fear of a popular majority limiting or abolishing slavery was indicated not only in its secession, but also in its constitution. MARSHALL L. DEROSA, THE CONFEDERATE CONSTITUTION OF 1861: AN INQUIRY INTO AMERICAN CONSTITUTIONALISM 40-41 (1991)

[164] Indeed, the Republican Party only sought to limit the spread of slavery in the territories, not to abolish it in the South. President Lincoln stated early in his 1860 inaugural address: "I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I have no lawful right to do so, and I have no inclination to do so." Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859-1865, at 215 (Don E. Fehrenbacher ed., 1989).

In the same speech, Lincoln acknowledged the right of the people to change the government, but he emphasized that it was a right of the people: "This country, with its institutions, belongs to the people who inhabit it. Whenever they shall grow weary of the existing government, they can exercise their *constitutional* right of amending it, or their *revolutionary* right to dismember, or overthrow it." *Id.* at 222.

and accordingly sought to limit the Ninth Amendment's potential reach. When writing their own constitution, the delegates of the Confederate States changed the Ninth Amendment to read: "The enumeration, in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people *of the several states.*"[165] By changing "the people" to "the people of the several states," the Confederate framers denied that a national people could exercise the sovereignty to interfere with slavery.[166] To further the denial of national sovereignty, the Confederate framers modified the U.S. Constitution by replacing all mentions of "the people" with "the people of the several states" or "the people thereof." The Confederate framers believed that the people could only exercise sovereignty through their states; thus, the federal government was an instrument of the states, not of the people.[167]

C. *Unenumerated Rights in State Constitutions*

Ironically, while the Confederate Constitution extolled states' rights, a dozen states—North and South—had proclaimed that those rights belonged to the people. In the antebellum period, many states inserted clauses in their constitutions borrowing the language of the Ninth Amendment.[168] These provisions stunningly demonstrate that the people, speak-

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[165] C.S.A. CONST. art. VI, § 5 (1861), *reprinted in* 3 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS: NATIONAL DOCUMENTS 1826-1900, at 125, 137 (Donald J. Musch & William F. Swindler eds., 1985).

[166] DERosa, *supra* note 163, at 38-40.

[167] Confederate leaders believed their constitution embodied the true meaning of the U.S. Constitution. According to President Jefferson Davis, the Confederate Constitution was "a Constitution differing only from that of our fathers in so far as it is explanatory of their well-known intent." He further claimed that "[t]he Constitution framed by our fathers is that of these Confederate States." Jefferson Davis, Inaugural Address of the President of the Provisional Government (Feb. 18, 1861), *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE CONFEDERACY 32, 35-36 (James D. Richardson ed., 1906) [hereinafter MESSAGES AND PAPERS OF THE CONFEDERACY]; *see also* Jefferson Davis, Inaugural Address (Feb. 22, 1862), *in* 1 MESSAGES AND PAPERS OF THE CONFEDERACY, *supra*, at 183-85.

[168] ALA. CONST. art. I, § 30 (1819); ARK. CONST. art. II, § 24 (1836); CAL. CONST. art. I, § 21 (1849); IOWA CONST. art I, § 25 (1846); KAN. CONST. art. I, § 22 (1855); KAN. CONST. BILL OF RIGHTS § 24 (1857); ME. CONST. art. I, § 24 (1820); MD. CONST. DECLARATION OF RIGHTS art. 42 (1851); MINN. CONST. art. I, § 16 (1857); N.J. CONST. art. I, § 19 (1844); OHIO CONST. art. I, § 20 (1851); ORE. CONST. art. I, § 34 (1857); R.I. CONST. art. I, § 23 (1842).

Three other states included Ninth amendment analogues in their constitutions before ratification of the Fourteenth Amendment. GA. CONST. art. I, § 21 (1865); NEB. CONST. art. I, § 20 (1866-67); NEV. CONST. art I, § 20 (1864).

ing through the states, considered the Ninth Amendment a declaration of rights, rather than a limitation on enumerated powers. Moreover, several state courts affirmed this understanding, using these Ninth Amendment analogues to enforce natural rights through the positive law of their constitutions.[169]

The existence of these Ninth Amendment analogues in the state constitutions directly undermines the view that the Ninth is a rule of construction. During the antebellum period state constitutions did not enumerate the powers granted to a limited government. Instead, most state governments exercised a general plenary power, a fact which remains true to this day.[170] Hence, states that adopted Ninth Amendment analogues could not have understood the provision as a rule of construction because their state constitutions had no enumerated powers to construe.[171] The mere presence of the baby Ninths in state constitutions shows an understanding of the Amendment's language as a declaration in favor of rights against the government.[172]

1. The Texts of the Baby Ninths

The texts of the baby Ninths confirm this theory. None of the states adopted the Ninth Amendment verbatim. Instead, they modified its provisions in important ways to enhance its rights-declaring function. California, Iowa, Maine, Maryland, New Jersey, Rhode Island, and Oregon made the simplest changes. They altered the language of their baby Ninths to: "This enumeration of rights [and privileges] shall not be construed to *impair* or deny others retained by the people." As discussed earlier, the use of "impair," rather than "deny," clarifies that the operation

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One author notes that such provisions were so prevalent in the laws of the antebellum period—either explicitly or implicitly—that he calls them a "usual *caveat*" in state bills of rights. Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 384 (1911).

[169] For a brief review of the modern use of state Ninth Amendment analogues, see Louis K. Bonham, Note, *Unenumerated Rights Clauses in State Constitutions*, 63 TEX. L. REV. 1321 (1985).

[170] *See* Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 178-79 (1983) (explaining that state constitutions limit rather than grant government power).

[171] *See* ELY, *supra* note 90, at 203 n.87.

[172] As John Ely has noted, "The fact that the constitution-makers in, say, Maine and Alabama in 1819 saw fit to include in their bills of rights provisions that were essentially identical to the Ninth Amendment is virtually conclusive evidence that they understood it to mean what it said and not simply to relate to the limits of federal power." *Id.*

of the clause depends on a pre-existing body of rights. "Impair" also deeply resonates with the Constitution's Contracts Clause, thereby affirming the reading of the Ninth as a declaration of rights.[173]

These states also placed their baby Ninths at the end of their declarations of rights, which was usually the first article of the constitution. This positioning is significant because it suggests a role as a reservations clause for unenumerated rights. If these provisions had operated as rules of construction, then we should have expected to see them placed after the articles vesting the legislative, executive, and judicial powers. In contrast, the Confederate Constitution placed the Ninth and Tenth Amendments after the articles enumerating the powers of the confederate government. This suggests that the Confederate framers intended those amendments to serve more as rules of construction than as declarations of rights. Furthermore, the Confederate Constitution separates the Ninth and Tenth Amendments from the rest of its Bill of Rights by attaching the first eight amendments of the Bill of Rights to its version of Article I.

Other states made more drastic changes in the Ninth's text. However, in every case they made its declaratory function more explicit. Alabama, Arkansas, and Kansas attached a common version at the end of their declarations of rights which read:

> This enumeration of certain rights shall not be construed to deny or disparage others retained by the people; *and to guard against any encroachments on the rights herein retained*, or any transgression of any of the high powers herein delegated, we declare, that everything in this article is excepted out of the general powers of government, and shall forever remain inviolate; and that all laws contrary thereto, or to the following provisions, shall remain void.[174]

The language of these provisions lends strong support to a declaratory interpretation of the Ninth Amendment. First, these provisions "declare" certain rights, instead of simply commanding how to construe other provisions. Second, they explicitly proclaim their purpose to guard against the encroachment upon rights retained by the people. These Ninth Amendment analogues recognize rights as something to be protected; it is not merely an interpretive tool. Third, they declare that the people's rights

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[173] *See* text accompanying note 61.

[174] ALA. CONST. art. I, § 30 (1819) (emphasis added).

shall remain an "inviolate" place where government cannot interfere. Fourth, they explicitly "broke out" references to delegated powers. If the Ninth Amendment's text was understood as solely a rule of construction, then there would have been no need to add an explicit declaration against the "transgression of any of the high power herein delegated." Finally, they announce that any laws which interfere with the people's retained rights and powers are "void." Thus, these provisions not only declare that certain unenumerated rights existed, but they empower the judiciary to invalidate any laws that encroach or transgress on those rights.

The constitutions of the two remaining states, Minnesota and Ohio, also manifested this understanding of the Ninth Amendment. Article I, Section 16 of Minnesota's constitution begins: "The enumeration of rights in this constitution shall not be construed to deny or impair others retained by *and inherent in* the people."[175] The Minnesota constitution's use of the word "inherent" is significant because it underscores that its framers understood the people's rights to pre-exist their textual specification. In other words, the rights would apply even if they were not mentioned in the constitution. Minnesota's provision also includes a declaration of the right to freely practice religion and the right of freedom of conscience.[176] By combining the rights of religion and conscience with a declaration of unenumerated rights, Minnesota's Ninth Amendment analogue emphasizes that the unenumerated rights retained by the people are of the same nature as the enumerated ones. Furthermore, Minnesota's inclusion of such expansive language in Section 16 suggests that the entire provision was designed to enforce both enumerated and unenumerated rights against the state government.

