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THE NINTH AMENDMENT: THE “HARD PROBLEM” OF U.S. CONSTITUTIONAL LAW

Jorge M. Farinacci-Fernós*

ABSTRACT

Like with the mythical lamp that can grant any three wishes, federal courts in the United States have buried the Ninth Amendment of the U.S. Constitution deep within the sands of American law in order to avoid coming to terms with its potential regarding the protection of unenumerated constitutional rights. Courts have been able to do so, in part, because of the seemingly impossible task of extracting from the text and history of the Ninth Amendment sufficient elements needed to identify which unenumerated rights may be subject to judicial enforcement.

This impossibility is an illusion and is contrary to the text, structure, history, and purpose of the Ninth Amendment. The Ninth Amendment means and does something. It is not superfluous or redundant. But, because of the nature of its object—unenumerated rights—there is an inherent limit to what the text of this constitutional provision can tell us about them. This is not a design flaw on the part of the drafters. It is a necessary characteristic when dealing with unenumerated items. It simply requires more effort on our part.

The Ninth Amendment constitutes a textual command regarding extra-textual things. This generates a normative gap: how do we get from the text to the unenumerated rights it references but does not, and cannot, identify specifically? This challenge represents the ultimate *hard problem* of U.S. constitutional law. But it is a solvable problem.

This Article analyzes the Ninth Amendment, including its text, structure, history, and purpose, as well as the intent of its drafters and the history of its interpretation by courts and scholars. Furthermore, this Article proposes that the

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Ninth Amendment is a multi-purpose tool that serves different roles. Its main role is as a residuary or reservations clause that allows for the identification of judicially enforceable unenumerated constitutional rights that can be claimed against both state and federal governments. As a result, the Ninth Amendment represents one of our best current bets with regard to the development of federal constitutional rights at a historical juncture where federal courts are weakening rights protections under the guise of textualism and originalism. The Ninth Amendment stands in the way of that endeavor, since its text and history are meant to *broaden* rights, not contract them.

INTRODUCTION

Every generation of American jurists has rediscovered the Ninth Amendment at different historical junctures. Each period of renewed interest has resulted in the proliferation of academic literature and judicial experiments with the hope of resurrecting this constitutional provision. Eventually, that interest dies down as other vehicles for the protection of individual rights are thought to be more viable or when apparent normative deadlocks are encountered. The U.S. Supreme Court's recent decision in *Dobbs v. Jackson Women's Health Center*,¹ and particularly its aggressively narrow approach to the notion of *unenumerated rights*, should give new life to the Ninth Amendment as a vehicle for the continued development of individual rights in the United States.²

The Ninth Amendment is the *hard problem* of federal constitutional law.³ It is a *textual* provision that announces the existence of *extratextual* or *unenumerated* rights without furnishing explicit criteria for their identification, operation, or enforcement.⁴ As a result, any new approach to the Ninth Amendment quickly confronts significant conceptual challenges, some of which are thought to be fatal or unsurmountable. Many of these obstacles are more apparent than real.

One particular challenge that accompanies the Ninth Amendment is determining what its specific role is. Scholars are divided into several camps that advance different views on this question, which range from the amendment being a relatively passive rule of construction to a more active independent source of enforceable rights. The premise of these debates is that there is a correct answer that points to a singular role for this constitutional provision. The goal, then, is to identify the right answer.

There is an alternative approach available: that the Ninth Amendment is a *multi-purpose* provision that fulfills several roles at once. This includes functioning

¹*Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022).

² There are other viable vehicles available that should be explored, such as state constitutions that offer greater protection to individual rights.

³ I import the term "hard problem" from the debates regarding the explanations of consciousness and how physical processes explain or lead to subjective, first-person experiences. See David J. Chalmers, *Facing up to the Problem of Consciousness*, 2 J. CONSCIOUSNESS STUD. 200 (1995). Something similar can be said about the Ninth Amendment and how its text can be analyzed to produce actual legal effects or results. Almost by definition, there is a "physical" gap between the text of the amendment and its possible normative effects. This may explain why some have viewed the Ninth Amendment with a "sense of intellectual disquiet." Floyd Abrams, *What Are the Rights Guaranteed by the Ninth Amendment?*, 53 A.B.A. J. 1033 (1967).

⁴ U.S. CONST. amend. IX.

as an independent source of enforceable rights, residuary or reservations clause, rule of construction, hold-harmless provision, and convergence point. In other words, that the Ninth Amendment is a sort of Swiss Army Knife for U.S. constitutional law.

This Article will attempt to delineate the Ninth Amendment's multiple roles and, in particular, its main function as a *residuary or reservations clause* that can be used to identify certain constitutional rights that should be duly enforced by courts. This requires carrying out a systematic and comprehensive analysis of the amendment's text, structure, history, purpose, and normative content.

Part I will address the Ninth Amendment's analytical journey in U.S. constitutional theory, its conceptual foundations, and the different roles that have been assigned to it by the current literature. Part II will offer an interpretive analysis of the Amendment itself, focusing on its text, structure, history, purpose, and intent. Part III proposes a practical framework for the identification and enforcement of unenumerated rights under the Ninth Amendment, including specific examples.

I. THE HISTORY OF VIEWS ON THE NINTH AMENDMENT

A. Introduction

The Ninth Amendment has been one of the most ignored components of U.S. constitutional law. While not officially banished or entirely forsaken, it has been mostly abandoned by courts and the legal community in practice. Law schools skip it entirely with regard to their curriculum. Every now and again, however, interest in the Ninth Amendment heats back up. This has produced intermittent, intergenerational conversations by jurists that have gone on for decades.

Renewed interest in the Ninth Amendment can arise for different reasons. During the 1960s, it was due to the amendment's prominent role in Justice Goldberg's concurrence in *Griswold v. Connecticut*.⁵ More recently, the Supreme Court's narrowing approach to unenumerated rights could usher in a new era of Ninth Amendment inquiry.

This Article begins its analysis with a very basic, and hopefully uncontroversial, premise: the Ninth Amendment of the U.S. Constitution must *mean something*.⁶ More importantly, it must *do something*, even if it "stubbornly resists

⁵ *Griswold v. Connecticut*, 381 U.S. 479 (1965) (Goldberg, J., concurring).

⁶ David K. Suttelan, *The Ninth Amendment: Guidepost to Fundamental Rights*, 8 WM. & MARY L. REV. 101 (1966) ("Surely, this Amendment must have some meaning because the members of the First Congress had felt it imperative it be included within the Bill of Rights.").

control” or definite analysis.⁷ Hopefully, any renewed study of the Ninth Amendment will focus on *what* it does, not *if* it does anything at all.

This assertion is a necessary consequence of the general notion that “in interpreting the Constitution, every word must have its due force and meaning.”⁸ This is so because “[t]he United States Constitution contains no superfluous language.”⁹ If the amendment had no meaning or effect, that would “assign[] to its framers an intention to engage in a purely moot exercise.”¹⁰ As Massey points out, “the amendment is, after all, a part of the Constitution.”¹¹

Of course, the amendment cannot mean anything or everything.¹² Thus, the main interpretive challenges exist on several analytical levels. First, what the provision actually says; second, what its effects are. In addition, if we conclude, for example, that there are enforceable unenumerated rights that are protected by the Ninth Amendment, then there is a further step that must be taken: the identification of these rights using a principled and coherent approach. Undoubtedly, this is a difficult task, but “a constitutional provision should not be ignored simply because it is hard to interpret.”¹³

Moreover, while the Ninth Amendment does not just do one thing, it does not do everything either. The Ninth Amendment should be understood, primarily, as a residuary or reservations clause that can be used to identify and enforce

⁷ Louis Michael Seidman, *Our Unsettled Ninth Amendment: An Essay on Unenumerated Rights and the Impossibility of Textualism*, 98 CALIF. L. REV. 2129 (2010); see Chase J. Sanders, *Ninth Life: An Interpretive Theory of the Ninth Amendment*, 69 IND. L.J. 759, 791 (1994) (discussing the possibility that the amendment means nothing at all or that its meaning is inherently unascertainable) [hereinafter Sanders, *Ninth Life*].

⁸ Knowlton H. Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L.J. 309, 312 (1936).

⁹ Gary L. Gardner, *The Ninth Amendment*, 30 ALB. L. REV. 89, 89 (1966); see 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 (1988) (rejecting the notion that the Amendment is “unimportant or redundant”); Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 HASTINGS. L.J. 305, 306 (1987) [hereinafter Massey, *Federalism and Fundamental Rights*].

¹⁰ Massey, *Federalism and Fundamental Rights*, *supra* note 9, at 316.

¹¹ *Id.* at 319.

¹² Laurence Claus, *Protecting Rights from Rights: Enumeration, Disparagement, and the Ninth Amendment*, 79 NOTRE DAME L. REV. 585, 588 (2004) (“We do not like law to mean nothing, nor do we like it to mean everything.”).

¹³ Sanders, *Ninth Life*, *supra* note 7, at 761.

unenumerated constitutional rights. *In addition*, it functions as an interpretive tool for the identification of rights that emanate from other provisions of the Constitution, as well as a general rule of construction. This normative proposal will be discussed in greater detail in Parts II and III.

But first, it is worthwhile to look at the different conceptual and operational approaches that have been taken so far with regard to the Ninth Amendment. As we will see, many of the existing proposals are articulated in mutually exclusive terms. In other words, that the Amendment either means one thing or another, to the exclusion of the rest. This Article partially challenges that approach by proposing that the Ninth Amendment is *primarily* a residuary or reservations clause, but that it also has *other significant roles*.

B. *The Inconsistent Attention Given to the Ninth Amendment*

For practical purposes, the Ninth Amendment—and its normative implications—have been written out of the constitutional text. Federal courts hardly use it to decide cases. This is an awkward state of affairs, in particular, for textualists. As Louis Michael Seidman observed, the amendment “stands as a paradoxical, textual monument to the impossibility of textualism.”¹⁴ That an express textual provision of the Constitution can be in a state of seemingly permanent exile is, at the very least, problematic.

Specifically, the Ninth Amendment has been mostly ignored since its inception and its moments in the sun have been considerably short lived. In Ryan Williams’s timeline, the story of the Ninth Amendment after its adoption includes several stages: (1) its combined use with the Tenth Amendment in the name of state authority, (2) its faded status during the New Deal, (3) its resurgence in *Griswold*, (4) Robert Bork’s characterization of the amendment as an “inkblot[,]” and (5) the current debate among originalists regarding its meaning.¹⁵ The main takeaway has been one of operational passivity with fleeting detours.

In fact, until its partial resurgence in the 1960s, scholarly attention to the Ninth Amendment was considerably scant.¹⁶ As David K. Suttelan observed in 1966, “[e]ither it has been purposely ignored or it was ultimately forgotten soon after its

¹⁴ Seidman, *supra* note 7, at 2129.

¹⁵ Ryan C. Williams, *The Ninth Amendment as a Rule of Construction*, 111 COLUM. L. REV. 498, 504–06 (2011).

¹⁶ See, e.g., Massey, *Federalism and Fundamental Rights*, *supra* note 9, at 305.

inception in 1789.”¹⁷ While other provisions of the federal constitution suffered a similar fate during the nineteenth century when the U.S. Supreme Court adopted a more limited and passive view of constitutional rights, the Ninth’s road to oblivion has been more evident.¹⁸ In fact, “until 1947, the courts had not successfully applied the Ninth Amendment in the protection of [even] one constitutional right.”¹⁹

After the U.S. Supreme Court issued its decision in *Griswold*, the Amendment acquired a “newfound notoriety.”²⁰ A new salvo of scholarly articles followed until the early 1970s.²¹ But that renewed attention was short-lived and no Ninth Amendment revolution followed its cameo appearance in *Griswold*.²² In that sense, *Griswold* “stands as a promise, as yet unfulfilled, of substantive meaning for the amendment.”²³

Every few years the amendment seems to make a scholarly comeback. Writing in 1983, Russell L. Caplan stated that “[a]fter lying dormant for over a century and a half [it] has emerged from obscurity to assume a place of increasing, if bemused, attention.”²⁴ In 1990, Thomas B. McAfee asserted that “the view that the ninth amendment provides a sound basis for the discovery and judicial enforcement of

¹⁷ Suttelan, *supra* note 6, at 101. As Caplan observes, from 1789 “until 1965, the amendment received only perfunctory treatment from courts and commentators.” Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 223–24 (1983).

¹⁸ Suttelan, *supra* note 6, at 108 (“By and large, however, the courts were virtually silent in the implications of the Ninth Amendment throughout all of the 19th century and the early part of the 20th [c]entury.”).

¹⁹ *Id.* at 110. See Gardner, *supra* note 9, at 92.

²⁰ Sanders, *Ninth Life*, *supra* note 7, at 771.

²¹ See, e.g., Norman Redlich, *Are There “Certain Rights . . . Retained by the People”?*, 37 N.Y.U. L. REV. 787 (1962); Suttelan, *supra* note 6; Gardner, *supra* note 9; James F. Kelley, *The Uncertain Renaissance of the Ninth Amendment*, 33 UNIV. CHI. L. REV. 814 (1966); Abrams, *supra* note 3; Gerald Kirven, *Under the Ninth Amendment, What Rights are the “Other Rights Retained by the People”?*, 14 S.D. L. REV. 80 (1969); Lyman Rhoades & Rodney R. Patula, *The Ninth Amendment: A Survey of Theory and Practice in the Federal Courts Since Griswold v. Connecticut*, 50 DENVER L.J. 153 (1973). Caplan refers to this as an explosion in scholarly literature dedicated to the Ninth Amendment. Caplan, *supra* note 17, at 224.

²² See Abrams, *supra* note 3, at 1033 (referencing how *Griswold* heightened “the significance of determining precisely what manner of amendment the Ninth Amendment is *and what future it is likely to have*”) (emphasis added).

²³ Rhoades & Patula, *supra* note 21, at 154–55.

²⁴ Caplan, *supra* note 17, at 223.

unenumerated individual rights is gaining some new adherents in the judiciary and fast becoming the new orthodoxy in the academy and Congress.”²⁵

But the promise and potential of the Ninth Amendment never seems to fully materialize. In fact, the Supreme Court of the United States has consistently and evidently avoided any “explicit discussion of the Ninth Amendment.”²⁶

The most recent rediscovery of the Ninth Amendment dates back almost twenty years.²⁷ Kurt Lash characterizes the current period as a recent renaissance.²⁸ The latest scholarly debates are mostly carried out by originalists,²⁹ debating whether the Ninth Amendment is a source of enforceable natural rights of a libertarian bend or a mere reaffirmance of the basic principles of federalism.³⁰

The intermittent attention given by scholars to the Ninth Amendment mirrors a similar approach by courts. However, so far, courts have been considerably reluctant to base their decisions solely on the Ninth Amendment. The recent decision in *Dobbs* could, and should, renew interest in the Ninth Amendment, particularly with regard to the existence and adequate enforcement of unenumerated rights.

²⁵ Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1216 (1990). McAfee recognized that “[a]dmittedly, however, the lower courts remain slow to embrace the ninth amendment as a source of fundamental rights decision making.” *Id.* at 1216 n.7. Sanders shared some of McAfee’s cautious optimism, stating in 1994 that, “since 1965, the Supreme Court has mentioned the Ninth Amendment in no fewer than twenty cases.” Sanders, *Ninth Life*, *supra* note 7, at 771.

²⁶ Cameron S. Matheson, *The Once and Future Ninth Amendment*, 38 B.C. L. REV. 179, 181 (1996).

²⁷ See, e.g., among others, Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331 (2004) [hereinafter Lash, *The Lost Original Meaning*]; Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1 (2006); Joseph F. Kadlec, *Employing the Ninth Amendment to Supplement Substantive Due Process: Recognizing the History of the Ninth Amendment and the Existence of Nonfundamental Unenumerated Rights*, 48 B.C. L. REV. 387 (2007); Kurt T. Lash, *A Textual-Historic Theory of the Ninth Amendment*, 60 STAN. L. REV. 895 (2008) [hereinafter Lash, *A Textual-Historic Theory*]; Seidman, *supra* note 7; Jeffrey D. Jackson, *Blackstone’s Ninth Amendment: A Historical Common Law Baseline for the Interpretation of Unenumerated Rights*, 62 OKLA. L. REV. 167 (2010); Williams, *supra* note 15; Duane L. Ostler, *Rights Under the Ninth Amendment: Not Hard to Identify After All*, 7 FED. CTS. L. REV. 35 (2013); Anthony B. Sanders, *Baby Ninth Amendments and Unenumerated Individual Rights in State Constitutions Before the Civil War*, 68 MERCER L. REV. 389 (2017) [hereinafter Sanders, *Baby Ninth Amendments*].

²⁸ Lash, *A Textual-Historic Theory*, *supra* note 27, at 896.

²⁹ See Barnett, *supra* note 27; Lash, *A Textual-Historic Theory*, *supra* note 27.

³⁰ See Barnett, *supra* note 27, at 1; Williams, *supra* note 15, at 504.

C. *Existing Views on the Ninth Amendment's Meaning and Effects*

1. Introduction

The accumulated scholarly literature on the Ninth Amendment offers different ideas regarding what the provision means and does. The general approach is that there is some sort of *correct* answer to be found through a thorough analysis of the text, purpose, and history of the amendment.³¹ The “nebulous” nature of the amendment’s language has led to evident scholarly disagreements regarding *which* answer is the right one.³² There are some that propose the possibility that the Ninth Amendment simply states an “idea” and does not set out any normative specifics.³³

Many of the views expressed in the literature are wholly compatible conceptually with each other, except for their shared claims regarding the existence of a single right answer that, by definition, excludes others. In other words, if singularity is removed from the equation, there can be more than one right answer that does not pose a conceptual contradiction or impossibility. While this Article partially chooses a side—it identifies a *main* role for the Ninth Amendment—it does not claim that the main role is the *only* role for the amendment. In other words, I am of the view that the Ninth Amendment plays *multiple* roles simultaneously.

The range of options given with respect to the meaning and operation of the Ninth Amendment is substantial, and they vary from passive truisms to having independent normative effect. I now turn to discussing these different approaches to provide a full picture of the current normative situation regarding the Ninth Amendment. This will be purely a descriptive endeavor and I will engage with these options from a normative perspective in Part II.

³¹ See Kelley, *supra* note 21, at 815 (“The result of this examination *strongly suggests* that the ninth amendment is *only* a rule of construction. . . .”) (emphasis added); Massey, *Federalism and Fundamental Rights*, *supra* note 9, at 307 (“Yet, there is a thread that, *when folded faithfully*, produces a *comprehensive, principled, and historically consistent theory* of both the content of the ninth amendment and the enforceability of its guarantees.”) (emphasis added); John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967, 967 (1993) (“Ironically, [the] debate over the Ninth Amendment seeks to fix into place a static vision of the Amendment’s meaning.”).

³² Suttelan, *supra* note 6, at 102. See also Caplan, *supra* note 17, at 223 (stating that the amendment’s meaning “has always been elusive”); Massey, *Federalism and Fundamental Rights*, *supra* note 9, at 305–07 (“[The Ninth Amendment] continues to perplex those seeking meaning within it . . . enigmatic nature of the amendment.”).

³³ See Suttelan, *supra* note 6, at 107.

2. The Ninth Amendment as a Mechanism to Reaffirm Federalism and Avoid the Expansion of Congressional Power

One of the earliest claims regarding the meaning of the Ninth Amendment can be characterized as the *federalism-limited powers* approach.³⁴ The view is that the recognition of certain rights in the constitutional text should not be interpreted as an admission that, if not for the inclusion of those rights, Congress would be able to regulate a particular area regardless, or even in excess, of its Article I powers. As a result, the amendment merely reaffirms the notion that the federal government is one of enumerated and limited powers, notwithstanding the recognition of a particular right elsewhere in the Constitution.

