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REVITALIZING THE QUIET NINTH AMENDMENT: DETERMINING UNENUMERATED RIGHTS AND ELIMINATING SUBSTANTIVE DUE PROCESS

Christopher J. Schmidt†

I. INTRODUCTION

Do people have a constitutional right to clone themselves? Does an individual have a constitutional right to receive health care? One day, these issues may be adjudicated in the United States' federal court system, most likely the United States Supreme Court, but what constitutional provision will govern the dispute? Under current law, the Due Process Clause of the Fourteenth Amendment determines if the liberty interest contained therein encompasses the proposed right. The text of the Constitution, however, requires that the Ninth Amendment govern whether the people retain an unenumerated right.

Part I of this article discusses the development of the substantive due process doctrine. The Fifth and Fourteenth Amendments have parallel provisions preventing the federal and state governments, respectively, from denying "life, liberty, and property without due process of law."¹ The substantive due process doctrine turns due process from a mechanism ensuring procedural fairness when the government attempts to deny life, liberty, or property, into a fourth protected entity that determines whether or not fundamental rights exist that are not enumerated within the Constitution. Under the doctrine, due process has some "substantive" quality that forms and then falls under the liberty provision. It is this judicial creation, void of text-based constitutional support, that has provided unpredictable legal standards and results because it can be bent to meet any ends necessary. However, this inconsistency can be easily eradicated by applying the text of the Ninth Amendment to determine unenumerated rights issues.

Sparse analysis of the Ninth Amendment by both courts and scholars makes it difficult to determine where Ninth Amendment jurisprudence stands. The Ninth Amendment states that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."² In contemporary constitu-

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1. U.S. CONST. amend. V, XIV.
2. U.S. CONST. amend. IX.

tional discussions, the analytical process generally requires sifting through a tremendous amount of material to reach a result. The Ninth Amendment is almost the direct opposite. Until 1965, only about ten Supreme Court cases mentioned the Ninth Amendment, and no case has relied on it as an exclusive or primary rule in its decision.³ The spark igniting the Ninth Amendment debate arose from Justice Goldberg's concurring opinion in *Griswold v. Connecticut*,⁴ in which he found a right to privacy to exist under the amendment.⁵ That opinion created a slight commotion in legal circles. Since then, the Ninth Amendment received serious attention as a possible source for protecting individual rights within the Constitution.⁶ The scholarly interest in the amendment fostered some intense and disputatious bursts of intellectual discourse.⁷ The United States Supreme Court, however, has sparingly applied the Ninth Amendment, and the substantive due process standard remains in full effect.⁸ Therefore, the time is right to sort through this body of material and develop a clear understanding of the Ninth Amendment with an appropriate test to analyze whether or not certain actions or behaviors are recognizable as unenumerated rights, while eliminating the judicially created substantive due process doctrine.

Part II of this article examines the text of the Ninth Amendment. The plain meaning of the amendment sanctions its authority to adjudicate whether an unenumerated right exists warranting constitutional recognition. This contradicts current jurisprudence adopting a substantive due process component in the Fourteenth Amendment. The language of the Ninth Amendment cannot be contradicted or supported by any attempt to analyze what the amendment's drafter, James Madison, thought the amendment means. His alleged view, which we cannot be sure of, cannot trump the text of the amendment. Because the text itself is so important, relying on the Founders' intent, particularly on Madison, to support conclusions about the Ninth Amendment's meaning is a dangerous fallacy. The one document the Founders agreed upon was the text of the Ninth Amendment. That text governs unenumerated rights, not what a modern-day scholar thinks Madison thought the Ninth Amendment meant. Because the

3. Chase J. Sanders, *Ninth Life: An Interpretive Theory of the Ninth Amendment*, 69 IND. L.J. 759, 761 (1994).

4. 381 U.S. 479 (1965).

5. *Id.* at 486-87.

6. See generally Gregory Allen, *Ninth Amendment and State Constitutional Rights*, 59 ALB. L. REV. 1659, 1660 (1996) (citing Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, in RANDY E. BARNETT, *THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT* 243 (Randy E. Barnett ed., 1989)).

7. Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U.L. REV. 550, 622-23 (1992).

8. See *Griswold*, 381 U.S. 479.

Ninth Amendment grants the people unenumerated rights, the judiciary has a duty to recognize them when federal or state governments infringe upon those rights.⁹ That 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 unconstitutional infringement. Natural law principles, the virtually undisputed philosophical backdrop of the Founders, and the Constitution, further support an interpretation of the Ninth Amendment granting the people rights not expressly enumerated elsewhere in the Constitution.¹⁰

I evaluate unenumerated rights under the Ninth Amendment interpretive paradigm listed above. My approach flows from the text of the Ninth Amendment and blends the original meaning of the text with current norms to determine if a proposed unenumerated right warrants constitutional recognition. If a preponderance of the evidence shows the proposed right deserves constitutional protection, it will be considered an unenumerated right and be free of government regulation absent a narrowly tailored, compelling government interest. If a preponderance of the evidence shows the proposed right does not deserve constitutional protection, it will not be considered an unenumerated right and the federal government can regulate it if it is rationally based on a legitimate government interest. This stable, text-based approach will eliminate the flawed substantive due process test and provide more consistent and credible standards and results.

Part III of this article explains problems in the traditional reading of the Ninth Amendment. That approach ignores the plain meaning of the Ninth Amendment for a structural interpretation of its content. This view proposes that the Ninth Amendment only ensures that the rights enumerated in the first eight amendments are protected from the federal government's limited powers. This contradicts the Ninth Amendment's express grant of unenumerated rights retained by the people. The traditional approach also neglects to apply the Ninth Amendment against the states, although as a portion of the Bill of Rights it is a privilege and immunity of citizenship that no state can abridge under the Fourteenth Amendment.¹¹

State constitutional provisions adopting language mirroring the Ninth Amendment prove that the traditional reading of the Ninth Amendment is inaccurate. If the traditional approach is correct, and the Ninth Amendment forever places a line between federal rights and powers, thereby leaving the remaining power to the states, then why does any state need to repeat that proclamation in its state constitution? Because the majority of states adopt a Ninth Amendment like

9. See Allen, *supra* note 6, at 1662.

10. See generally *Criswold*, 381 U.S. 479.

11. See U.S. CONST. amend. XIV; see also *infra* Part II.B.

declaration, we know that the amendment grants the people rights that were not mentioned in the Constitution. Therefore, state constitutions following that mantra directly protect their citizens by granting them unenumerated rights not present in their state constitutions.

II. SUBSTANTIVE DUE PROCESS AND NINTH AMENDMENT LAW

A. *The Development of Substantive Due Process Law*

In *Lochner v. New York*,¹² an owner of a bakery was convicted under a New York state law that prohibited employers from requiring or allowing their employees to work in excess of a sixty hour work week, or more than ten hours a day.¹³ The Court overturned the conviction finding that entering into an employment contract was a substantive right under the Fourteenth Amendment and constituted a protected liberty interest.¹⁴ The Court's legal trick turned the procedural command of the Due Process Clause – that life, liberty, or property could not be taken without sufficient procedural safeguards – into a substantive form of due process wherein unenumerated rights could be based.¹⁵

The Court's assertion that the right to enter into an employment contract was protected by the Fourteenth Amendment was inaccurate because the amendment does not explicitly provide for such a protection.¹⁶ The Court "manufactured a constitutional right . . . out of its substantive formulation of due process."¹⁷ The decision, devoid of a textual foundation, stands as a startling example of judicial intervention into the political choices of the legislature; thus, it serves as a cautionary tale of the inappropriate exercise of judicial power.¹⁸ *Lochner* effectively immortalized the substantive due process mechanism that is still the standard for analyzing claims regarding unenumerated constitutional rights today.¹⁹

12. 198 U.S. 45, 46 n.1 (1905).

13. Marc C. Niles, *Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights*, 48 UCLA L. REV. 85, 144 (2000) (citing *Lochner*, 198 U.S. at 46 n.1).

14. *Id.* at 145 (citing *Lochner*, 198 U.S. at 57).

15. *Id.* The precise birth of substantive due process is difficult to ascertain. Its origin may be *Dred Scott v. Sanford*, 313 U.S. 236 (1857) (noting that a slave who went to a free state was not free upon return to the slave state). The Court read into the Constitution the legality of slavery forever and denied the federal and state governments from preventing slavery. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 32 (Collier MacMillan 1990).

16. *Id.* at 145.

17. *Id.*

18. *Id.* at 146 (citing *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting)).

19. Niles, *supra* note 13, at 145 (citing *Washington v. Glucksberg*, 521 U.S. 702, 719-36 (1997)) ("[A]pplying substantive due process analysis in determining that there is no constitutional right to physician-assisted suicide.").

After *Lochner*, substantive due process inappropriately developed into “the primary textual basis for recognizing or rejecting ‘unenumerated’ fundamental rights.”²⁰ In *Meyer v. Nebraska*,²¹ the Court struck down a Nebraska statute preventing instructors from teaching students foreign languages before a student passes eighth grade.²² The Court concluded that individuals have “certain fundamental rights which must be respected.”²³ In so doing, the Court held that the right of the instructor to teach, and the parent’s right to obtain instruction for their child was within the liberty component of the Fourteenth Amendment.²⁴ The words of the Court’s opinion show the illogical nature of substantive due process.²⁵ A fundamental *right* of the instructor and parents was at stake, not necessarily their lib-

20. James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 56 (1995). As noted in the Fleming’s article, the following cases adopt the substantive due process analysis to determine if an unenumerated or fundamental right exists: *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (“liberty of conscience and freedom of thought”); *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984) (“freedom of association, including both expressive association and intimate association”); *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977) (“right to live with one’s family, whether nuclear or extended”); *Shapiro v. Thompson*, 394 U.S. 618, 629-30 (1969) (“right to travel or relocate”); *Turner v. Safley*, 482 U.S. 78, 95-96 (1987) (“right to marry”); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“right to marry”); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (“right to procreate”); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (“right within marital association to use contraceptives”); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“right of individual, married or single, to use contraceptives”); *Carey v. Population Servs. Int’l*, 431 U.S. 678, 694 (1977) (“right to distribute contraceptives”); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (“right of a woman to decide whether to terminate a pregnancy”); *Planned Parenthood v. Casey*, 505 U.S. 833, 861 (1992) (“reaffirming ‘central holding’ of *Roe*”); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (“right to direct the education of children”); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925) (“right to direct the upbringing and education of children”); *Washington v. Harper*, 494 U.S. 210, 221-22 (1990) (“right to bodily integrity, in particular, to avoid unwanted administration of anti-psychotic drugs”); *Rochin v. California*, 342 U.S. 165, 172-73 (1952) (“right to bodily integrity, in particular, to be protected against the extraction of evidence obtained by ‘breaking into the privacy’ of a person’s mouth or stomach”); *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261, 279 (1990) (“assuming for purposes of the case a ‘right to die’”); *Id.* at 339-45 (Stevens, J., dissenting) (“arguing that decisions about death are a matter of individual conscience”); *see also Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (“right of privacy includes both an ‘individual interest in avoiding disclosure of personal matters’ and an ‘interest in independence in making certain kinds of important decisions’”); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (“right to receive ideas and to be free from unwanted government intrusions into the privacy of one’s home”). *Id.* at 7 n.27

21. 262 U.S. 390 (1923).

22. *Id.* at 400.

23. *Id.* at 401.

24. *Id.* at 400.

25. *Id.* at 399-400.

erty.²⁶ If an unenumerated *right* is at issue, then the Ninth Amendment governs the adjudication of that legal claim.²⁷ In *Pierce v. Society of the Sisters of the Holy Names*,²⁸ the Court invalidated an Oregon statute requiring parents and/or guardians of children to send them to public school.²⁹ The Court stated that “rights guaranteed by the Constitution may not be abridged”³⁰ and “those who nurture [a child] and direct his destiny have the right . . . to recognize and prepare him for additional obligations.”³¹ Although unenumerated rights were at issue, the Court followed *Meyer* and based its decision on the liberty component of the Due Process Clause.³² A Connecticut statute preventing the use of contraceptive devices and preventing medical advice related to using those devices was not substantively addressed by the Court in *Poe v. Ullman*.³³ The Court dismissed the plaintiff’s declaratory judgment action because the statute had not been enforced and there was no realistic fear of future prosecution.³⁴

As the Warren Court began to address more fundamental rights issues, it first curtailed its own power to review legislative enactments. In *Ferguson v. Skrupa*,³⁵ the Court upheld a Kansas statute that authorized only lawyers to engage in debt adjustment.³⁶ The Court affirmed its full step back from *Lochner*-type decisions, announcing that it would not strike down laws that it finds are unreasonable, unwise, or incompatible with some economic or social philosophy.³⁷ The Court recognized that states have the ability to legislate “so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.”³⁸ The Court appropriately returned to the original constitutional proposition, in which it does not substitute its own beliefs for the judgment of the legislature.³⁹

Eliminating the “super-legislature”⁴⁰ position of the Court in *Lochner*-type substantive due process claims returned the Court to a textually definitive starting point for substantive due process issues – or did

26. *Meyer*, 262 U.S. at 400.