Although a less striking example, Ohio's provision is notable because it explicitly improved upon a Tenth Amendment-like provision. Article VII, Section 28 of Ohio's 1802 Constitution guaranteed the rights of the citizens of Ohio by declaring "that all powers not hereby delegated remain with the people."[177] Moreover, Ohio's 1802 provision, like the rest of its bill of rights, followed the articles vesting power in the government. As we saw with the Confederate Constitution, this placement implies that Section 28 was a rule for construing the state government's powers. Nonethe-

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[175] MINN. CONST. art. I, § 16 (1857) (emphasis added).

[176] *Id.*

[177] OHIO CONST. art. VIII, § 28 (1802).

less, some of Ohio's judges believed the provision was a guarantor of unenumerated rights as well as a restriction on delegated powers. In *Griffith v. Commissioners of Crawford County*,[178] a member of the Ohio Supreme Court opined that Section 28's inclusion of the phrase "remain with the people" signaled its role as a declaration of unenumerated state constitutional rights.[179] Judge Spalding wrote that "[a]mong the most important of those powers remaining with the people is, in my apprehension, the right of every citizen to manage his own private property in his own private way."[180] Even when the language of the provision indicated a more Tenth Amendment-like meaning, the Ohio courts still took Section 28 to protect individual rights.

By 1851 Ohio's people found Section 28 and the rest of their constitution lacking. According to one justice, the 1802 Constitution had failed to prevent the legislature from invading personal property rights, especially by allowing local majorities to use tax dollars to buy stock in railroad companies: "Private property was thus, in effect, placed at the mercy of irresponsible, local majorities."[181] Justice Ranney argued that the government and courts ignored the command of Section 28 and created an "unlimited power" which had the "most disastrous" results.[182] To correct this problem, the citizens of Ohio moved their declaration of rights to the beginning of their constitution and added to it: "This enumeration of rights shall not be construed to impair or deny others retained by the people."[183] Although they also retained the delegation language, Ohio citizens apparently believed they had to further secure their rights by declaring that certain unenumerated rights existed. And at the very least, retention of the "powers" language shows that Ohio's framers never believed that the phrase "rights retained by the people" had anything to do with delegated

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[178] 20 Ohio 609 (1851).

[179] *Id.* at 623. Judge Spalding's opinion was dicta, however, because the court dismissed the case for lack of jurisdiction.

[180] *Id.*

[181] Cass v. Dillon, 2 Ohio St. 607, 631 (1853) (Ranney, J., dissenting).

[182] *Id.* at 630.

[183] OHIO CONST. art. I, § 20 (1851). The writers of the Ohio Constitution also placed specific bans on borrowing by local governments to assist corporations, and it further prohibited an expansion of the state debt. *See id.* art. VIII. These more specific provisions responded to the "general decline of popular faith in state policy as the proper instrument for fulfilling the interests of the commonwealth" as exemplified by state investment in the canal and railroad systems. HARRY N. SCHEIBER, OHIO CANAL ERA: A CASE STUDY OF GOVERNMENT AND THE ECONOMY, 1820-1861, at 297-98 (1969).

powers. Thus, this understanding of the Ninth Amendment's language, as reflected in the constitutions of other states, allowed Ohio's framers to declare and protect unenumerated rights by adopting similar language.[184]

2. *The Structure of the Texts*

Like the citizens of Ohio, the people of other states simply did not understand their baby Ninths as rules for construing governmental powers. Strikingly, none of the states that had baby Ninths included separate Tenth Amendment analogues in their declarations of rights. Thus the states did not see the Ninth Amendment as a necessary complement to the Tenth Amendment's prohibition on a government of general powers. If the drafters of the state constitutions intended their baby Ninths to mimic the federal Ninth's limitation on enumerated powers, they would have included a baby Tenth as well. Instead, they left out the Tenth as unnecessary in a state government of general powers. They left the Ninth in because individual and popular rights needed protection in a government of general powers.

The structural relationship of these state baby Ninths to the rest of their declarations of rights and their constitutions strengthens our rights-bearing reading of the Ninth Amendment. State constitutions always attached their baby Ninths to their declaration of rights, which usually came at the beginning, and sometimes were completely separate from the rest, of the document.[185] This placement of the baby Ninths suggests that the declarations concentrated on rights and not on the construction of the government's delegated powers. That task was left to the constitution and not the declaration of rights. Placement of the baby Ninths at the end of the declarations also indicates that the state framers understood the Ninth as a savings clause meant to reserve any rights they had forgotten to enumerate. If the Ninth's language was to involve anything beyond protecting rights, the framers would have included it in the constitutional provisions

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[184] The experience of Ohio takes on greater significance during Reconstruction's reformulation of the Ninth Amendment because several of the leaders behind the adoption of the Fourteenth Amendment, such as Representative Bingham and Senator Thurman, hailed from Ohio.

[185] *See, e.g.*, MD. DECLARATION OF RIGHTS (1851); MD. CONST. (1851). The practice of separating the declaration of rights from the constitution was prevalent during the founding. *See, e.g.*, MD. DECLARATION OF RIGHTS (1776); N.C. DECLARATION OF RIGHTS (1776); PA. DECLARATION OF RIGHTS (1776).

placed after a declaration of rights.

Moreover, like the federal Ninth Amendment and Bill of Rights, these declarations did exactly what their title announced: they *declared* the existence of rights that pre-existed the government and the constitution. The people of Alabama said: "That the general, great, and essential principles of liberty and free government may be recognized and established, we *declare*."[186] Similarly, the people of Rhode Island said, "In order effectually to secure religious and political freedom . . . we do *declare* that the essential and unquestionable rights and principles . . . mentioned shall be established, maintained, and preserved."[187] As the Rhode Island example suggests, the framers of the state constitutions were declaring their current understanding of existing natural law and inherent popular rights, and not creating these rights through positive law. Indeed, several states declared not only the people's "unalienable right to alter, reform, or abolish their form of government,"[188] a right the framers of the federal Constitution believed inherent in popular sovereignty, but also "certain inherent and indefeasible" individual rights, such as the right to property.[189] Regardless of whether the rights were popular or individual, the state framers declared them both exactly as the federal Framers had declared the rights in the federal Bill. Thus, just as we did with their federal counterpart, we should read the baby Ninths together with the surrounding provisions to be declaratory of rights and not as mere glosses on the enumerations of government power.

The nature of these declarations suggests the kind of rights their framers intended the baby Ninths to protect. Unlike the federal Constitution, the state declarations of rights did not phrase their provisions solely as limitations on the government. They were also drafted as broad guarantees that proclaimed individual rights against the government and against majorities. For example, compare the First Amendment of the federal Constitution—"Congress shall make no law . . . abridging the freedom of speech, or of the press"[190]—with the parallel provision in a typical state constitution—"Every person may speak, write, and publish his sentiments

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[186] ALA. CONST. art. I (1819) (emphasis added).
[187] R.I. CONST. art. I (1842) (emphasis added).
[188] *See* MD. DECLARATION OF RIGHTS art. I (1851).
[189] ARK. CONST. art. II, § 1 (1836).
[190] U.S. CONST. amend. I.

on all subjects, being responsible for the abuse of that right."[191] Similarly, compare the First Amendment proclamation that "Congress shall make no law respecting an establishment of religion"[192] with a state's guarantee that "[n]o person shall be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience."[193] The state provisions do not provide instructions on how to construe government power; they are the declaration of inalienable rights.

These state declarations also further undermine the rule of construction interpretation of the Ninth Amendment. Adherents of this thesis argue that the Framers designed the Ninth Amendment to prevent interpretation of the Bill of Rights' prohibitions as recognizing federal powers beyond those enumerated.[194] In this scheme, the Ninth Amendment would forbid us from reading the First Amendment's "Congress shall make no law respecting an establishment of religion" as an implicit acknowledgment that the federal government would have the power to create a state church if there were no First Amendment. Such a rule of construction is unnecessary under the constitutional design of the antebellum states because their constitutions declared rights, *not* limitations on government powers. The framers in those states did not worry about future interpreters construing prohibitions as an implication of general powers. First, the state governments already exercised general powers. Second, the rights themselves were declared in a straightforward manner that left little doubt about their application against state action. For example, antebellum states did have the general plenary power to restrict speech, but this power was restricted by state declarations of rights which proclaimed that all individuals possessed the freedom of speech. Such declarations cut across all state powers to prevent any action that violated the guaranteed right in question. This is very different from construing state power narrowly or broadly depending on a negative prohibition.

Thus, although the state constitutions did not have the problem of preserving a system of limited, enumerated government powers, they still included language approximating that of the federal Ninth Amendment. This suggests that the peoples of the states viewed the Ninth Amendment

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[191] IOWA CONST. art. I, § 7 (1846).
[192] U.S. CONST. amend. I.
[193] N.J. CONST. art. I, § 3 (1844).
[194] *See generally* McAffee, *supra* note 2, at 1225.

as a guarantor of unenumerated rights, not as a rule of construction.