For example, the inclusion of the right to worship freely in the First Amendment should not be construed to mean that, if not for that right, Congress could, in fact, regulate religious worship in the United States. The Ninth Amendment, the argument goes, was meant to prevent that negative inference.³⁵ In other words, that the existence of a right should not be seen as an indirect grant of power over the subject matter addressed by that right.³⁶ As McAfee explains, its purpose “was to prevent the inference of a government of general powers from the provisions in a bill of rights.”³⁷

According to Lash, this means that the Ninth Amendment should be seen as a “rule of construction that limited the interpretation of enumerated federal power.”³⁸ This would impede the aforementioned inferred power scenario, which, if left unaddressed, could lead to a significant expansion of federal power.³⁹

³⁴ See Kelsey, *supra* note 8, at 309; Jordon J. Paust, *Human Rights and the Ninth Amendment: A New Form of Guarantee*, 60 CORNELL L. REV. 231, 238 (1975); Barnett, *supra* note 27, at 1; Kadlec, *supra* note 27, at 399.

³⁵ See Kelsey, *supra* note 8, at 316; Caplan, *supra* note 17, at 256; McAfee, *supra* note 25, at 1220.

³⁶ See McAfee, *supra* note 25, at 1220; Kelley, *supra* note 21, at 819.

³⁷ McAfee, *supra* note 25, at 1226.

³⁸ Lash, *The Lost Original Meaning*, *supra* note 27, at 336. This approach seems to combine the rule of construction model with the federalism-limited powers approach. While Lash takes on the rule of construction approach in methodological terms (“All the Ninth Amendment does is forbid interpreting particular provisions in a particular way.”), he applies it to a specific substantive view, namely, the federalism-limited powers theory. *Id.* at 903. This is why his views are analyzed under the latter.

³⁹ Lash, *The Lost Original Meaning*, *supra* note 27, at 353.

This approach immediately runs into two obstacles. First, neither federalism nor powers are addressed in the text of the Ninth Amendment.⁴⁰ It would seem odd that the Ninth Amendment was adopted to make clear that the existence of a right does not equate to the existence of federal governmental power yet fails to make that point clearly or even refer to those issues at all.⁴¹ Second, this approach fails to adequately take into consideration the text, role, and history of the *Tenth Amendment* as a power-limiting mechanism, thus turning either one into a superfluous provision.⁴²

Some have tried to avoid the redundancy problem by proposing a joint reading of both amendments. In other words, that the Ninth and Tenth “are the two sides of the same coin.”⁴³ This was the historical practice of federal courts before 1965, where the Ninth Amendment was “uniformly read *in conjunction with* the tenth as a rule of construction *limiting the powers of the federal government*.”⁴⁴ But this possibility should be quickly discarded, given the important textual differences between both amendments and their creation histories.⁴⁵ As Massey suggests, “[c]onstruing the Ninth Amendment as a mere declaration of a constitutional truism, devoid of enforceable content, renders its substance nugatory and assigns to its framers an intention to engage in a purely moot exercise.”⁴⁶

The main argument in favor of the Ninth Amendment as a federalism-limited powers provision stems from an intent-based analysis of the amendment. As we will see in Part II, this approach is misguided. A closer look at the drafting history of the amendment reveals a more dynamic and complex picture regarding intent in terms of the meaning of the Ninth Amendment. This is particularly true when taking into

⁴⁰ Kadlec, *supra* note 27, at 396.

⁴¹ See Lawrence E. Mitchell, *The Ninth Amendment and the Jurisprudence of Original Intention*, 74 GEO. L.J. 1719, 1728 (1986) (arguing that there is no textual basis for concluding that the Ninth Amendment “was simply an assertion of the federalist principle that [the federal] government is one of enumerated powers”).

⁴² Kelley, *supra* note 21, at 20, at 832; Sager, *supra* note 9, at 246. This issue will be addressed in greater detail in Part II.

⁴³ McAfee, *supra* note 25, at 1226.

⁴⁴ Rhoades & Patula, *supra* note 21, at 154 (emphasis added).

⁴⁵ Claus, *supra* note 12, at 608 (stating that Madison “was concerned with more than the implied expansion of federal rights”).

⁴⁶ Massey, *Federalism and Fundamental Rights*, *supra* note 9, at 316.

account the role of the Anti-Federalists in the creation of the Bill of Rights in general, and the Ninth Amendment in particular.

But there is an additional reason to be skeptical of this approach. There are instances where Congress *does have the power* to regulate particular areas that could impair the exercise of *individual rights*.⁴⁷ That means that certain individual rights can be effectively raised even in situations where Congress is acting under its Article I powers.⁴⁸ These flaws have resulted in the search for alternative explanations regarding the Ninth Amendment's meaning and operation, "mainly by eliminating the explicit focus on preventing an inference of enlarged powers" belonging to the federal government.⁴⁹

3. The Ninth Amendment as a Rule of Construction or Hold Harmless Provision

Another popular view is the Ninth Amendment as a *negative rule of construction*.⁵⁰ A subset of this approach can be described as the *hold harmless* model.⁵¹ I address each one in turn.

The rule of construction model proposes that the Ninth Amendment is a methodological instruction regarding the interpretation of enumerated rights. Specifically, that an enumerated right should not be interpreted in such a way as to negate or diminish already existing unenumerated rights: "[T]he ninth amendment is only a rule of construction applicable to the entire Constitution; it is a guide post at

⁴⁷ See Matheson, *supra* note 26, at 186.

⁴⁸ *Id.* ("The Constitution does not assign the federal government power in certain areas, even if legislation would not otherwise violate people's individual rights. The Constitution does, however, grant power to the federal government in certain areas where legislation might violate individual rights.").

⁴⁹ McAfee, *supra* note 25, at 1237.

⁵⁰ See Suttelan, *supra* note 6, at 102; Paust, *supra* note 34, at 238; Yoo, *supra* note 31, at 967; Sanders, *Ninth Life*, *supra* note 7, at 791; Claus, *supra* note 12, at 621 ("The Ninth Amendment is a rule of construction."); Williams, *supra* note 15, at 501 ("[The Ninth Amendment] merely establishes a very narrow and precise rule of construction."). For a contrary view, see Christopher J. Schmidt, *Revitalizing the Quiet Ninth Amendment: Determining Unenumerated Rights and Eliminating Substantive Due Process*, 32 U. BALT. L. REV. 169, 214 (2003) (stating categorically that the Ninth Amendment is "not a rule of construction").

⁵¹ Williams, *supra* note 15, at 501.

the end of the Bill of Rights reminding courts of the existence of other rights not specifically enumerated.”⁵²

According to this view, the existence of extratextual rights should guide courts in the interpretation of the textual ones.⁵³ In other words, the Ninth Amendment does not protect unenumerated rights; it merely orders courts to take them into consideration when interpreting enumerated rights.⁵⁴ As a result, the main focus of the provision is not unenumerated rights, but enumerated ones. The role of unenumerated rights is merely to serve as an analytical accessory in the correct interpretation of enumerated rights.

In that sense, the amendment simply declares that the enumeration of a particular right does not, automatically, deny the existence of unenumerated ones.⁵⁵ That means that silence should not be equated with inexistence,⁵⁶ and that an enumerated right should not be interpreted in a way that, as a result, erodes or diminishes an unenumerated one that exists elsewhere.

This approach misses the mark. Moreover, it misses the focus of the Ninth Amendment and the object of its commands. As we will discuss in Part II, it is true that “[o]n its face . . . the amendment is a rule of construction.”⁵⁷ But that fails to consider how the Bill of Rights is actually written. Take, for example, the First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.⁵⁸

⁵² Kelley, *supra* note 21, at 815.

⁵³ Claus, *supra* note 12, at 592.

⁵⁴ *Id.* (“[T]he Ninth Amendment protects rights from rights.”).

⁵⁵ Kelley, *supra* note 21, at 823 (stating that the amendment should “not be read as a summary or source of unenumerated rights, but rather as a rule of construction stating that the enumeration of some rights does not deny the existence of others”).

⁵⁶ Abrams, *supra* note 3, at 1035.

⁵⁷ Gardner, *supra* note 9, at 89. Gardner goes further and states that “[a] look at its history shows that it was so intended.” *Id.*

⁵⁸ U.S. CONST. amend. I.

The first thing that stands out from the language structure of this provision is that it acts as a *prohibition on Congress*; what Madison called an *exception*.⁵⁹ It is only by *inference* that we can conclude that a certain right exists. There is no actual declaration regarding the affirmative constitutional recognition of any rights as such. Also note that, except with regard to peaceful assembly and the redress of grievances, the other instances mentioned in the First Amendment are not even actually articulated as *rights* (“freedom of speech”).⁶⁰

The same thing happens with the Contracts Clause.⁶¹ The text of that provision states: “No State shall . . . pass any . . . law impairing the obligation of contracts. . . .”⁶² This clause is part of Section 10, Article I, which deals with powers denied to the states. Note, again, that the language structure of this provision is a denial of power, and it is not written as an assertive declaration of an enforceable individual right. Another example of negative inference is the Just Compensation Clause in the Fifth Amendment.⁶³ While it is written as a prohibition regarding the taking of private property without just compensation, there is an evident inference as to the existence of eminent domain power in the first place.

Something similar happens with the Ninth Amendment. Even if its language structure mirrors a rule of construction, there are crucial inferences that flow from the provision. Just as the First Amendment indirectly establishes a right to free speech though an express prohibition—or “exception”—on Congress, the Ninth Amendment has indirect effects even if written as a rule of construction.

More importantly, we should not overlook the crucial fact that the rule of construction adopted in the Ninth Amendment refers to the *enumeration* of rights, *not to those rights themselves*. In other words, it is a rule of construction regarding the fact of enumeration. This impacts how the rule of construction operates in the first place. This issue will be discussed in further detail in Part II.

The *hold harmless* theory is a byproduct of the rule-of-construction model. It is meant to deny any argument that could be made from the fact that some rights were enumerated as demonstrative of the inexistence of some other right that may

⁵⁹ See Claus, *supra* note 12, at 606.

⁶⁰ U.S. CONST. amend. I.

⁶¹ U.S. CONST. art. I, § 10, cl. 1.

⁶² *Id.*

⁶³ U.S. CONST. amend. V.

have been established by a source other than the new federal constitutional text.⁶⁴ In that sense, the Ninth Amendment “announces no new law,” as it “seems more like a statement about the way things already are.”⁶⁵

The amendment, the argument goes, was meant to prevent any inference that would alter the status quo regarding rights in the United States, particularly in the context of the Supremacy Clause. In other words, if an unenumerated right exists elsewhere, it continues to exist in its pre-constitutional state. But, if the right is nonexistent, it continues to be nonexistent as well. In that sense, the Ninth Amendment acts to preserve the *status quo* with regard to rights.

Specifically, this approach states that “the amendment neither creates new rights nor alters the status of pre-existing rights.”⁶⁶ On the contrary, “it simply provides that the individual rights contained in state law are to continue in force under the Constitution until modified or eliminated by state enactment, by federal preemption, or by a judicial determination of unconstitutionality.”⁶⁷ This means that the Ninth Amendment’s role is merely to establish that the enumeration of rights in the federal Constitution did not impact other rights established elsewhere, whichever they are.⁶⁸

As a result, other existing rights, such as those under state law, would continue in operation as before. This was designed to avoid the inference that, by explicitly recognizing certain rights in the federal Constitution, other preexisting rights that were omitted from the constitutional text were somehow weakened or even eliminated simply because of that fact.⁶⁹

As Claus explains, “[t]he Ninth Amendment concerns the status of rights that other rights ‘retained by the people’ would have enjoyed in the absence of the Bill

⁶⁴ Williams, *supra* note 15, at 501.

⁶⁵ Mitchell Gordon, *Getting to the Bottom of the Ninth: Continuity, Discontinuity, and the Rights Retained by the People*, 50 IND. L. REV. 421, 427 (2017).

⁶⁶ Caplan, *supra* note 17, at 228.

⁶⁷ *Id.*

⁶⁸ Sager, *supra* note 9, at 244 (“[T]o protect rights guaranteed by the states to other rights—by constitution, statute and common law—against the possibility that the Bill of Rights would somehow unravel these state guarantees.”) (emphasis deleted).

⁶⁹ Caplan, *supra* note 17, at 254 (“In order to guarantee that rights protected under state law would not be construed as supplanted by federal law merely because they were not expressly listed in the Constitution.”).

of Rights. It is not a command to treat other rights ‘retained by the people’ as if they were *in* the Bill of Rights.”⁷⁰ In that sense, the amendment would be merely declaratory in order to avoid a negative inference regarding a particular right’s omission from the Bill of Rights.⁷¹ Whether that particular right existed or not would not depend on the fact of its omission. The right would need to exist independently of the federal constitution in order to obtain Ninth Amendment protection from the negative inference that would arise from its exclusion from the federal constitutional text.

The hold-harmless approach suffers from some of the same deficiencies as its rule-of-construction parent. Specifically, it would allow unenumerated rights to be treated *differently* as their enumerated brethren, thus resulting in the latter’s denial or disparagement precisely because of their unenumerated character. This would run contrary to the text and purpose of the Ninth Amendment. The difference in treatment stems from the unenforceability of unenumerated rights as federal protections that can be opposed to the national government. As discussed in Part II, *this was precisely what the Anti-Federalists—the main proponents of an expansive Bill of Rights—wanted to avoid.*⁷²

If the point of the Bill of Rights was to *increase* the number of rights that could be used to protect the public from the enlarged powers of the new national government, and if the Ninth Amendment was the Federalist response to the incompleteness of any attempt at enumeration, then the notion that the Ninth Amendment merely preserves the *status quo* of rights that exist outside of the U.S. Constitution—and are, thus, *unopposable to the federal government*—seems like a *non sequitur*. If the Ninth Amendment *only* operates as a hold harmless provision, then we would need to conclude that the Anti-Federalists were sold the biggest bill of goods in the history of U.S. constitutional law. A simpler alternative exists, namely, that the Ninth Amendment does, in fact, protect unenumerated rights against the federal government, and that it also preserves the *status quo* of rights that exist elsewhere, regardless of their status as enforceable federal unenumerated rights.

In that sense, *the Ninth Amendment has an additional role as a hold-harmless provision*. In other words, that one of the *indirect* effects of the Ninth Amendment is to, in addition to giving federal constitutional status to certain unenumerated rights, leave unaltered the status of some rights that are recognized by nonfederal sources,

⁷⁰ Claus, *supra* note 12, at 587.

⁷¹ *Id.* at 591–92.

⁷² Lash, *A Textual-Historic Theory*, *supra* note 27, at 904.

such as state constitutional rights. This means that the hold-harmless model serves as one of the tools in our constitutional Swiss Army Knife.

4. The Ninth Amendment as an Unenforceable Statement of Policy

Others believe that the Ninth Amendment can simply be taken as a *statement of policy* that, among other things, can be used to identify rights, but does not, by itself, allow for their direct enforcement.⁷³ This means that, “[u]nlike other provisions of the Bill of Rights, the Ninth Amendment neither acts as a limitation on the federal government nor creates new rights through positive enactment.”⁷⁴ Yoo suggests that “the Ninth declared the Framers’ understanding of what rights already existed, both in others parts of the Constitution and outside the Constitution altogether.”⁷⁵ If this is true, then the Ninth Amendment would have the same normative weight as the Preamble. As a result, placing the Ninth Amendment in the Bill of Rights seems, at the very least, odd, and somewhat incoherent. It would also seem to be an awful waste of political capital and an awkward solution to the problem of enumeration identified by the Federalists and accepted by the Anti-Federalists.

5. The Ninth Amendment as a Tool for the Enforcement of Unenumerated Rights

A bolder approach views the Ninth Amendment as an *independent source of enforceable constitutional rights*.⁷⁶ This is the result of the amendment’s assertion that the rights enumerated in the constitutional text are not exhaustive.⁷⁷ As Sanders points out, “[t]he text seems straightforward: the Constitution contemplates other rights besides those specifically listed in the first eight amendments and elsewhere.”⁷⁸

In line with the source of rights approach is the characterization of the Ninth Amendment as a *residuary or reservations clause* that can be used to identify, and

⁷³ See Suttelan, *supra* note 6, at 102; Paust, *supra* note 34, at 238.

⁷⁴ Yoo, *supra* note 31, at 967.

⁷⁵ *Id.* at 967–68.

⁷⁶ See *id.* at 967; Sanders, *Ninth Life*, *supra* note 7, at 791; Paust, *supra* note 34, at 254.

⁷⁷ Gardner, *supra* note 9, at 97.

⁷⁸ Sanders, *Ninth Life*, *supra* note 7, at 761.

require the enforcement of, unenumerated rights.⁷⁹ As Sager explains, “[a]t the functional level, this reading has its obvious corollary: the amendment announces that there are valid claims of constitutional rights which are not explicitly manifest in the liberty-bearing provisions of the Constitution but which enjoy the same status as those made explicit in the text.”⁸⁰

A similar view refers to the Ninth Amendment as an interpretive tool that can be used to *infer* unenumerated rights from the enumerated ones.⁸¹ This would be the rights equivalent of the Necessary and Proper Clause with regard to powers.⁸² While not completely analogous, the Ninth Amendment possesses many similar qualities with the Clause, including their placement, structure, and purpose.⁸³

A somewhat milder version of this approach proposes that the amendment protects rights whose existence are established elsewhere.⁸⁴ In other words, that it operates as a vehicle for their protection, but not necessarily as a source for their existence or creation.⁸⁵

The models that propose that there are unenumerated rights which can be enforced through the Ninth Amendment must then address the issue of *which rights* are covered by the provision,⁸⁶ and what are the appropriate sources that should be used in this endeavor. Again, there are multiple approaches in the literature, which

⁷⁹ Kelley, *supra* note 21, at 814 (“[D]efine rights adjacent to, or analogous to, the pattern of rights which we find in the Constitution.”); *Palmer v. Thomson*, 403 U.S. 217, 233 (1971) (Douglass, J., dissenting) (“The ‘rights’ retained by the people within the meaning of the Ninth Amendment may be related to those ‘rights’ which are enumerated in the Constitution.”); *see also* Caplan, *supra* note 17, at 243; Lash, *The Lost Original Meaning*, *supra* note 27, at 344; Barnett, *supra* note 27, at 1.

⁸⁰ Sager, *supra* note 9, at 240.

⁸¹ Some believe that this was made redundant and superfluous by the Fifth and Fourteenth Amendments. *See* Paust, *supra* note 34, at 238.

⁸² U.S. CONST. art. I, § 8, cl. 18.

⁸³ *See id.*

⁸⁴ Kelley, *supra* note 21, at 815.

⁸⁵ *See id.* (rejecting that the Ninth Amendment does either, but recognizing that they are separate roles). This is somewhat different from the hold-harmless theory since it sees the Ninth Amendment as the vehicle for the protection of these unenumerated rights. *Id.*

⁸⁶ Jackson, *supra* note 27, at 198 (“The exact scope of these preexisting rights and their potential for abridgement, however, [has] engendered many disagreements.”); Gardner, *supra* note 9, at 90 (“The rights of the ninth amendment permit no precise definition.”).

range from natural law rights,⁸⁷ to contemporary human rights;⁸⁸ from rights that existed at the moment of adoption of the Bill of Rights to others that would emerge later on; from state constitutions to English common law.⁸⁹ Because this Article argues that the primary role of the Ninth Amendment is as a residuary or reservations clause that allows for the identification of enforceable unenumerated rights, these issues will be addressed in greater detail in Parts II and III.

6. The Ninth Amendment as a Multi-use Tool for Constitutional Analysis

The Ninth Amendment is not a single-purpose provision.⁹⁰ Yet, its multi-purpose nature does not exclude the possibility that the provision has a *primary* role, to which we latch on *additional* roles of a secondary or auxiliary nature. In Part II we discuss a specific proposal with regard to the amendment's multi-purpose operation.

The preliminary point made here is that, regardless of which purposes are finally decided upon, the Ninth Amendment should not be seen as a mere one-trick pony. There is nothing in the text, structure, or history of the Ninth Amendment to suggest that it possesses this characteristic.⁹¹ On the contrary, they suggest that this provision can play different roles, even simultaneously.⁹² This should allow us to transcend a narrow view of the amendment, and, as a result, the debate about the correct singular answer as to its meaning and operation.