27. If the Court determined that an enumerated right existed under the Ninth Amendment, the right would have applied against Nebraska through the Privileges and Immunities Clause of the Fourteenth Amendment. See U.S. CONST. amend. XIV.

28. 268 U.S. 510 (1925).

29. *Id.*

30. *Id.* at 535.

31. *Id.*

32. *Id.* at 534-35.

33. 367 U.S. 497 (1961).

34. *Id.* at 508-09.

35. 372 U.S. 726 (1963).

36. *Id.*

37. *Id.* at 729-30.

38. *Id.* at 730-31 (quoting *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 536 (1949)).

39. *Ferguson*, 372 U.S. at 730.

40. *Id.* at 731.

it? The Court only addressed its inability to overturn otherwise constitutional statutes that were unwise, improvident, or out of harmony with a particular school of thought.⁴¹ The Court did not address a return to the constitutional underpinnings of unenumerated rights issues found in the Ninth Amendment. That foundation, if properly laid, would have to come in *Griswold v. Connecticut*.⁴²

B. The Ninth Amendment Affirmatively Enters the Substantive Due Process Analysis

The hallmark case of *Griswold v. Connecticut* forever intertwined substantive due process and Ninth Amendment jurisprudence. At issue before the Court was the constitutionality of a Connecticut statute that prohibited the use or assistance in use of contraceptive devices.⁴³ The Court held that the statute was unconstitutional because it “concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.”⁴⁴ The decision concluded, “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”⁴⁵ The Court found that various guarantees in the Constitution create zones of privacy, such as the right of association in the First Amendment, the right to prohibit the quartering of soldiers in homes in times of peace in the Third Amendment, the right to be free from unreasonable search and seizures under the Fourth Amendment, the right against self-incrimination in the Fifth Amendment, and the Ninth Amendment.⁴⁶

The Court’s mention of the Ninth Amendment as support for its conclusion that a marital zone of privacy exists creates a confusing form of reasoning. The Court enunciates the specific rights held under the First, Third, Fourth, and Fifth Amendments that create a zone of privacy.⁴⁷ However, it only quotes the text of the Ninth Amendment; it does not explain what right under the Ninth Amendment helps mold the zone of privacy recognized.⁴⁸ Furthermore, the Court does not explain or state anything else in reference to the Ninth Amendment. Its text is left dangling before the curious reader’s eyes as though awaiting some explanation. The reason no explanation exists is because the Court cannot give one. It cannot explain how the Ninth Amendment can support recognizing a zone of privacy under the liberty component of the Fourteenth Amendment

41. *Id.* at 731-32 (quoting *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955)).

42. 381 U.S. 479 (1965).

43. *Id.* at 480.

44. *Id.* at 485.

45. *Id.* at 484.

46. *Id.*

47. *Griswold*, 381 U.S. at 484.

48. *Id.*

because the text and meaning of the Ninth Amendment precludes that conclusion. The specific guarantee under the Ninth Amendment is that the people retain unenumerated rights.⁴⁹ Therefore, the Ninth Amendment recognizes the zone of privacy that encompasses a marital couple's choice to use contraceptive devices. *The Ninth Amendment is an authoritative source guaranteeing the zone of privacy, not a persuasive source supporting the constitutional recognition of a zone of privacy through a provision of another amendment.*

Justice Goldberg's concurring opinion, joined by Chief Justice Warren and Justice Brennan, supports the right of marital privacy through precedent and the language and history of the Ninth Amendment.⁵⁰ Justice Goldberg caught the majority's curt mention of the Ninth Amendment as well and explained that his opinion will "add . . . words to emphasize the relevance of that amendment to the Court's holding."⁵¹ He argued that "[t]he 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."⁵² While Justice Goldberg fell into the all-too-familiar trap of relying on James Madison's alleged intent behind the Ninth Amendment, he posited the first substantial judicial body of work advocating a Ninth Amendment adjudication of unenumerated rights issues.⁵³ He concluded that:

To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment, which specifically states that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."⁵⁴

49. U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

50. *Griswold*, 381 U.S. at 486-87 (Goldberg, J., concurring).

51. *Id.* at 487 (Goldberg, J., concurring).

52. *Id.* at 488 (Goldberg, J., concurring).

53. *Id.* at 490-91.

54. *Id.* at 491-92 (quoting U.S. CONST. amend. IX).

As a breakthrough opinion, Justice Goldberg hedged on the limits of Ninth Amendment jurisprudence. He did not proclaim enough of an authoritative Ninth Amendment jurisprudence to evaluate unenumerated rights claims. In addition, he conceded too much and inaccurately provided, "I do not mean to imply that the Ninth Amendment is applied against the states by the Fourteenth."⁵⁵

To ensure, however, that unenumerated rights receive protection from state infringement, the Ninth Amendment must be applied against the states. While it must be admitted that the Bill of Rights was only intended to protect citizens against federal intrusion, and that the states had the ability to determine how they would protect individual liberties,⁵⁶ the incorporation doctrine – holding that particular portions of the Bill of Rights are applicable to the states through the Due Process Clause of the Fourteenth Amendment – is a fictional judicial creation. The Court's selective incorporation of some, but not all, rights to the states, creates a slot machine theory where some rights are in and some are out.⁵⁷ The Ninth Amendment has never been incorporated through the Fourteenth Amendment.⁵⁸ But the Fourteenth Amendment, ratified in 1868, states that "[n]o State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States. . . ."⁵⁹ That clause is "meant to do the work of incorporation."⁶⁰ The clause "is an 'eminently reason-

55. *Griswold*, 381 U.S. at 492 (Goldberg, J., concurring).

56. See generally Sanders, *supra* note 3, at 774-75; Laurence 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, 245 (1988) (noting that the Bill of Rights only restricted the federal government, it did not restrict the States); Lawrence E. Mitchell, *The Ninth Amendment and the "Jurisprudence of Original Intent,"* 74 GEO. L.J. 1719, 1730 (1986) (noting that most commentators agree that the Ninth Amendment was originally meant to apply to the federal government).

57. Sanders, *supra* note 3, at 775 (citing Justice Frankfurter in HENRY J. ABRAHAM, *FREEDOM AND THE COURT* 57 (4th ed. 1982)). A list of the rights incorporated through the Due Process Clause of the Fourteenth Amendment is found in *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968).

58. Calvin R. Massey, *The Anti-Federalist Ninth Amendment and its Implications for State Constitutional Law*, 1990 WIS. L. REV. 1229, 1250 (1990).

59. U.S. CONST. amend. XIV. Unfortunately, the Privileges and Immunities Clause is virtually insignificant in constitutional law. Currently, the privileges and immunities of state citizens are not intended to have any additional protection under the Fourteenth Amendment. *Slaughter-House Cases*, 83 U.S. 36, 74 (1872). Privileges and immunities "owe their existence to the federal government, its National character, its Constitution, or its laws." *Id.* at 79. Thus, the Court essentially deleted the Privileges and Immunities Clause from the Fourteenth Amendment. Akhil Reed Amar, *The Document and the Doctrine*, 114 HARV. L. REV. 26, 123 n. 327 (2000).

60. Sanders, *supra* note 3, at 777 (citing MICHAEL K. CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (Duke Univ. Press 1986) and Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863 (1986)); see also Laurence H. Tribe, *Contrasting Constitutional Visions: Of Real and Un-*

able way of expressing the idea that henceforth the Bill of Rights shall apply to the States.’”⁶¹ The Bill of Rights provisions are obviously privileges and immunities of citizens of the United States; thus, they are incorporated into the Fourteenth Amendment.⁶² The Privileges and Immunities Clause commands that no State can lessen, diminish or impair these rights, which include unenumerated rights under the Ninth Amendment.⁶³ Recognizing the Privileges and Immunities Clause as the incorporation mechanism establishes credibility in the incorporation doctrine and undermines, if not eliminates, the troubling concept of substantive due process.⁶⁴ Precluding the application of the Ninth Amendment directly to the states would eliminate a Ninth Amendment only jurisprudence, rendering the Ninth Amendment merely persuasive, and not a dispositive law regarding unenumerated rights issues. This fails to follow the text of the amendment itself, leaving intact the flawed substantive due process doctrine. Courts would still use the Ninth Amendment as support, along with other portions of the Bill of Rights, to determine whether a fundamental right exists. Furthermore, courts would then likely follow the inaccurate precedent established and apply the right against the states through the Due Process Clause of the Fourteenth Amendment. A

real Differences, 22 HARV. C.R.-C.L. L. REV. 95, 102 (1987) (stating that the substantive due process decisions “might better have been cast in terms of ‘privileges’ or ‘immunities’ of national citizenship” under the Privileges and Immunities Clause of the Fourteenth Amendment); Michael Conant, *Antimonopoly Tradition Under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-Examined*, 31 EMORY L.J. 785, 819 (1982) (“These privileges and immunities of citizens of the United States are found in the original Constitution, in the Bill of Rights, and in English constitutional protections of 1791 preserved by the Ninth Amendment.”).

61. Sanders, *supra* note 3, at 777 (quoting *Duncan*, 391 U.S. at 166 (Black, J., concurring)); see also Thomas K. Landry, *Unenumerated Federal Rights: Avenues for Application Against the States*, 44 U. FLA. L. REV. 219, 223 (1992) (“The Privileges or Immunities Clause would provide a simple and direct textual basis for application of the Bill of Rights to the states.”); Amar, *supra* note 59, at 124 (noting that the Fourteenth Amendment incorporates the Bill of Rights against the states).
62. Sanders, *supra* note 3, at 777. Sanders cites Senator Jacob Howard’s view that the Privileges and Immunities Clause protects fundamental guarantees from state intrusion to support his conclusion. *Id.* at 776 (citing CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866)). I agree with Sanders’ conclusion, however, I reject using a legislator’s view of what a constitutional amendment means when interpreting that amendment. See *infra* Part III.A & C.
63. Michael Kent Curtis, *Resurrecting the Privileges and Immunities Clause and Revising the Slaughter-House Cases without Exhuming Lochner: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. REV. 1, 21 (1996). Text, context, history, ethical aspirations, precedent and constitutional structure suggest that the Privileges and Immunities Clause was designed to make the Constitution a guarantee of liberty. *Id.* at 2 (providing a full account of the meaning, history, and interpretation of the Privileges and Immunities Clause).
64. Sanders, *supra* note 3, at 779.

Ninth Amendment only jurisprudence to determine whether an unenumerated right exists follows the Constitution's text, as does applying that unenumerated right against the states through the Privileges and Immunities Clause of the Fourteenth Amendment. This entirely text-based apparatus streamlines the jurisprudence through a credible constitutional foundation that eliminates the ability of judges to inaccurately alter the issue before them to reach a legal result that does not conform to constitutional language.

Next, the Ninth Amendment, as a separate constitutional provision, must be recognized as an independent source of rights. Justice Goldberg denied that the "[N]inth [A]mendment constitutes an independent source of rights."⁶⁵ He concluded there is no textual basis for reading the Amendment that way.⁶⁶ Reading the Ninth Amendment as an independent source of rights does not mean that the Ninth Amendment creates rights. It simply recognizes unenumerated rights retained by the people. Accordingly, those rights must be independent of the enumerated rights already existing in the text of the remainder of the Constitution. Justice Goldberg's complimentary view of the Ninth Amendment concluded: "[T]he Ninth Amendment simply lends strong support to the view that the 'liberty' protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments."⁶⁷ The Ninth Amendment, however, is the textually prescribed amendment to adjudicate whether or not an unenumerated right exists. Its text does not indicate, nor infer, that it is a complimentary doctrine to aid the Court in determining whether or not a fundamental right exists under the liberty interest protected by the Fourteenth Amendment.

The Ninth Amendment, rather, recognizes that there are fundamental personal rights that are protected from government abridgement although they are not specifically mentioned in the Constitution.⁶⁸ Justice Goldberg need only go that far. He appropriately ended his analysis with, "in sum, I believe that the right of privacy in the marital relation is fundamental and basic - a personal right 'retained by the people' within the meaning of the Ninth Amendment."⁶⁹ There is no reason to curtail the reading of the Ninth Amendment by expanding upon that pronouncement. Allowing the Ninth Amendment to be the sole arbiter of unenumerated rights is-

65. Mitchell, *supra* note 58, at 1731 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 492 (1965) (Goldberg, J., concurring)).

66. Mitchell, *supra* note 56, at 1731.

67. *Griswold*, 381 U.S. at 493 (Goldberg, J., concurring) (citing *United Public Workers v. Mitchell*, 330 U.S. 75, 94-95 (1947) ("The right of a citizen to act as a party official or worker to further his own political views . . . [is contained in the First, Ninth, and Tenth Amendments].").

68. *Id.* at 496 (Goldberg, J., concurring).

69. *Id.* at 499 (Goldberg, J., concurring).

sues is not legislating from the bench, it is the constitutional commandment of its text.