3. Glosses on the Texts

When state courts examined the baby Ninth provisions, they interpreted them as powerful rights-bearing texts. The most striking reading of a baby Ninth came from the Supreme Court of Alabama in the case of *In re Dorsey*.[195] In *Dorsey*, the plaintiff challenged a state statute which required attorneys to take an oath stating that they had not engaged in any duels in the past, nor would they in the future.[196] The plaintiff claimed that the state statute punished a particular class of citizens without trial and that it deprived them of the vested right to practice law. Two of the three judges relied upon Alabama's baby Ninth Amendment, Article I, Section 30 of the state constitution,[197] to invalidate the law. Judge Ormond compared the rights protected by Section 30—which was identical to provisions in Arkansas and Kansas—to the natural rights cited by Justice Chase in *Calder v. Bull*.[198] Further, he invoked Lord Coke's holding that "where an act of parliament is against common right or reason, or repugnant, or impossible to be performed, the common law shall adjudge it to be void."[199] However, Judge Ormond did not rely on such natural rights decisions "because the people who formed the Constitution of Alabama, have provided by the organic law of the State, for the examination by the judiciary, of all laws having this tendency, whether expressly forbidden by the bill of rights or not."[200] Judge Ormond believed that Section 30 gave the judiciary the power to strike down laws that transgressed natural rights.

In this sense, these rights were also positive law because they were protected by Section 30's command that unenumerated rights not be denied or disparaged. According to Judge Ormond, Section 30 not only removed such rights from the power of government, but affirmed that "[t]he people, by [the constitution of Alabama], have enumerated and asserted certain

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[195] 7 Port. 293 (Ala. 1838).

[196] For the text of the oath, see *id.* at 355-56.

[197] ALA. CONST. art. I, § 30 (1819).

[198] 3 U.S. (3 Dall.) 386 (1798).

[199] 7 Port. at 375 (citing College of Physician's Case (Dr. Bonham's Case), 123 Eng. Rep. 928 (C.P. 1609)).

[200] *Id.* at 377.

first principles, which they therein declare, they have reserved to themselves, and have not delegated to the legislative department of the government."[201] Judge Ormond emphasized that Section 30 was not only a delegation of powers clause, but also a declaration of rights clause. His analysis is worth excerpting at length:

> By this it appears, not only that the rights asserted in this instrument, are reserved out of the general powers of government, but also that this enumeration shall not disparage others not enumerated; and that any act of the legislature which violates any of these asserted rights, or which trenches on any of these great principles of civil liberty, or inherent rights of man, though not enumerated, shall be void.
>
> It cannot, I think, be successfully maintained, that this last and not least important clause of the Bill of Rights, is void of meaning. Is it unreasonable to suppose that the framers of this declaration knew, that the principles maintained by the immortal British judges, cited in this opinion, as well as by the jurists of our own country, had been frequently called in question; and that they intended to provide against every possible infraction of our free institutions? Be this as it may, it is certain that many cases might easily be supposed, of flagrant enormity, of most undeniable injustice, and in direct hostility with the dearest rights of man, which are not forbidden by the bill of rights, if this clause has no effect.[202]

Judge Ormond's opinion confirms that our reading of the Ninth Amendment's text accurately captures the understanding in the antebellum states. The text does not simply construe enumerated powers; it declares that governmental action may not reach certain unenumerated rights. Section 30 declares that such rights, similar if not identical to the natural rights identified by Justice Chase and Blackstone, receive protection from state action. Most importantly, Judge Ormond affirmed that Section 30 empowers the courts to enforce "those greatest principles of civil liberty," or the "inherent rights of man," even though they are not enumerated. In *Dorsey*, Judge Ormond found those principles in the right to the pursuit of happiness protected by the Declaration of Independence.

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[201] *Id.*

[202] *Id.* at 378.

He argued that this right included "the right to select which of the various avocations or pursuits in life, a young man will engage in."[203]

Dorsey also indicates a shift in the way the rights protected by the Ninth's text were understood. Among the state constitutions, the Ninth's text protected minority, rather than majoritarian, rights. Thus, in *Dorsey*, the court used Section 30 to protect an individual's right to pursue a trade. Similarly, in the 1857 case of *Billings v. Hall*,[204] the California Supreme Court held the state's Settlers Act unconstitutional because it violated the property rights of individual landowners. The Act required landowners to bring an act of ejectment against any new settlers present on the their land and to pay them the value of any improvements made.[205] The court held that the Act violated the natural right to property by giving title to the settler if the landowner refused to pay for the improvements. Judge Burnett, concurring in the judgment, argued that this right to property was protected by the baby Ninth clause in the California Constitution:[206]

> [T]here are certain inherent and inalienable rights of human nature that no government can justly take away—that some of these rights have been enumerated in our State's Constitution, and in the language of that instrument, "This enumeration of rights shall not be construed to impair or deny others retained by the people."[207]

Judge Burnett declared that the California Supreme Court had the duty to strike down the law to enforce such unenumerated rights as equally as the enumerated ones.

Thus, where previously the Ninth's text safeguarded popular sovereignty rights such as the right to alter or abolish government, its antebellum state analogues preserved individual rights from majority encroachment. For example, in *Dorsey* and *Billings* the inalienable and inherent right at issue is not the right to self-government, but the right to own

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[203] *Id.* at 382. Judge Goldthwaite agreed with his colleague that the oath act violated § 30, but he argued that the act violated the plaintiff's unenumerated right to be accused, tried, and convicted by a jury whenever he is punished by a law. *Id.* at 358-60, 367-69. In disagreeing with his two colleagues, Chief Judge Collier argued that § 30 proved that the state government could enact any law which did not fall within the strict limitations of the Alabama bill of rights. *Id.* at 407.

[204] 7 Cal. 3 (1857).

[205] *Id.*

[206] CAL. CONST. art. I, § 21 (1849).

[207] 7 Cal. at 16 (Burnett, J., concurring).

property free from interference by the majority in the guise of the state legislature. Nineteenth century lawyers called such privileges "civil rights." They traditionally defined these as the right to engage in economic relationships, such as the right to own property, the right to contract and to move freely, and a host of juridical and marital rights.[208]

In part, these courts were following practices in other states that did not have baby Ninths. Taking to heart Justice Chase's suggestion that "a law that takes *property* from *A*, and gives it to *B*" would violate a natural right,[209] several state courts invalidated such legislation, even though it did not violate any explicit constitutional provision.[210] For example, in *White v. White*[211] the New York Court of Appeals struck down the Married Woman's Property Act for interfering with vested rights already established by the common law: "[T]he security of the citizen against such arbitrary legislation rests upon the broader and more solid ground of natural rights, and is not wholly dependent upon these negatives upon the legislative power contained in the constitution."[212] Similarly, the Court of Appeals of Maryland in *Regents of the University of Maryland v. Williams*,[213] invalidated legislation that impaired contracts because it violated "a fundamental principle of right and justice, inherent in the nature and spirit of the social compact . . . that rises above and restrains and sets bounds to the power of legislation."[214]

These courts understood that the people could exercise their unenumerated natural rights against the state, even if they had not explicitly included a Ninth Amendment analogue in their state constitutions. Thus, the Ninth Amendment declared a fundamental principle—that the enu-

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[208] HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875, at 395-97, 402 (1982).

[209] Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798). State courts regularly cited Justice Chase's language. *See, e.g.*, Taylor v. Porter, 4 Hill 140 (N.Y. 1843).

[210] Parham v. Justices, 9 Ga. 341 (1851); Wynehamer v. People, 13 N.Y. 378 (1856); Taylor v. Porter, 4 Hill 140 (N.Y. 1843); White v. White, 5 Barb. 474 (N.Y. App. Div. 1849); Hoke v. Henderson, 15 N.C. 1 (1833); University v. Foy, 5 N.C. 57 (1805); *see* HYMAN & WIECEK, *supra* note 208, at 20-23; Michael L. Benedict, *Laissez-Faire and Liberty: A Re-evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 L. & HIST. REV. 293 (1985); Corwin, *supra* note 168, at 378-85, 463-75; Maltz, *supra* note 127, at 307-09, 317; Nelson, *supra* note 125, at 530-31.

[211] 5 Barb. 474 (N.Y. App. Div. 1849).

[212] *Id.* at 484.

[213] 9 G. & J. 365 (Md. 1838).

[214] *Id.* at 408.

meration of rights does not preclude enforcement of unenumerated rights—that these state courts understood well. In *People v. Toynbee*,[215] for example, the New York Court of Appeals held that laws regulating liquor sales infringed the right to property: such natural rights "have come down to us from magna charta, and are sanctioned and approved by the wisdom and experience of near seven hundred years, and under our system are intended to save absolute inherent rights from the force of legislative acts which interrupt their enjoyment or impair their value."[216] As Justice Brown wrote for the court: "The same unrestrained dominion over property which the parliament and people of Great Britain have denied to the crown and reserved to parliament, the people of the state of New York have denied to the legislature and reserved to themselves."[217] Similarly, the Georgia Supreme Court invalidated state action which took private property without just compensation.[218] The court invoked the declaratory nature of the Bill of Rights and the fundamental principle expressed by the Ninth Amendment:

> The Constitution of the United States upon [takings without just compensation], I know has been held to be a restraint upon federal legislation alone, and not to apply to the States. If that be admitted, yet it is still authority, most significant, for the application of the rule in the States. It is the affirmation of the rule in the most solemn form. It is the declaration of the opinion of the American people, that the governmental right of appropriating property, is subject to that limitation. In creating a government of limited and merely delegated powers, with a careful vigilance over the rights of the people, as derived from the Common law—the great charter and petition of rights—it was a matter of commendable caution to embody this limitation in the Constitution.[219]

All this in a state with no Ninth Amendment analogue.