II. THE MEANING OF THE NINTH AMENDMENT

A. General Proposal

The Ninth Amendment is, *primarily*, a vehicle for the enforcement of unenumerated constitutional rights. The amendment is able to exercise this function

⁸⁷ See Barnett, *supra* note 27, at 13–15; Calvin R. Massey, *The Natural Law Component of the Ninth Amendment*, 61 U. CIN. L. REV. 49 (1992) [hereinafter Massey, *Natural Law Component*].

⁸⁸ See Massey, *Federalism and Fundamental Rights*, *supra* note 9, at 312; Caplan, *supra* note 17, at 223 (discussing “basic human freedoms”).

⁸⁹ See Gardner, *supra* note 9, at 97.

⁹⁰ See Yoo, *supra* note 31, at 967 (“[D]ebate over the Ninth Amendment seeks to fix into place a static vision of the Amendment’s meaning.”) (emphasis added); Kelley, *supra* note 21, at 815 (referencing the Ninth Amendment’s “possible meanings”); Kadlec, *supra* note 27, at 399; Sanders, *Ninth Life*, *supra* note 7, at 783.

⁹¹ See Caplan, *supra* note 17, at 223–24.

⁹² See, e.g., Caplan, *supra* note 17, at 223–24; Barnett, *supra* note 27, at 7; Kadlec, *supra* note 27, at 389.

independently from any other provision of the Constitution. In other words, it is sufficient, by itself, to protect unenumerated rights.

At the same time, the Ninth Amendment can also be used as an interpretive device that allows for the identification of additional constitutional rights that can be *inferred* from the textual provisions of the U.S. Constitution. This also includes the ability to identify *implied* rights. Inferred rights are those that can be derived from the operation of enumerated rights, while implied rights are those that must exist in order for an enumerated provision to work in the first place.

This is an *additional* function to its primary role as an independent vehicle for the identification and enforcement of unenumerated rights that are retained by the people through other mechanisms, which also includes unenumerated rights that are so obvious that it would be superfluous or utterly unnecessary to enumerate them. When we combine these two roles, the Ninth Amendment also becomes a *convergence point* that allows interpreters to determine the existence of unenumerated rights from the combination of *inferences* and *implications* made with relation to enumerated rights and the independent analysis made with regard to unenumerated rights proper. As we saw, the Ninth Amendment also functions as a hold-harmless provision, in that it makes sure that the fact of enumeration of certain rights in the U.S. Constitution is not taken to mean that other rights recognized outside of the Constitution are somehow diminished because of their exclusion from the federal text.⁹³

This proposal is the result of a combined analysis of the text, structure, history, and purpose of the Ninth Amendment. We now turn to an interpretive exercise of the amendment to demonstrate the viability of this proposal.

B. *Selecting an Interpretive Approach*

How to interpret constitutional provisions has been a perennial debate in U.S. constitutional law. In the context of the Ninth Amendment, there are two main analytical sequences that can be deployed. First, a chronological approach that starts with the historical circumstances surrounding the amendment's drafting, the reasons for its development, the drafting history, and then the text itself. As a historical endeavor, this approach would be optimal, since it addresses the events that led to the adoption of the Ninth Amendment sequentially, as they happened.

The second option is to engage in a more formal legal analysis that employs the common tools used in constitutional interpretation, particularly by courts. This approach requires starting with the text of the Ninth Amendment to ascertain its

⁹³ See Kelley, *supra* note 21, at 823.

communicative meaning, thus avoiding anachronisms and properly identifying any communicative insufficiency or grammatical or semantic deficiency that must be addressed at the outset. These insufficiencies and deficiencies can be dealt with using interpretive tools, such as context, sources of semantic meaning, and also extra-textual sources like adoption, history, purpose, and intent.

Once the communicative meaning of the text has been adequately extracted, extra-textual sources take center stage again, this time in combination with communicative meaning to identify the legal effects of the text. This second stage of normative construction is distinct from the role played by extra-textual sources in the interpretive stage and is done regardless of how under-determinate the communicative meaning remains.⁹⁴

Because of the deliberate gap between the text and effect of the Ninth Amendment with regard to the individual identification of unenumerated rights, extra-textual sources will be key. But the text is still vital with regard to the first analytical stage: determining what the amendment actually says and does.

C. *Text and Structure: Discerning Communicative Meaning*

We therefore begin with a textual analysis of the Ninth Amendment in order to identify its communicative meaning.⁹⁵ This should be done in order “to identify the textual parameters to which any account of the Ninth Amendment must conform.”⁹⁶

The Ninth Amendment reads: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”⁹⁷ Although the amendment is short,⁹⁸ its text contains several layers of information and meaning that require a more detailed examination. And though there has been a

⁹⁴ This approach is based on the basic tenets of the so-called “New Originalism.” See Jorge M. Farinacci-Fernós, *The ‘New Originalism’ and Statutory Interpretation*, 55 REVISTA JURÍDICA U. INTERAMERICANA P.R. 691 (2021).

⁹⁵ It is curious that many self-identified originalists tend to skip a textual analysis of the Ninth Amendment when addressing this subject. See Schmidt, *supra* note 50, at 192. Others insist on the need to focus on the text. See Lash, *A Textual-Historic Theory*, *supra* note 27, at 900 (“All interpretive theories begin with the text.”).

⁹⁶ Lash, *A Textual-Historic Theory*, *supra* note 27, at 900.

⁹⁷ U.S. CONST. amend. IX.

⁹⁸ Abrams, *supra* note 3, at 1033 (noting that “no Amendment contains fewer words” than the Ninth Amendment, except the Eighth).

more recent interest in what the amendment actually says, “there has been little real analysis of the language of the ninth amendment.”⁹⁹

As Kadlec points out, the language used in this provision “meant essentially the same in 1791 as it means today.”¹⁰⁰ While this avoids the risk of anachronism, the text of the amendment does include several ambiguities and other communicative insufficiencies that require the deployment of different interpretative tools.¹⁰¹ As Barnett recognizes, “[b]ecause the words of the Ninth Amendment could have been used in different ways at the time of its enactment depending on the context, the Ninth Amendment is open to more possible interpretations than other provisions of the text.”¹⁰²

One consistently overlooked aspect of the Ninth Amendment is the correct identification of its *subject*. In this case, it is the term “enumeration.”¹⁰³ This refers to the act of listing different rights through explicit mention throughout the constitutional text.¹⁰⁴

Notice, then, that the amendment does not focus on the enumerated rights *per se*, but on the fact of their enumeration. The amendment *does not read*: “The rights enumerated in this Constitution shall not be construed to deny or disparage others retained by the people.” If this were the case, then we would be dealing with an explicit interpretive rule regarding the construction of enumerated rights. But that is not what the provision states. The subject of the amendment is “[t]he *enumeration* in the Constitution, of certain rights.”¹⁰⁵

⁹⁹ McAfee, *supra* note 25, at 1240.

¹⁰⁰ Kadlec, *supra* note 27, at 396. Thus, its so-called plain meaning should be the same now as it was then. See McAfee, *supra* note 25, at 1224; Lash, *The Lost Original Meaning*, *supra* note 27, at 339; Barnett, *supra* note 27, at 5.

¹⁰¹ While I do not deny that “[w]hen compared with some of the language and punctuation of the rest of the Constitution, the Ninth Amendment is a rather straightforward and clear pronouncement,” that does not mean that the text has its share of ambiguities and communicative deficiencies that need to be addressed through interpretation. Schmidt, *supra* note 50, at 193.

¹⁰² Barnett, *supra* note 27, at 7. In fact, some suggest that we should focus more on the ideas in the Ninth Amendment than the textual specifics. See Suttelan, *supra* note 6, at 107; Kadlec, *supra* note 27, at 422 (“The Ninth Amendment is a structural concept.”).

¹⁰³ Seidman, *supra* note 7, at 2141.

¹⁰⁴ *See id.*

¹⁰⁵ U.S. CONST. amend. IX (emphasis added).

As a result, what cannot be construed in a way that denies or disparages other rights is the *enumeration of rights*,¹⁰⁶ not the *enumerated rights* themselves. This is why the Ninth Amendment as a “rule of construction” regarding the enumerated rights theory falls somewhat flat, because it has less to do with how we interpret enumerated rights, and more to do with the effects caused by their explicit listing in the text as a separate fact.

Moreover, it is important to note that the enumeration mentioned in the Ninth Amendment *is not limited to the Bill of Rights*.¹⁰⁷ It also includes the rights mentioned in the original version of the Constitution.¹⁰⁸ We should further note that the reference to the Constitution *is not limited to the current version of the text*. The Ninth Amendment also accounts for the possibility of *future modifications* that could incorporate additional rights.¹⁰⁹ The drafters of the Ninth Amendment were well aware of the potential use of Article V to incorporate additional rights in the constitutional text.¹¹⁰ Let’s not forget that the Ninth Amendment was adopted, precisely, by way of Article V.¹¹¹ These added rights would become part of the enumeration that is the focus of the Ninth Amendment’s normative commands, which would, in turn, impact unenumerated rights.

The phrase “certain rights” completes the identification of the subject of the Ninth Amendment. It refers to the rights included in the enumeration made in the text. “Certain rights” becomes shorthand for enumerated rights. Moreover, the use of the word “certain” strongly indicates that the list is *deliberately incomplete*. “Certain rights” supposes that there are “other” rights yet to be accounted for. As we will see, the text of the Ninth Amendment completes this equation through the word “others.”

Once the subject has been correctly identified, we can move on to discuss the other terms and grammatical features of the Ninth Amendment. I turn now to the

¹⁰⁶ Claus, *supra* note 12, at 613 (“It says only that *listing* federal constitutional rights must not negatively affect the status of unlisted rights, whatever that status is.”) (emphasis added).

¹⁰⁷ *See id.* (“It also precludes reading *the Bill of Rights* in ways that ‘deny or disparage’ rights ‘retained by the people.’”) (emphasis in original).

¹⁰⁸ McAfee, *supra* note 25, at 1240 (“[W]hether in the bill of rights or the body of the Constitution. . . .”); Yoo, *supra* note 31, at 971 (referencing “important connections to the body of the Constitution”); Matheson, *supra* note 26, at 183.

¹⁰⁹ *See* Yoo, *supra* note 31, at 971.

¹¹⁰ *Id.*

¹¹¹ *Id.*

phrase “shall not be construed.”¹¹² As Kadlec suggests, this is a declaration against a particular type of interpretation or explanation.¹¹³ This means that the fact of enumeration cannot be read in a particular way.

The next phrase in the Ninth Amendment reads “to deny or disparage.”¹¹⁴ The use of the conjunction “or” suggests that *neither* action can be taken as a consequence of the enumeration of certain rights in the Constitution. While denial is an absolute and objective act, disparaging is a relative and subjective term that encompasses many situations and scenarios. The former includes, as Kadlec states, disregarding or failing to accept the existence of something,¹¹⁵ while the latter means “to injure or place into an inferior condition, even while recognizing its existence.”¹¹⁶

In the end, both are rejected as possible outcomes. Thus, the only acceptable outcome is *equal treatment* between the items that are mentioned and connected in the amendment, meaning enumerated rights and unenumerated rights. In other words, “the text does seem to imply that other unenumerated rights exist and ought to be respected to the same degree as enumerated rights.”¹¹⁷

What may not be denied or disparaged? The short answer is “others.” After applying basic linguistic context, the larger answer becomes other rights.¹¹⁸ This would mean that “there are apparently other constitutional rights as deserving of judicial protection as those enumerated in the Bill of Rights or elsewhere.”¹¹⁹

As can be appreciated, rights are thus referenced *twice* in the Ninth Amendment: certain rights, followed by other rights. The connection between these two sets of rights suggests substantive similarity separated only by physical reference. In other words, all of these rights are basically the same, the only difference being that “certain” rights are mentioned or enumerated, while “others”

¹¹² U.S. CONST. amend. IX.

¹¹³ Kadlec, *supra* note 27, at 395. *See also* Lash, *A Textual-Historic Theory*, *supra* note 27, at 903.

¹¹⁴ U.S. CONST. amend. IX.

¹¹⁵ Kadlec, *supra* note 27, at 395.

¹¹⁶ *Id.*

¹¹⁷ Lash, *A Textual-Historic Theory*, *supra* note 27, at 901; *see also* Jackson, *supra* note 27, at 167–68 (“[The text] seems to clearly indicate that there are rights other than those in the text of the Constitution that should be recognized as constitutional.”).

¹¹⁸ Lash, *The Lost Original Meaning*, *supra* note 27, at 341.

¹¹⁹ Sanders, *Ninth Life*, *supra* note 7, at 788.

are not.¹²⁰ The Ninth Amendment ensures that this characteristic does not cause these rights to be treated differently.

With regard to the specific nature and type of rights protected by the Ninth Amendment, the text offers hints, but does not give definitive answers. This is part of the hard problem identified earlier. As a result, it is better to analyze this question later on through a combination of textual clues and extratextual tools. For now, the point is that the relation between enumerated rights (“certain”) and unenumerated rights (“others”) made by the text suggests that both sets of rights are of a *similar nature* and, more importantly, must be treated equally by institutional actors, particularly courts.

Which rights? Those “retained by the people.” The word “retained” is ambiguous. On the one hand, it may mean that the rights protected by the Ninth Amendment must have already existed in a completed form when the provision was adopted.¹²¹ But, as Claus points out, “retained” can refer to instances that may appear later on: “While the primary meaning of ‘retain’ is to keep what one already has, the word may also refer to employing something new.”¹²² In other words, that the “people may expand the set of retained rights.”¹²³

The language structure of the Ninth Amendment supports the latter alternative. The amendment deliberately leaves open the possibility of expanding the scope and range of unenumerated rights in the future. Since the “enumeration of rights in the Constitution” is subject to modification through the adoption of amendments under Article V, the Ninth Amendment seems to recognize that the number of unenumerated rights is not fixed or exhausted in one particular historical moment. The phrase “in the Constitution,” by definition, includes—and even presupposes—future modifications to the text. And since future modifications to the Constitution could impact the scope of enumerated rights, it would necessarily impact the range of unenumerated rights. This would mean that “retained” is a dynamic, not a static,

¹²⁰ McAfee, *supra* note 25, at 1240 (“To the modern reader, the language and structure may suggest that the unenumerated rights referred to are a string of additional individual rights protections of the same type as the enumerated rights.”).

¹²¹ See Schmidt, *supra* note 50, at 196 (“A judge, following the letter of the Ninth Amendment, can only recognize an unenumerated right that the people *have already retained*.”) (emphasis added); Jackson, *supra* note 27, at 175 (“[I]t simply evidences a whole body of *preexisting* rights.”) (emphasis added).

¹²² Claus, *supra* note 12, at 595.

¹²³ *Id.* See also Kadlec, *supra* note 27, at 395 (referencing those rights which were not dismissed by the people, that remained after the drafting and adopting of the Constitution).

term.¹²⁴ In the end, the people have the last word as to which rights they decide to retain and, more importantly, *when to retain them*.

The Ninth Amendment is deliberately silent as to where unenumerated rights may be found, given the multiplicity of possible sources, including those outside the text of the federal Constitution. As we will discuss later on, historical considerations point to several potential sources. Some are static and fixed, like *Blackstone's Commentaries* and the English Bill of Rights.¹²⁵ Others are considerably more dynamic, like state constitutions, statutes, and common law which, by definition, are subject to constant change and expansion.

The term “the people” is also ambiguous. It can be defined through a “national lens, or within their states.”¹²⁶ As Claus explains, if it is the former, “then the rights retained by the people are a set of rights that are *shared* by the people of the several states.”¹²⁷ This would require that the claimed unenumerated right must be common to all. If it is the latter, it would allow the protection of less “commonly recognized rights to be found anywhere among the states.”¹²⁸ Moreover, it is worth noting that the use of the term “people” in the Constitution, particularly through later amendments, points to an expanded notion of *who* the people are and of who is able to retain unenumerated rights.

Having addressed each individual term used in the Ninth Amendment, other textual features deserve attention. While no legal text should ever be read in total isolation, this is particularly true when it comes to the Ninth Amendment.¹²⁹ The language used in this provision explicitly references *other* parts of the Constitution. Specifically, it is obvious that the language structure of the Ninth Amendment is different from that used in the first eight amendments.¹³⁰ This was intentional: the first eight amendments address specific instances of constitutional rights, while the

¹²⁴ Yoo, *supra* note 31, at 967 (emphasizing that a historical analysis with regard to unenumerated rights should be seen as “the beginning . . . not as the end point”).

¹²⁵ See Jackson, *supra* note 27.

¹²⁶ Claus, *supra* note 12, at 593.

¹²⁷ *Id.* (emphasis in original). Some, like Kadlec, opt for a more general definition. Kadlec, *supra* note 27, at 395 (focusing on “the citizens of the respective states”).

¹²⁸ Claus, *supra* note 12, at 593.

¹²⁹ See Sager, *supra* note 9, at 240.

¹³⁰ Sanders, *Ninth Life*, *supra* note 7, at 781.

Ninth Amendment indicates that those instances are not exhaustive.¹³¹ In that sense, the role of the Ninth Amendment is different, broader, and potentially more impactful.¹³² This is reminiscent of the amendment's similarities with the Necessary and Proper Clause with regard to powers.

This feature also strengthens its characterization as a residuary or reservations clause that, almost by definition, requires an integrated analysis in order to identify its meaning and, more importantly, its normative effects. In the end, “[t]he text seems straightforward: the Constitution contemplates other rights besides those specifically listed in the first eight amendments and elsewhere.”¹³³ Moreover, it is clear that the text Ninth Amendment *requires* interpreters to *look elsewhere* in order to fully satisfy its normative commands. In that sense, “the power of the Ninth Amendment to evolve through interpretation *is granted from its text*.”¹³⁴

Finally, we should not forget that many of the “rights” enumerated in the Constitution are also not actually articulated, characterized, or identified as such.¹³⁵ For example, as we saw previously, the First Amendment’s structure refers to a *prohibition* on congressional action (“Congress shall make no law . . .”).¹³⁶ Of the six different instances mentioned in the First Amendment, *only two* are explicitly articulated as rights.¹³⁷ As we will see later on, this is closely related to the early characterizations of the provisions in the Bill of Rights as *exceptions* instead of *rights* as such.

But no one would seriously argue today that the First Amendment is not an affirmative source of individual rights, such as freedom of speech or of the press. This merely reminds us that we should not make the mistake of attempting to interpret the Ninth Amendment in a way we no longer use for any other provision in the Bill of Rights.¹³⁸ It also demonstrates how the notion of rights has developed in

¹³¹ *See id.*

¹³² *Id.* (“Whereas the first eight amendments protect the enjoyment of certain specific liberties, the Ninth and Tenth Amendments speak in much broader terms.”).

¹³³ *Id.* at 761 (“[The text] appears to speak to unenumerated rights.”).

¹³⁴ Schmidt, *supra* note 50, at 194 (emphasis added).

¹³⁵ This is also true with regard to rights included in early state constitutions. McAfee, *supra* note 25, at 1241.

¹³⁶ U.S. CONST. amend. I.

¹³⁷ *Id.*

¹³⁸ *See Yoo, supra* note 31, at 972.

the United States at the federal level, from particular exceptions to grants of power, to self-contained normative entities.

In fact, some of the Framers constantly referred to the rights mentioned in the original amendments, not as rights *per se*, but as *exceptions*.¹³⁹ That the Ninth Amendment speaks directly of *rights* and not *exceptions*, as originally drafted, strengthens the case in favor viewing the Ninth Amendment, not as a provision that only, or even primarily, deals with governmental powers, but one that directly addresses rights as a separate and distinct category.¹⁴⁰ In that sense, the Ninth Amendment operates as a constitutional command,¹⁴¹ one which is written in operational terms.¹⁴²

But there is one thing that the text of the Ninth Amendment cannot do: identify which unenumerated rights are to be protected or even what criteria should be used to identify them. Yet, that should not be seen as an incorrect or inadequate use of language by the drafters. On the contrary, it reveals a deeper operation of the provision that requires looking past the text. In that sense, the text of the Ninth Amendment is clear on what it attempted to accomplish: to establish the existence of unenumerated rights.¹⁴³ How to find and enforce them is intentionally left to other devices.¹⁴⁴ That is why the language of the provision “suggests that the Ninth Amendment is perhaps the most dynamic and open-ended of the Constitution’s provisions.”¹⁴⁵ This is where the *hard problem* lives.