Justice Black refurbished, if not created, the textually inaccurate traditional approach to Ninth Amendment jurisprudence in his dissenting opinion, joined by Justice Stewart.⁷⁰ Justice Black concluded there is no right to privacy written in the Constitution and that the Court should stick to the simple language of amendments when construing them.⁷¹ However, he failed to heed his own warning and ignored the text of the Ninth Amendment. He rejected the idea that judges can determine whether or not state law violates fundamental principles of liberty and justice or is contrary to the people's traditions and collective conscience.⁷² He incorrectly stated that "one would . . . have to look far beyond the *language* of the Ninth Amendment to find that the Framers vested in this Court any such awesome veto powers over lawmaking, either by the States or by the Congress."⁷³ The language of the amendment declares that the people retain unenumerated rights. As Justice Black admitted, under *Marbury v. Madison*,⁷⁴ the United States Supreme Court "has constitutional power to strike down statutes, state or federal, that violate commands of the Federal Constitution."⁷⁵ It is an open and shut case then. The plain meaning of the Ninth Amendment announces that the people retain unenumerated rights. The holding of *Marbury* sanctions the Court to strike down state or federal law violating a portion of the federal Constitution.⁷⁶ If we follow the simple words of the amendment and *Marbury*, how can we *not* recognize that the Court has to be the arbiter of unenumerated rights issues? Because Justice Black had no text on which to stand, he used a non-textual historical analysis. He proclaimed that the purpose of the Ninth Amendment was to assure the people that the Constitution would limit the federal government to its expressly granted powers or those developed from necessary implication.⁷⁷ If that is what the Ninth Amendment means, why does its text not say that or something somewhat similar?

Justice Black suggested that allowing judges to determine unenumerated rights would create a "day-to-day constitutional convention."⁷⁸ That is inaccurate because the text of the Ninth Amend-

70. See generally *id.* at 507-27 (Black, J., dissenting).

71. See *id.* at 508-09 (Black, J., dissenting).

72. *Id.* at 518-19 (Black, J., dissenting).

73. *Griswold*, 381 U.S. at 519 (Black, J., dissenting) (emphasis added).

74. 5 U.S. (1 Cranch) 137 (1803).

75. *Griswold*, 381 U.S. at 513 (Black, J., dissenting); see also *Marbury*, 5 U.S. (1 Cranch) at 177-78.

76. See *Marbury*, 5 U.S. (1 Cranch) at 177-78.

77. *Griswold*, 381 U.S. at 520 (Black, J., dissenting); see also *id.* at 530 (Stewart, J., dissenting) ("[T]he Federal Government was to be a government of express and limited powers, and that all rights and powers not delegated to it were retained by the people and the individual States.").

78. *Griswold*, 381 U.S. at 520 (Black, J., dissenting).

ment commands that the people retain unenumerated rights; thus, they warrant constitutional protection from all three branches of government. The amendment creates a degree of uncertainty since rights not enumerated are protected. If a judge granted an unenumerated right constitutional protection without the presence of the Ninth Amendment in the Constitution, that would be judicial activism. Since the text mandates that the people retain unenumerated rights, a judicial mechanism protecting them from unconstitutional infringement is constitutionally necessary. Justice Black feared that authorizing judges to strike down laws under the Ninth Amendment because they are “unreasonable, unwise, arbitrary, capricious or irrational” would blur the separation of powers in government and reduce states’ rights.⁷⁹ The Ninth Amendment’s text does not allow a judge to strike down a law for those reasons; thus, that fear is unfounded. The Court may only recognize an unenumerated right retained by the people.

C. *The Ninth Amendment and Substantive Due Process Since Griswold*

1. Recent Substantive Due Process Jurisprudence

Unfortunately, the textually erroneous substantive due process doctrine has grown much like Pinocchio’s nose. However, the unsound nature of the doctrine has met judicial resistance. While the United States Supreme Court still follows the doctrine when determining unenumerated rights issues, it has alluded to the weak foundation and applicability of the doctrine, thereby leaving a window of opportunity for the Ninth Amendment to reenter the constitutional landscape and shut the door on substantive due process.

In *Roe v. Wade*,⁸⁰ the Court ruled that a woman has a right to privacy, including a qualified right to terminate a pregnancy, under the Fourteenth Amendment’s concept of personal liberty.⁸¹ The Court found the roots of the right to privacy in the text and case law of the First Amendment,⁸² the Fourth and Fifth Amendments,⁸³ the penumbras of the Bill of Rights,⁸⁴ the Ninth Amendment,⁸⁵ and the concept

79. *See id.* at 521.

80. 410 U.S. 113 (1973).

81. *Id.* at 153.

82. *Id.* at 152 (citing *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)). In *Stanley*, the right of privacy protected a citizen’s private possession of obscene matter from criminal culpability. 394 U.S. at 559.

83. *Roe*, 410 U.S. at 152 (citing *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968); *Katz v. United States*, 389 U.S. 347, 350 (1967); *Olmstead v. United States*, 277 U.S. 438, 478-79 (1928) (Brandeis, J., dissenting); *Boyd v. United States*, 116 U.S. 616, 621 (1886)).

84. *Roe*, 410 U.S. at 152 (citing *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965)).

85. *Id.* (citing *Griswold*, 381 U.S. at 486 (Goldberg, J., concurring)).

of liberty in the Fourteenth Amendment.⁸⁶ Astonishingly, that smorgasbord of amendments, decisions, and legal principles, from numerous portions of the Constitution, made it clear to the Court that only personal rights considered fundamental or implicit in the concept of ordered liberty are part of the guarantee of personal privacy.⁸⁷ The Court's reliance on varying decisions, from separate constitutional provisions, to find a right of privacy shows substantive due process's non-textual foundation. The Court can rely on a panoply of majority, concurring, and dissenting opinions addressing different legal issues, to determine the scope of the right to privacy. This system allows the Court to reach as far and wide as needed to find support for its holding. That type of judicial stretching at least begs credibility to the question of whether the Court is acting as another legislature. Furthermore, the Court need not, and should not, follow a judicially crafted yellow brick road to recognize an unenumerated right. Adjudicating unenumerated rights through the Ninth Amendment would establish standards and case law to evaluate those concerns, thereby strengthening the jurisprudence through specific textual and case law driven guidelines. Consequently, the folly of searching for an analogy to buttress recognition of a fundamental right becomes unnecessary.

In *Moore v. City of East Cleveland*,⁸⁸ the Court invalidated a city housing ordinance restricting the family members available to reside in a dwelling to only a few categories of related individuals.⁸⁹ The Court concluded that substantive due process protects the freedom of personal choice in matters of marriage and family life.⁹⁰ The decision conceded that substantive due process has been a treacherous field, with numerous risks present when the Court grants substantive liberties without the guidance of a specific portion of the Bill of Rights.⁹¹ The Court admitted that *Lochner*-type decisions foster caution and restraint; however, it refused to abandon substantive due process.⁹² This is a perfect example of the Court recognizing its substantive due process dilemma, while still holding true to it, instead of reverting to the text and meaning of the Ninth Amendment. That reversion would provide a specific portion of the Bill of Rights to invalidate the city ordinance, thereby decreasing the level of risk, caution, and restraint present when determining unenumerated rights issues.

In *Bowers v. Hardwick*,⁹³ the Court upheld a Georgia statute criminalizing homosexual sodomy.⁹⁴ The decision narrowly framed

86. *Id.* (citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

87. *Id.* (quoting in part *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

88. 431 U.S. 494 (1977).

89. *Id.* at 496, 499.

90. *Id.* at 499.

91. *Id.* at 502.

92. *Id.*

93. 478 U.S. 186 (1986).

94. *Id.* at 189.

the issue, questioning whether there is a right to engage in homosexual sodomy, not whether the actions were protected privacy rights.⁹⁵ The Court found the right to engage in homosexual sodomy was not a fundamental liberty implicit in the concept of ordered liberty or a liberty that was deeply rooted in the country's history and tradition.⁹⁶ The Court continued to acknowledge substantive due process's loose foundation by concluding:

It is true that despite the language of the Due Process Clauses of the Fifth and Fourteenth Amendments, which appears to focus only on the process by which life, liberty, or property is taken, the cases are legion in which those Clauses have been interpreted to have substantive content, subsuming rights that to a great extent are immune from federal or state regulation or proscription.⁹⁷

Once again, the Court took notice of the textual problem it faced when applying the substantive due process doctrine, but the Court continued to sanction the doctrine's use without a look to the text of the Ninth Amendment to solve the problem.

In *Michael H. v. Gerald D.*,⁹⁸ the Court upheld a California statute that presumes a child born to a married couple is a product of that relationship, thereby excluding a person outside the marriage from establishing paternity to the child.⁹⁹ The decision reiterated the problematic nature of substantive due process,¹⁰⁰ and focused its principles on (1) the interests society traditionally protects¹⁰¹ that are (2) so rooted in the people's traditions and conscience to be ranked as fundamental.¹⁰² In *Planned Parenthood v. Casey*,¹⁰³ the Court affirmed the core holding of *Roe* and retreated from the ardent historical and traditional analysis for a more flexible standard. The decision determined that due process has not been reduced to any formula; thus, its content cannot be determined by reference to any code.¹⁰⁴ Also, the Court concluded freezing due process at some fixed stage of time or

95. *Id.* at 190. The United States Supreme Court is expected to rule in *Lawrence v. Texas*, whether a Texas statute punishing homosexual sodomy is constitutional.

96. *Id.* at 191-92 (citing *Palko v. Connecticut*, 302 U.S. 319, 325-26; *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)); *see also* *Griswold v. Connecticut*, 381 U.S. 497, 506 (1965).

97. *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986).

98. 491 U.S. 110 (1989).

99. *See id.* at 131-32.

100. *See id.* at 121-22.

101. *Id.* at 122.

102. *Id.* (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

103. 505 U.S. 833 (1992).

104. *Id.* at 849 (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (opinion dissenting from dismissal on jurisdictional grounds)).

thought suggests that constitutional adjudication is a function for inanimate machines and not for judges.¹⁰⁵

In *Washington v. Glucksberg*,¹⁰⁶ the Court upheld a Washington law preventing physician-assisted suicide.¹⁰⁷ The decision provides a return towards a more historical and traditional review of substantive due process, while at the same time still criticizing the doctrine itself. The weak and flawed substantive due process doctrine¹⁰⁸ is exposed:

[T]he Court has “always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this uncharted area are scarce and open-ended.” By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore “exercise the utmost care whenever we are asked to break new ground in this field,” lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court. . . .

. . . We have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, “deeply rooted in this Nation’s history and tradition,” and “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if they were sacrificed.” Second, we have required in substantive-due-process cases a “careful description” of the asserted fundamental liberty interest. Our Nation’s history, legal traditions, and practices thus provide the crucial “guideposts for responsible decision making,” that direct and restrain our exposition of the Due Process Clause.¹⁰⁹

*Troxel v. Granville*¹¹⁰ gave the Court another opportunity to utilize the Ninth Amendment. Instead it, “invoked the nonmammalian whale of substantive due process, a phantasmagorical beast conjured up by judges without clear textual warrant.”¹¹¹ The Court relied on *Meyer* and *Pierce* to conclude a Washington state statute allowing visitation rights to persons other than a child’s custodial parents violated a mother’s fundamental right to make decisions concerning the care, custody, and control of her children.¹¹²

105. *Id.* at 850 (quoting *Rochin v. California*, 342 U.S. 165, 171-72 (1952)).

106. 521 U.S. 702 (1997).

107. *Id.* at 735.

108. Niles, *supra* note 13, at 135.

109. *Id.* at 136 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 719-21 (1997) (citations omitted)).

110. 530 U.S. 57 (2000).

111. Amar, *supra* note 59, at 122-23.

112. 530 U.S. at 65-67.

A few weeks after *Troxel*, in *Stenberg v. LeRoy*,¹¹³ the Court had another chance to right its substantive due process wrong. The Court began its opinion with a sentence that should have called its attention to the Ninth Amendment: "We again consider the *right* to an abortion."¹¹⁴ Because an unenumerated right, abortion, was considered, the amendment concerning unenumerated rights, the Ninth, should have governed the case. Instead, the Court followed substantive due process precedent in *Roe* and *Casey* and determined a Nebraska statute criminalizing certain partial birth abortions was unconstitutional.¹¹⁵

While the standards of substantive due process continue to fluctuate, a more restrictive evaluation has generally been adopted. Formerly, the Court considered whether an asserted unenumerated fundamental right was "of the very essence of a scheme of ordered liberty,"¹¹⁶ or was required by a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."¹¹⁷ Now the Court considers only whether the alleged right has historically been protected against governmental interference.¹¹⁸ Before the change, the Court inquired into traditions as if they were principles in which to aspire to, allowing for more development and progression.¹¹⁹ After the change, the Court now inquires into traditions as if they were narrowly conceived historical practices.¹²⁰

The topsy-turvy nature of recent substantive due process methodology seems to conform to the result needed, depending upon which ideological block forms a majority. It has become based on more tradition and history, thereby, limiting the recognition of rights, while still expanding to contain more flexible and evolving principles when recognizing the existence of a fundamental right. These inconsistent analytical means undoubtedly promote the possibility of judicial legislation due to substantive due process's lack of a textual origin.