As scholars have noted, these antebellum state courts gradually turned to substantive due process to enforce such natural rights.[220] Generally,

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[215] 20 Barb. 168 (N.Y. App. Div. 1855).

[216] *Id.* at 193-94.

[217] *Id.* at 194-95.

[218] *See* Parham v. Justices, 9 Ga. 341 (1851).

[219] *Id.* at 351.

[220] *See* Benedict, *supra* note 210; Corwin, *supra* note 168; Lowell J. Howe, *The Meaning of "Due Process of Law" Prior to the Adoption of the Fourteenth Amendment*, 18 CAL. L. REV. 583

courts invalidated state laws as "class legislation" that disadvantaged individuals or groups or that transgressed "vested rights."[221] As Howard Graham stated, "Substantivized due process [was] essentially constitutionalized natural law."[222] Hence, state due process clauses gave judges a positive source of law with which to protect unenumerated minority rights from majority encroachment.

State adoption of the Ninth Amendment's text could have, and sometimes did, perform a similar function. The Ninth's language provided state courts with a constitutional provision that explicitly declared the existence of certain fundamental, unenumerated rights.[223] Like substantive

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(1930).

[221] *See, e.g.*, Wynehamer v. People, 13 N.Y. 378 (1856) (striking down law restricting sale and storage of alcohol); Hoke v. Henderson, 15 N.C. 1 (1833) (invalidating statute replacing court clerks originally appointed to serve for good behavior).

[222] Howard J. Graham, *Procedure to Substance — Extra-judicial Rise of Due Process, 1830-1860*, 40 CAL. L. REV. 483, 488 (1952).

[223] These two provisions, due process and the baby Ninths, could work to supplement each other's protections of property rights. For example, in Billings v. Hall, 7 Cal. 1 (1857), California Chief Justice Murray not only relied upon his state's baby Ninth, but he also cited approvingly to Taylor v. Porter, 4 Hill 140 (N.Y. 1843). *Billings*, 7 Cal. at 13. *Porter* used New York's Due Process and Law of the Land Clauses to strike down a state law taking private property for the use as a private road. As Professor Corwin has said, *Porter* "annexed the doctrine of natural rights and of limitations inherent to legislative power to the written constitution" through those two clauses. Corwin, *supra* note 168, at 464.

However, the framers of the baby Ninths may have viewed the Ninth Amendment somewhat differently from the Due Process Clause, the Just Compensation Clause, or unenumerated rights protecting property. This may explain why the baby Ninth Amendments did not appear more often in the antebellum state and federal courts. Those courts could have used the baby Ninths in the eminent domain/takings litigation that filled their dockets. These cases revealed a tension between the "vested rights" of individual property owners and the state's eminent domain and police powers. *See* Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247 (1914). In response, state courts often invoked their state's enumerated, or unenumerated, takings clause, which permitted a taking only for a public purpose and required just compensation. But as Professor Harry Scheiber has shown, courts read "public purpose" and "just compensation" with such flexibility that states could substantially regulate or even take property with great freedom. *See* Harry N. Scheiber, *Property Law, Expropriation, and Resource Allocation by Government, 1789-1910*, *in* AMERICAN LAW AND THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES 132-41 (Lawrence M. Friedman & Harry N. Scheiber eds., 1978). Indeed, state courts justified government intervention in the economy based on the public interest or the collective good. *See* Harry N. Scheiber, *The Road to* Munn*: Eminent Domain and the Concept of Public Purpose in the State Courts*, *in* 5 LAW IN AMERICAN HISTORY 329 (Donald Fleming & Bernard Bailyn eds., 1971); Harry N. Scheiber, *Public Rights and the Rule of Law in American Legal History*, 72 CAL. L. REV. 217 (1984). I would suggest that the nature of the rights at issue made the difference. Antebellum lawyers perhaps did not see the baby Ninths as centrally focused on vested rights, which were defined as the rights of one who had already acquired control over a piece of property. *See* Corwin, *supra*, at 275. Instead they may

due process, these baby Ninths focus on declaring and judicially enforcing those rights, not on limiting delegated government power. Importantly, these were rights of the minority against the majority, not the rights of the majority against the government. They were primarily civil rights, not political rights. As the Civil War came to a close, the Framers of the Fourteenth Amendment would carry this understanding with them to Congress.

III. THE NINTH AND THE FOURTEENTH

The reconceptualization of the Ninth Amendment from a majoritarian to an individual rights provision culminated with the framing of the Fourteenth Amendment. During that process, the Fourteenth Amendment's guarantees of rights against the states and the Ninth Amendment's protections of unenumerated rights profoundly influenced each other's meaning. In essence, the Reconstruction Congress *re-declared* the Ninth Amendment's guarantees as part of its quest to guarantee civil rights for blacks in the Fourteenth Amendment. Put another way, the framers of Reconstruction imported the understanding of the baby Ninths into the Ninth Amendment itself, as well as into the Privileges and Immunities Clause of the Fourteenth Amendment. Reconstruction rejected an interpretation of the Ninth Amendment as a rule of construction and ratified an understanding of the Ninth as a declaration of unenumerated rights.

To comprehend the re-declaration of the Ninth Amendment, we first must understand the purpose and history behind the Fourteenth Amendment. When President Johnson repeatedly vetoed congressional plans for Reconstruction, radical republicans sought to fix in the Constitution the fruits of their victory in the Civil War. The Thirty-Ninth Congress' Republicans, both conservative and radical, sought to achieve three basic goals in Reconstruction: to guarantee the security of Southern unionists, to permanently cement the Union, and to ensure that freemen could exercise their equal rights under federal and state law.[224] Republicans were deeply disturbed by the South's antebellum violation of the constitutional rights

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have understood the baby Ninths as protecting what we today think of as natural rights which attach to each individual and not rights which vest due to the operation of state laws, such as property rights.

[224] MICHAEL L. BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION 169 (1974); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 176-261 (1988).

of both white abolitionists and slaves. After the war, Republicans were troubled further by reports that the Southern states once again were preventing freemen from exercising their constitutional rights by passing the infamous Black Codes. These codes restricted the former slaves' rights to vote, to move, to contract, to own property, to assemble, to speak freely, and to bear arms.[225] Republicans believed that as citizens, the freemen were entitled to all of the same rights, privileges, and immunities as every other citizen, regardless of race. The Fourteenth Amendment, and Reconstruction in general, represented the Republicans' efforts to secure full constitutional rights and liberties to all citizens, whether born free or slave.[226]

As with the Ninth Amendment, interpretations vary as to what rights the Reconstruction Congress intended the Fourteenth Amendment to protect against state interference. Most scholarship on the Fourteenth Amendment concentrates on whether the Thirty-Ninth Congress intended to incorporate the Bill of Rights against the states via the Fourteenth Amendment.[227] Recent work[228] has proven convincingly that both the text and the legislative history of the Fourteenth Amendment's Privileges and Immunities Clause[229] manifest an intent to incorporate the first eight amendments against the states.[230] However, the framers of the Fourteenth Amendment apparently did not intend to incorporate the Ninth and

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[225] CURTIS, *supra* note 6, at 35; KENNETH M. STAMPP, THE ERA OF RECONSTRUCTION: 1865-1877, at 80 (1965).

[226] CURTIS, *supra* note 6, at 34-56.

[227] *See* BERGER, *supra* note 55, at 134-56; 2 WILLIAM W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1056-82 (1953); CURTIS, *supra* note 6, at 57-91; TENBROEK, *supra* note 144, at 214-15; Amar, *supra* note 7, at 1218-38; Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 STAN. L. REV. 5 (1949).

[228] *See* CURTIS, *supra* note 6, at 56-91 (reviewing legislative history showing intent of Fourteenth's Framers to incorporate Bill of Rights); Amar, *supra* note 7, at 1218-33 (noting parallel between Privileges and Immunities Clause and First Amendment's "Congress shall pass no law" language).

[229] "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 1.

[230] *See* CONG. GLOBE, 42d Cong., 1st Sess. 84 App. (1871) (statement of Rep. Bingham) (arguing that Privileges and Immunities Clause applies protections of first eight amendments against states); CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866) (statement of Sen. Howard) (same). This bears some resemblance to Justice Black's total incorporation theory which sought only to incorporate the first eight amendments. *See* Duncan v. Louisiana, 391 U.S. 145, 166 (1968) (Black, J., concurring); Adamson v. California, 332 U.S. 46, 89 (1947) (Black, J., dissenting).

Tenth Amendments. This could suggest that they saw the two amendments as twin federalism provisions which could not be enforced against the states.

This suggestion deserves careful consideration, but in the end it misses the subtle role played by the Ninth Amendment. The Fourteenth's framers did intend the Privileges and Immunities Clause to protect rights beyond those contained in the first eight amendments. Raoul Berger and Charles Fairman, though hostile to the incorporation idea, agree that the Fourteenth Amendment at a minimum guaranteed those rights secured by the Civil Rights Act of 1866.[231] These rights included the right to contract, to own property, and to act in a juridical capacity.[232] John Harrison has argued that the Privileges and Immunities Clause also prohibits discrimination in the allocation of a state-created right.[233] Thus, most scholars seem to acknowledge that the Fourteenth Amendment incorporates some rights unenumerated in the federal Bill of Rights.