One final point. The placement of the Ninth Amendment is also informative about its meaning and operation. The fact that the provision was placed at the end of

¹³⁹ See Sager, *supra* note 9, at 249.

¹⁴⁰ This is not to deny that rights and powers are inherently related. The point is simpler: that they are not synonyms and that the focus of the Ninth Amendments are rights, not powers, even though one could argue that many of the other provisions in the Bill of Rights speak more to limitations or exceptions on powers rather than to rights.

¹⁴¹ Paust, *supra* note 34, at 238.

¹⁴² Sager, *supra* note 9, at 242.

¹⁴³ Paust, *supra* note 34, at 237 (“It seems clear from the language of the ninth amendment that certain rights exist even though they are not enumerated in the Constitution, that these rights are retained by the people, and that by express command these unenumerated rights are not to be denied or disparaged by any governmental body.”).

¹⁴⁴ See Kirven, *supra* note 21, at 81 (explaining that the unenumerated rights protected by the Ninth Amendment are not fixed in time).

¹⁴⁵ Yoo, *supra* note 31, at 967.

the Bill of Rights is indicative of its operation as a reservations clause, which are usually placed at the end of a non-exhaustive list.¹⁴⁶

D. *The History of the Ninth Amendment*

The Ninth Amendment's main role as a residuary or reservations clause that can be used to identify and enforce unenumerated rights is the necessary result of its text, structure, and purpose. Identifying the purpose of the amendment has been a point of contention among scholars, and its potentially elusive nature can account for some of the confusion regarding the amendment's operation.¹⁴⁷

Even though its grammatical structure *may appear* at first glance to point to a rule of construction,¹⁴⁸ its normative implications extend much further. The text points to this conclusion. Its drafting history tends to confirm it. Because of its unique structure, the adoption history of the Ninth Amendment is particularly insightful: "Historical precedent is then one of the paths to a further understanding as to *why* the drafters included it, what *meaning they meant* to convey, and what ultimate *purpose* they hoped to accomplish by its inclusion."¹⁴⁹

The Ninth Amendment's historical purpose also sheds light on the meaning of its text and, more importantly, on its normative effects. Any communicative insufficiency or normative under-determinacy can be addressed by the history and debates surrounding the creation of the Bill of Rights in general and the Ninth Amendment in particular.

Like the Bill of Rights, the Ninth Amendment has multiple parents responsible for its creation. The convergence of interests and concerns that led to the adoption of the amendment is quite illustrative regarding its meaning and operation. This history reaffirms the textual reading of the Ninth Amendment as, primarily, a residuary or reservations clause that can be invoked for the protection of unenumerated rights, as well as a more general interpretive tool that carries out other functions.

¹⁴⁶ See Schmidt, *supra* note 50, at 229.

¹⁴⁷ Paust, *supra* note 34, at 234 (stating that there are "misconceptions as to its nature and purpose").

¹⁴⁸ Massey, *Federalism and Fundamental Rights*, *supra* note 9, at 306 ("On its face it would seem to be so.").

¹⁴⁹ Suttelan, *supra* note 6, at 102 (emphasis added).

1. The Main Driving Motivation Behind the Ninth Amendment Was a Fear of Exclusion Through Omission with Regard to Rights

As we will see later on in this Article, the legislative debate regarding the Ninth Amendment is scant. In the absence of debate, the lessons that can be extracted from the drafting history will prove considerably valuable, particularly with regard to what the amendment actually says and does.

Yet, these lessons will not solve the entire puzzle, especially as to *which* unenumerated rights may be protected by the Ninth Amendment. In that sense, “when trying to determine the substance of unenumerated rights in the Constitution, both ‘original-intent’ and ‘original public-meaning’ originalism come up short.”¹⁵⁰ What text and history can do is to “confirm the existence” of these unenumerated rights and the amendment’s protection of them, but not to identify them adequately as such.¹⁵¹

Another critical source that may shed light on these matters is the general historical circumstances that led to the adoption of the Bill of Rights—including the Ninth Amendment—in the first place. In other words, “[t]he key to discerning the original meaning of the ninth amendment, then, appears to lie in a fuller understanding of the debate over the demand for a bill of rights during the struggle over ratification of the Constitution.”¹⁵² As we are about to see, the principal motivating factor that resulted in the adoption of the Ninth Amendment was a shared concern regarding the necessarily incomplete nature of the enumeration of rights made in the text of the Constitution, and the unintended impact that could have with regard to rights that were not included in the final version of the text.

The replacement of the Articles of Confederation with a new Constitution that would significantly increase the scope and breadth of the powers of the federal government was not a universally acclaimed or supported proposal.¹⁵³ Anti-Federalists rallied in an attempt to defeat the proposed Constitution.¹⁵⁴ While those

¹⁵⁰ Jackson, *supra* note 27, at 174.

¹⁵¹ *Id.*

¹⁵² McAfee, *supra* note 25, at 1237.

¹⁵³ *See id.* at 1228.

¹⁵⁴ *Id.* at 1228–29.

efforts ultimately failed, they generated sufficient opposition to the project so as to threaten its viability at the time.

One of the arguments leveled against the proposed text was the absence of a declaration or bill of rights.¹⁵⁵ This absence was notable given the evident increase in the powers of the national government in contrast with those granted by the Articles of Confederation. Rights would be needed to counter or balance that increase in power.

Federalists resisted the call for the inclusion of a bill of rights,¹⁵⁶ for two main reasons. The first objection was that it would be unnecessary to do so.¹⁵⁷ Their argument rested on the limited nature of the newly formed federal government. Because the powers of the federal government were limited and narrow, it would simply have no authority to intrude on the liberties of citizens.¹⁵⁸

According to the Federalists, adopting a bill of rights in that circumstance would, at best, be superfluous and redundant. At worst, it could generate the incorrect inference that, if not for the recognition of a particular right in the text of the Constitution, the federal government could regulate freely over the subjects covered by the right.¹⁵⁹ Anti-Federalists were not persuaded by this argument and insisted on the adoption of a bill of rights in the Constitution.¹⁶⁰

The second objection raised by Federalists to the proposal of adopting a bill of rights related to its inherently imperfect and incomplete nature, and the risk of exclusion through omission.¹⁶¹ As James Wilson stated during the Pennsylvania Ratification Convention, “[a]n imperfect enumeration would throw all implied power into the scale of government; *and the rights of the people would be rendered incomplete.*”¹⁶²

¹⁵⁵ Kelley, *supra* note 21, at 817.

¹⁵⁶ Suttelan, *supra* note 6, at 103.

¹⁵⁷ *Id.*

¹⁵⁸ Gardner, *supra* note 9, at 90.

¹⁵⁹ *Id.*

¹⁶⁰ That the Anti-Federalists were not persuaded by this argument weakens its use in order to demonstrate that the Ninth Amendment is, in the end, merely a federalism-powers limitation provision.

¹⁶¹ Sager, *supra* note 9, at 242.

¹⁶² *Id.* (emphasis added); *see also* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 388 (Merrill Jensen ed., 1976).

In other words, there was a generalized concern that the enumeration of rights would inadvertently activate the *expressio unius est exclusio alterius* maxim.¹⁶³ The combination of silence and enumeration could lead to the incorrect conclusion that omission meant exclusion.¹⁶⁴

But nobody seriously suggested that the only rights that the people enjoyed were those that would be specifically mentioned in a proposed bill of rights.¹⁶⁵ On the contrary, there was a universal recognition regarding “the imperfection of language, and [the] limitations of the mind,”¹⁶⁶ which could have an impact on any attempt at enumeration. In that sense, “one of the central purposes of the Ninth Amendment was to avoid the implication that the Bill of Rights was an exhaustive list of rights.”¹⁶⁷

Anti-Federalists were more impressed with this argument than the previous one.¹⁶⁸ But, instead of walking back their proposal, they offered an affirmative solution. In this case, *the suggestion was to adopt a residuary or reservations clause*: “Thus, if a bill of rights were adopted in which certain key rights were reserves and ‘other’ rights were incorporated by reference in a *residuary clause*, recourse to the existing constitutions, states, and common law of the states would be necessary to ascertain those unenumerated rights.”¹⁶⁹ The result was the Ninth Amendment.¹⁷⁰

This convergence between Federalists and Anti-Federalists poses an additional analytical challenge: whose intent would be more determinative with regard to the

¹⁶³ See Suttelan, *supra* note 6, at 105.

¹⁶⁴ See Kadlec, *supra* note 27, at 428.

¹⁶⁵ Gardner, *supra* note 9, at 95–96. See also Kelley, *supra* note 21, at 823 (explaining that a bill of rights would not be seen as an “exhaustive catalogue” of constitutional rights); Sanders, *Ninth Life*, *supra* note 7, at 773 (explaining that rights are “too numerous to catalogue”); Barnett, *supra* note 27, at 2.

¹⁶⁶ Gardner, *supra* note 9, at 98.

¹⁶⁷ Lash, *A Textual-Historic Theory*, *supra* note 27, at 904.

¹⁶⁸ That the Anti-Federalists were impressed by this objection strengthens the case in favor of treating the Ninth Amendment as residuary or reservations clause that acts as a rights protection provision.

¹⁶⁹ Caplan, *supra* note 17, at 243.

¹⁷⁰ According to Schmidt, the Ninth Amendment “appears to be a failsafe” in order to avoid the unintended consequences of imperfect enumeration. Schmidt, *supra* note 50, at 192.

meaning of the Ninth Amendment?¹⁷¹ There is no single or simple answer to this question.

The Anti-Federalists were the main force behind the need to adopt a bill of rights. But it was Federalists who led the drafting process that resulted in the amendments themselves. And it was the Federalists who warned about the dangers regarding the inherently incomplete nature of enumeration in terms of rights.¹⁷² However, Anti-Federalists *agreed* with this objection,¹⁷³ which then produced the Ninth Amendment. We should also not forget that the Federalists did not want *any* enumerated rights included in the Constitution, while the Anti-Federalists emphasized the fact that the original Constitution already included rights provisions.¹⁷⁴

In that sense, while the *immediate cause* of the Ninth Amendment can be traced to the Federalists,¹⁷⁵ it was the Anti-Federalists who insisted on the constitutional recognition of rights in the first place.¹⁷⁶ Whether enumerated or unenumerated, the notion of federally recognized constitutional rights is, first and foremost, an Anti-Federalist project. This requires adopting a view of the Ninth Amendment that maximizes the Anti-Federalist goal of *increasing* the number of rights that could be opposed to the new national government.

2. The Drafting History of the Ninth Amendment: Shifting Focus from Powers to Rights

Where did the Ninth Amendment come from? Some suggest that the text of the amendment was not a total invention, as similar language already existed in state

¹⁷¹ See, e.g., Kelley, *supra* note 21, at 818 (“The ninth amendment had its genesis in the *Federalist* answer to this argument.”) (emphasis added).

¹⁷² Caplan, *supra* note 17, at 255 (“Madison explained the need for this amendment by adducing the early federalist argument that specification of some rights ‘would disparage those rights which were not placed in that enumeration.’”).

¹⁷³ Claus, *supra* note 12, at 601.

¹⁷⁴ McAfee, *supra* note 25, at 1234.

¹⁷⁵ *Id.* at 1248 (“The text of the ninth amendment can only be understood against the backdrop of the Federalist objection to a bill of rights that led to proposals for a provision clarifying the impact of an enumeration of specific rights on the rights retained by the people.”).

¹⁷⁶ See Sanders, *Ninth Life*, *supra* note 7, at 788 (explaining that both Federalists and Anti-Federalists welcomed the amendment, as opposed to the Bill of Rights *per se*); Lash, *The Lost Original Meaning*, *supra* note 27, at 349.

constitutions.¹⁷⁷ Others emphasize the fact that “the ninth amendment is the only one of the provisions contained in the Bill of Rights that has no antecedent in the English Constitution, the common law, the revolutionary period, or the Articles of Confederation.”¹⁷⁸

Regardless of the answer, it is uncontroversial to state that the most immediate sources for what would eventually become the Ninth Amendment are the Virginia and New York resolutions.¹⁷⁹ In particular, the Virginia resolution read:

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.¹⁸⁰

This early incarnation of what would eventually be adopted as the Ninth Amendment could be catalogued under the federalism-powers limitation model. Those who advocate for that reading and follow an intent-based analysis tend to focus on these early drafts as evidence in support of their conclusions.¹⁸¹

¹⁷⁷ Kadlec, *supra* note 27, at 399–400.

¹⁷⁸ McAfee, *supra* note 25, at 1227. *But see* Caplan, *supra* note 17, at 262–63 (“Though not in sequence in Madison’s draft, the ninth and tenth amendments both derived from article II of the Articles of Confederation and were paired in the final version of the Bill of Rights, probably because of their analogous residual purposes.”). In any event, this does not mean that these sources are irrelevant when it comes to the Ninth Amendment. Quite the opposite, *precisely because the first amendments in the Bill of Rights are linked with these sources, and because the unenumerated rights referenced in the Ninth Amendment are related to the enumerated rights contained in the rest of the Constitution, including the Bill of Rights, there is a direct connection between the Ninth Amendment and these historical sources.*

¹⁷⁹ Suttelan, *supra* note 6, at 104 (stating that these resolutions “formed the nucleus” of what would become the Ninth Amendment); McAfee, *supra* note 25, at 1236. Other sources that have been identified as the ancestors of the Ninth Amendment include the North Carolina 18th proposal and Article 3 of the Rhode Island Declaration of Rights. Massey, *Federalism and Fundamental Rights*, *supra* note 9, at 310 n.26. The Virginia Resolution is generally considered as the main source. McAfee, *supra* note 25, at 1236 (stating that the Ninth Amendment was “drafted largely from Virginia’s proposals”).

¹⁸⁰ Kelley, *supra* note 21, at n.25 (emphasis added); Yoo, *supra* note 31, at 992.

¹⁸¹ *See, e.g.,* Gardner, *supra* note 9, at 89 (referencing the Ninth Amendment’s role as a rule of construction meant to avoid a negative inference with regard to federal governmental power because “[a] look at its history shows that it was so intended”); Mitchell, *supra* note 41, at 1721 (“Although the interpretation of any written law must begin with its text, James Madison, the author of the ninth amendment, recognized the limits of language ensured the futility of looking solely to the text. . . .”); McAfee, *supra* note 25, at

But the modifications suffered by these early drafts are simply too compelling, particularly with regard to the ascendant emphasis on the protection of unenumerated rights and the subsequent deemphasizing of the powers issue, until it was eventually eradicated altogether and spun over to the Tenth Amendment. In other words, a collective intent starts to emerge, and it is somewhat different from Madison's individual intent.¹⁸²

The shift away from powers and into rights was made even more evident by the draft introduced by Madison in the House of Representatives:

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.¹⁸³

From this passage we can see that “Madison included in this proposal and others not only the limitation of congressional power *but the protection of popular rights*.”¹⁸⁴ As McAfee explains, “[w]hile Madison based his proposed ninth amendment on state proposals, his draft included additional language that specifically prohibited an inference diminishing ‘the just importance of other rights retained by the people[.]’”¹⁸⁵ Note also how Madison's proposal echoes some of the language of the Virginia resolution (“as inserted merely for greater caution”), which failed to make it into the final version of the text.

Madison's speech on the floor of the House of Representatives also reflects the *shift* with regard to the content and operation of the Ninth Amendment, moving from a limitation of power towards the recognition of unenumerated rights:

1225 (“When the ninth amendment's text is read in its historical context, the originally intended meaning emerges with surprising clarity.”).

¹⁸² The drafting history of the Ninth Amendment becomes a vital source for the identification of intent, particularly when “[t]he contemporaneous commentary of the Framers is recorded in the same imprecise language as the text of the Constitution.” Mitchell, *supra* note 41, at 1721.

¹⁸³ Kelley, *supra* note 21, at 821 (emphasis added).

¹⁸⁴ Kirven, *supra* note 21, at 82 (emphasis added).

¹⁸⁵ McAfee, *supra* note 25, at 1236–37.

It has been objected also against a bill of rights that, by enumerating 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.¹⁸⁶

Note, again, that *both* unenumerated rights and the limitation of power are the subject of his proposal. But now the separation and independence between both is becoming clearer since the issue regarding powers is characterized as an *implication* of the omission of unenumerated rights. In other words, there are now two different ideas that, while linked in terms of consequences and implications, are operationally and conceptually distinct.¹⁸⁷

But Madison's speech did not stop at identifying the problem of enumeration. As Hamilton had hinted earlier, it also included a solution:

This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; *but, I conceive, that it might be guarded against*. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution.¹⁸⁸

Madison's proposals were sent to a House committee for evaluation. The version that was presented on the House floor was considerably different from the original draft,¹⁸⁹ which considerably weakens using Madison's intent as indicative of the amendment's meaning.¹⁹⁰ This makes identifying a "unified intent of the

¹⁸⁶ Sanders, *Ninth Life*, *supra* note 7, at 767; James Madison, *The Debates and Proceedings in the Congress of the United States*, in 1 ANNALS OF CONGRESS 439 (J. Gales & W. Seaton eds., 1834) [hereinafter Madison, *The Debates and Proceedings*].

¹⁸⁷ Kadlec, *supra* note 27, at 402 ("Madison told President Washington that the reason for this deletion was the reciprocal nature of rights and powers.").

¹⁸⁸ Sanders, *Ninth Life*, *supra* note 7, at 767–68 (emphasis added); Madison, *The Debates and Proceedings*, *supra* note 186.

¹⁸⁹ Schmidt, *supra* note 50, at 203 ("[M]ore than just minor alterations were made to his proposal.").

¹⁹⁰ *Id.* at 199 (explaining further "James Madison's [i]rrelevant [i]ntent"). Others insist on the relevancy of Madison's intent. See Claus, *supra* note 12, at 612.

Framers” with regard to this provision that much more difficult.¹⁹¹ However, one can be discerned from the changes made to the draft which, as previewed, moves away from a powers-rationale to a focus on unenumerated rights.

While “[t]he text of the amendment provoked virtually no debate on the Floor of the House,”¹⁹² some final, but nominal, modifications were made to the draft, such as changing “this constitution” to “the constitution,” and adding a comma at the end of that phrase.¹⁹³ A proposal to change “disparage” to “impair” was not seconded, and was therefore rejected without debate.¹⁹⁴

This lack of debate in the House of Representatives raises an important question. As Ostler suggests, “if Ninth Amendment rights are so difficult to identify, why wasn’t that very point raised against it?”¹⁹⁵ One possibility, of course, is that nobody wanted to make this point if it risked the amendment not passing, which could put the entire Bill of Rights in jeopardy. But another possibility is that, in fact, these rights are not really so difficult to identify. We will return to this issue in Part III.

The draft amendment then made its way to the Senate. That body added the words “or to the people” at the end of the provision.¹⁹⁶ Because of the secret nature of the Senates’ deliberations at that time,¹⁹⁷ we cannot know the official reasons for that modification. The lack of debate in the House and the secret nature of any discussion in the Senate accounts for the amendment’s “extremely” sparse legislative history.¹⁹⁸

The language added by the Senate is reminiscent of the Tenth Amendment and may lead to the unfortunate conclusion that both amendments are basically twins, treating them incorrectly as a single operative provision. As we just saw, the drafting

¹⁹¹ Mitchell, *supra* note 41, at 1719. According to Schmidt, there are even “conflicting conclusions regarding what [Madison] intended the Ninth Amendment to mean.” Schmidt, *supra* note 50, at 200.

¹⁹² Abrams, *supra* note 3, at 1035.

¹⁹³ *See id.*

¹⁹⁴ *See Sanders, Ninth Life, supra* note 7, at 769.

¹⁹⁵ Ostler, *supra* note 27, at 38.

¹⁹⁶ Redlich, *supra* note 21, at 806.

¹⁹⁷ *See id.*

¹⁹⁸ *See McAfee, supra* note 25, at 1237.

history points in a different direction: the separation of these apparent twins into distinct entities with normative independence from one another.

Massey suggests that “the final draft of the ninth amendment reveals a subtle shift of focus.”¹⁹⁹ But when we compare the Virginia Resolution, Madison’s first draft, his speech during the deliberations in the House of Representatives, and the final approved text,²⁰⁰ we notice a *substantial shift of focus* and, therefore, meaning and effect.