2. Recent Ninth Amendment Jurisprudence

As you might expect, the Ninth Amendment's role in modern jurisprudence is still largely irrelevant. A few post-*Griswold* cases, however,

113. 530 U.S. 914 (2000).

114. *Id.* at 920 (emphasis added).

115. *Id.* at 929-30. Justice Scalia discussed the Ninth Amendment in his dissent. For analysis of his opinion see *infra* Part II.C.2.

116. Fleming, *supra* note 20, at 57 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)); see *Roe v. Wade*, 410 U.S. 113, 152-53 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965).

117. Fleming, *supra* note 20, at 57 (quoting *Palko*, 302 U.S. at 325 (citations omitted)).

118. *Id.* (citing *Bowers v. Hardwick*, 478 U.S. 186, 192-94 (1986)).

119. *Id.*

120. *Id.*

have mentioned the Ninth Amendment.¹²¹ Justice Douglas is largely responsible for post-*Griswold* Ninth Amendment jurisprudence and has become a pseudo-pioneer of recognizing Ninth Amendment rights. In *Palmer v. Thompson*,¹²² the Court upheld a city's decision to close racially segregated swimming pools, rather than keeping them open and integrated.¹²³ Justice Douglas opined:

My conclusion is that the Ninth Amendment has a bearing on the present problem.

...
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.

...
There is, of course, not a word in the Constitution, unlike many modern constitutions, concerning the right of the people . . . to recreation by swimming or otherwise. Those rights, like the right to pure air and pure water, may well be rights "retained by the people" under the Ninth Amendment. May the people vote them down as well as up?¹²⁴

In *Doe v. Bolton*,¹²⁵ Justice Douglas concluded that Ninth Amendment rights include customary, traditional, and time honored rights, amenities, privileges, and immunities that come within the "the Blessings of Liberty" mentioned in the Constitution's preamble.¹²⁶ He blends his Ninth Amendment jurisprudence with substantive due process by adding that many Ninth Amendment rights are within the meaning of "liberty" in the Fourteenth Amendment.¹²⁷ In *Lubin v. Parrish*,¹²⁸ Justice Douglas announced that "the right to vote in state

121. See *Doe v. Bolton*, 410 U.S. 179, 210 (1975) (Douglas, J., concurring); *Lubin v. Parrish*, 415 U.S. 709, 721 n.* (1974) (Douglas, J., concurring); *Palmer v. Thompson*, 403 U.S. 217, 233 (1971) (Douglas, J., dissenting).

122. 403 U.S. 217 (1971).

123. *Id.* at 219.

124. *Id.* at 233-34 (Douglas, J., dissenting); see also *Osborn v. United States*, 385 U.S. 323, 341 (1966) (Douglas, J., dissenting) (quoting *Griswold's* mention of the Ninth Amendment as a source for the right of privacy); *Olf v. E. Side Union High Sch. Dist.*, 445 F.2d 932 (9th Cir. 1971), *cert. denied*, 404 U.S. 1042, 1043 (1972) (Douglas, J., dissenting from denial of certiorari) (noting that a school student's hair style is a fundamental right retained under the Ninth Amendment); *Freeman v. Flake*, 448 F.2d 258 (10th Cir. 1971), *cert. denied*, 405 U.S. 1032 (1972) (Douglas, J., dissenting from denial of certiorari) (dissenting for the same reasons as stated in the *Olf* dissent.).

125. 410 U.S. 179 (1973).

126. *Id.* at 210 (Douglas, J., concurring); see also *Branzburg v. Hayes*, 408 U.S. 665, 714 (1972) (Douglas, J., dissenting) (quoting Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 254 ("The Second through the Ninth Amendments limit the powers . . . in order that due regard shall be paid to the private 'rights of the governed.'")).

127. *Doe*, 410 U.S. at 210-11 (Douglas, J., concurring).

128. 415 U.S. 709 (1974).

elections is one of the rights . . . 'retained by the people' by virtue of the Ninth Amendment as well as included in the penumbra of First Amendment rights."¹²⁹

In *Richmond Newspapers, Inc. v. Virginia*,¹³⁰ the Court used the Ninth Amendment to support the finding that the First Amendment contains a right of the press to attend criminal trials.¹³¹ The Court's sojourn into the Ninth Amendment is largely irrelevant because the amendment was inappropriately used as a rule of construction, rather than an explicit guarantee of the right.¹³² This approach is similar to the *Griswold* majority's curt mention of the Ninth Amendment as support for its finding of a right to privacy applied through the substantive due process doctrine.¹³³

As discussed above, *Troxel* concluded a Washington state statute allowing visitation rights to persons other than a child's biological parents violated the biological mother's fundamental right to bring up her children under a substantive due process methodology.¹³⁴ Justice Scalia's dissent concluded the right of parents to direct the upbringing of their children was an unalienable right proclaimed in the Declaration of Independence and an unenumerated right under the Ninth Amendment.¹³⁵ Unfortunately, Justice Scalia dropped the ball by concluding that the Constitution did not entitle him to deny legal effect to laws he views infringe upon what he considers an unenumerated right.¹³⁶ However, the Constitution provides "the supreme Law of the Land"¹³⁷ and Justice Scalia is "bound by Oath or Affirmation"¹³⁸ to support the Constitution; thus, he must uphold and apply the Ninth Amendment. To determine that an unenumerated right exists that cannot be abridged, and then to allow a legislature to abridge that right, nullifies the right and places the legislature above a co-equal branch of government, the judiciary.¹³⁹

129. *Id.* at 721 n.*.

130. 448 U.S. 555 (1980).

131. *Id.* at 579-80; *see also* *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (citing *Griswold v. Connecticut*, 381 U.S. 479, 495-96 (1965) (Goldberg, J., concurring) ("The integrity of the family unit has found protection in [the Ninth Amendment].").

132. *See* *Mitchell*, *supra* note 56, at 1732.

133. *See id.* at 1732-33.

134. 530 U.S. 57 (2000).

135. *Id.* at 91 (Scalia, J., dissenting).

136. *Id.* at 92.

137. U.S. CONST. art. VI.

138. *Id.*

139. For two other non-substantive due process views on *Troxel* see *Amar*, *supra* note 59, at 123 (pointing out that Justice Scalia ignores the Privileges and Immunities Clause as constitutional text limiting state power to restrict unspecified, fundamental freedoms); *Troxel*, 530 U.S. at 80 n.* (Thomas, J., concurring) (declining to reevaluate whether substantive due process cases contradict the original understanding of the Due Process Clause and

Troxel's cursory discussion of the Ninth Amendment, along with *Stenberg* not mentioning it a few weeks later, left Ninth Amendment jurisprudence essentially where it has been for a while. The Court does not use the Ninth Amendment as a tool for incorporating independent unenumerated rights or as an independent source of rights; instead, the Ninth Amendment incorporates certain rights – unenumerated but related to those enumerated – into the Bill of Rights.¹⁴⁰ These incorporated rights are then applied against the states through the Fourteenth Amendment's Due Process Clause.¹⁴¹

D. *The Elimination of Substantive Due Process Law*

Regardless of what interpretative school of thought a legal scholar is in, there should be little debate that the creation of "substantive due process" in the Fourteenth Amendment is a judicial leap. How can due *process* have a substantive element? The Constitution provides no textual basis for substantive due process.¹⁴² The Fourteenth Amendment states that "nor shall any State deprive any person of life, liberty, or property, without due process of law."¹⁴³ The amendment does not contain the word "substantive" before the words "due process." As John Hart Ely noted, "'there is simply no avoiding the fact that the word that follows 'due' is 'process.' [W]e apparently need periodic reminding that 'substantive due process' is a contradiction in terms sort of like 'green pastel redness.'"¹⁴⁴ Substantive due process is a paradoxical, oxymoronic phrase that "'has been inflated into a patched and leaky tire on which precariously rides the load of some substantive human rights not named in the Constitution."¹⁴⁵ Due process simply requires that the substance of any law be applied to a person through fair procedures by any tribunal hearing the case.¹⁴⁶ The clause does not say anything about what the substance of the law must be.¹⁴⁷ The meaning of the Due Process Clause's words, and their natural implications, do not guarantee substantive rights.¹⁴⁸ Due process prevents the government from doing certain things to people

whether the Privileges and Immunities Clause is incorrectly interpreted because those issues were not argued).

140. Mitchell, *supra* note 56, at 1731.

141. *Id.*

142. Niles, *supra* note 13, at 91 (citing CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED* 3 (Penguin Putnam Books 1997)).

143. U.S. CONST. amend. XIV, § 1.

144. JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 34-41 (1980).

145. Niles, *supra* note 13, at 136 n.162 (quoting BLACK, *supra* note 142, at 3).

146. Bruce N. Morton, *John Locke, Robert Bork, Natural Rights and the Interpretation of the Constitution*, 22 SETON HALL L. REV. 709, 756 (1992) (quoting BORK, *supra* note 15, at 31).

147. *Id.*

148. Niles, *supra* note 13, at 91 n.20 (citing BLACK, *supra* note 142, at 3).

without fair procedures.¹⁴⁹ The clause does not state what things may or may not be done.¹⁵⁰ For example, the Due Process Clause prevents a person from being tried before a bribed judge, or from being tried without being informed of the charge against them.¹⁵¹ It could not prevent an unbribed tribunal from convicting a defendant in a procedurally fair trial for marrying at age thirty-nine under a state statute setting the minimum age to marry at forty.¹⁵² Changing due process from a procedural protection to a quality being protected is not a small step, but one giant leap for judge-kind. By applying substantive due process, “[t]he Court has attempted to fit square pegs into round holes, by forcing rights that might properly be protected by the broad language of the [N]inth [A]mendment into constitutional provisions where no amount of pushing can comfortably make them fit.”¹⁵³ Therefore, the lack of textual support for fundamental rights protected under substantive due process, and the corresponding reliance on tradition and fundamentality to restrict the doctrine, result in a weak and unsatisfactory mechanism for the protection of personal freedom.¹⁵⁴ Marc C. Niles adopted Charles L. Black, Jr.’s view concerning substantive due process’s deficiencies by stating:

[The application of substantive due process] follows no sound methods of interpretation (how could it, given the nature of the phrase itself?) and is therefore neither reliably invocable in cases that come up, nor forecastable in result by anything much but a guess. This kind of non-standard is not good enough for a systematic equity of human rights. It everlastingly will not do; it is *infra dignitatem*, it leaks in the front and leaks in the back.¹⁵⁵

The substantive due process doctrine’s lack of textual constitutional support persuades judges to limit the scope of rights granted under it. Conservative jurists ascribed to this ironic rights-limiting view of the rights-expanding substantive due process doctrine as a mechanism for identifying and protecting only those rights or liberties that have a

149. Morton, *supra* note 146, at 756 (quoting BORK, *supra* note 15, at 180).

150. *Id.*

151. Niles, *supra* note 13, at 91 n.20 (quoting BLACK, *supra* note 142, at 2).

152. *Id.* (quoting BLACK, *supra* note 142, at 2-3).

153. Mitchell, *supra* note 56, at 1727; see also Jason S. Marks, *Beyond Penumbra and Emanations: Fundamental Rights, The Spirit of the Revolution, and the Ninth Amendment*, 5 SETON HALL CONST. L.J. 435, 482 (1995) (noting that the Ninth Amendment appears to be a stronger textual basis than the Fourteenth Amendment for unenumerated rights.).

154. Niles, *supra* note 13, at 137; see also Derrick Alexander Pope, *A Constitutional Window to Interpretive Reason: or in Other Words. . . The Ninth Amendment*, 37 HOW. L.J. 441, 458 (1994) (“[A]ny reliance upon the Due Process Clause to identify substantive rights is ill-advised.”).

155. Niles, *supra* note 13, at 91 n.19 (quoting BLACK, *supra* note 142, at 3).

firm foundation in the murky legal, historical, moral or ethical tradition of Britain or the United States.¹⁵⁶

The need to find some form of judicial restraint causes the Court to rely on "tradition to decide whether a right deserves protection under the Due Process Clause."¹⁵⁷ The need for some restraint on substantive due process – necessary because of the doctrine's lack of a textual foundation that would otherwise provide an effective limitation – results in its great failure as a mechanism to protect individual privacy rights and check illegitimate government power.¹⁵⁸ This restriction identifies a limited sphere of personal autonomy primarily because it requires individuals to demonstrate that what they intend to do is so fundamental and sacrosanct in the English speaking world's history that any government attempt to regulate the activity should be closely scrutinized.¹⁵⁹

When the Court defines fundamental liberties that are not mentioned in the Constitution, it must act with more caution or become susceptible to criticism that it is imposing its own controversial choices of value upon the people.¹⁶⁰ If the Court were to determine unenumerated rights under the Ninth Amendment, as opposed to fundamental liberties through substantive due process's ever changing sources, a textual foundation would be laid in this area of jurisprudence decreasing judicial caution and public criticism because the judiciary would be acting under constitutionally prescribed authority instead of whimsical notions of judicial creativity.¹⁶¹

III. THE MEANING OF THE NINTH AMENDMENT

A. *The Ninth Amendment's Text*

It is well known that "[t]he interpretation of any written law must begin with its text."¹⁶² A Constitutional analysis begins with the "constitutional text speaking to . . . [the] precise question."¹⁶³ Accordingly, "[t]he text itself is an obvious starting point of legal analysis. Is it even

156. *Id.* at 138 (citing *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. at 293-94 (Scalia, J., concurring)).