Furthermore, the rights protected by the Privileges and Immunities Clause were fundamentally different from those declared in the federal Bill of Rights. The Framers of 1791 infused the original Bill of Rights with the majoritarian rights of the People, to be exercised collectively against a despotic central authority for the preservation of republican self-government. In contrast, the Reconstruction Congress declared rights against state governments. Moreover, these rights were to be exercised against majorities in the states by individuals in the minority. Thus, the text of section one of the Fourteenth Amendment speaks of "privileges and immunities of citizens of the United States" and not of the "rights" of "the People." The framers' choice of the phrase "privileges and immunities" emphasized the individual, negative, libertarian nature of their declaration of rights in section one. In this way, the Reconstruction congressmen built upon the reoriented understanding of rights common among the Abolitionists and the states.

The language of the Ninth Amendment—especially as it was understood by the states—provided a place for the Fourteenth's framers to look

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[231] Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27. *See* BERGER, *supra* note 55, at 150-52; Fairman, supra note 227, at 60-67;.

[232] BERGER, *supra* note 55, at 150-52.

[233] John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992).

for such rights. For them, the Ninth Amendment served as an example of what the Privileges and Immunities Clause could become: a declaration of the unenumerated natural rights common to all Americans. Several of the leading framers of the Fourteenth Amendment intended the Privileges and Immunities Clause to protect the "great fundamental rights," which they found in Justice Washington's opinion in *Corfield v. Coryell*,[234] in Blackstone's *Commentaries*, in Chancellor Kent's commentaries, in the common law, and in eighteenth and nineteenth Century natural rights theories.[235] For example, Justice Washington defined privileges and immunities as

> those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. . . . They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety. . . . The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state. . . .[236]

The first eight amendments were only some of these great fundamental rights. Others centered around Blackstone's common law rights to personal security, to personal liberty, and to acquire and enjoy property.[237]

The Fourteenth's framers looked to the Ninth Amendment to catalogue these unenumerated rights protected by the phrase "privileges and immunities." In defending federal enforcement of fundamental and natural rights in the South, Senator James Nye of Nevada invoked the Ninth Amendment to show that the Framers of 1789 had provided for the protection of such unenumerated rights:

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[234] 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

[235] *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866) (statement of Sen. Trumbull); *Id.* at 1118-19 (statement of Rep. Wilson); *Id.* at 1832-33 (statement of Rep. Lawrence).

[236] 6 F. Cas. at 551-52.

[237] 1 BLACKSTONE, *supra* note 69, at *125-34.

> In the enumeration of natural and personal rights to be protected, the framers of the Constitution apparently specified everything they could think of—"life," "liberty," "property," "freedom of speech," "freedom of the press," "freedom in the exercise of religion," "security of the person," &c.; and then, *lest something essential in the specifications should have been overlooked, it was provided in the ninth amendment* that "the enumeration in the Constitution of certain rights should not be construed to deny or disparage other rights not enumerated." *This amendment completed the document. It left no personal or natural right to be invaded or impaired by construction. All these rights are established by the fundamental law.*[238]

Here, Senator Nye clearly envisions the Ninth Amendment as a reserve clause that protects all of the natural rights which the Framers may have "overlooked." Moreover, Senator Nye calls these rights "natural and personal rights" that are exercised by the "person" and not by the people. This statement shows that the Reconstruction Congress adopted the antebellum interpretation of the Ninth Amendment among the states as a guarantee of minority civil rights, not of majoritarian political ones. Senator Nye's statement denies an interpretation of the Ninth Amendment as primarily about construing the enumeration of federal powers.

The Fourteenth Amendment's drafter, John Bingham of Ohio, implicitly agreed with this interpretation of the Ninth Amendment. Bingham believed that Congress could not pass the Civil Rights Bill of 1866 without the authority of the Fourteenth Amendment, which had not yet passed Congress. He argued that the Constitution limited the federal government from passing such a sweeping bill:

> [T]he enforcement of the [civil] bill of rights, touching the life, liberty, and property of every citizen of the Republic within every organized State of the Union, is of the reserved powers of the States.
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> . . . .
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> Who can doubt this conclusion who considers the words of the Constitution: "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?"[239]

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[238] CONG. GLOBE, 39th Cong., 1st Sess. 1072 (1866) (statement of Sen. Nye) (emphasis added).
[239] CONG. GLOBE, 39th Cong., 1st Sess. 1291 (1866) (statement of Sen. Bingham).

Senator Bingham only cited the Tenth Amendment as a limitation on federal power. If the framers of the Civil Rights Act of 1866 had seen the Ninth Amendment as a rule of construction, Bingham would have cited the Ninth Amendment in conjunction with the Tenth Amendment as such a limitation. In fact, this argument was made by a Democratic opponent of broad federal power to reconstruct the South. Criticizing congressional measures to disenfranchise former rebels, Representative Benjamin Boyer of Pennsylvania quoted the Ninth and Tenth Amendments together as a limitation on the federal government.[240] Boyer's arguments met with silence, and he found himself on the losing side in his opposition to the Fourteenth Amendment.

A more extensive discussion of the Ninth Amendment in relation to the Fourteenth Amendment took place six years later, during debates over the Civil Rights Act of 1875.[241] The Act, which guaranteed equality of access to inns, theaters, public amusements, and public transportation, has been accorded significant weight in interpreting the intent behind the Fourteenth Amendment.[242] Although passed after the ratification of the Fourteenth Amendment, the Act sparked extensive debates by its framers over the meaning of the Amendment. In the most revealing debate, Senator John Sherman, a member of the Thirty-Ninth Congress, voiced an understanding of the Ninth Amendment similar to that voiced by Senator Nye. Sherman used the Ninth to define the breadth of the rights protected by the Fourteenth Amendment's Privileges and Immunities Clause—in the hope of establishing Congress' power to pass the Civil Rights Act of 1875. Sherman's analysis linked the Ninth and the Fourteenth Amendments:

> But these [first eight] amendments to the Constitution do not define all the rights of American citizens. They define some of them. The Constitution itself amply secures some of the rights of American citizens, *but the ninth amendment expressly provides that*—"The enu-

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[240] *Id.* at 2467 (statement of Rep. Boyer).

[241] Act of Mar. 1, 1875, ch. 114, § 1, 18 Stat. 336.

[242] *See* Alfred Avins, *The Civil Rights Act of 1875: Some Reflected Light on the Fourteenth Amendment and Public Accommodations*, 66 COLUM. L. REV. 873 (1966).

The Act was originally much broader in scope: it forbade discrimination in access to schools, churches, juries, and cemetaries. CONG. GLOBE, 42d Cong., 1st Sess. 21 (1871). Moreover, Senator Sumner of Massachusetts attached the Act's provisions as a rider to a bill which removed the Fourteenth Amendment's disqualification of ex-confederates from holding public office. Avins, *supra*, at 877.

> meration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."
>
> *There are certain rights enumerated in these articles of amendment, but they are not all the rights of the American citizen; very far from it.* Where do we find the record of those rights? The fourteenth amendment then coming in says: "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States."
>
> What are those privileges and immunities? Are they only those defined in the Constitution, the rights secured by the amendments? Not at all. *The great fountain-head, the great reservoir of the rights of an American citizen is in the common law. . . .Our rights are not limited to those given by the Constitution. What are those rights? Sir, they are as innumerable as the sands of the sea. You must go to the common law for them. . . .*[243]

Sherman and Nye's speeches suggest that at least some of the Fourteenth's framers regarded the Ninth Amendment and the Privileges and Immunities Clause as twins.[244] Just as the Ninth Amendment guarantees unenumerated natural rights beyond those expressed in the first eight amendments, the Privileges and Immunities Clause protects unexpressed fundamental rights beyond those in the federal Bill of Rights.

Of course, Sherman's speech leaves some questions unanswered. It is unclear what he meant by seeking the Ninth Amendment's unenumerated rights in the common law. In subsequent discussion with an opponent of the Act, Senator Sherman clarified:

> [T]he ordinary rights of citizenship, which no law has ever attempted to define exactly, the privileges, immunities, and rights, (because I do not distinguish between them, and cannot do it,) of citizens of the United States, such as are recognized by the common

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[243] CONG. GLOBE, 42d Cong., 2d Sess. 843 (1872) (statement of Sen. Sherman) (emphasis added). Senator Sherman reiterated his belief that the Ninth Amendment protected unenumerated constitutional rights in a floor debate with Senator Thurman, who argued that the Fourteenth Amendment's Privileges and Immunities Clause referred only to those rights already set out in the Constitution. Sherman said, "If my colleague will allow me, if he will turn to the ninth article of amendment he will see that there are other rights beyond those recognized [in the Bill of Rights]." *Id.* at App. 26 (statement of Sen. Sherman).

[244] Sherman and Nye might have expressed the thinking of a majority of the framers, since no one immediately rose to dispute their characterization of the Ninth Amendment.