One final note regarding the drafting history of the Ninth Amendment, which will be crucial when addressing the nature and type of right protected by this provision. Addressing the problem of the Senate’s secret deliberations when discussing the Ninth Amendment, Seidman makes an important point:

We do know, however, that the Senate *considered and rejected* a provision that would have provided that there are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity; among which are the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property and pursuing and obtaining happiness and safety.²⁰¹

From this drafting history, we can appreciate several things. First, that the text of the Ninth Amendment evolved as it made its way through the legislative process. What started as a Virginia Resolution meant to avoid a negative inference from the enumeration of rights in the Constitution in terms of governmental power, ended up as a provision that centered on unenumerated rights. The Senate’s rejection of specific natural rights language left the Ninth Amendment explicitly neutral with regard to the type of rights it was meant to address. This task is left to other interpretive devices.

¹⁹⁹ Massey, *Federalism and Fundamental Rights*, *supra* note 9, at 310.

²⁰⁰ See Lash, *The Lost Original Meaning*, *supra* note 27, at 333.

²⁰¹ Seidman, *supra* note 7, at 2135 (emphasis added); U.S. Senate, *Tuesday, September 8, 1789*, in SENATE J. 73 (1st Congress, 1789).

E. *The Structure of the Ninth Amendment: Splitting the Rights/Powers Atom and the Implications of “Baby” Ninth Amendments in State Constitutions*

The Ninth Amendment must be read *harmoniously* with the Tenth Amendment.²⁰² This is conceptually different from reading it *in accordance with or as synonymous to* the Tenth Amendment.²⁰³ They are textually separate and normatively distinct.²⁰⁴

Both the Ninth and Tenth Amendments can be traced to the original proposal made by Madison. As we saw, Madison’s text included the connector “or,” which marked the beginning of the conceptual separation between the Ninth as a rights provision and the Tenth as a powers provision.²⁰⁵ As Abrams observes, “[i]nsofar as the Ninth Amendment was designed to protect against the possibility that the retained rights of the people were insufficiently specified, the amendment suggests—as *the Tenth does not*—that certain reserved rights may override broadly granted federal powers.”²⁰⁶ In that sense, the Tenth Amendment “serves the function usually imputed to the Ninth.”²⁰⁷ This deals a fatal blow to the Ninth Amendment as a powers limitation provision model.²⁰⁸

The eventual adoption of two separate amendments confirms this separation and the existence of important operational differences between them.²⁰⁹ At most, the

²⁰² Caplan, *supra* note 17, at 263 (noting that both provisions share “analogous residual purposes”).

²⁰³ See Redlich, *supra* note 21, at 804 (noting that both amendments “have frequently been linked together and, particularly in recent years, written off as redundancies”); Rhoades & Patula, *supra* note 21, at 154 (noting that the Ninth Amendment has been “uniformly read in conjunction with the tenth as a rule of construction limiting the power of the federal government”).

²⁰⁴ See Abrams, *supra* note 3, at 1036 (“The Ninth Amendment is different.”); Caplan, *supra* note 17, at 262 (stating that the Ninth Amendment is “not redundant with the tenth amendment”).

²⁰⁵ See Caplan, *supra* note 17, at 263.

²⁰⁶ Abrams, *supra* note 3, at 1036 (emphasis added).

²⁰⁷ Yoo, *supra* note 31, at 988. *But see* Claus, *supra* note 12, at 591.

²⁰⁸ See Claus, *supra* note 12, at 601; Lash, *The Lost Original Meaning*, *supra* note 27, at 336, 343.

²⁰⁹ Kelley, *supra* note 21, at 822 (“Madison regarded the tenth amendment as the only explicit limitation on federal power to be found in the Constitution. . .”).

relation between the Ninth and Tenth Amendments can be characterized as *complementary*,²¹⁰ since they “seem to occupy the same conceptual space.”²¹¹

Another factor that should be considered when analyzing the meaning and operation of the Ninth Amendment is the adoption in state constitutions of so-called “baby” Ninth Amendments.²¹² The existence of these provisions sheds considerable light with regard to how the federal Ninth Amendment works or, at least, how the people of the states thought it worked.

A majority of U.S. states have provisions in their state constitutions that mirror the Ninth Amendment.²¹³ The first state to adopt such a constitutional provision was Alabama in 1819.²¹⁴ Maine adopted its state provision shortly after in 1819.²¹⁵ This was part of a generalized antebellum practice where “many states inserted clauses in their constitutions borrowing [the] language of the Ninth Amendment.”²¹⁶

As Yoo explains, “[n]one of the states adopted the Ninth Amendment verbatim. Indeed, the states modified its provisions in important ways to enhance its rights-declaring function.”²¹⁷ This could have two different explanations. First, that the textual differences between the state provisions and their federal counterpart demonstrate that they mean different things. Therefore, if the state provisions refer to the existence of enforceable unenumerated rights, that must mean that the federal provision does not do that. Another explanation is that state framers attempted to achieve the same goal as the Ninth Amendment—the protection of enforceable unenumerated rights—but chose to polish the text to make that point even clearer.

²¹⁰ See Kelsey, *supra* note 8, at 310.

²¹¹ Sager, *supra* note 9, at 243 (“[T]hey are guides to a structural understanding of the Constitution’s enumeration of governmental power and personal rights. . .”).

²¹² Another similar phenomenon can be seen in many Latin American constitutions that also include provisions related to unenumerated rights. See Jorge M. Farinacci-Fernós, *Los derechos no enumerados en las constituciones latinoamericanas*, IBERICONNECT (Sept. 13, 2022), <https://www.ibericonnect.blog/2022/09/los-derechos-no-enumerados-en-las-constituciones-latinoamericanas>.

²¹³ Louis Karl Bonham, *Unenumerated Rights Clauses in State Constitutions*, 63 TEX. L. REV. 1321, 1324 n.16 (1985). Schmidt counted thirty-two states in 2003 as having similar provisions. Schmidt, *supra* note 50, at 229. Sanders counted thirty-three in 2017. Sanders, *Baby Ninth Amendments*, *supra* note 27, at 392.

²¹⁴ Bonham, *supra* note 213, at 1324 n.16.

²¹⁵ See Yoo, *supra* note 31, at 1009.

²¹⁶ *Id.* at 1008; Bonham, *supra* note 213, at 1324 n.16.

²¹⁷ Yoo, *supra* note 31, at 1009; see Bonham, *supra* note 213, at 1323; see also Schmidt, *supra* note 50, at 229 (suggesting that the state provisions are “strikingly similar”).

This would mean that there was, in fact, a universal view regarding the basic meaning of the Ninth Amendment as a rights provision that found its way into state constitutions.²¹⁸

That so many state constitution drafters would find it useful to adopt baby Ninth Amendments stands in opposition to the view of the Ninth Amendment as a rule of construction regarding the powers of the federal government. State governments possess the general police power and, unless a particular power has been explicitly withheld or is blocked by the exercise of a constitutional right, they are able to regulate a wide array of activities. As a result, it would make very little sense for state framers to incorporate a constitutional provision that only works in the context of a government of *limited* powers, such as the federal government.²¹⁹

State courts have consistently enforced their state provisions without much difficulty.²²⁰ Specifically, they have been able to “use these clauses as a basis for judicial recognition of individual rights not enumerated in state constitutions or the federal bill of rights.”²²¹ In other words, they “have not limited unenumerated rights clauses to the ninth amendment’s traditional role of a ‘mere rule of construction.’”²²² Federal courts, in charge of enforcing the “original” Ninth Amendment, should follow their example.

F. Summary: The Primary and Secondary Roles of the Ninth Amendment

After analyzing the communicative content of the text of the Ninth Amendment, as well as its history, intent, purpose, and structure, it becomes difficult to resist the conclusion that the Ninth Amendment operates, at least primarily, as a residuary or reservations clause that can be used to seek judicial recognition and protection of unenumerated constitutional rights. While the Ninth Amendment is not a right *per se*,²²³ it does clearly function as a *vehicle* for the enforcement of extratextual rights. Whether this requires characterizing it as an “independent source

²¹⁸ See Schmidt, *supra* note 50, at 171 (“State constitutional provisions adopting language mirroring the Ninth Amendment prove that the traditional reading of the Ninth Amendment is inaccurate.”).

²¹⁹ See Bonham, *supra* note 213, at 1325 (“The provisions seem out of place in the constitution of state governments, whose power scholars generally consider to be plenary.”).

²²⁰ *Id.* at 1324 (“[S]tate courts have applied these clauses regularly.”); Yoo, *supra* note 31, at 1009.

²²¹ Bonham, *supra* note 213, at 1325.

²²² *Id.*

²²³ See Schmidt, *supra* note 50, at 175.

of rights” misses the point.²²⁴ The bottom line is the same: there are unenumerated rights that, because of the Ninth Amendment, are entitled to equal treatment with the enumerated ones, which includes appropriate judicial enforcement of the former.

As we are about to see in Part III, the Ninth Amendment also functions as an interpretive rule that allows for a better understanding of enumerated rights as well. This provision aids in the interpretation of enumerated rights and the identification of *derivable* rights that can be inferred from, or that are implied by, them.

III. THE OPERATION OF THE NINTH AMENDMENT: JUDICIALLY ENFORCEABLE UNENUMERATED RIGHTS

A. Identification

As Caplan suggests, “[t]he central question in ninth amendment interpretation has been the *existence* and *extent* of the federal rights the amendment is supposed to encompass.”²²⁵ In other words, which unenumerated rights can be identified as deserving of Ninth Amendment protection.²²⁶

²²⁴ See Kelley, *supra* note 21, at 815 (“[N]ot a source . . . [nor a] vehicle for protecting [unenumerated rights].”); Abrams, *supra* note 3, at 1038 (“The argument that the Ninth Amendment is not an ‘independent source’ of rights but merely an aid in the interpretation of the Fifth and Fourteenth Amendments claims too little for the Ninth Amendment.”); Kirven, *supra* note 21, at 81 (“The United States Constitution does not, then, create any rights, although it enumerates rights.”); Caplan, *supra* note 17, at 228 (“[T]he amendment neither creates new rights nor alters the status of pre-existing rights.”); Schmidt, *supra* note 50, at 179 (“[T]he Ninth Amendment, as a separate constitutional provision, must be recognized as an independent source of rights.”); Kadlec, *supra* note 27, at 403 (“[T]he Ninth Amendment is not itself a source of rights.”); Jackson, *supra* note 27, at 175 (“The Ninth Amendment, on the other hand, does not confer a right.”); Griswold v. Connecticut, 381 U.S. 479, 492 (Goldberg, J., concurring) (“Nor do I mean to state that the Ninth Amendment constitutes an independent source of rights protected from infringement from either the States or the Federal Government.”); Schowengerdt v. United States, 944 F.2d 483, 490 (9th Cir. 1991) (“[The ninth] amendment has not been interpreted as independently securing any constitutional rights for purposes of making out a constitutional violation.”); Jenkins v. Comm’r, 483 F.3d 90, 92 (2d Cir. 2007) (“The Ninth Amendment is not an independent source of rights.”); Murray v. Bledsoe, 650 F.3d 246, 247 (3d Cir. 2011) (“Although there is some authority for the proposition that the Ninth Amendment is a source of fundamental rights. . .”).

²²⁵ Caplan, *supra* note 17, at 227 (emphasis added); see also Paust, *supra* note 34, at 254 (referring to the “proper identification” of these unenumerated rights).

²²⁶ Abrams, *supra* note 3, at 1038 (“[T]he question of which rights exist with what effect subject to what governmental restrictions is the identical question which the extensive body of due process law has developed and is continuing to develop.”); McAfee, *supra* note 25, at 1218; see also Sanders, *Ninth Life*, *supra* note 7, at 773 (“[W]hat are those rights?”).

This is so because the text of the Ninth Amendment, almost by definition, falls short in terms of the goal of identifying these unenumerated rights.²²⁷ Herein lies the true *hard problem* of the Ninth Amendment: connecting the text of the Ninth Amendment to particular unenumerated rights.²²⁸

But, as previewed, this challenge is not the result of an inadequate use of language or evidence of a design flaw. It is simply in the nature of the Ninth Amendment's object: *unenumerated* rights. These

are by nature outside the text of the Constitution and thus cannot be looked at in quite the same way as we might look at the meaning of "Commerce" in Article I, or even the meaning of the "right of the people to keep and bear Arms" in the Second Amendment.²²⁹

In other words, in order to protect unenumerated rights, the Ninth Amendment does not have to identify or specify them.²³⁰ If it did, then they would become enumerated rights. The operative language of the Ninth Amendment is enough to initiate a proper search for them.

Now, since the Ninth Amendment cannot mean anything or everything, any model that proposes the existence and enforceability of unenumerated rights stemming from the Ninth Amendment must put forward workable standards or criteria to permit a principled identification of these protected rights, as opposed to others that fall outside the amendment's protections.²³¹ This must be done to avoid the charge that the Ninth Amendment is a "bottomless well from which can be extracted any hitherto unarticulated private right."²³² In other words, a limiting principle must be identified.

²²⁷ Gardner, *supra* note 9, at 90 ("The rights of the ninth amendment permit no precise definition."); Schmidt, *supra* note 50, at 214 ("[D]oes not prescribe how to determine what unenumerated rights are.").

²²⁸ See Kelley, *supra* note 21, 822 n.36 (referring to the problem of adequately identifying which rights should receive Ninth Amendment protection); see also Jackson, *supra* note 27, at 168 ("[H]ow to identify and give form to these rights still continues to pose problems.").

²²⁹ Jackson, *supra* note 27, at 174.

²³⁰ Paust, *supra* note 34, at 256.

²³¹ See Massey, *Federalism and Fundamental Rights*, *supra* note 9, at 330.

²³² *Id.* at 312.

Another problem that arises has to do with the intent of the First Congress when settling on the final version of the draft that was sent to the states for ratification. Because of a lack of robust debate in Congress regarding the type of right referenced in the Ninth Amendment, or even individual examples as to some of these rights, “[n]either the text of the Ninth Amendment, therefore, nor the history of its passage contains any solution to the question of *what* rights, if any, are retained by the people.”²³³ Other tools are therefore needed for that endeavor, even though the text and structure of the Ninth Amendment, as we saw in the previous part, points us in the right direction.

In the end, the process of identifying unenumerated rights that can be enforced through the Ninth Amendment involves “a process of determination and elimination.”²³⁴ But this first requires settling on the sources and characteristics that these rights must possess in order to claim Ninth Amendment status.²³⁵ This includes identifying adequate limiting principles to avoid turning the amendment into an anything-goes provision.²³⁶

B. Sources for the Identification of Unenumerated Rights

By definition, unenumerated rights are not to be found *explicitly* in the text of the U.S. Constitution. Therefore, they must be found in other sources.²³⁷ But which ones? What critical mass is required in order to conclude that these rights are protected by the Ninth Amendment? Is there any sort of hierarchy with regard to outside sources?

As we saw in the previous part, the first place to look is the *Constitution itself*. Since the Ninth Amendment functions as a sort of Necessary and Proper Clause for rights, then it allows us to *infer* unenumerated rights from the enumerated ones.²³⁸ In other words, that “[t]he ‘rights’ retained by the people within the meaning of the

²³³ Abrams, *supra* note 3, at 1035 (emphasis added).

²³⁴ Kelsey, *supra* note 8, at 310–11.

²³⁵ See Kirven, *supra* note 21, at 83–84.

²³⁶ Gardner, *supra* note 9, at 96; Kirven, *supra* note 21, at 89; Massey, *Federalism and Fundamental Rights*, *supra* note 9, at 313.

²³⁷ Schmidt, *supra* note 50, at 217 (“[A]n evaluation of an unenumerated right must look to [a] diverse range of sources.”).

²³⁸ Kelsey, *supra* note 8, at 311; Suttelan, *supra* note 6, at 116; Schmidt, *supra* note 50, at 217; Jackson, *supra* note 27, at 196.

Ninth Amendment may be *related* to those ‘rights’ which are enumerated in the Constitution.”²³⁹

Take, for example, the right to vote. While not explicitly mentioned as an affirmative right, it is discernable from the Republican Guarantee Clause of the federal Constitution, as well as other provisions.²⁴⁰ This is consistent with the view that the original Bill of Rights itself—regardless of the Ninth Amendment—was “meant to protect natural, inherent, and fundamental right[s]” and not just those mentioned within its provisions.²⁴¹ This example will be studied in greater detail later on.

The Ninth Amendment also provides an important textual clue as to where to start looking. The concept “retained by the people” points us to those places and devices, where the people *go to in order to enshrine their rights*. This, as part of a comprehensive exploration of those instances that reflect “the consensus of the American People” with regard to their rights.²⁴²

The first obvious place to look once we leave the confines of the text of the U.S. Constitution are *state constitutions*.²⁴³ This is a direct consequence of the “‘certain rights’ enumerated in the Constitution and the Bill of Rights [that] were derived from state law.”²⁴⁴ In that sense, “[e]xamining 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 of the Bill of Rights and the Constitution.”²⁴⁵ The Declaration

²³⁹ *Palmer v. Thompson*, 403 U.S. 217, 233 (1971) (Douglas, J., dissenting) (emphasis added); *see also* *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579 (1980) (acknowledging that “implicit in enumerated guarantees” are certain unarticulated rights).

²⁴⁰ U.S. CONST. art. IV, § 4.

²⁴¹ Suttelan, *supra* note 6, at 106.

²⁴² Kirven, *supra* note 21, at 83–84.

²⁴³ Gardner, *supra* note 9, at 97; Yoo, *supra* note 31, at 968; Claus, *supra* note 12, at 594. Such is the importance of state constitutions that, in a concurring opinion, then Justice Stevens chastised a Massachusetts court for allowing “[t]he enumeration of certain rights in the Fourth Amendment to disparage the rights retained by the people of Massachusetts *under Art. 14 of the Massachusetts Declaration of Rights*.” *Massachusetts v. Upton*, 466 U.S. 727, 737–38 (1984) (Stevens, J., concurring) (emphasis added).

²⁴⁴ Caplan, *supra* note 17, at 259.

²⁴⁵ Yoo, *supra* note 31, at 975.

of Independence also offers important insights into the pool of potential unenumerated rights.²⁴⁶

With regard to state constitutions, these are the primary candidates for the identification of federally unenumerated rights “retained by the people.”²⁴⁷ This is so since “the specific guarantees selected for enumeration were derived from similar specific guarantees then in existence under state charters, constitutions, or declaration of rights.”²⁴⁸ By definition, state constitutional rights predate their federal counterparts. And because state constitutions supplied most of the enumerated rights in the federal Constitution, it follows that they would also supply, or at least be the primary source of, most of the unenumerated ones as well.

As we saw, Federalists believed that the U.S. Constitution should not include a list of rights. This is not to say that they were not supportive of fundamental rights. Quite the contrary. But where would these rights reside if not in the U.S. Constitution? The obvious answer is state constitutions, in part, because it was state governments that held general legislative powers that required, as an important safeguard, the existence of rights to limit their exercise.

Right below state constitutions are state statutes and common law.²⁴⁹ At a minimum, this includes state rights existing at the time of the framing. But the notion that state common law can also be a source of unenumerated rights at the federal level also speaks to the *dynamic* nature of these rights, given the inherent evolving characteristic of a common law system.²⁵⁰ The same can be said about positive law sources.

In that sense, “[t]he retained rights envisioned by the framers, however, included *not only* those established by common law and statute as of the Constitution’s adoption, *but also* those to be *subsequently established by state*

²⁴⁶ Gardner, *supra* note 9, at 97. The same can be said about other colonial sources. Kirven, *supra* note 21, at 90.

²⁴⁷ Madison, *The Debates and Proceedings*, *supra* note 186, at 439. Of course, it should be noted that “some states ha[d] no bill of rights” at the time of the founding, and that “others provided with very defective ones, and there [were] others whose bills of rights are not only defective but absolutely improper.” Caplan, *supra* note 17, at 254. Caplan does not elaborate on what he considers to be “improper” constitutional rights.