157. *Id.* at 139 (quoting Anthony C. Cicia, Note, *A Wolf in Sheep's Clothing?: A Critical Analysis of Justice Harlan's Substantive Due Process Formulation*, 64 *FORDHAM L. REV.* 2241, 2246 (1996)).

158. *Id.* at 140.

159. *Id.*

160. Tribe, *supra* note 60, at 105 (citing *Thornburgh v. Am. Coll. of Obstetricians*, 476 U.S. 747, 790 (1986) (White, J., dissenting)).

161. See also Mitchell, *supra* note 56, at 1727 ("The decisions the Court's critics find most objectionable might be more textually defensible if premised frankly on the principle embodied in the [N]inth [A]mendment – that the scope of the Constitution in protecting individual rights is broader than its text.").

162. *Id.* at 1721; see also U.S. CONST. art. VI (stating that the Constitution is the supreme law of the land).

163. *Printz v. United States*, 521 U.S. 898, 905 (1997).

possible to deduce the spirit of a law without looking at its letter?"¹⁶⁴ Therefore, a reading of the Ninth Amendment is the first step in revitalizing it. The Ninth Amendment states, "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."¹⁶⁵ As one commentator noted:

It seems clear from the language of the [N]inth [A]mendment 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. It is also a generally accepted truism that "[i]t cannot be presumed that any clause in the [C]onstitution is intended to be without effect. . . ." ". . . [A]s no constitutional guarantee enjoys preference, so none should suffer subordination or deletion."¹⁶⁶

164. Akhil Reed Amar, *Textualism and the Bill of Rights*, 66 GEO. WASH. L. REV. 1143, 1143 (1998).

165. U.S. CONST. amend. IX.

166. Jordan J. Paust, *Human Rights and the Ninth Amendment: A New Form of Guarantee*, 60 CORNELL L. REV. 231, 237 (1975); see also Barnett, *infra* note 182, at 3, 42 (noting that the Ninth Amendment protects unenumerated rights retained by the people); Bitensky, *supra* note 7, at 623 (noting that straightforward reading of Ninth Amendment means that the enumeration of rights in the Constitution must not be interpreted to preclude future recognition of unenumerated rights in the Constitution); David M. Burke, *The "Presumption of Constitutionality" Doctrine and the Rehnquist Court: A Lethal Combination for Individual Liberty*, 18 HARV. J.L. & PUB. POL'Y 73, 128 (1994) ("The Ninth Amendment['s] [language] commands that the enumeration of the rights in the first eight Amendments 'shall not be construed to deny or disparage' those rights, too numerous to describe specifically, 'retained' by the people."); Phoebe A. Haddon, *An Essay on the Ninth Amendment: Interpretation for the New World Order*, 2 TEMP. POL. & CIV. RTS. L. REV. 93, 93 (1992) ("The text, on its face seems to support the argument that the rights protected by the Constitution are not limited to its express provisions."); Stephen D. Hampton, *Sleeping Giant: The Ninth Amendment and Criminal Law*, 20 SW. U. L. REV. 349, 349 (1991) ("[T]he Ninth Amendment establishes United States citizens have unenumerated rights, rights not listed in the Constitution."); Douglas Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review*, 59 TEX. L. REV. 343, 368 (1981) (noting that the Ninth Amendment's text recognizes unenumerated rights); Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 HASTINGS L.J. 305, 343 (1987) (noting that the Ninth Amendment preserves "fundamental rights that were not enumerated in the first eight amendments or elsewhere in the Constitution"); Mitchell, *supra* note 56, at 1742 ("[T]he Ninth Amendment commands broad incorporation of the individual rights that the Constitution was intended to protect."); Randall R. Murphy, *The Framers' Evolutionary Perception of Rights: Using International Human Rights Norms as a Source for Discovery of Ninth Amendment Rights*, 21 STETSON L. REV. 423, 447 (1992) (noting that the meaning of the Ninth Amendment's words "seems to be that not all rights retained are enumerated in the Constitution"); Pope, *supra* note 154, at 450 ("The Ninth Amendment recognizes that, in the realm of human existence and development, there are potentially more rights and privileges than the Constitution can bear to enumerate."); Sager,

This straightforward interpretation of the Ninth Amendment has the distinct virtue of construing the amendment's words for just what they seem to say.¹⁶⁷ The Ninth Amendment's message, "as plain as one might hope for given the vagaries of language, that the specification of some rights was not to be interpreted as denying the equal presence within the legal system of other, enumerated rights."¹⁶⁸ Even if the Ninth Amendment's language is considered vague, "[i]t is rare . . . that even the most vague and general text cannot be given some precise, principled content – and that is indeed the essence of the judicial craft."¹⁶⁹

The Ninth Amendment prescribes that there are unenumerated rights retained by the people and a reading of other constitutional rights cannot be used to deny or even disparage the unenumerated rights retained by the people.¹⁷⁰ The amendment, at first glance, appears to be a failsafe. In case a right retained by the people was not enumerated, that does not preclude the recognition of that right.

Originalist judges and scholars, supposedly committed to an original understanding of the Ninth Amendment, skip the text of it and jump to the secondary components of legal analysis to find their answer.¹⁷¹ These sources include historical understanding and practice, the Constitution's structure, and the jurisprudence of the United States Supreme Court.¹⁷² These sources are only invoked to answer a constitutional question when there is "no constitutional text speaking to [the] precise question."¹⁷³ However, originalists, who advocate strict adherence to the explicit language of the Constitution and condemn the judicial practice of protecting privacy rights that have no

supra note 56, at 242 (noting that unenumerated rights, not explicitly manifest in liberty-bearing provisions of the Constitution, enjoy the same status as those made explicit in the text.); Sanders, *supra* note 3, at 761 (noting that the text of the Ninth Amendment contemplates unenumerated rights besides those specifically listed elsewhere); Sol Wachtler, *Judging the Ninth Amendment*, 59 *FORDHAM L. REV.* 597, 617 (1991) (noting that the Ninth Amendment was adopted to ensure unenumerated rights would be protected). Compare with Sotirios A. Barber, *The Ninth Amendment: Inkblot or Another Hard Nut to Crack?* 64 *CHI.-KENT L. REV.* 67, 79 (1988) (stating that a liberal reading of the Ninth Amendment recognizing unenumerated rights suggests the Constitution's openness to justice). But see Michael McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 *CHI.-KENT L. REV.* 89, 109 (1988) ("Open-ended judicial review—the doctrine of unenumerated rights—threatens to cut short the very process of 'open-minded and public-spirited' deliberation upon which moral realism depends.").

167. Bitensky, *supra* note 7, at 623.

168. Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 *CHI.-KENT L. REV.* 131, 141 (1988).

169. Burke, *supra* note 166, at 123 (quoting Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 *U. CHI. L. REV.* 1175, 1183 (1989)).

170. Morton, *supra* note 146, at 751.

171. *Printz v. United States*, 521 U.S. 898, 905 (1997).

172. *Id.*

173. *Id.*

specific textual basis,¹⁷⁴ do not follow the text of the Ninth Amendment. Robert Bork proposed this alleged originalist view.¹⁷⁵ He argued:

I do not think you can use the Ninth Amendment unless you know something of what it means. For example, if you had an amendment that says "Congress shall make no" and then there is an inkblot, and you cannot read the rest of it, and that is the only copy you have, I do not think the Court can make up what might be under the inkblot.¹⁷⁶

Bork believes that when "original understanding is lost, or cannot be established with sufficient confidence," judges should refrain from working because there is nothing to work with.¹⁷⁷ Unfortunately for Bork, "[t]here is no inkblot after the words 'The enumeration in the Constitution.' We have the full text of the sentence."¹⁷⁸ This is a perfect example of the non-original originalist argument against recognizing that the Ninth Amendment grants the people rights not enumerated in the Constitution. When compared with some of the language and punctuation of the rest of the Constitution, the Ninth Amendment is a rather straightforward and clear pronouncement. To deny that its original meaning grants the people unenumerated rights is not an originalist position.

The Ninth Amendment's meaning cannot be compromised by peripheral legal arguments. While a strong smoke screen can be established through these positions, one need look no further than the text of the amendment to dissipate the cloud of smoke. A brief reading of the amendment leads to a simple and obvious conclusion – individuals retain unenumerated rights outside the enumerated rights in the Constitution. Unless the Ninth Amendment is repealed or altered through a constitutional amendment, courts have a duty to give full effect to its terms.¹⁷⁹

Originalists, critics of a Ninth Amendment jurisprudence authorizing the recognition of unenumerated rights, "ignore the implications of the . . . amendment and thus depart from their own stated commit-

174. Geoffrey G. Slaughter, *The Ninth Amendment's Role in the Evolution of Fundamental Rights Jurisprudence*, 64 IND. L.J. 97, 98 (1988).

175. See Sanders, *supra* note 3, at 791.

176. Sanders, *supra* note 3, at 791 (quoting Robert H. Bork, *The Bork Disinformers*, WALL ST. J., Oct. 5, 1987, at 22).

177. Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477, 535-36 (1998) (citing BORK, *supra* note 15, at 166).

178. Sanders, *supra* note 3, at 791.

179. Burke, *supra* note 166, at 122. The Constitution, including the Ninth Amendment, may be amended. See U.S. CONST. art. V. Until that occurs, federal judges are bound by oath or affirmation to uphold the Ninth Amendment. U.S. CONST. art. VI.

ment to constitutional text and original intent."¹⁸⁰ Because the Ninth Amendment was intended to point toward enforceable fundamental rights that exist apart from the text, originalists who deny these rights exist have to resort to a non-originalist foundation for their constitutional theory.¹⁸¹ When originalists abandon their methodology only when considering the Ninth Amendment, they may reach their desired result of greatly limiting the scope of constitutional rights, but only at the price of maintaining a consistent originalist methodology.¹⁸² The Ninth Amendment's plain meaning is an embarrassment to originalists and their political agenda.¹⁸³ Originalists are "compelled . . . to assert that the amendment does not mean what it says. . . ."¹⁸⁴ Therefore, originalists like Bork are left to make personally held philosophical and policy based arguments, instead of following the language and history of the Constitution.¹⁸⁵ Ultimately, the Ninth Amendment's existence serves as proof that originalists fatally misread the Bill of Rights' purpose and role.¹⁸⁶

The Ninth Amendment provides the appropriate balance between complying with the Constitution's text and providing an evolving form of jurisprudence. Texts limit, even if they do not precisely define, the interpretations that can be reasonably offered for them and the legal fictions that they can generate.¹⁸⁷ The Ninth Amendment acknowledges these restrictive problems and suggests that the Constitution is capable of adapting to societal change.¹⁸⁸ We must remember, however, that the power of the Ninth Amendment to evolve through interpretation is granted from its text.¹⁸⁹ This concept seems illogical in some legal circles. Generally, textualists rely "on a fixed view of the meaning of a law based on how it was believed to have been interpreted at the time of its adoption."¹⁹⁰ This stance overly restricts legal thought and analytical growth by positing that "[t]he text of the document and the original intention of those who framed it would be the judicial standard in giving effect to the Constitution."¹⁹¹ Liberals argue for analytical development, but do so without pointing to a tex-

180. Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1215 (1990) (citing Levinson, *supra* note 168, at 134-35).

181. *Id.*

182. Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 32 (1988).

183. Morton, *supra* note 146, at 751.

184. *Id.* at 751.

185. Wachtler, *supra* note 166, at 608.

186. *Id.* at 609.

187. Tejshree Thapa, *Expounding the Constitution: Legal Fictions and the Ninth Amendment*, 78 CORNELL L. REV. 139, 141 (1992).