> law, such as are ingrafted in the great charters of England, some of them ingrafted in the Constitution of the United States, some of them in the constitutions of the different States, some of them in the Declaration of Independence, our fathers did not attempt to enumerate. They expressly said in the ninth amendment that they would not attempt to enumerate these rights; they were inumerable, depending upon the laws and the courts as from time to time administered.[245]

Thus, under Sherman's understanding, the declaration of fundamental rights had been ongoing throughout American history. The people could recognize the rights via constitutional enactments, laws passed by the legislatures, or judicial decisions in the courts. Sherman conceded that there would be "great dispute and doubt" over what rights received Ninth Amendment (and hence Fourteenth Amendment) protection.[246] However, he said that "judicial tribunals" in the future should look to a descending hierarchy of sources: first, the Constitution "as the primary fountain of authority," then the Declaration of Independence; next, "every scrap of American history," "the history of England," "the old decisions of Lords Mansfield and Holt," "and so on back to the earliest recorded decisions of the common law."[247] "There," Sherman predicted, "they will find the fountain and reservoir of the rights of American as well as English citizens."[248]

The context of the debate over the Civil Rights Bill provides a glimpse of how the common law would inform the declaration of Ninth Amendment rights. Opponents of the bill claimed that the Fourteenth Amendment, and federally guaranteed rights in general, could only regulate conduct by government.[249] Thus, the bill could not forbid discrimination by an innkeeper because Congress had no power to regulate the acts of private persons on private property.[250] Senator Sherman responded that the Ninth Amendment and the Fourteenth Amendment's Privileges and Immunities Clause incorporated common law principles which forbade such discrimination:

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[245] CONG. GLOBE, 42d Cong., 2d Sess. 844 (1872) (statement of Sen. Sherman).
[246] *Id.*
[247] *Id.*
[248] *Id.*
[249] Avins, *supra* note 242, at 886-94.
[250] CONG. GLOBE, 42d Cong., 2d Sess. App. 29 (1872).

> Under the old common law of England, if the humblest subject of the British Crown was excluded from a public highway, or from a public inn, or from the fair and just enjoyment of the privileges given and granted by these public institutions which had their origin in the common law, he would have a right to sue for damages; and I can make no distinction at all between such a case and this case.[251]

The Ninth and Fourteenth Amendments protected common law rights as federal rights, but not in their pure common law form. Instead, they protected the distillation of those rights, such as a right of equal access to public areas.

Sherman's interpretation of the Ninth Amendment did not meet with passive acceptance. Senator Allen Thurman, a Democrat from Ohio and former Chief Justice of the Ohio Supreme Court, criticized Sherman's view. Admitting that "there are certain other rights that are secured by the late amendments to the Constitution," Thurman questioned whether they could be derived from the common law.[252] After quoting the Ninth Amendment, the Senator said:

> My colleague is entirely mistaken if he supposes that these other rights which are retained by the people are rights that appertain to them in their character of citizens of the United States. It is true that they are rights, but they are rights which have never been surrendered to this Government; and that they are not their rights in their character of citizens of the United States is further shown by the fact that whatever right a man has as a citizen of the United States, that right the Government can protect.[253]

In contrast to Sherman, Senator Thurman understood the Ninth Amendment along the lines plotted by the Framers of 1791. The Ninth Amendment protects those rights not given up to government when the people entered into the state of society. The government could not act to protect those rights because they lay entirely outside the government's powers. According to Thurman, "The power of the Government is commensurate with the rights of the citizens of the United States, and therefore whatever right a man has as a citizen of the United States, that right

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[251] *Id.* at 844 (statement of Sen. Sherman).
[252] *Id.* at App. 26 (statement of Sen. Thurman).
[253] *Id.*

the Government has the power to protect in the mode provided by the Constitution."[254] Thurman believed that these rights could be either collective or individual, but they were held against the government, as envisioned by the Framers of 1791. They were natural and inherent in the people and could not be surrendered:

> [T]hese other rights that are retained by the people have not been surrendered to the Government at all, and it has no jurisdiction over them. The people hold them not as citizens of the United States, but so to speak, in despite of the United States. They hold them against the Government of the United States by as good a title as they hold them against the world. They belong to them as people or as individuals. They have never surrendered them to any Government, and they do not hold them by the grace of any Government whatsoever; they hold them because they were and are their inherent natural rights which have never been surrendered.[255]

Thurman's response to Sherman is significant for several reasons. First, he does not dispute Sherman's contention that the Ninth Amendment contains unenumerated rights. The disagreement is simply over how to define them. Thurman rightly saw that Sherman's (and the framers of the Fourteenth Amendment's) vision of the Ninth could lead to an open-ended inquiry whose end result could depend more on individual judicial whim than anything else. "Where are we to find [these rights]?" Thurman asked Sherman. "The Senator from Massachusetts [Charles Sumner, the sponsor of the Bill,] finds the definition in the Declaration of Independence; another Senator finds it in something else; and so on to the end of the chapter; and we have nothing certain, nothing definite, nothing upon which any man can rely."[256] So instead, Thurman proposed that the Ninth Amendment protected only those natural, inalienable rights that cannot be given up to the government. This interpretation correctly discerned the intent of the Amendment's framers.

Second, Senator Thurman's response is important because it was rejected. Senator Thurman was not a member of the Thirty-Ninth Congress which drafted the Fourteenth Amendment. He served in the Senate from

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[254] *Id.*
[255] *Id.*
[256] *Id.*

1869 to 1881.[257] His reading of the Ninth Amendment, while true to the Amendment's original intent, does not accurately reflect the understanding of the framers of 1866. Meanwhile, Senator Sherman was one of the leaders of the radical Republicans in the Thirty-Ninth Congress. Thus his statement more accurately describes the understanding held during the Fourteenth Amendment's passage. Furthermore, Thurman's argument failed in the Civil Rights Bill debate in Congress. Thurman was a persistent and sharp critic of the bill's constitutionality, and he was proved right when the Supreme Court struck down the Act in the *Civil Rights Cases*.[258] However, his speeches could not prevent the bill's approval in 1875. Thus, we can also assume that Senator Sherman expressed the prevailing understanding of the Ninth Amendment, while Thurman represented a minority view.

This post-ratification evidence fortifies a vision of the Ninth Amendment as declaratory. Some of the Fourteenth Amendment's framers saw both the Privileges and Immunities Clause of Section One and the Ninth Amendment as declaring the existence and enforceability of rights outside the text of the Constitution. These rights were not linked simply to those already mentioned in the federal Bill of Rights, as the right to the free expression of ideas was linked to the First Amendment's prohibition on congressional power over free speech. Instead, these rights formed the preexisting background to the Constitution; the Bill of Rights' enumeration only declared some of these rights. Thus, the members of the Thirty-Ninth Congress consistently described such rights as "natural," "personal," "fundamental," or "universal."[259]

For these radical Republicans, the common law served as a significant source for these unenumerated rights. Thus, Senator Sherman declared that the rights mentioned in the Ninth Amendment derive from "[t]he great fountain-head, the great reservoir of rights[:] . . . the common law."[260] Such rights were "as innumerable as the sands of the sea."[261] According to the Reconstruction Congress, the first eight amendments of

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[257] *See* THE RECONSTRUCTION AMENDMENTS' DEBATES: THE LEGISLATIVE HISTORY AND CONTEMPORARY DEBATES IN CONGRESS ON THE 13TH, 14TH, AND 15TH AMENDMENTS 759 (Alfred Avins ed., 1967).

[258] 109 U.S. 3 (1883).

[259] CURTIS, *supra* note 6, at 54, 72-77.

[260] CONG. GLOBE, 42d Cong., 2d Sess. 843 (1872) (statement of Sen. Sherman).

[261] *Id.*

the Bill of Rights followed the long litany of English declarations of these common law rights—common to all English and American citizens. Even Blackstone described such documents as the Magna Charta, the Habeas Corpus Act, the Petition of Right, and the Bill of Rights as "the declaration of our rights and liberties," just as the American Bill of Rights had also declared some of these rights.[262] For the framers of the Fourteenth Amendment, section one followed in this tradition of declaring and re-declaring fundamental natural rights. Moreover, by passing the Fourteenth, they declared their understanding that the Ninth Amendment already protected these rights and that Section One reaffirmed that constitutional guarantee against the states.

When looking to the common law as the source of unenumerated individual rights, the framers of section one often turned to Blackstone. During the debate over the Civil Rights Act of 1866, for example, Republican Senators Lyman Trumbull and James Wilson explicitly relied on Blackstone for definitions of common law rights protected by the Constitution.[263] Blackstone grouped the absolute rights of mankind into three classifications. First was the right of personal security, which he defined as "a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation."[264] Second came the right of personal liberty, which included "the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law."[265] Finally, Blackstone placed third the right of property, "which consists in the free use, enjoyment, and disposal of all [a person's] acquisitions, without any control or diminution, save only by the laws of the land."[266]

The framers' invocation of the common law showed how they sought to re-declare the meaning of rights within the Constitution. Like the radical Abolitionists' approach to natural rights, Blackstone's common law rights were emphatically *personal* in nature. The Privileges and Immunities Clause and the Ninth Amendment worked together to guarantee unenumerated rights that were "more liberal than republican, more indi-

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[262] 1 BLACKSTONE, *supra* note 69, at *123-25.
[263] CURTIS, *supra* note 6, at 73-74.
[264] 1 BLACKSTONE, *supra* note 69, at *125.
[265] *Id.* at *130.
[266] *Id.* at *134.

vidualistic than collectivist, more private than public, more negative than affirmative."[267] Furthermore, the Constitution no longer enforced these rights solely against the central government in favor of the collective people. The Ninth and Fourteenth declared the existence of the same rights, and both required their enforcement against the federal and state governments in favor of individuals. Finally, the Fourteenth's framers emphasized that many of these rights were primarily civil, not political.[268] The Civil Rights Act of 1866 further defined these unenumerated, individual civil rights as the rights

> to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property. . . .[269]

The Reconstruction Congress' reorientation of the Ninth Amendment fits in well with our narrow versus broad model of a declaratory amendment. During the antebellum and Civil War periods, federal institutions interpreted the Ninth Amendment in its most narrow form: as a rule of construction. This approach created tension with the broader interpretation of the Ninth Amendment put forth by the radical Abolitionists and many state constitutions and state courts. As the Thirty-Ninth Congress set about the task of constitutionalizing the results of the Civil War, its leaders decided to reinterpret the Ninth Amendment as a broad protection of rights—rights that focused on individual, negative, civil rights rather than majoritarian, affirmative, political rights.