²⁴⁸ Massey, *Federalism and Fundamental Rights*, *supra* note 9, at 322.

²⁴⁹ Caplan, *supra* note 17, at 241; Claus, *supra* note 12, at 594.

²⁵⁰ See Jackson, *supra* note 27, at 170; Mitchell, *supra* note 41, at 1728 (“The Framers were aware of the elasticity of the common law and the changing nature of state constitutions and statutes.”).

legislation.”²⁵¹ The Ninth Amendment ensures that these rights *are not susceptible to preemption through federal legislation*,²⁵² *since they would be protected by a higher federal source: the U.S. Constitution itself.*

This brings up the all-important issue of the Supremacy Clause and the possible conflict that could arise from recognizing state constitutional rights as judicially enforceable federal unenumerated rights.²⁵³ But such conflict does not exist *when one takes into account the existence and operation of the Ninth Amendment.* Precisely because the Ninth Amendment gives constitutional status to *some* state constitutional rights, they thus *become federal law* not susceptible to congressional preemption or displacement. This should not be seen as nullification of the Supremacy Clause but as a constitutionally sanctioned mechanism for the development of federal constitutional law meant, among other things, *to limit the powers of Congress.* If the point of the Bill of Rights is to limit *Congress*, then allowing state constitutional rights—that is, those retained by the People—to access federal constitutional status is *consistent* with this goal and does not compromise the Supremacy Clause. It simply broadens what will be considered as federal law and, thus, becomes part of the supreme law of the land.

Moreover, the conflict completely disappears when considering Article V of the U.S. Constitution. We should never forget that, while Congress is responsible for the adoption of federal *statutes*, state legislatures are ultimately responsible for the adoption of federal constitutional *amendments*. So, if state legislatures can ultimately amend the U.S. Constitution and incorporate new enumerated rights at the federal level, the notion that state constitutional rights—even those adopted recently—or even state legislation, can attain Ninth Amendment protection and defeat a federal statute is not out of bounds.

In fact, one could argue that once a sufficient number of state constitutions or statutes recognize a particular right, activating Article V is an anticlimactic and unnecessary exercise. In fact, because one of the purposes of the Ninth Amendment was to protect unenumerated rights and avoid the negative inference that could be made from enumeration, it seems odd that Article V should be seen as the exclusive vehicle for the inclusion of new rights in the Constitution. In other words, this would mean that, unless a right is included through Article V, it does not exist or is able to

²⁵¹ Caplan, *supra* note 17, at 248 (emphasis added).

²⁵² See Claus, *supra* note 12, at 589.

²⁵³ See *United States v. Spencer*, 160 F.3d 413, 415 (7th Cir. 1998) (“The Ninth Amendment does not empower the states, by creating *new* state constitutional rights, to truncate the power of Congress under Article I by preempting federal legislation.”). As we are about to see, that undermines the very process by which amendments to the federal Constitution are adopted.

receive federal constitutional status. That would directly negate the whole point of the Ninth Amendment. A simpler alternative is to adopt a *harmonious* relationship between the Ninth Amendment and Article V. The latter is still necessary to adopt formal changes to the Constitution, particularly to non-rights related matters that the Ninth Amendment could never reach.

The Ninth Amendment itself stands as a textual articulation of this logic, meaning that “the people” have, at least, two avenues for the formal recognition of federal constitutional rights: (1) through an Article V process which turns them into enumerated rights, or (2) through state constitutional enactment that, by way of the Ninth Amendment, achieve unenumerated status. The Ninth Amendment’s command that unenumerated rights are to be treated the same as enumerated rights means that either pathway leads to the same result. In other words, if the states can ultimately amend the Constitution *directly* through Article V, they can also amend their own state constitutions and incorporate a right *indirectly* through the Ninth Amendment. The notion that the only alternative to expand the scope of federal constitutional rights is through Article V creates unnecessary tension between both provisions when a more harmonious interaction is easily available.

The remaining question is *how many state constitutions must recognize a particular right before achieving Ninth Amendment status*.²⁵⁴ At the very minimum, if the number is greater than three-fourths—the same number required for an Article V amendment—then the case for that right becomes strongest.²⁵⁵ But that does not mean that *only* those rights that have found their way into three-fourths of state constitutions have access to Ninth Amendment protection.

On the contrary, this creates a spectrum that interacts with *other* sources, whether other state enactments or of a historical nature. The higher the number, the stronger the case and the less need for complementing it with additional sources. The lower the number, the weaker the case and the increased need for including additional sources into the equation.

When the U.S. Constitution was adopted, not all rights were recognized in positivized law. Individual rights were also found in constitutional culture and

²⁵⁴ See Claus, *supra* note 12, at 593 (examining the different possible interpretations of “the people”).

²⁵⁵ I thank Jack Weisbeck, one of my students in the University at Buffalo School of Law 9th Amendment Seminar, for this insightful suggestion.

practice, as part of the common law tradition. As such, we must also look to these historical sources in our goal of identifying unenumerated rights.²⁵⁶

One obvious source is English common law as it existed at the time of the Founding. This is because one of the main grievances during the War of Independence was that the colonists had been denied their rights as “Englishmen.”²⁵⁷ It would be odd indeed if those rights were not now protected under the newly established constitutional system.²⁵⁸

Among the most authoritative sources in terms of the content of the common law at that time, particularly from the American perspective, were Blackstone,²⁵⁹ as well as Coke “as expounded . . . in their commentaries.”²⁶⁰ Other relevant sources are the Magna Carta²⁶¹ and the English Bill of Rights,²⁶² as instruments where some of the “rights of Englishmen” were articulated.

C. *Type of Rights*

The next step is to identify the substantive characteristics of those unenumerated rights that could claim Ninth Amendment status.²⁶³ Because of its main operation as a residuary or reservations clause, the rights protected under the Ninth Amendment must be, at the very least, *compatible and consistent* with the

²⁵⁶ See Kelley, *supra* note 21, at 833 (“[I]n the eighteenth century[,] inherent rights were generally *somewhere* written down.”) (emphasis added).

²⁵⁷ Gardner, *supra* note 9, at 91; Kirven, *supra* note 21, at 83–84; Massey, *Federalism and Fundamental Rights*, *supra* note 9, at 320; Jackson, *supra* note 27, at 199.

²⁵⁸ Massey, *Federalism and Fundamental Rights*, *supra* note 9, at 320 (“[I]t would seem a safe point of departure to assume that the unenumerated rights of the ninth amendment were intended to be the remaining such ‘rights of Englishmen.’”).

²⁵⁹ Kelsey, *supra* note 8, at 314; Kirven, *supra* note 21, at 84; Yoo, *supra* note 31, at 982; Claus, *supra* note 12, at 596. Although, as Jackson cautions, Blackstone’s commentaries may not have been “an entirely accurate representation of the state of British common law at the time it was published.” Jackson, *supra* note 27, at 203.

²⁶⁰ Kirven, *supra* note 21, at 84.

²⁶¹ Kelley, *supra* note 21, at 816; Kirven, *supra* note 21, at 84; *Whelchel v. McDonald*, 176 F.2d 260, 261 (5th Cir. 1949).

²⁶² Kirven, *supra* note 21, at 84.

²⁶³ See Lash, *A Textual-Historic Theory*, *supra* note 27, at 908.

enumerated rights included in the constitutional text,²⁶⁴ including amendments that were added later and may be added in the future.²⁶⁵

One of the most controversial issues regarding the scope of unenumerated rights protected under the Ninth Amendment deals with whether these rights are only opposable to the federal government or if, in addition, they are opposable to state governmental action. Many scholars and courts take the former position as a given.²⁶⁶ A closer look at the text of the Ninth Amendment suggests otherwise.

As we saw previously, the “certain” rights whose enumeration is the subject of the Ninth Amendment are to be found “in the Constitution,” *not just the Bill of Rights*.²⁶⁷ And because unenumerated rights are *similar* to enumerated rights, it follows that if some enumerated rights share a particular characteristic, enumerated rights can share them too. In this case, *the U.S. Constitution, even the original text before the first set of amendments was adopted, included rights opposable to the states*.²⁶⁸ As Paust observes, “the application of the ninth amendment to the states would have been completely consistent with the general expectation of the Founders pertaining to the relationship between governments and the rights of men.”²⁶⁹

The clearest example of this phenomenon is the Contracts Clause, found in Article I of the original Constitution. It declares that “[n]o State shall . . . pass any . . . law impairing the obligation of contracts. . . .”²⁷⁰ While the provision is not written in rights language, we should keep in mind that, as we saw previously, neither are

²⁶⁴ See Suttelan, *supra* note 6, at 111–12; Kirven, *supra* note 21, at 84.

²⁶⁵ Kirven, *supra* note 21, at 85 (stating that “[a]lthough the claim has been made that this Amendment was intended to restrict the states as well as the federal government,” the provision only protects rights opposable to the federal government); Massey, *Federalism and Fundamental Rights*, *supra* note 9, at 306 n.6 (“There is no direct holding on the applicability of the ninth amendment to the states.”); Schmidt, *supra* note 50, at 171 (“The traditional approach also neglects to apply the Ninth Amendment against the states.”).

²⁶⁶ See Redlich, *supra* note 21, at 805; Abrams, *supra* note 3, at 1034; Suttelan, *supra* note 6, at 108. See also *Livingston v. Moore*, 32 U.S. 469, 551–52 (1833) (“[S]ince it is now settled, that those amendments [contained in the Bill of Rights] do not extend to the states.”).

²⁶⁷ Kelley, *supra* note 21, at 815.

²⁶⁸ See *id.* at 835; Gardner, *supra* note 9, at 95; Paust, *supra* note 34, at 249; Claus, *supra* note 12, at 587; Lash, *A Textual-Historic Theory*, *supra* note 27, at 902.

²⁶⁹ Paust, *supra* note 34, at 249; see also Sanders, *Ninth Life*, *supra* note 7, at 784 (“[A]n independent function of the Amendment becomes clear—to protect rights against federal *and* state encroachment.”) and Kadlec, *supra* note 27, at 427.

²⁷⁰ U.S. CONST. art. I, § 10 (emphasis added).

the “rights” contained in the Bill of Rights. But it seems obvious from a modern perspective that the Contracts Clause recognizes an individual right, and one that is first and foremost directed at *state governments*. Moreover, amendments adopted *after* the Bill of Rights was enacted are also explicitly directed at the states.²⁷¹

Speaking of amendments that were adopted after the original Constitution and Bill of Rights were enacted—and their impact with regard to the scope of unenumerated rights that are subject to Ninth Amendment protection²⁷²—we need to mention the Thirteenth Amendment and the fact that it is opposable to *private action as well*. While most enumerated rights at the federal level are, indeed, only opposable to governmental action—whether state or federal—there are others, like the Thirteenth Amendment, that do not require state action. As Yoo explains, the Ninth Amendment “anticipates that future amenders of the Constitution may re-declare their interpretation of constitutional rights.”²⁷³ This broadens the nature of possible unenumerated rights that could be vindicated through the Ninth Amendment.²⁷⁴

This goes to the very nature of the Ninth Amendment: unenumerated rights track the sort and type of rights included in the Constitution, which means that when more unenumerated rights are added, more unenumerated rights can claim Ninth Amendment status and, as a result, judicial protection. As Schmidt explains, “it is judicial activism *not* to apply the Ninth Amendment.”²⁷⁵ This leaves us with the proposition that the Ninth Amendment incorporates the characteristics of all the

²⁷¹ See U.S. CONST. amend. XIV. This argument is separate from the proposal that the Ninth Amendment was incorporated against the states by way of the Fourteenth Amendment. See Redlich, *supra* note 21, at 806; Massey, *Federalism and Fundamental Rights*, *supra* note 9, at 327; Sanders, *Ninth Life*, *supra* note 7, at 774; Schmidt, *supra* note 50, at 171; Claus, *supra* note 12, at 587; Lash, *The Lost Original Meaning*, *supra* note 27, at 345. It is also different from the link between Ninth Amendment rights and the liberty clause of the later provision. See also Gardner, *supra* note 9, at 93; Abrams, *supra* note 3, at 1037; Sanders, *Ninth Life*, *supra* note 7, at 777; Schmidt, *supra* note 50, at 169. The point here is that the Fourteenth Amendment established enumerated rights opposable to state governments and that this impacts the sort of rights that are protected by the Ninth Amendment. Again, if an enumerated right is opposable against the states, it follows that so can unenumerated rights.

²⁷² Kirven, *supra* note 21, at 85; Lash, *The Lost Original Meaning*, *supra* note 27, at 340.

²⁷³ Yoo, *supra* note 31, at 968.

²⁷⁴ Schmidt, *supra* note 50, at 194 (“We must remember, however, that the power of the Ninth Amendment to evolve through interpretation is granted from its text.”).

²⁷⁵ *Id.* at 195 (emphasis added).

enumerated rights, including those that are found outside of the Bill of Rights, whether it is Article I or even future amendments that could be adopted later.²⁷⁶

This brings us to the interaction between the Ninth Amendment and so-called natural rights.²⁷⁷ Libertarian scholars have proposed that the type of unenumerated rights protected by the Ninth Amendment are of that kind.²⁷⁸ One of the leading proponents of this view, Randy Barnett, suggests that “[t]he purpose of the Ninth Amendment was to ensure that all individual natural rights had the same stature and force” as enumerated ones.²⁷⁹ As a result, the argument goes, “the Ninth Amendment is natural law’s logical textual home within the Constitution.”²⁸⁰

In addition to the difficult question of adequately ascertaining which rights are natural rights,²⁸¹ and which of these can claim Ninth Amendment protection,²⁸² two other problems arise that represent an obstacle to this approach. First, most of the enumerated rights found in the Constitution *cannot really be considered natural rights*. Rights such as free speech, equal protection, right to counsel, and so on, are historically and politically grounded. And second, as we saw previously, the Senate

²⁷⁶ See Gardner, *supra* note 9, at 95 (emphasizing that the original version of the provision also insisted on its application to the *whole* of the Constitution, including provisions that were addressed at the states, such as the ones found in Article I).

²⁷⁷ See Lash, *The Lost Original Meaning*, *supra* note 27, at 343.

²⁷⁸ See Kelsey, *supra* note 8, at 313 (suggesting a natural rights approach); Suttelan, *supra* note 6, at 106 (stating that the Bill of Rights was, “meant to protect natural, inherent, and fundamental rights”); Paust, *supra* note 34, at 260; Sanders, *Ninth Life*, *supra* note 7, at 800 (“[I]t is simply not open to dispute that the Framers unequivocally believed in natural rights and law.”). Others take a more nuanced approach and make general references to natural law views prevalent at the time of the framing of the Constitution. See Kirven, *supra* note 21, at 83–84; Caplan, *supra* note 17, at 230. Some seem to adopt a critical view regarding the viability of identifying unenumerated rights through this approach. Massey, *Federalism and Fundamental Rights*, *supra* note 9, at 330 (“[M]akes them virtually impossible to discern by application of neutral principles.”).

²⁷⁹ Barnett, *supra* note 27, at 2.

²⁸⁰ Massey, *Natural Law Component*, *supra* note 87, at 50. This view is also grounded on the idea that the framers of the Constitution adhered to natural law views. See generally Chester James Antieau, *Natural Rights and the Founding Fathers-The Virginians*, 17 WASH. & LEE 43, 45, 48 (1960).

²⁸¹ Massey, *Natural Law Component*, *supra* note 87, at 95 (“[N]atural law was converted into natural rights, which only meant that the rights in question were self-evident.”) (quoting LLOYD L. WEINREB, *NATURAL LAW AND JUSTICE* 1 (1987)). See also Antieau, *supra* note 280, at 45. For a more in-depth explication of the notion of natural rights existing at the time of the Founding, see Massey, *Natural Law Component*, *supra* note 87, at 46–49.

²⁸² See Lash, *The Lost Original Meaning*, *supra* note 27, at 401.

considered and *rejected* the use of natural rights language in the Bill of Rights.²⁸³ As Seidman explains, “on five separate occasions, Congress was presented with provisions that would have expressly accomplished what Barnett claims the Ninth Amendment achieved by implication. *It failed to adopt these measures.*”²⁸⁴

This is not to say that some natural rights cannot receive Ninth Amendment protection. It is just that there does not seem to be any particular justification for giving all natural rights, solely because of that feature, automatic access to Ninth Amendment status. A more reasonable approach would be to analyze whether a particular natural right complies with the criteria applicable to any potential unenumerated right. In other words, natural rights should not have an automatic privilege for Ninth Amendment purposes, nor should they be immediately discarded either.

*D. Enforcement (or Lack Thereof) of the Ninth Amendment by
(Federal) Courts and the Possibility of Future Judicial
Enforcement of Unenumerated Rights*

Federal courts have not been kind to the Ninth Amendment.²⁸⁵ Some believe that its open-ended nature could be a recipe for unlimited or unprincipled judicial policymaking.²⁸⁶ Of course, as we have seen, the Ninth Amendment does not operate as a free-for-all vehicle for anything and everything.²⁸⁷ There are textual, structural, and historical considerations that serve as criteria for the identification of unenumerated rights and as a limiting principle to avoid overreaching.²⁸⁸

More importantly, if the Ninth Amendment has an open-ended nature that could, potentially empower courts to expand the list of protected rights in the United

²⁸³ Seidman, *supra* note 7, at 2135; Jackson, *supra* note 27, at 199.

²⁸⁴ Seidman, *supra* note 7, at 2145 (emphasis added); *see also* Jackson, *supra* note 27, at 170 (stating that natural rights proponents “overstate the influence of these theories on the views of the framers, ratifiers, and, most importantly, the general public regarding their rights”).

²⁸⁵ Rhoades & Patula, *supra* note 21, at 159–69.

²⁸⁶ Massey, *Federalism and Fundamental Rights*, *supra* note 9, at 313 (“[S]eemingly involves the courts in an open-ended exercise in noninterpretive judicial review.”).

²⁸⁷ The same could be said about other open-ended provisions of the Constitution like “due process,” “liberty,” “equal protection of the law,” “reasonable searches and seizures,” among many others.

²⁸⁸ *See, e.g.*, Schmidt, *supra* note 50, at 180–95. *Compare with* Lash, *A Textual-Historic Theory*, *supra* note 27, at 898 (“[A]dvocates of the individual rights theory of the Ninth have yet to produce a *textual theory* of the Ninth capable of judicial enforcement.”) (emphasis added). This Article attempts to address those concerns.

States,²⁸⁹ *that was precisely the function the drafters intended.*²⁹⁰ As McAfee suggests, “[i]f the ninth amendment was intended to point toward enforceable fundamental rights that exist apart from the text, then originalists who deny that these rights exist are compelled to resort to a non-originalist grounding for their constitutional theory.”²⁹¹

For most of the nineteenth century and the early twentieth century, federal courts simply ignored the Ninth Amendment. When they started to pay attention to it, they mostly adopted the federalism view.²⁹² Specifically, they crafted the following approach: if a particular power is explicitly granted to the federal government, the Ninth Amendment cannot be used to defeat it. This is one of the negative consequences of the federalism model. As we saw, this model suggests that the Ninth Amendment stands for the proposition that just because a right was not mentioned, it does not follow that the federal government has power over that issue. But then federal courts took that view a step further: if a power *does exist*, then an unenumerated right cannot impede its exercise. This not only constitutes a *non-sequitur*, but it also reflects the inherent problems of the federalism model.

One of the first articulations of this view came in *Ashwander v. Tennessee Valley Authority*, where the Supreme Court stated that “the Ninth Amendment . . . in ensuring the maintenance of the rights retained by the people, does not withdraw the rights which are expressly granted to the federal government.”²⁹³ This view was eventually developed in *United Public Works of America (C.I.O.) v. Mitchell*.²⁹⁴

²⁸⁹ See Sanders, *Ninth Life*, *supra* note 7, at 773 (“[D]oes the Ninth Amendment mandate judicial protection of unenumerated constitutional rights?”).

²⁹⁰ Suttelan, *supra* note 6, at 119 (“Thus, the Ninth Amendment was a direction to the judiciary to use great latitude and discretion in the protection of individual liberty and not simply to construe the Constitution strictly in favor of those rights specifically enumerated.”); McAfee, *supra* note 25, at 1215 (“The ninth amendment attracts those . . . who advocate an expansive judicial role in the articulation of fundamental rights because it appears to provide the definitive response to the originalist critique of fundamental rights adjudication.”).