188. Mitchell, *supra* note 56, at 1723.

189. Thapa, *supra* note 187, at 161.

190. Mitchell, *supra* note 56, at 1724.

191. *Id.* at 1723 n.24 (quoting Attorney General Edwin Meese, III, before the American Bar Association (July 9, 1985)).

tual foundation to support their premise. That position inappropriately obviates the text by concluding that following the Constitution's words leads to simple, myopic, inhibiting references to an enacted law's words.¹⁹² This position believes the Constitution's broadly drafted clauses demonstrate the impossibility of textualism; thus, it follows that courts should apply the principles embodied in these phrases.¹⁹³ Similarly, this view proclaims no language is copious enough to supply words and phrases for every complex idea, or so correct as to exclude many equivocally denoting different ideas.¹⁹⁴

Therefore, differing views surrounding the vision of the Ninth Amendment are each incomplete. The Ninth Amendment specifically authorizes constitutional evolution because its text provides that the people retain unenumerated rights. Because the text of the amendment issues this commandment, analytical development is a text-based function of Ninth Amendment jurisprudence. It is, in a sense, the best of both worlds. The meaning of the words of the amendment at issue are applied and adhered to, and the flexibility of the amendment to apply to current legal disputes is sanctioned.

B. The Judiciary's Role in Ninth Amendment Jurisprudence

The application of the Ninth Amendment to evaluate unenumerated rights claims is not judicial activism; conversely, it is judicial activism not to apply the Ninth Amendment.¹⁹⁵ Judges are responsible for adjudicating competing claims of right between governments and individuals.¹⁹⁶ The Declaration of Independence expressed the expectation that all government bodies, including the members of the judiciary, were to secure rights that were fundamental to all.¹⁹⁷ The judiciary's action or inaction will directly affect the realization of fundamental human expectations.¹⁹⁸ The Ninth Amendment's unenumerated, judicially unenforceable constitutional rights com-

192. *Id.* at 1724 (quoting ELY, *supra* note 144, at 34-41).

193. *Id.* at 1721 n.15.

194. *Id.* at 1721 (quoting THE FEDERALIST NO. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961)).

195. *Id.* at 1723. "[J]udicial restraint is but another form of judicial activism." *Id.* at 1719 (quoting LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW iv (1978)). "By inference the language of the Ninth Amendment also invites the view that judges are authorized to protect rights that are not enumerated as well as ones that are enumerated." Haddon, *supra* note 166, at 93 (citing Barnett, *supra* note 182); Massey, *supra* note 166, at 312-13). Stephen Macedo argues that the Ninth Amendment calls upon judges to engage in principled judicial activism based upon sound moral thinking and our political tradition. Charles J. Cooper, *Limited Government and Individual Liberty: The Ninth Amendment's Forgotten Lessons*, 4 J.L. & POL. 63, 65 (1987) (citing STEPHEN MACEDO, THE NEW RIGHT V. THE CONSTITUTION 43 (The Cato Institute 1986)).

196. Morton, *supra* note 146, at 752.

197. Paust, *supra* note 166, at 235.

198. *Id.* at 235.

mand the respect of governmental actors whose conduct could transgress them, and in the absence of judicial enforcement, those actors would still be obliged to determine and respect these rights.¹⁹⁹

Bork argues that if judges were to determine unenumerated rights issues, then the Founders would have placed that in the Ninth Amendment's text.²⁰⁰ Specifically, Bork concludes:

[I]t is inconceivable that men who viewed the judiciary as a relatively insignificant branch could have devised, without even discussing the matter, a system, known nowhere else on earth, under which judges were given uncontrolled power to override the decisions of the democratic branches by finding authority outside the written Constitution.²⁰¹

That statement is textually inaccurate. The authority to override the legislative and executive branches is found in the text of the Ninth Amendment. The Ninth Amendment grants the people unenumerated rights. If the legislative and executive branches unconstitutionally abridge an unenumerated right, the judiciary has a duty to rule the law unconstitutional. This form of power is controlled by what unenumerated rights the people retain. A judge, following the letter of the Ninth Amendment, can only recognize an unenumerated right that the people have already retained. The judiciary cannot avoid its responsibility for policy serving decision-making by simplistic notions of noninvolvement, nor can it continue to ignore several rights of mankind with a self-deceiving claim of unfamiliarity with fundamental and continuous expectations that were not specifically enumerated over 200 years ago.²⁰²

Bork believes that if judges were to be given authority to determine what rights the people retain, the Ninth Amendment would have said

199. Sager, *supra* note 56, at 252.

200. Allen, *supra* note 6, at 1662 (citing BORK, *supra* note 15, at 183); see also Raoul Berger, *The Ninth Amendment, as Perceived by Randy Barnett*, 88 Nw. U. L. REV. 1508, 1517-18 (1994) (Allowing the judiciary to enforce unenumerated rights could inappropriately enlarge judicial power and discretion); Helen K. Michael, *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of "Unwritten" Individual Rights?*, 69 N.C. L. REV. 421 (1991) (noting that the Founders did not intend judges to declare legislation unconstitutional based on unwritten natural law and it is unclear whether they intended judges to declare legislation unconstitutional to protect rights enumerated in the Constitution).

201. Wachtler, *supra* note 166, at 607 (quoting BORK, *supra* note 15, at 185); see also Thomas B. McAfee, *Federalism and the Protection of Rights: The Modern Ninth Amendment's Spreading Confusion*, 2 BYU L. REV. 351, 388 (1996) (stating that the Founders did not think it was acceptable for the judiciary to recognize unenumerated rights).

202. Paust, *supra* note 166, at 235. An example of the judiciary's unfamiliarity argument is Justice Jackson's statement that Ninth Amendment rights "are still a mystery to me." *Id.* at 235 n.14 (quoting ROBERT JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 75 (1955)).

as much.²⁰³ He argues that the amendment could have been drafted stating: "The courts shall determine what rights, in addition to those enumerated here, are retained by the people," or "The American people . . . delegate to their courts the task of determining what rights, other than those enumerated here, are retained by the people."²⁰⁴ Does the text of the First Amendment state that the judiciary should determine what is protected speech? Does the text of the Fourth Amendment state that the judiciary should determine what is a constitutional search and seizure? Does the text of the Fifth Amendment state that the judiciary should determine if due process of law has been violated? Those rhetorical questions go on and on. In an esoteric sense, we can take constitutional interpretive questions to mindless settings. Someone could go as far as to say that the Constitution does not state that we should read it in order or from left to right. How do we know how to read it then? In other words, common sense has to enter the equation at some point. Here, common sense indicates that judicial enforcement is a necessary concomitant of a meaningful right, not an extra governmental power.²⁰⁵ In the end, "the rightness of judicial review for enumerated rights settles the issue of the rightness of judicial review for unenumerated ones, because anything else would 'disparage' these latter rights."²⁰⁶

The legislative and executive branches have a role in unenumerated rights issues. Legislatures generally can grant additional rights through constitutional amendments, and the executive can enforce them. However, that does not preclude a situation wherein a legislature passes a law unconstitutionally restricting an unenumerated right, an executive signs it, and the court finds that the law is unconstitutional because it violates an unenumerated right under the Ninth Amendment. When a violation of a vested right occurs, there exists a legal remedy.²⁰⁷ A judicial review to determine if a law violates an unenumerated right conveys legitimacy on legislation and, thus, legitimacy on the Constitution.²⁰⁸ Critics of judges evaluating Ninth

203. BORK, *supra* note 15, at 183.

204. *Id.*

205. Sanders, *supra* note 3, at 793; see e.g., Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1169 (1987) (stating that legal remedies exist for violations of rights).

206. Haddon, *supra* note 166, at 109 (citing Randy E. Barnett, *Foreword: Unenumerated Constitutional Rights and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 615, 630-35, 641-42 (1991)).

207. Jack Alan Levy, *As Between Prince and King: Reassessing the Law of Foreign Sovereign Immunity as Applied to Jus Cogens Violators*, 86 GEO. L.J. 2703, 2728 (1998) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162-63 (1803)) (stating that the right of individuals to claim protection of the laws when she is injured is a primary duty of government); see also *Virginia Coupon Cases*, 114 U.S. 270, 303 (1884) (noting that taking away the remedy enforcing a right "is to take away the right itself").

208. Randy E. Barnett, *Foreword: The Ninth Amendment and Constitutional Legitimacy*, 64 CHI.-KENT L. REV. 37, 64 (1988).

Amendment issues must realize that judges are supposed to judge – and that is constitutional.

Bork correctly notes that the Ninth Amendment is not a warrant for judges to create constitutional rights not mentioned in the Constitution.²⁰⁹ If a judge determines that an unenumerated right exists, however, that does not mean that she created a right.²¹⁰ Natural rights exist independently of any form of government; thus, neither judges nor anyone else can create them.²¹¹ The text of the Ninth Amendment, legal materials, and traditions of debate all discipline and temper judges' moral judgments concerning justice and liberties.²¹² Judges interpreting unenumerated rights issues will be "morally informed critics of the constitutional order, working within the limits of fidelity to legal materials and professional norms to make their polity the best it can be."²¹³ Judges should look to the Constitution, as well as natural law and the inherent rights of mankind, when determining the validity of a statute.²¹⁴ Therefore, the judiciary cannot make a blind pronouncement that an unenumerated right exists. That would constitute the creation of an unenumerated right and could only be constitutional if the Ninth Amendment said something like, in Bork's words, "The courts shall create new rights as required by the principles of the republican form of government."²¹⁵ In an unenumerated right capacity, however, the judiciary acts when a valid legal issue is brought before them. If they determine that a law violates an unenumerated right, then that *recognizes* the existence of the unenumerated right, it does not *create* one. It must have already existed for it to be protected by a Court evaluating the action or behavior in question at some later date.

If the judiciary does not determine unenumerated rights, then who does? Congress was not granted the power to evaluate unenumerated rights issues.²¹⁶ If only congressional self-restraint checked such a power, then that would violate separation of powers and permit Con-

209. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 3 (1971).

210. Morton, *supra* note 146, at 752.

211. *Id.*

212. Stephen Macedo, *Morality and the Constitution: Toward A Synthesis for "Earth-bound" Interpreters*, 61 *U. CIN. L. REV.* 29, 40 (1992).

213. *Id.* at 41.

214. Wachtler, *supra* note 166, at 611 (quoting Sherry, *supra* note 205, at 1145).

215. BORK, *supra* note 15, at 183. Justice Scalia also misconstrues a Ninth Amendment jurisprudence sanctioning judges to recognize unenumerated rights as a proposal for judges to create rights. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 38 (Princeton Univ. Press 1997).

216. Allen, *supra* note 6, at 1661-62. The Constitution also prohibits Congress and the States from passing bills of attainder. U.S. CONST. art. I, § 9, cl. 3; U.S. CONST. art. I, § 10, cl. 1. Bills of attainder are legislative acts "prescribing capital punishment, without a trial, for a person guilty of a high offense such as treason or a felony." BLACK'S LAW DICTIONARY 159 (7th ed. 1999).

gress “to become [its own] ‘constitutional judge.’”²¹⁷ The Ninth Amendment’s historical context was not designed to grant Congress authority to create additional rights.²¹⁸ That power did not come, if ever, until Section Five of the Fourteenth Amendment was ratified.²¹⁹ Nor is the Ninth Amendment’s reference to other rights retained by the people an apt way of stating that Congress may create unenumerated rights.²²⁰

State governments cannot protect a federal constitutional guarantee through statutes, common law, or state constitutional law.²²¹ This leads us back to a very basic premise – the federal judiciary has the power to determine if a law violates an unenumerated right protected by the Ninth Amendment of the federal Constitution. For judges to ignore it would be a violation of the Founders’ express intent announced through the words of the Amendment.²²²

C. *James Madison’s Irrelevant Intent*

James Madison is generally considered the sole author of the Ninth Amendment.²²³ Therefore, there is a scholarly temptation to determine what his vision was of the Ninth Amendment. Logically since the amendment is the work of Madison, his explanation of its intent and meaning should control.²²⁴

However, any analysis of what legislators, even Madison, intended the Ninth Amendment to mean is irrelevant to my position.²²⁵ Whether the Constitution or a statute is interpreted, the original meaning of the text is analyzed, and “‘not what the original draftsmen intended.’”²²⁶ The law is what the law says; thus, we should be con-

This prohibition supports the constitutional ideal that the judiciary, not the legislature, should adjudicate legal claims.

217. Burke, *supra* note 166, at 125 (quoting THE FEDERALIST No. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

218. Allen, *supra* note 6, at 1662 (quoting ELY, *supra* note 144, at 37). “[T]here is nothing about elected non-judicial officials that qualifies them specially to respond to the rights referenced by the [N]inth [A]mendment.” Sager, *supra* note 56, at 252 (referencing Laurence G. Sager, *Rights Skepticism and Process-Based Responses*, 56 N.Y.U. L. REV. 417, 436-41 (1981)).

219. Allen, *supra* note 6, at 1662.

220. *Id.*

221. *Id.* at 1662 (citing ELY, *supra* note 144, at 37).

222. See Levinson, *supra* note 168, at 142. For Bork to state that “the set of enforceable constitutional rights is limited to those specified in text is . . . to defy the [N]inth [A]mendment by denying that there are other rights retained by the people and by disparaging the enterprise of searching for a mode of analysis that might flesh out this admittedly otherwise skeletal remainder.” *Id.*

223. Niles, *supra* note 13, at 117.

224. Mitchell, *supra* note 56, at 1721 n.16 (citing BENNETT PATTERSON, THE FORGOTTEN NINTH AMENDMENT 18 (Bobbs-Merill 1955)).