Of course, one could interpret all of this simply as post-ratification evidence for an understanding of the Ninth Amendment as a rights-bearing provision. However, the evidence shows more at work. This examination has shown how the meaning of the Ninth Amendment evolved along with legal and political developments from the founding to Reconstruction. This makes sense if we view the Constitution as a declaratory document

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[267] Amar, *supra* note 7, at 1261.

[268] Representative James Wilson, chairperson of the House Judiciary Committee, defined civil rights as "the natural rights of man"—which did not include the vote, "for suffrage is a political right which has been left under the control of the several states." CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866). Wilson further defined civil rights as "those which have no relation to the establishment, support, or management of government." *Id.*

[269] Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27.

as well as a document containing positive structural or individual rights. Various changes to the Constitution, just as with the original drafting of the Constitution itself, declared the understanding of law, rights, and constitutional structure held by their Framers. Later amendments impose their own gloss on previous provisions of the Constitution without explicitly stating every change their framers desired line by line.[270]

A declaratory vision of the Constitution requires us to read its provisions together with the understanding of the framers of later amendments. Thus, we must read the Ninth Amendment's reservation of rights in light of Reconstruction's reconceptualization of constitutional rights from popular rights to individual rights and from popular sovereignty rights to Blackstonian rights. In fact, scholars currently invoke this understanding when they say that the Reconstruction Amendments fundamentally changed the nature of federalism by elevating the powers of the national government above those of the states. Although the text of the amendments nowhere explicitly mentions federalism, we have construed their purpose and intent as reordering the nature of "Our Federalism" and expanding the original 1789 grants of powers to the federal government. Hence, since Reconstruction we have witnessed the surge of federal powers—over interstate commerce and foreign affairs, for example. Furthermore, there has been a concomitant reduction of federalism provisions—the Second and Tenth Amendments, for example. Similarly, by passing Section One of the Fourteenth Amendment, the Reconstruction Congress declared that the Constitution would enforce federal rights against the general powers of the states.

IV. CONCLUSIONS

The history of the Ninth Amendment suggests that the Supreme Court's current approach to unenumerated constitutional rights has gone awry. It appears that the Court's reliance on the due process clauses of the Fifth and Fourteenth Amendments has been misplaced, if not mis-

[270] Recently, a plurality of the Court adopted a similar approach in defining the meaning of due process for personal jurisdiction purposes. In Burnham v. Superior Court of Cal., 495 U.S. 604 (1990), Justice Scalia, writing for the Court, upheld the practice of territorial personal jurisdiction, or "tag jurisdiction" as it is sometimes known. He did so by examining state practices at the founding, during the antebellum period, at the time of the adoption of the Fourteenth Amendment and during the late nineteeth and early twentieth centuries. *Id.* at 611-12.

taken. The Ninth Amendment is the true home for substantive, unenumerated rights. Our review of the historical evidence points to two different approaches for courts to follow.

First, courts could choose to enforce only the understanding of the Amendment held by the Framers of 1791. At a minimum, the Ninth Amendment would require courts to employ a rule of constitutional construction that would defeat any inference of enlarged federal powers implied from the prohibitions contained in the Constitution. For example, the Ninth would defeat the conclusion that Congress would have the implied power to regulate free speech if not for the First Amendment's prohibition.

In addition, the historical evidence of the framing shows that the Ninth Amendment would have a substantive content as well. It is not enough, as is the practice today, for a court to first examine whether the government has the power to enact a certain regulation and then decide if that regulation treads on any rights. Instead, the Ninth Amendment requires us to first define what the right is and then to protect that right from infringement. As we have seen, the Ninth Amendment would act today to preserve the people's right to self-government and the right to alter or abolish existing government when necessary. This is not simply hortatory. For example, the Ninth Amendment would prevent the federal government from "self-dealing," to borrow a phrase from corporate law.

More concretely, the Ninth Amendment could play a powerful role in situations where the federal government attempts to intervene in elections to support incumbents. Currently, the Supreme Court employs a tortured approach toward such election law cases.[271] In *Buckley v. Valeo*,[272] for example, minor political parties and their candidates challenged the Federal Election Campaign Act of 1974. They claimed that provisions funding the presidential candidates of major parties at a higher level than that of minor parties constituted an unconstitutional subsidy to incumbents. The Court upheld the Act, holding that incumbents were not favored by

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[271] *See* Burdick v. Takushi, 112 S. Ct. 2059, 2063-64 (1992) (Hawaii prohibition on write-in voting); Tashjian v. Republican Party of Conn., 479 U.S. 208, 214 (1986) (Connecticut law prohibiting independents from voting in Republican primaries); Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (early filing deadlines); Williams v. Rhodes, 393 U.S. 23, 31 (1968) (minimum support requirement for placement on ballot).

[272] 424 U.S. 1 (1976) (per curiam).

the law because the Act also provided funds to major-party challengers. In the process, however, the Court held that a subsidy which benefitted only incumbents would violate the Equal Protection Clause, which would have force here due to some unspecified osmosis via the Due Process Clause of the Fifth Amendment.[273] Judge Silberman of the District of Columbia Circuit recently relied on this constitutional prohibition to invalidate portions of the congressional franking privilege used during election campaigns.[274]

Instead of relying on the rather artificial sounding "equal protection component of the Due Process Clause of the Fifth Amendment," courts should turn to the Ninth Amendment. If anything, the Ninth was designed for precisely such a case. Subsidies to incumbents inhibit the people's right to self-government by maintaining current office holders in power, even against the wishes of the people. In the District of Columbia Circuit case, the franking statute permitted members of Congress to send mass mailings—at taxpayer expense—to districts they did not currently represent. The representatives had to run in new districts because of redistricting after the decennial census.[275] The statute's motivation of providing assistance to incumbents was clear.[276] Nothing could have been less relevant than the Due Process Clause, and nothing more important for the analysis than the Ninth Amendment. However, bound by Supreme Court precedent, the District of Columbia Circuit correctly relied on the Fifth Amendment. But in an insightful opinion on the merits, Judge Silberman noted that the true core of the right protected by the Due Process Clause lay elsewhere in the Constitution.[277] When government attempts to en-

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[273] The Court said:

> Appellants suggest that a less discriminatory formula would be to grant full funding to the candidate of the party getting the most votes in the last election and then give money to candidates of other parties based on their showing in the last election relative to the "leading" party. That formula, however, might unfairly favor incumbents, since their major-party challengers would receive less financial assistance.

Id. at 98 n.133 (citation omitted).

[274] Coalition To End a Permanent Congress v. Runyon, 979 F.2d 219, 223 (D.C. Cir. 1992) (Silberman, J., dissenting).

[275] *Id.* at 222.

[276] *Id.* at 225.

[277] Judge Silberman correctly understood that the right to freely choose among candidates could not emanate from due process:

> [T]he notion that the very nature of American constitutional democracy requires that voters be able to choose freely between at least two viable parties or candidates. Therefore, when

trench itself against the wishes of the people, the Ninth Amendment provides the source of that right.

History also suggests a broader application for the Ninth Amendment. If we are to enforce the understanding of the framers of 1866—in other words, their re-declaration of the Amendment's meaning—courts should look to the Ninth Amendment first when it defines unenumerated individual rights. At the very least, the Ninth Amendment requires greater analytical precision in its use. For example, in his concurring opinion in *Griswold v. Connecticut*,[278] Justice Goldberg invoked the Ninth Amendment to invalidate a state law forbidding the use of contraceptives, thus bringing the Amendment into the modern era.[279] While claiming that he did "not mean to imply that the Ninth Amendment is applied against the States by the Fourteenth,"[280] he proceeded to do exactly that:

> While the Ninth Amendment—and indeed the entire Bill of Rights—originally concerned restrictions upon *federal* power, the subsequently enacted Fourteenth Amendment prohibits the States as well from abridging fundamental personal liberties. And, the Ninth Amendment, in indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights, now protected from state, as well as federal, infringement.[281]

In short, Justice Goldberg believed the that Ninth protects individual rights unmentioned in the original Bill of Rights by acting in some unspecified way through the Fourteenth Amendment. Our examination of the relationship between the Ninth Amendment and the Fourteenth shows that Justice Goldberg had things backwards. Section One's declaration

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> the government seeks to favor one major-party candidate against another, the Court will look closely at the government's justification. Perhaps our Constitution was inevitably so interpreted. I dare say that even if the Bill of Rights had not been adopted, the Supreme Court of Chief Justice Marshall's time would have relied on other provisions of the original Constitution to subject [the franking provision] to careful scrutiny.