²⁹¹ McAfee, *supra* note 25, at 1215.

²⁹² Seidman, *supra* note 7, at 2138–44. Federal courts also started the practice of bundling up the Ninth and Tenth Amendments. *Id.*

²⁹³ 297 U.S. 288, 330–31 (1936). Note the use of the term “rights” to refer to the powers granted to the federal government. *Id.*

²⁹⁴ *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947).

In *Mitchell*, a claim was made with regard to the unenumerated right of public employees to participate in political campaigns and related activities.²⁹⁵ In an interesting concession to the potential existence of unenumerated rights, the Court stated that “[w]e accept appellants’ contention that the nature of political rights reserved to the people by the Ninth and Tenth Amendments are involved.”²⁹⁶ But, the Court reasoned, because the challenged statute was adopted by Congress in the exercise of one of the powers granted by the Constitution, it was not susceptible to Ninth Amendment attack.²⁹⁷ According to the Court, “[i]f granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail.”²⁹⁸

This is another *non-sequitur*, and the end result is a disparagement of unenumerated rights, precisely what the Ninth Amendment is supposed to avoid.²⁹⁹ One would think that the Supreme Court would not take the same position with regard to enumerated rights. If Congress adopts a statute banning the production, sale, and distribution of newspapers—which would, presumably, fall within the scope of the Commerce Clause—no one would seriously argue that the First Amendment would be inapplicable simply because Congress acted within one of its granted powers.

The same logic must extend to *unenumerated* rights which, as we saw, must be given equal footing with enumerated rights. Therefore, regardless of whether Congress acted pursuant to a granted power, an unenumerated right, just like an enumerated one, can be invoked to challenge the statute adopted by Congress. After all, if Congress adopts a statute in excess of its Article I powers, there is no need to identify a constitutional right to challenge it. Rather, it would simply fail as an overreaching legislative exercise.

Mitchell states that if power is granted, then the Ninth Amendment cannot be raised to defeat it. But that just begs the question: if power is not granted, then the statute adopted by Congress would be unconstitutional, not because of the existence of an unenumerated right, *but because Congress would have acted beyond the scope*

²⁹⁵ *Id.* at 78.

²⁹⁶ *Id.* at 94.

²⁹⁷ *Id.* at 95–96.

²⁹⁸ *Id.* at 96.

²⁹⁹ While *Mitchell* may be right for *Tenth Amendment* purposes, it is clearly inappropriate for Ninth Amendment inquiries. See Sanders, *Ninth Life*, *supra* note 7, at 770.

of its granted authority. This would necessarily mean that the Ninth Amendment is wholly irrelevant: it cannot defeat the exercise of granted power, yet it is unnecessary to object to the exercise of ungranted power, since that very act makes it unconstitutional on its own terms.

For many years, *Mitchell* remained the leading, and mostly only, case in Ninth Amendment law.³⁰⁰ Then came *Griswold* and, in particular, Justice Goldberg's concurrence, joined by Chief Justice Warren and Justice Brennan. The concurring opinion started with all guns blazing: "The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are *additional fundamental rights*, protected from governmental infringement, *which exist alongside those fundamental rights* specifically mentioned in the first eight constitutional amendments."³⁰¹ It went on to explain that "the Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people."³⁰²

Among other things, Justice Goldberg's concurrence finally divorced the Ninth Amendment from the Tenth Amendment,³⁰³ and insisted that "[i]t cannot be presumed that any clause in the Constitution is intended to be without effect."³⁰⁴ Yet, at the end, the opinion slowed down significantly: "Nor do I mean to state that the Ninth Amendment constitutes an independent source of rights protected from infringement by either the States or the Federal Government."³⁰⁵

Since *Griswold*, federal courts have mostly returned to the rule announced in *Mitchell*.³⁰⁶ Only marginal opinions, mostly concurrences and dissents, have hinted at the Ninth Amendment as a rights-protecting provision.³⁰⁷ Some courts simply

³⁰⁰ *Griswold v. Connecticut*, 381 U.S. 479, 490 n.6 (1965) (Goldberg, J., concurring) ("As far as I am aware, until today this Court has referred to the Ninth Amendment only in" *Mitchell*, *Tennessee Electric Power*, and *Ashwander*).

³⁰¹ *Id.* at 488 (emphasis added).

³⁰² *Id.* at 490.

³⁰³ *Id.* at 490 n.5.

³⁰⁴ *Id.* at 490–91 (quoting *Marbury v. Madison*, 1 Cranch 137, 174 (1803)).

³⁰⁵ *Id.* at 492.

³⁰⁶ The *Mitchell* approach to the Ninth Amendment has been the subject of scholarly criticism. See Kelsey, *supra* note 8, at 310; Kirven, *supra* note 21, at 87 (stating that the case "ignores the possibility that unenumerated rights may be of equal dignity with granted power").

³⁰⁷ See, e.g., *Karr v. Schmidt*, 460 F.2d 609, 619–20 (5th Cir. 1972) (Wisdom, J., dissenting) ("[T]he Bill of Rights is not a comprehensive catalogue of all the specific rights possessed by the people of this nation

reject this possibility outright.³⁰⁸ Another interesting phenomenon are cases where the court *either* finds that the enumerated right exists or,³⁰⁹ *if it finds that it may exist*, then it returns to the *Mitchell* doctrine, which makes it inoperable.³¹⁰ In other words, the party seeking Ninth Amendment protection is placed in a no-win situation. In the end, *Mitchell* remains the current legal rule regarding the Ninth Amendment.³¹¹

As a result, Justice Goldberg's modest yet bold concurrence in *Griswold* has become somewhat of an outlier. Writing in 1973, Rhoades and Patula state that the decision "stands as a promise, as yet unfulfilled, of substantive meaning for the amendment."³¹² Nearly fifty years later, the promise remains tragically unfulfilled.

But the fact remains that the Ninth Amendment is an operative component of the U.S. Constitution. This fact generates a duty upon the Judiciary to enforce its commands,³¹³ however difficult or uncomfortable that may be for judges.³¹⁴ If state courts can do it, so can federal courts.³¹⁵ As Seidman observes, there is "nothing anomalous about a court enforcing implied rights,"³¹⁶ particularly if their existence

against the federal government. . . . The Bill of Rights, then, does not provide an exhaustive list of the rights of the American people to freedom from government interference."); *id.* at 625 (Roney, J., dissenting) ("It is precisely this kind of intrusion into the private lives of citizens which the Ninth Amendment was designed to protect against.").

³⁰⁸ *Phillips v. City of New York*, 775 F.3d 538, 544 (2d Cir. 2013) ("Because plaintiffs fail plausibly to allege a violation of any other constitutional right, their effort to recast their unsuccessful claims as a violation of the Ninth Amendment also fails.").

³⁰⁹ *See, e.g., Murray v. Bledsoe*, 650 F.3d 246, 247 (3d Cir. 2011) ("[T]here is some authority for the proposition that the Ninth Amendment is a source of fundamental rights. . . ."); *Mapco, Inc. v. Carter*, 573 F.2d 1268, 1278 (Temp. Emer. Ct. App. 1978) ("We find no basis in constitutional history, judicial interpretation, political history, legal scholarship, or persuasive argument to conclude that such a right exists under the Ninth Amendment, or any other provision of the Constitution of the United States.").

³¹⁰ *See, e.g., Lull v. Comm'r*, 602 F.2d 1166, 1172 (4th Cir. 1979) ("The Ninth Amendment cannot be applied to negate section 8 of article I of the Constitution, which grants to Congress the power to lay and collect taxes.").

³¹¹ *See Gardner, supra* note 9, at 92 ("It was once said that whenever the ninth amendment was cited in support of an asserted right, the courts should look to the power the government sought to exercise, and if it was proper, the right claimed necessarily gave way.").

³¹² Rhoades & Patula, *supra* note 21, at 154–55.

³¹³ Claus, *supra* note 12, at 586 ("[T]here is every reason to find the Ninth Amendment justiciable.").

³¹⁴ *See Paust, supra* note 34, at 238; Sager, *supra* note 9, at 241. No less problematic is the idea that unenumerated rights exist but are, inherently, judicially unenforceable. *See Kadlec, supra* note 27, at 407.

³¹⁵ Bonham, *supra* note 213, at 1323.

³¹⁶ Seidman, *supra* note 7, at 2147.

is grounded on an explicit constitutional command that, in addition, requires its equal treatment with enumerated rights.

In that sense, “[b]ecause the Ninth Amendment grants the people unenumerated rights, the judiciary has a duty to recognize them when federal or state governments infringe upon those rights.”³¹⁷ As Schmidt explains, “[t]hat is not a form of judicial activism because the Constitution grants the people unenumerated rights; thus, the judiciary has a duty to recognize and protect them from constitutional infringement.”³¹⁸ To act in any other way tends to *deny and disparage* the unenumerated rights retained by the people that, by virtue of the Ninth Amendment, should be treated the same as their enumerated counterparts.

E. Possible Candidates for Ninth Amendment Status

1. In General

Some scholars are skeptical about attempting to identify the list of unenumerated rights covered by the Ninth Amendment: “Any attempt . . . to list the rights likely to be judicially denominated as Ninth Amendment rights is futile.”³¹⁹ But that is just a natural consequence of the way the Ninth Amendment works. Almost by definition, coming up with a comprehensive list of possible Ninth Amendment rights would stumble upon the same problem the framers of the Bill of Rights had in the first place: the necessarily incomplete nature of that list. One could almost say that drafting a determinative list of unenumerated rights is an oxymoron.

We now come to a crucial part of any Ninth Amendment proposal that posits that the provision is an adequate vehicle for the enforcement of unenumerated rights: identifying said rights. As we saw, it is contrary to the very design of the Ninth Amendment to suggest a definite list of unenumerated rights that can be claimed under this provision. Not only will the list be subject to inevitable fallibility, *the full scope of possible Ninth Amendment rights is, by its very nature, incomplete since it can change in response to future alternations to the constitutional text.* However, there are some initial candidates that can be put forward, if only to establish a proof of concept and see the viability of the operational model described previously in this Article.

Two final issues merit analysis before addressing possible unenumerated rights. First, the challenge of settling on the adequate *level of generality* in terms of the

³¹⁷ Schmidt, *supra* note 50, at 170–71.

³¹⁸ *Id.* at 171.

³¹⁹ Abrams, *supra* note 3, at 1038.

specific articulation of a particular right. And second, the possible variance with regard to the *normative force* different unenumerated rights may possess. I address these issues in turn.

In terms of the level of generality issues, this refers to how broadly or narrowly to identify the potential unenumerated right. One flawed approach to Ninth Amendment rights is to attempt to articulate a potential right in ultra-specific terms, such as the right to own a pet, fly a kite in a public park, or to wear one's hair in a particular way.³²⁰ Instead, a higher level of generality must be explored, without turning the right into a meaningless abstraction. For example, there is no need to amend the Constitution to include a right to sing in a public park, since it can be inferred quite easily from the more general freedom of speech recognized in the First Amendment. The same thing applies to unenumerated rights.

The second issue refers to the normative force of the particular right and, therefore, the applicable standard of review for instances where it is violated.³²¹ In other words, this involves determining whether the right is fundamental or whether it ranks lower in the constitutional universe. Since not all enumerated rights are fundamental, there is no inherent requirement that all the unenumerated ones be deemed fundamental.³²² But, since one of the main arguments for the exclusion of certain rights from textual enumeration is that some of these rights are so obvious that to list them would be unnecessary, it would make sense that these were of a fundamental nature. For purposes of this Article, I will focus on fundamental unenumerated rights, since these are probably the easiest to demonstrate. But this should not be confused with a claim that only fundamental unenumerated rights are worthy of Ninth Amendment protection.

I now turn to some examples of unenumerated rights that should be protected from encroachment *under the Ninth Amendment*. These are: (1) the right to *vote*, (2) the right to *personal autonomy*, (3) the right to *privacy*, and (4) the right of *association*.³²³ Each potential right will be analyzed though the model discussed in

³²⁰ See Kadlec, *supra* note 27, at 424 (pet example); Karr v. Schmidt, 460 F.2d 609 (5th Cir. 1972) (hair example).

³²¹ See Jackson, *supra* note 27 n.16.

³²² Claus, *supra* note 12, at 613 (“[The Ninth Amendment] says only that listing federal constitutional rights must not negatively affect the status of unlisted rights, *whatever that status is.*”) (emphasis added); Seidman, *supra* note 7, at 2145–46.

³²³ Many scholars have proposed several other potential candidates. See Gardner, *supra* note 9, at 91 (birth control); Kelley, *supra* note 21, at 832 (marital privacy); Kirven, *supra* note 21, at 87 (procreation, right to know, right to die); Paust, *supra* note 34, at 261 (human dignity); Yoo, *supra* note 31, at 983

this Article. For reasons of space, the analysis will not be as comprehensive as it should. In fact, it will be quite limited. For our purposes, the point is to offer a *proof of concept* regarding the application and operation of the conceptual model for the identification of Ninth Amendment rights, as presented in this Article. While many of these rights could be identified using other methodological approaches, our goal is to demonstrate that they can be identified using the Ninth Amendment exclusively.

At this point, it is useful to quickly restate the main normative formulation adopted in this Article regarding the operation of the Ninth Amendment. First, the amendment functions as a tool for the identification of *inferred* rights that stem from the enumerated rights established in the Constitution. This includes the ability to identify rights that are *implied* by the text. Second, it also protects unenumerated rights that are consistent and compatible with the enumerated ones, particularly when dealing with rights that are recognized in numerous state constitutions, statutes, and common law, as well as in other relevant historical sources. This also includes those unenumerated rights that are so obvious so as to elude the need for enumeration.

2. The Right to Vote

The right to *vote* is probably the best candidate for Ninth Amendment status, since it checks most of the relevant boxes. We start from a basic fact: the right to vote is not *explicitly* granted by the U.S. Constitution. Although there are many *references* to the right, there is no particular or singular provision that asserts it as an

(conscience); Sanders, *Ninth Life*, *supra* note 7, at 818, 823 (sexual expression and autonomy, procreative choice); Lash, *The Lost Original Meaning*, *supra* note 27, at 365 (conscience, acquiring property); Ostler, *supra* note 27, at 46–93 (retaining U.S. citizenship, association, judicial review, zone of privacy, travel within the United States, educating one’s children, freely choosing a profession, among many others). State and federal courts have also addressed possible candidates. *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (marital privacy); Palmer v. Thompson, 403 U.S. 217 (1971) (marry); Lubin v. Panish, 415 U.S. 709 (1974) (vote); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (right of public and press to attend criminal trials). *See also* Rhoades & Patula, *supra* note 21, at 160–69; Bonham, *supra* note 213, at 1325–26.

The students in my Ninth Amendment Seminar at the University at Buffalo School of Law proposed other, very interesting, candidates: bodily autonomy (Chloe Combs), a minimally adequate education (Jack Weisbeck), dignity and the treatment of the mentally ill (Ron Oakes), the right to build (Alec Herbert), the right to petition asylum (Marc Gull), the right to be free from government violence (Lexi Horton), the right to clean water (Michael Johnson) and clean air (Zachary Schuler), and the right to health care (Erin Pierchala). Three other students proposed very creative proposals regarding the operation of the Ninth Amendment itself: how the Ninth Amendment requires a general theory of constitutional interpretation that considers current ideological worldviews (Daniel Russell), how the Ninth Amendment can work as a more effective tool to identify rights normally associated with the concept of substantive due process (Gabriella Decker), and a more general reflection on what the Ninth Amendment is meant for (Jonathan Oster).

independent, separate right. As Douglas observes, “[t]he U.S. Constitution merely implies the right to vote.”³²⁴

In that sense, the right to vote is not part of the enumeration of rights mentioned in the first phrase of the Ninth Amendment. But because the enumeration of certain rights in the Constitution “shall not be construed to deny or disparage others retained by the people,”³²⁵ we must now analyze whether the right to vote is one of those “other” rights that are subject to Ninth Amendment protection.

As we saw, one of the roles played by the Ninth Amendment is a sort of Necessary and Proper Clause for rights. In other words, it allows interpreters to turn an inferred or implied right into a full-fledged constitutional right. Can the right to vote be inferred from any of the provisions of the U.S. Constitution? All evidence points to an affirmative answer.

There are several provisions of the Constitution that point to the existence of an individual right to vote, even if there is no explicit granting of that right. Some of these provisions achieve this directly while others are more indirect.

With regard to the first group, we can point to multiple provisions, some of which form part of the original Constitution, while others were adopted after the Ninth Amendment became effective. As we saw, this makes no difference for Ninth Amendment purposes. This first group contains instances where there is a direct mention of the concept of voting, but that still falls short in recognizing a basic, separate right to vote in the first place. First, the Fourteenth Amendment states:

[W]hen the *right to vote at any election* for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.³²⁶

³²⁴ Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 95 (2014).

³²⁵ U.S. CONST. amend IX.

³²⁶ U.S. CONST. amend XIV, § 2 (emphasis added).

In addition, Section 1 of the Fifteenth Amendment commands that: “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”³²⁷ This provision supposes, but does not affirmatively declare, the pre-existence of a general right of citizens to vote in federal or state elections.

Something similar happens with regard to the Nineteenth Amendment: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.”³²⁸ For its part, the Twenty-Fourth Amendment states: The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.³²⁹

The Twenty-Sixth Amendment instructs that “[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.”³³⁰ Finally, the Seventeenth Amendment orders that “[t]he Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years.”³³¹

Still, regardless of all of these obvious references to the right to vote, there is no separate provision that grants it in the first place. All of the cited provisions merely *elaborate* on the right, *supposing* its pre-existence; a pre-existence that is not explicitly stated.

With regard to the second group, there are also multiple provisions that indirectly signal the existence of an undeclared right to vote. First, the first phrase of Article 1, Section 2 states that: “The House of Representatives shall be composed of Members *chosen* every second Year *by the People* of the several States.”³³² That the people are able to choose members of the House of Representatives suggests the

³²⁷ *Id.* amend XV, § 1 (emphasis added).

³²⁸ *Id.* amend XIX (emphasis added).

³²⁹ *Id.* amend XXIV, § 1 (emphasis added).

³³⁰ *Id.* amend XXVI, § 1 (emphasis added).

³³¹ *Id.* amend XVII (emphasis added).

³³² *Id.* art. I, § 2, cl. 1 (emphasis added).

exercise of an election which, in turn, supposes individual suffrage. Second, the last sentence of Article 1, Section 2 states that: “When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue *Writs of Election* to fill such Vacancies.”³³³ Again, elections imply voting. Third, the first phrase of Article I, Section 4 references “[t]he Times, Places and Manner of holding *Elections* for Senators and Representatives. . . .”³³⁴

In addition to individual provisions that hint at the existence of an unenumerated right to vote, there are structural considerations that confirm this suspicion. The entire existence of the House of Representatives is premised on popular elections which, in turn, are premised on some sort of voting.³³⁵ In addition, the Republican Guarantee Clause in Article IV, Section 4 further cements the notion of republicanism which, in turn, requires basic democratic practices, including citizen participation in the selection of their leaders.³³⁶

From all of these textual provisions we can infer a general right to vote for all citizens of the United States. *But the analysis under the Ninth Amendment has only just started.*

Now we turn to state sources to see if the people have used them to retain their right to vote. Unsurprisingly, there is an entire universe of state sources recognizing and channeling an individual’s right to vote in federal, state, and local elections, including in state constitutions and statutes. As Douglas explains, “[v]irtually *every* state constitution confers the right to vote to its citizens *in explicit terms*.”³³⁷ More specifically, “[f]orty-nine states explicitly grant the right to vote through specific language in their state constitutions.”³³⁸ As to the right itself, the most common

³³³ *Id.* art. I, § 2, cl. 4 (emphasis added).

³³⁴ *Id.* art. I, § 4, cl. 1 (emphasis added). Section 5 of Article I also references elections. *Id.* art. I, § 5, cl. 1.

³³⁵ *See id.* art. I, § 2, cl. 1.

³³⁶ *Id.* art. IV, § 4.