225. See *Tome v. United States*, 513 U.S. 150, 167 (1995) (Scalia, J., concurring).

226. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 740 n.555 (1999) (quoting SCALIA, *supra* note 215 at 38).

tent with reading the law rather than psychoanalyzing its enactors.²²⁷ The text is the key, therefore, we should ignore drafting history without discussing it, instead of after discussing it.²²⁸ The views of Alexander Hamilton, a draftsman, bear no more authority than the views of Thomas Jefferson, not a draftsman, with regard to the meaning of the Constitution.²²⁹ The thoughts of a draftsman regarding what rule he or she drafted meant does not change the meaning the rule would otherwise bear.²³⁰ Therefore, the views of James Madison should bear no more authority than the views of anyone else associated with the drafting and ratifying of the Ninth Amendment.

Besides the fact that Madison's interpretation of the Ninth Amendment bears no authoritative weight, scholars come to conflicting conclusions regarding what he intended the Ninth Amendment to mean.²³¹ Thus, even if Madison's views on the meaning of the Ninth Amendment were relevant, they still would not shed light on the amendment's meaning since his view is hotly contested. Some traditionalist scholars, who feel the Ninth Amendment only forever places a line between the rights of the people and the powers of the government, maintain that Madison argued for judicial review of only enumerated rights.²³² Therefore, this position believes Madison intended the Ninth Amendment to assure anti-federalists that the "Constitution would leave intact those individual rights contained in state constitutions, statutes, and common law."²³³ On the other hand, some affirmative rights advocates, who contend the Ninth Amendment recognizes individual rights not listed in the first eight amendments, believe it is unlikely Madison thought unenumerated rights would be left entirely to the will of the legislature or the majority of the community, with only enumerated rights receiving judicial protection.²³⁴ Under this model, Madison feared that unenumerated rights would be left

227. *Bank One Chi. v. Midwest Bank*, 516 U.S. 264, 279 (1996) (Scalia, J., concurring) (citing *United States v. Public Util. Comm'n of Cal.*, 345 U.S. 295, 319 (1953) (Jackson, J., concurring)).

228. *Bank One Chi.*, 516 U.S. at 283 (Scalia, J., concurring); see also Philip P. Frickey, *Revisiting the Revival of Theory in Statutory Interpretation: A Lecture in Honor of Irving Younger*, 84 MINN. L. REV. 199, 205 n.31 (1999) (citing *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 28 n.† (1998) (noting that Justice Scalia joins entire opinion except section discussing and rejecting a party's appeal to legislative history)); *Assocs. Commercial Corp. v. Rash*, 520 U.S. 953, 955 n.* (1997) (noting that Justice Scalia joins entire opinion except footnote discussing and rejecting legislative history to construe a statute).

229. *Tome*, 513 U.S. at 167 (Scalia, J., concurring).

230. *Id.* at 168.

231. See Barnett, *supra* note 182 at 3; Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 260-61 (1983).

232. See, e.g., Barnett, *supra* note 182, at 20.

233. Caplan, *supra* note 231, at 259.

234. Barnett, *supra* note 182, at 20.

unprotected; thus, the Ninth Amendment was proposed and adopted.²³⁵

While I realize statutes, cases, and other materials will forever be subject to differing interpretations, when a person's alleged intent behind drafting a constitutional amendment from over two hundred years ago is in doubt, should we not take our medicine and concede we do not know what Madison believed the Ninth Amendment to mean? No scholar, to my knowledge, has any Madison source stating, "I believe the Ninth Amendment means" Instead, intent based scholars seem to rely on a grab bag of Madison's amendment proposals, letters, speeches, and writings with the hope of pulling it together to effectuate his Ninth Amendment beliefs.²³⁶ Once again, while I admit referring to analogous sources to a legal issue is an appropriate analytical tool, the situation here is different. There is no collective principle at issue in which a Madisonian belief from similar arenas can be applied to answer. Here, there is a curt constitutional amendment. Absent a direct quotation from Madison interpreting it, I find it implausible to attempt to string together a panoply of his commentaries, over an unspecified time period, concerning multiple issues, and then conclude, with certainty mind you, that Madison believed this or that about the Ninth Amendment.

The best example of the limitations present when attempting to utilize Madison's alleged intent behind the amendment is found in writings by the leading affirmative rights Ninth Amendment scholar, Randy E. Barnett.²³⁷ Barnett feels it is appropriate to "rely heavily on the explanation of constitutional rights provided by James Madison in his speech before the House of Representatives."²³⁸ Barnett places almost complete interpretative control over the Ninth Amendment in Madison's hands because Madison conceived the amendment and his "conception of constitutional rights is the most pertinent to an understanding of the Ninth Amendment's intended function."²³⁹ Barnett acknowledges the gap in his own theory by admitting that Madison's speech to the House of Representatives may or may not reflect a clear consensus of Madison's contemporaries.²⁴⁰ Even with that concession, Barnett still claims that "if a robust theory of the unenumerated

235. See Mitchell, *supra* note 56, at 1740.

236. See generally Part.III.C.

237. Barnett has published and edited a number of pieces on the Ninth Amendment. See, eg., THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT (Randy E. Barnett ed. 1989); THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT (Randy E. Barnett ed. 1993); Randy E. Barnett, *A Ninth Amendment for Today's Constitution*, 26 VAL. U.L. REV. 419 (1991); Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1 (1988).

238. Barnett, *supra* note 182, at 3.

239. *Id.*

240. *Id.*

rights retained by the people is consistent with [Madison's] vision, then it will be quite difficult to sustain an objection to such a theory on the ground that it violates original intent."²⁴¹ If Barnett admits that one Madison speech on the Ninth Amendment may not carry the day regarding the Ninth Amendment's intent, then how can he give authoritative weight to a vision correlating to that speech? Barnett could have created a more authoritative position, based on a concrete textual foundation, with: "if a robust theory of the unenumerated rights retained by the people is consistent with the text of the Ninth Amendment, then it will be quite difficult to sustain an objection to such a theory on the ground that it violates original intent." That statement eliminates the shaky intent ground that Barnett currently rests on. If you want a clear consensus of what Madison and his contemporaries thought the Ninth Amendment means, just look at what they agreed upon – the words and wording of the amendment itself. The Ninth Amendment's text is the best source to determine the clear consensus of its meaning.

Scholars and judges who study Madison's intent also concede that his work never went unquestioned. The Ninth Amendment was "almost entirely the work of James Madison."²⁴² However, the first draft of the Constitution drew criticism from representatives of the thirteen states.²⁴³ It has been noted that "[m]any in the state delegations to the Constitutional Convention complained that the document did not include a statement of the rights that individual citizens would enjoy under the new government."²⁴⁴ Madison drafted the first ten amendments "[i]n an attempt to respond to those concerns"²⁴⁵ and he "was a vocal opponent of the inclusion of a bill of rights until it became clear the Constitution would not be ratified by the states without one."²⁴⁶ The Bill of Rights formed after a classic political compromise between competing factions with complex, conflicting, and shifting attitudes toward liberty and the community.²⁴⁷ If we are going to attempt to discern the intent behind the Ninth Amendment, surely we must attempt to discern all persons' intentions that helped mold the amendment. Since this is impossible, I disavow it and do not consider the Founders' (including Madison's) alleged intent behind the Ninth Amendment.

241. *See id.*

242. *Griswold*, 381 U.S. at 488-89.

243. Niles, *supra* note 13, at 117.

244. *Id.*

245. *Id.*

246. *Id.* at 118 n.117.

247. JoEllen Lind, *Liberty, Community, and the Ninth Amendment*, 54 OHIO ST. L.J. 1259, 1288 (1993).

Examining a prior draft of a Madison amendment shows that more than just minor alterations were made to his proposal.²⁴⁸ Madison proposed the following:

The exceptions here or elsewhere in the [C]onstitution, 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 [C]onstitution; but either as actual limitations of such powers, or as inserted merely for greater caution.²⁴⁹

The above language was “split into two resolutions, which would form the thematic basis for separate amendments.”²⁵⁰ The Tenth Amendment was formed stating, “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”²⁵¹ Madison’s Ninth Amendment proposal stated, “[t]he enumeration in this Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.”²⁵² The only changes after that were substituting a “[t]he” for the “this” and placing a comma after Constitution.²⁵³ This, however, does not mean that Madison’s proposal made up 99.9% of the Ninth Amendment because “significant changes were made in the language of the earliest proposals.”²⁵⁴ Madison may have conceived the Ninth Amendment, but a House of Representatives’ Committee revised it.²⁵⁵ Madison served on that committee, but does that mean that the ideas, views, and overall input of other committee members are irrelevant?²⁵⁶ Just look to Madison’s draft above that was divided into two separate amendments.²⁵⁷ A severe change of that nature cannot be ignored even though the last revision appears to be slight.

Scholars also unsurprisingly reach conflicting historical conclusions surrounding the proposal and ratification of the Ninth Amendment.

248. See *infra* notes 249-257 and accompanying text. Drafting history is irrelevant and unauthoritative when interpreting subsequent legislation. See *supra* notes 225-230 and accompanying text. Therefore, I ignore previous drafts of legislation, including constitutional amendments, because the only thing we definitely know about them is that they were rejected. In this instance, though, I use Madison’s prior draft of the Ninth Amendment for a very limited purpose – rebutting the argument that we should follow Madison’s alleged intent behind it.

249. Niles, *supra* note 13, at 120.

250. *Id.*

251. U.S. CONST. amend. X.

252. Niles, *supra* note 13, at 120 (quoting 1 ANNALS OF CONGRESS 754 (Joseph Gales ed., 1789)).

253. *Id.* at 120-21.

254. *Id.* at 121 n.125.

255. Barnett, *supra* note 182, at 2.

256. *Id.*

257. See *supra* note 249 and accompanying text.

These conflicting conclusions create even more confusion regarding the meaning of the Ninth Amendment. This is especially problematic here because all facts and interpretations must be precise for anyone to plausibly state what Madison thought about the Ninth Amendment over two hundred years ago.

Incomplete facts, interpretations, and conclusions regarding the intent behind the Ninth Amendment are found in how the legislature debated the amendment. One view states that there was almost no debate in the House of Representatives concerning the Ninth Amendment²⁵⁸ before it was passed, and there was virtually no discussion of either Madison's first proposal or the Select Committee's draft.²⁵⁹ Barnett, on the other hand, does not categorize the level of debate in the House of Representatives.²⁶⁰ Even if the correct view is that little debate occurred, what was that little debate about? Who said it? What does it mean in reference to what the Ninth Amendment actually means? Furthermore, differing views exist regarding the debate that occurred in the Senate. While the appropriate view seems to be that the amendment's treatment in the Senate is unknown because deliberations in that chamber were closed to the public,²⁶¹ another view contends that "[t]here was no further discussion of this amendment in either the House or *Senate*."²⁶² Which is it? If the debate in the Senate was closed to the public, how could we accurately state that there was no discussion of it in that body? This is precisely the type of unknown information that causes me to hedge before adopting Madison's alleged intent behind the Ninth Amendment. We are uncertain about the degree of debate in the House of Representatives and the Senate, yet we are to lean on Madison's idea of the amendment, while excluding the views of others involved in its genesis, evolution, and ratification. One person's views cannot supplant the views of the entire House and Senate.²⁶³

Obviously, the collective input of many persons from state representatives to state delegations influenced the drafting of the Ninth Amendment, as "the Constitution was not written and ratified by a single actor with clear motivations, but by many participants, most of whom left little or no record of their intentions."²⁶⁴ There were many

258. Niles, *supra* note 13, at 121 n.125.

259. Sherry, *supra* note 205, at 1164.

260. See Barnett, *supra* note 182, at 2.

261. Leslie W. Dunbar, *James Madison and the Ninth Amendment*, 42 VA. L. REV. 627, 632 (1956).

262. Sherry, *supra* note 205, at 1164.

263. For more conclusory statements about Madison's intent, which I find inappropriate, see Caplan, *supra* note 231, at 259. "Madison intended [the Ninth Amendment] to assure the antifederalists that the Constitution would leave intact those individual rights contained in the state constitutions, statutes, and common law." *Id.*

264. Mitchell, *supra* note 56, at 1721.

Founders in Congress and the ratifying assemblies, speaking at many times.²⁶⁵ However, usually nothing about their intent, vision or motivation behind the Ninth Amendment is included in an intent analysis. Do their views count? Are they considered meaningless? There is no reason to believe a consensus existed amongst the Founders regarding what unenumerated rights meant, nor is there any reason to believe that we could determine what that consensus was if it indeed existed.²⁶⁶ Thus, the “relevant ‘intent’ [behind the Ninth Amendment] may have been very general or nonexistent.”²⁶⁷

Again, most, not all, of Madison’s proposed amendments were ratified²⁶⁸ and there were minor alterations made to his text.²⁶⁹ Accordingly, should we not investigate the intention behind those who declined a Madison amendment or caused an alteration in the language? Their input had to be significant if it led to declining an original proposal or changing the wording of subsequent amendment proposals. A sufficient number of people were not comfortable with an entire proposed Madison amendment or the text of an amendment subsequently adopted.²⁷⁰ How then can we be comfortable with Madison’s intent behind the Ninth Amendment? If only his intent counted, then why were alterations to his text made? Allowing Madison totalitarian control over the Ninth Amendment’s meaning is troubling.²⁷¹ Allowing his alleged view behind the Ninth Amendment to control its meaning discards numerous thoughts, opinions, conversations, concessions, and other human interactions during a dynamic time period. Most of that information we are not privy to. Instead of attempting to overemphasize what small portion of that information is accessible, I err on the side of caution and disregard it. Therefore, I ensure that all of the ideas surrounding the Ninth Amendment gain recognition in the text that was affirmatively adopted. The consensus of varying views surrounding what the Ninth Amendment means is incorporated into one, unifying work – the text of the Ninth Amendment. The best means to fulfill the grandiose ideal of understanding constitutional intent is to rely on the text agreed upon. Lawrence E. Mitchell quoted Justice Story’s view that:

265. Tribe, *supra* note 60, at 96.

266. See generally Lind, *supra* note 247. At worst it may be said that the Founders intentions cannot be ascertained with finality; some thought one way and some another, thus, it will never be entirely clear exactly where their decisive collective judgment came to rest. Mitchell, *supra* note 56, at 1722 n.20 (quoting ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 15-16 (Irvington Pub. 1962)).