Id.

In an interesting footnote, Judge Silberman suggested that the structure of the Constitution, putting into place as it did a republican form of government, might require that the federal government act according to republican principles such as popular sovereignty. *Id.* at 225 n.3.

[278] 381 U.S. 479 (1965).

[279] *Id.* at 486-93 (Goldberg, J., concurring).

[280] *Id.* at 492.

[281] *Id.* at 493.

that all citizens held the privileges and immunities of Americans free from state interference helped reorient the Ninth's protection of rights toward individuals and away from the collective majority. The Ninth Amendment should have nothing to do with *Griswold*. Instead, the Fourteenth Amendment's Privileges and Immunities Clause, acting alone, should have provided the source for any individual rights to be found. *Griswold* could have implicated the Ninth only if it had involved a federal statute outlawing contraceptives.

Similarly, the Court looked to the wrong provision in *Bolling v. Sharpe*,[282] which held that segregated schools in the District of Columbia violated the Due Process Clause of the Fifth Amendment. Arguing that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government" than that imposed upon the states by *Brown v. Board of Education*,[283] Chief Justice Warren held that the Due Process Clause essentially incorporated the Fourteenth Amendment's equal protection values against the federal government. However, our declaratory vision of the Ninth Amendment suggests that *Bolling* should have turned to the Ninth Amendment for support. Certainly, the Ninth Amendment, which after Reconstruction protected negative individual rights, is a more likely source for the right to be free from discrimination by federal school authorities than the Fifth Amendment's Due Process Clause. In fact, as we saw during the Reconstruction debates, members of the Thirty-Ninth Congress believed the Ninth Amendment embodied such a principle against discrimination.[284]

Bolling and *Griswold* suggest two different methods for determining what unenumerated rights the Ninth Amendment enforces against the federal government. In *Bolling*, the Court could have found that the Ninth Amendment included the right of equal protection declared in the Fourteenth Amendment. This would prove consistent with our narrow interpretation of a declaratory Ninth Amendment which requires us to examine the Constitution as a whole for other declarations of the rights retained by the people. This shows that the Equal Protection Clause, as a right declared in the Constitution, could provide a principle to be enforced through the Ninth Amendment. In contrast, *Griswold* requires us to look

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[282] 347 U.S. 497 (1954).

[283] 347 U.S. 483 (1954).

[284] *See infra* text accompanying notes 249-51.

outside the document—if one rejects the argument that the Third and Fourth Amendments create a penumbra protecting a right to privacy. This invokes a broad interpretation of the Ninth Amendment which requires us to look at those pre-existing rights which formed the background to the Constitution. Our inquiry would require us to examine whether the common law in 1791, or in 1866, recognized a right to privacy similar to the one in *Griswold*.

This analysis of *Griswold* points the way to fertile grounds for determining what unenumerated rights should receive constitutional protection. One method could look to Blackstone's triad of absolute rights of personal security, personal liberty, and private property. Since the framers of section one expressly stated their belief that the Ninth Amendment protected common law rights as defined by Blackstone, we would have to find any right to privacy within the rights to personal security, liberty, or property. Were we to undertake such an analysis, it is more likely we would find stronger support for a right against racial discrimination, than for a right to use contraceptives.

Of course, there would be practical problems with such approaches. Protecting unenumerated rights at a constitutional level might invite unchecked judicial power over government actions, such as in the substantive due process case of *Lochner v. New York*.[285] Judges could freely import their own economic or political philosophies into the Constitution without restraint, as Justice Holmes' dissent argued the *Lochner* majority had done: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics . . . ."[286] Under the model of the Fourteenth Amendment's Privileges and Immunities Clause and the Ninth Amendment proposed here, judges today similarly could enact, in Justice Holmes' words, "a particular economic theory, whether of paternalism and the organic relation of the citizen to the State, or of laissez faire."[287]

There are two answers to this important concern. First, the Court already does this. As illustrated in *Roe v. Wade*,[288] the Court already uses the Due Process Clause to protect what it considers fundamental rights

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[285] 198 U.S. 45 (1905).

[286] *Id.* at 75 (Holmes, J., dissenting).

[287] *Id.*

[288] 410 U.S. 113 (1973).

and liberties from state violation. This examination of the relationship between the Ninth and the Fourteenth Amendments simply shows that economic or common law rights and liberties are entitled to similar protection by the courts—something they generally have been unwilling to do since the New Deal.[289] However, the Framers of the Bill of Rights, of the antebellum state constitutions, and of the Reconstruction Amendments would have demanded that such economic rights receive the same, if not greater, protection by the judiciary. Often, enforcing economic liberty will dovetail with the larger aims of the Bill of Rights to ensure equal rights. For example, in *Yick Wo v. Hopkins*,[290] the Court struck down a San Francisco ordinance that sought to violate Chinese laundry owners' economic liberties and their right to be free of racial discrimination by the government. The meaning of the Ninth Amendment might require courts today to engage in a similar review of state regulations that violate economic liberties or equal rights.

Second, it is not entirely true that a judiciary armed with the Ninth Amendment would possess the unfettered discretion to import their own philosophies into the Constitution. Courts would be restrained by the intent of the framers of 1866. Our review of the historical record shows that the members of the Thirty-Ninth Congress believed that the Ninth Amendment protected certain civil rights, such as the right to contract, as well as certain common law principles. In his argument with Senator Thurman, Senator Sherman provided a methodology for articulating unenumerated constitutional rights: examine the major organic acts of the American people, and, at times, the English tradition as well. Judges examining the Ninth Amendment would find the boundaries of their inquiry set by history itself. Thus in *Bolling*, a court would look to the Constitution, state constitutions, and the common law to discern a principle against racial discrimination by government. At the very least we would find that members of the Thirty-Ninth Congress believed that the common law did prohibit such discrimination in public places, as we saw in Senator Sherman's debate with Senator Thurman. However, a similar analysis would probably fail to discover a principle to include *Griswold* within the Ninth Amendment's protections.

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[289] *See, e.g.*, West Coast Hotel v. Parrish, 300 U.S. 379 (1937).

[290] 118 U.S. 356 (1886).

However, this difficult problem probably is better addressed by the first approach. Limiting the Ninth Amendment to collective political rights places some tighter constraints on judicial discretion. Enforcing only the understanding of the 1791 Framers also alleviates another problem with looking to the intent of 1866 framers. Although the Thirty-Ninth Congress re-declared the meaning of the Ninth Amendment, judicially recognizing that fact would require courts to give effect to an intent in search of a text. Such an approach could lead to unwanted results. For example, if the drafters of the Twentieth Amendment had a certain opinion on what the Commerce Clause meant, it is a doubtful matter whether courts would or should give that understanding force. Similarly, our declarative model requires courts to give effect to a different understanding of the Amendment from that of its drafters, even though no corresponding change in the text had taken place. Deciding whether to obey such an intent would then descend into a fruitless inquiry over how easily the later framers could have altered the constitutional provision.

A synthesis of the two approaches might solve these problems. Courts could give force to the Ninth Amendment's core focus on collective political rights without much difficulty. However, the courts should defer to other branches of government to determine the individual rights added by the re-declaration in 1866. Before enforcement by the courts, the Ninth Amendment may require congressional identification of rights, both civil and individual. Not only the legislative branch would play a role in this system; the executive branch, headed by the only nationally-elected political official in the country, certainly could make a legitimate claim to announcing those rights. Justice Chase recognized this point in *Calder v. Bull*[291] when he expressed doubts that federal courts were the proper tribunals for articulating natural rights.[292] However, Senator Sherman did expect federal courts to play such a role.

Putting aside the question of how to give content to the Ninth Amendment, the historical evidence presented in this Article also provides some further insights into the process of constitution-making. This Article has shown that the federal Constitution is part of a mosaic of different American constitutions. While the federal Constitution is supreme, supremacy

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[291] 3 U.S. (3 Dall.) 386 (1798).

[292] *Id.* at 393-95.

does not prevent state constitutions from informing the meaning of the federal Constitution. As we have seen with the Ninth Amendment, a subtle and dynamic relationship exists between the federal and state constitutions. The federal Ninth Amendment took its meaning from the many provisions in the state constitutions that declared the right of the people to govern themselves. In return, the federal Ninth Amendment imparted back to the states the example of an explicit provision which expressly protected unenumerated—albeit collective and political—rights. State constitutions then adopted their own versions of the Ninth Amendment, in the process reorienting the provision toward the protection of individual rights. That meaning again fed back into the federal Ninth Amendment when members of the Reconstruction Congress designed new amendments to regulate state actions.

These are brief thoughts concerning very difficult problems. I only wish here to suggest the possibilities for analysis produced by a declaratory vision of the Ninth Amendment. This approach to the Ninth Amendment not only remains true to the intent of the framers of 1791 and 1866, but it also gives life to the robust, dynamic vision of the Amendment they created.