³³⁷ Douglas, *supra* note 324, at 91.

³³⁸ *Id.* at 101. The only outlier is Arizona, which addresses the right to vote in negative terms, similar to the U.S. Constitution. *Id.* at 102.

characteristic is that it must be exercised by citizens who are over eighteen years of age and are *bona fide* residents of the particular state.³³⁹

These state sources easily satisfy the 3/4 threshold for amendments under Article V of the U.S. Constitution.³⁴⁰ Specifically, they signal an unequivocal desire of the people of the United States to protect their retained right to vote in democratic elections at all levels of government. As Douglas suggests, the answer to the “puzzle of how best to protect voting rights . . . is right in front of us: state constitutions.”³⁴¹ More importantly, the Ninth Amendment connects these state constitutional rights *directly to the U.S. Constitution as a federally protected right*.³⁴²

There are also, of course, historical considerations that strongly indicate the existence of an unenumerated right to vote as part of the U.S. constitutional project. For example, the English Bill of Rights, after chastising King James II for “violating the freedom of *election* of members to serve in Parliament,”³⁴³ specifically asserts “[t]hat *elections* of members of Parliament ought to be *free*.”³⁴⁴ For his part, Blackstone states:

If these persons had votes, they would be tempted to dispose of them under some undue influence or other. This would give a great, an artful, or a wealthy man, a larger share in elections than is consistent with general liberty. If it were probable that every man would give his vote freely and without influence of any kind, then, upon the true theory and genuine principles of liberty, every member of the community, however poor, should have a vote in electing those delegates, to whose charge is committed the disposal of his property, his liberty, and his life.³⁴⁵

³³⁹ *Id.* at 101–02. Some state constitutions, but not a majority, have restrictions for felons. *Id.* at 102. Many state constitutions give some leeway to their legislatures in terms of being able to adopt mechanisms to avoid fraud and preserve the integrity of elections. *Id.*

³⁴⁰ U.S. CONST. art. V.

³⁴¹ See Douglas, *supra* note 324, at 91 (stating that state constitutions are the best way to protect people’s right to vote).

³⁴² See U.S. CONST. amend. IX.

³⁴³ English Bill of Rights 1689, 1 W. & M. c. 2 (emphasis added).

³⁴⁴ *Id.* (emphasis added).

³⁴⁵ 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 171 (Phila., J.B. Lippincott Co. 1753).

In the specific context of the American colonies, the Declaration of Independence makes constant references to the breaches of individual rights related to the existence and operation of elected representative bodies on the part of the British Crown.³⁴⁶ The overriding principle behind these assertions is the right to elect governmental authorities. Post-ratification history also reveals a consistent protection and expansion of the right to vote in the United States.³⁴⁷

According to Madison, “[t]he right of suffrage is a *fundamental* Article in Republican Constitutions.”³⁴⁸ He went on to emphasize its importance and the need for its continued expansion.³⁴⁹ In a similar vein, Justice Story linked the U.S. political system with “the principle of representation. The American people had long been in the enjoyment of the privilege of electing, at least, one branch of the legislature; and, in some of the colonies, of electing all the branches composing the legislature.”³⁵⁰ This history is inherently related to a general right of suffrage.³⁵¹

These sources—state constitutional and historic—strengthen the notion that the right to vote is one of those unenumerated rights that was so obvious and inherent to the system set up by the federal Constitution, as to escape specific assertive enumeration. The Ninth Amendment makes sure that this omission does not deny or disparage an individual’s right to vote and the availability of federal judicial protection of that right.³⁵²

³⁴⁶ See THE DECLARATION OF INDEPENDENCE paras. 4, 6, 7, 18 & 23 (“He has refused to pass other Laws for the accommodation of large districts of people, *unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.*”; “He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people.”; “He has refused for a long time, after such dissolutions, *to cause others to be elected; whereby the Legislative powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the meantime exposed to all the dangers of invasion from without, and convulsions within.*”; “For imposing Taxes on us without our *Consent.*”; “*For suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.*”) (emphasis added).

³⁴⁷ See U.S. CONST. amends. XV, XIX, XXIV & XXVI.

³⁴⁸ JAMES MADISON, *Property and Suffrage: Second Thoughts on the Constitutional Convention (1821)*, in THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 501, 502 (Marvin Meyers ed., 1973).

³⁴⁹ See *id.* at 502–09.

³⁵⁰ 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 572 (Lonang Inst. 2005) (1833).

³⁵¹ *Id.* § 578.

³⁵² U.S. CONST. amend. IX.

While the *original* right to vote may have been considerably limited—excluding non-white, non-male, non-wealthy people from access to that right—the continued development of the right to vote, *including the adoption of later constitutional amendments*, has now turned into a *general right of every adult citizen in the United States*.³⁵³ In addition, because of its historical importance and due to the fact that it permeates the entire constitutional structure, the right to vote must be deemed as *fundamental*, which can only be denied in the narrowest of circumstances. Finally, we can also safely assume that the unenumerated right to vote protects against encroachment from both the federal and state governments.

In summary, the existence of an unenumerated right to vote can be identified from: (1) an inference from different textual provisions in the U.S. Constitution, (2) its inherent relation with the political structure established by that document, (3) its historical circumstances, (4) its ubiquitous presence in state sources, including state constitutions and statutes, and (5) its ideological connection with the predominant view at the time of the founding regarding individual rights and the ‘rights of Englishmen,’ among many other considerations. By way of the Ninth Amendment, all of these factors converge and require the recognition of the judicially enforceable, unenumerated right of all capable adult citizens in the United States to vote in federal, state, and local elections.

3. The Right to Personal Autonomy

We now turn to the right to *personal autonomy*. Again, we apply the approach described throughout this Article, starting with the basic premise: this right is not explicitly granted by the U.S. Constitution. Like with the right to vote, there are some provisions that hint at its existence but do not declare it explicitly. But because the enumeration of certain rights in the Constitution shall not be construed to deny or disparage others retained by the people, we must now analyze if the right to personal autonomy is one of those “other” rights that are subject to Ninth Amendment protection. Once again, we start with an inference exercise.

Autonomy is inherently connected to the ability of making individual choices. Choice, in turn, implies the power to select among many options. The ability to exercise constitutional rights is, by definition, *a choice*. As a general matter—subject to important exceptions and qualifications—no one is compelled to exercise their rights if they freely choose not to. As such, *the very existence of individual rights supposes personal autonomy to decide whether to exercise them at all, and under*

³⁵³ I propose that this articulation constitutes an adequate level of generality for this particular right.

what circumstances. This is inherent to the notion of a republican system. This, in turn, is related to *how* we exercise those rights. A few examples should suffice.

The right to speak requires a conscious decision as to *what to say*. This implies choice and autonomy. The same thing applies to the right to worship freely. *Even the unenumerated right to vote supposes choice: who to vote for*. This could also imply that one enumerated right can be derived from another. The notion of *due process of law* enshrined in the Fifth and Fourteenth Amendments also suggests the notion of being free from unwarranted intrusion into our personal *liberty*.³⁵⁴ Something similar happens with the right to be “secure in [our] persons” as recognized by the Fourth Amendment.³⁵⁵

But no other provision of the Constitution more clearly supposes the right to personal autonomy than the Thirteenth Amendment. Its prohibition against the institution of slavery and involuntary servitude suggests the existence of an individual right to live freely, to engage in personal self-determination, and to make independent life choices. And because the Thirteenth Amendment is of fundamental value and applies against both governmental action—whether state or federal—as well as private conduct, we can also conclude that the unenumerated right to personal autonomy shares those characteristics.

The notion of personal autonomy also has deep historical roots.³⁵⁶ In addition, there are multiple state constitutional provisions that cement this basic individual

³⁵⁴ Liberty, of course, is mentioned in the Constitution in its Preamble and in the Fifth and Fourteenth Amendments. There are two important reasons why the concept of “personal autonomy” should be considered separate, although related, with the term liberty as used in the cited amendments and with the due process clauses more generally. First, because the term liberty is significantly abstract, and it is very difficult to identify a principled mechanism to derive specific instances from that word. And second, because the due process clauses—which are the ones that mention liberty in the first place—are written in procedural terms. So instead of making arguments regarding substantive due process—which are quite open to intellectual attacks—asserting the existence of a Ninth Amendment right to personal autonomy seems a quicker and sturdier alternative.

³⁵⁵ U.S. CONST. amend. IV.

³⁵⁶ See *Hodes v. Schmidt*, 440 P.3d 461, 525 (Kan. 2019) (citing JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 27 (Gryphon ed., 1994) (1698) (“[E]very Man as a Property in his own Person.”)); *id.* at 480 (citing JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING BOOK II: IDEAS § 8 (Hackett Publishing Co. 1996) (1698)) (“[S]o far as man as power to think, or not to think; to move or not to move, according to the preference or direction of his own mind; so far is a man free.”); BLACKSTONE, *supra* note 345, at 129–38; Raymond H. Brescia, *Social Change and the Associational Self: Protecting the Integrity of Identity and Democracy in the Digital Age*, 125 PENN. ST. L. REV. 773, 779–99 (2021); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (“Those who won our independence believed that the final end of the State was to make men free to develop their faculties. . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and

right.³⁵⁷ The combined normative weight of these considerations strongly favors the existence of an enforceable unenumerated right to personal autonomy.

In summary, the existence of an unenumerated right to personal autonomy can be identified from: (1) an inference from different textual provisions in the U.S. Constitution, (2) its inherent relation with the republican system established by that document, (3) its historical circumstances, (4) its ubiquitous presence in state sources, including state constitutions, and (5) its ideological connection with the predominant view at the time of the founding regarding individual rights, among many other considerations. By way of the Ninth Amendment, all of these factors converge and require the recognition of the judicially enforceable, unenumerated right of all capable adults to make, for themselves, the most basic decisions regarding their identity, body, beliefs, and life choices. It is, in the end, the ability to govern ourselves.

4. The Right to Privacy

Then there is the right to *privacy*, which is infamously missing from text of the U.S. Constitution. Like with the right to vote, there are some provisions that hint at its existence but do not declare it explicitly.³⁵⁸ But because the enumeration of certain rights in the Constitution shall not be construed to deny or disparage others retained by the people, we must now analyze if the right to privacy is one of those “other” rights that are subject to Ninth Amendment protection. Once again, we start with an inference exercise.

While there are many provisions in the U.S. Constitution that have a link with the concept of privacy, one in particular stands out: the Fourth Amendment.³⁵⁹ This constitutional provision recognizes “[t]he right of the people to be secure in their

spread of political truth; that without free speech and assembly, discussion would be futile. . . .”); CALEB PERRY PATTERSON, CONSTITUTIONAL PRINCIPLES OF THOMAS JEFFERSON 189 (1953); *Letter from Thomas Jefferson to Miles King (Sept. 26, 1814)*, reprinted in 14 THE WRITINGS OF THOMAS JEFFERSON 196 (Albert E. Bergh ed., 1907).

³⁵⁷ See, e.g., KAN. CONST. § 1; IOWA CONST. art. I, § 1; MONT. CONST. art. II, § 10; HAW. CONST. art. I, § 6; ILL. CONST. art. I, § 6; ALASKA CONST. art. I, § 1. Many of these provisions refer to a general right of privacy that state supreme courts have interpreted as encompassing a right to personal autonomy.

³⁵⁸ Instead of thinking in terms of *penumbras*, it is more effective to approach to issue, as a first step, from the perspective of implication or inference.

³⁵⁹ The Third Amendment, hardly mentioned in U.S. constitutional law, also has important privacy implications. See U.S. CONST. amend. III. Something similar could be said of the two liberty provisions in the Fifth and Fourteenth Amendments. See U.S. CONST. amends V & XIV.

persons, houses, papers, and effects, against unreasonable searches and seizures”³⁶⁰ Although written in negative terms (“shall not be violated”), it is undoubtedly an assertive provision, similar to what we saw with regard to the First Amendment.

The connecting thread in terms of security with relation to our persons, houses, papers, and effects is the existence of a *personal space* that belongs to each individual. The notion of being “secure” in those spaces refers to the ability to enjoy those personal spaces free from outside intervention. This is the essence of *privacy*: the right to be in a space, including physical, informational, and personal, that others cannot normally invade.

While an express right to privacy is not enumerated in the federal Constitution, several *state* constitutions include provisions explicitly recognizing privacy as an individual right.³⁶¹ Some state supreme courts have also interpreted their state constitutions to include a general right to privacy.³⁶² While these states do not reach the three-fourths threshold for an Article V amendment, the number of state constitutions that recognize an explicit or implicit right to privacy is significant and, when considered in combination with other factors, tilts the balance in favor of its recognition under the Ninth Amendment.

For example, the right of privacy, like with personal autonomy, has significant historical roots.³⁶³ In particular, Blackstone states:

[N]ay, that even laws themselves, whether made with or without our consent, if they regulate and constrain our conduct in matters of mere indifference, without any good end in view, are laws destructive of liberty: whereas if any public advantage can arise from observing such precepts, the control of our private

³⁶⁰ U.S. CONST. amend. IV.

³⁶¹ See, e.g., ALASKA CONST. § 22; ARIZ. CONST. § 8; CAL. CONST. § 1; FLA. CONST. § 23; HAW. CONST. § 6; ILL. CONST. § 6; LA. CONST. § 5; MONT. CONST. § 10; N.H. CONST. art. 2-b; S.C. CONST. § 10; WASH. CONST. § 7. In 2022, the voters of Michigan and Vermont amended their state constitutions to expressly protect reproductive freedom and choice. MICH. CONST. art. I, § 28; VT. CONST. art. 22.

³⁶² See, e.g., John Paul Marshall, *Twenty-Fifth Issue on State Constitutional Law: State Constitutional Law—Privacy—Search and Seizure Lockstep: The Illinois Supreme Court’s Narrow Conception of Privacy Limits the Reach of its State Constitutional Provision*. *People v. Hollins*, 971 N.E.2d 504 (Ill. 2012), 44 RUTGERS L.J. 761, 771 n.77 (2014); J. Lyn Entrikin, *The Right of Privacy in Arkansas: A Progressive State*, 35 U. ARK. LITTLE ROCK L. REV. 439, 441 (2013).

³⁶³ See Judge Harold R. Demoss Jr. & Michael Coblenz, *An Unenumerated Right: Two Views on the Right of Privacy*, 40 TEX. TECH. L. REV. 249, 272 (2008).

inclinations, in one or two particular points, will conduce to preserve our general freedom in others of more importance; by supporting that state, of society, which alone can secure our independence.³⁶⁴

In that sense, while “[t]he right to privacy is as a *legal concept*, a fairly recent invention,”³⁶⁵ the idea itself has deep roots in the common law.³⁶⁶ This right protects an intimate zone where we are able to dwell alone to the exclusion of others. It also encompasses other intimate spheres such as our family lives.

The combined normative weight of these considerations strongly favors the existence of an enforceable unenumerated right to privacy. Specifically, the existence of an unenumerated right to privacy can be identified from: (1) an inference from different textual provisions in the U.S. Constitution, particularly the Fourth Amendment, (2) historical sources, and (3) its ubiquitous presence in state sources, including state constitutions, among many other considerations. By way of the Ninth Amendment, all of these factors converge and require the recognition of the judicially enforceable, unenumerated right of all persons, particularly adults, to enjoy a personal space, which includes, but is not limited to the physical, that is shielded from outside intervention.

5. The Right of Association

Finally, we address the right of *association*. Once again, we apply the approach described throughout this Article, starting with the basic premise: this right is not explicitly granted by the U.S. Constitution. Like with the other rights discussed earlier, there are some provisions that hint at its existence but do not declare it explicitly. But because the enumeration of certain rights in the Constitution shall not be construed to deny or disparage others retained by the people, we must now analyze if the right of association is one of those “other” rights that are subject to Ninth Amendment protection. One last time, we start with an inference exercise.

The main source for an inferred or implied right of association in terms of the enumerated rights in the U.S. Constitution is, without a doubt, the First Amendment which states, in relevant part, that “Congress shall make no law . . . abridging . . . *the right of the people peaceably to assemble*, and to petition the Government for a redress of grievances.”³⁶⁷ Although a more general right to *associate* transcends the

³⁶⁴ BLACKSTONE, *supra* note 345, at 126.

³⁶⁵ Dorothy J. Glancy, *The Invention of the Right to Privacy*, 21 ARIZ. L. REV. 1 (1979) (emphasis added).

³⁶⁶ *Id.* at 2 (“[A]n already existing common law right.”).

³⁶⁷ U.S. CONST. amend. I (emphasis added).

mere ability to *assemble*, the former stands as the conceptual articulation of the latter. In other words, the right to assemble does not just refer to a particular physical act done at a specific instance. The “right of the people peaceably to assemble” requires, as a conceptual foundation, the legal right to coordinate with other persons.

Moreover, notice that the operative term is “assemble” which, unlike “gather,” has evident political connotations. The political nature of the right to assemble strongly suggests the right to, therefore, engage in collective political action with other like-minded individuals. In addition, the location of the right of the people peaceably to assemble strengthens its political characteristics and its normative consequences. The fact that this right is located in the First Amendment, right after speech and press, is indicative of its normative content. Finally, just as a broader right of expression can be derived from the seemingly narrower rights of speech and press, so can a broader right of association be derived from the seemingly narrower right to peaceably assemble.

Some states recognize the right of association in their individual constitutions,³⁶⁸ although most of them do it using a wording similar to the First Amendment with respect to the right of the people to assemble peacefully. From a historical perspective, the right of association has similarly been recognized as a convergence between the enumerated rights of speech and to peacefully assemble.³⁶⁹ It has also been seen as a necessary byproduct of republican government. Writing in 1875, the U.S. Supreme Court stated that “[t]he very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.”³⁷⁰

The combined normative weight of these considerations strongly favors the existence of an enforceable, unenumerated right of association. Specifically, the existence of an unenumerated right of association can be identified from: (1) an inference from different textual provisions in the U.S. Constitution, particularly the First Amendment, (2) historical sources, and (3) its presence in state sources, including state constitutions, among many other considerations. By way of the Ninth Amendment, all of these factors converge and require the recognition of the judicially enforceable, unenumerated right of all persons to associate with other persons, as long as they do so in a peaceful manner.

³⁶⁸ See, e.g., OKLA. CONST. art. II, § 3; VA. CONST. art. I, § 12; N.H. CONST. art. 32; IND. CONST. art. I, § 31; LA. CONST. art. I, § 9.

³⁶⁹ See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

³⁷⁰ *United States v. Cruikshank*, 92 U.S. 542, 552 (1875).

F. Some Final Thoughts

The Ninth Amendment's full story is yet to be told. It still lies dormant under the doctrinal waves waiting to be rediscovered in order to take its rightful place among the provisions of the Constitution that positively impact the daily lives of its citizens.

The Bill of Rights spared us from the dangerous consequences of total silence, and the Ninth Amendment protected us from the unavoidable imperfection of enumeration. For more than two centuries, the federal judiciary has been enforcing most of the Bill of Rights with the stated aim of protecting individual rights. This history has been wildly inconsistent. But one consistent factor has been the relegation of the Ninth Amendment to near constitutional oblivion. What should arguably be the most dynamic, active, and effective rights provision in the Constitution has become a prisoner of hesitancy and intellectual abdication on the part of those whose task is to enforce it.

Among the many possible reasons for this situation is the difficulty of moving from the text of Ninth Amendment to the enforcement of unenumerated rights. To many, this sounds like constitutional alchemy; it is undoubtedly a hard problem. Actually, it is *the* hard problem of U.S. constitutional law. But hard problems are not unsolvable: the task of carrying out the textual commands of the amendment regarding the proper identification of judicially enforceable unenumerated rights is not out of our reach. The tools are there for any to use.

In this Article, I have attempted to demonstrate that the Ninth Amendment fulfills several roles at once. Chief among these is the recognition of judicially enforceable unenumerated rights that can be discerned from a combination of textual inference, state law, and historical sources, among other things. It also guides our interpretation of enumerated rights and their relationship with unenumerated rights. And in the current climate of significant erosion of federal constitutional protections, the Ninth Amendment remains the last great untapped source of constitutional rights. Hopefully it is not too late.