267. Tribe, *supra* note 60, at 96.

268. Niles, *supra* note 13, at 117, citing 1 ANNALS OF CONGRESS, *supra* note 252, at 630.

269. Niles, *supra* note 13, at 117.

270. See generally *Id.*

271. See Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1127 (1998).

The Constitution was adopted by the people of the United States In different states and in different conventions, different and very opposite objections are known to have prevailed; and might well be presumed to prevail. Opposite interpretations, and different explanations of different provisions, may well be presumed to have been presented in different bodies And there can be no certainty, either that the different state conventions in ratifying the [C]onstitution, gave the same uniform interpretation to its language, or that, even in a single state convention, the same reasoning prevailed with a majority, much less with the whole of the supporters of it. . . . It is not to be presumed, that . . . clauses [of the Constitution] were always understood in the same sense, or had precisely the same extent of operation. . . . Nothing but the *text itself* was adopted by the people.²⁷²

Because nothing but the text was agreed upon; the text and not the intent is the appropriate starting place for a constitutional analysis. What originalists, or other intent based scholars, do not understand is that the Constitution's text is the best source of the Founder's intent. By relying on certain persons' intentions, the original intent of the Constitution is not found. Original intent of the select few who left a semblance of their vision is found. The views of a precious few cannot be considered the original intent behind the Constitution.

D. Historical Understanding of the Ninth Amendment Through Natural Law Principles

While the text of the Ninth Amendment is the correct starting place for analyzing it, legal thought before its passage is relevant to its interpretation. Prior legal thought and theory illustrates the mode of thought present at the Ninth Amendment's ratification.²⁷³ At that time, legal thought found its home in natural law principles.²⁷⁴ Natural law is premised upon a theory that "[r]ules of natural justice are those which are universally recognized among civilized men."²⁷⁵ Natural law and natural rights refer to "infallibly delivered conclusions as

272. Mitchell, *supra* note 56, at 1722 (quoting 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 388-89 (1970) (emphasis added)).

273. See generally Raoul Berger, *Natural Law and Judicial Review: Reflections of an Earthbound Lawyer*, 61 U. CIN. L. REV. 5, 5 (1992) (quoting Frederick Pollock, *The History of the Law of Nature: A Preliminary Study*, 1 COLUM. L. REV. 11, 30 (1901)).

274. *Id.*

275. *Id.* at 5-14 (quoting Frederick Pollock, *The History of the Law of Nature: A Preliminary Study*, 1 COLUM. L. REV. 11, 30 (1901)).

to moral and metaphysical truths.”²⁷⁶ Inanimate objects or human beings are to follow the laws essential to their nature.²⁷⁷

Natural law has evolved as an interpretative mechanism, whereby “[t]raditional natural law is primarily and mainly an objective ‘rule and measure,’ a binding order to, and independent of the human will, while modern natural law tends to be primarily and mainly a series of ‘rights,’ of subjective claims originating in the human will.”²⁷⁸ A natural right is “generally recognized by a significant portion of contemporary society as one inextricably connected with the inherent dignity of the individual.”²⁷⁹

The existence of natural law and natural rights was restated by philosopher John Locke,²⁸⁰ “and passed into the general understanding of the Framers.”²⁸¹ Many of the most well known Founders expressed a belief in natural law principles.²⁸² Thus, it is clear that the Founders

276. Morton, *supra* note 146, at 724.

277. *Id.* at 716.

278. Berger, *supra* note 273, at 11 (quoting LEO STRAUSS, *THE POLITICAL PHILOSOPHY OF HOBBS* vii-viii (Elisa M. Sinclair trans., 1963)).

279. Massey, *supra* note 166, at 331.

280. 12 *THE WORLD BOOK ENCYCLOPEDIA* 413 (1998). John Locke (1632-1704) was an English philosopher; his writings strongly influenced our Founding Fathers. According to Locke, all people possessed certain natural rights and duties including life, liberty and property. Locke believed that the duty of the state was to ensure the rights of the people since government can easily infringe on those rights. The justification for the state's existence must be asserted by its ability to guard human rights better than individuals acting on their own. *Id.*

281. Morton, *supra* note 146, at 716; *see also* Sanders, *supra* note 3, at 764 (citing GORDAN S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-81*, at 283 (1969) (“The Founders were, almost to a man, disciples of John Locke.”)).

282. Levy, *supra* note 207, at 2723. In 1775, Alexander Hamilton wrote “the sacred rights of mankind . . . are written . . . in the whole volume of human nature . . . and can never be erased or obscured by mortal power.” *Id.* (quoting BENJAMIN FLETCHER WRIGHT, *AMERICAN INTERPRETATIONS OF NATURAL LAW* 90-91 (1931) (quoting Alexander Hamilton)). In 1763, John Adams referred to “the unalienable, indefeasible rights of men”. *Id.* (quoting JOHN ADAMS, *LIFE AND WORKS* 440 (1951)). Adams told the people, “[y]ou have rights antecedent to all earthly governments: rights that cannot be repealed or restrained by human laws.” Robert M. Hardaway, ET AL., *The Right to Die and the Ninth Amendment: Compassion and Dying After Glucksberg and Vacco*, 7 *GEO. MASON L. REV.* 313, 348-49 (1999) (quoting PATTERSON, *supra* note 224, *reprinted in* BARNETT, *supra* note 6, at 108. In 1764, James Otis declared that human rights are derived from the law of nations that “are natural, inherent, and inseparable rights.” Levy, *supra* note 207, at 2723, (quoting Jordan J. Paust, *On Human Rights: The Use of Human Rights Precepts in U.S. History and the Right to an Effective Remedy in Domestic Courts*, 10 *MICH. J. INT’L L.* 543, 549 (1989) (quoting James Otis)). The Massachusetts Resolution of 1765 states “there are certain essential rights . . . which are founded in the law of God and nature, and are the common rights of mankind.” *Id.* William Blackstone argued that despite the fact that individuals were required to surrender a portion of their natural liberty in return for the advantages of society, they “retained certain

believed in unwritten natural rights.²⁸³ Because individual rights existed, they deserved judicial protection even if they were not contained in the Constitution's text.²⁸⁴ Therefore, higher law, or natural law, is "arguably the great founding principle of American constitutionalism."²⁸⁵ The social compact theory is the "philosophical background against which the Constitution was written."²⁸⁶ Locke expressed that natural rights comprise life, liberty, and property. It is no surprise that the Fifth Amendment of the United States Constitution states, "nor shall any person . . . be deprived of life, liberty, or

fundamental rights that were not subject to government infringement." Wachtler, *supra* note 166, at 599 (citing 5 THE FOUNDER'S CONSTITUTION 388 (Philip B. Kurland & Ralph Lerner eds., 1987) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 120-41 (1765)). Blackstone identified these rights as "personal security, personal liberty, and personal property." Wachtler, *supra* note 166, at 599-600 (citing BLACKSTONE, *supra* at 390-94). Samuel Adams said, "[a]mong the Natural Rights of the Colonists are these[:] First a Right to *Life*, Secondly to *Liberty*, Thirdly to *Property*. . . . Every natural Right not expressly given up or from the nature of a Social Compact necessarily ceded remains." Sanders, *supra* note 3, at 802 (quoting Samuel Adams, *The Rights of the Colonists 20 Nov. 1772, Writings 2:350-59*, in 5 THE FOUNDER'S CONSTITUTION, *supra* at 394-95). Thomas Jefferson said, "Locke's little book on Government is perfect as far as it goes." Niles, *supra* note 13, at 109 n.73 (quoting MICHAEL P. ZUCKERT, NATURAL RIGHTS AND THE NEW REPUBLICANISM 19 (1994)). James Wilson said, "the law of nature, though immutable in its principles, will be progressive in its operations and effects." Jeff Rosen, *Was the Flag Burning Amendment Unconstitutional*, 100 YALE L.J. 1073, 1082 (1991) (quoting 1 THE WORKS OF JAMES WILSON 127 (J. Andrews ed. 1896)).

283. Suzanna Sherry, *Textualism and Judgment*, 66 GEO. WASH. L. REV. 1148, 1151 (1998); see also Sherry, *supra* note 205, at 1146 ("[A] constitution was not itself seen as positive, enacted law but rather as a declaration of first principles.").
284. *Id.*
285. David N. Mayer, *The Natural Rights Basis of the Ninth Amendment: A Reply to Professor McAfee*, 16 S. ILL. U. L.J. 313, 326 (1992).
286. Kevin W. Saunders, *Privacy and Social Contract: A Defense of Judicial Activism in Privacy Cases*, 33 ARIZ. L. REV. 811, 822 (1991) (citing Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 383-98 (1928)); see also Haddon, *supra* note 166, at 103 ("Few would dispute that at the time of the Constitution's framing and the discussion of proposed amendments there was a general belief in natural law."); Levy, *supra* note 207, at 2722 ("References to natural law as the source for inalienable rights of mankind were pervasive at the time immediately before the Constitution's adoption."); Massey, *supra* note 166, at 314 (stating that the Founders "relied upon natural law principles in formulating constitutional guarantees"); Rosen, *supra* note 282, at 1075 ("Virtually all commentators agree that the Framers and ratifiers of the Bill of Rights believed in natural rights. . . ."); Saunders, *supra* at 822 n.78 (citing Randy E. Barnett, *Are Unenumerated Constitutional Rights the Only Rights We Have? The Case of Associational Freedom*, 10 HARV. J.L. & PUB. POL'Y 101, 103-04 (1987)) (noting that the Founders were influenced by the Lockean philosophy of rights first and government second). *But see* Ely, *supra* note 144, at 39 (stating that natural law theory was not universally accepted by the Founders and was probably not even the majority view at the time).

property, without due process of law”²⁸⁷ An evaluation of natural law and natural rights theory, therefore, provides persuasive historical understanding surrounding the interpretation of the Bill of Rights. Stephen Macedo appropriately describes how natural law principles attach to the Constitution with:

Natural law or “higher law” principles are not yanked from the sky and slung onto constitutional hooks. Rather, an open ended and complex document is read in a certain spirit: in light of the principles that seem to underlie its specific phrases and larger structures, principles that help justify the document’s more specific aspects. Indeed, by interpreting the document in light of its underlying moral principles we extend the document’s meaning in a way that vindicates the preamble’s claim that the Constitution is meant to approximate justice and other basic moral goals. The point is to read this document and the history of its interpretation as best they can be, drawing out latent principles, understanding the whole as attempting to realize the preamble’s ends of justice, liberty, and the general welfare.²⁸⁸

Natural rights theory can neither explain the text of the Ninth Amendment nor show the intent behind it. The written Constitution is the highest law of society,²⁸⁹ but that does not mean that there is no room for principles of natural law.²⁹⁰ Natural law shows us where the Founders were coming from because “it is beyond serious dispute that natural law principles colored the outlook of those who drafted the Declaration of Independence and later the Constitution.”²⁹¹ Although the text of the Ninth Amendment governs unenumerated

287. U.S. CONST. amend. V; *see also* U.S. CONST. amend. XIV (“[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . .”); DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of American principle that government does not bestow or grant rights upon the people, but that the people are born with such rights - and that a government that seeks to suppress these unalterable rights does so at its own peril.” Robert E. Hirshon, *Peace and Freedom: As We Enjoy the Benefits of Independence, We Should Reflect on its Beginnings*, 88 A.B.A. J. 8, 8 (July 2002); *see also* Niles, *supra* note 13, at 109 (“Locke’s political doctrine . . . contains all the defining doctrines of the American Declaration of Independence.”); Rosen, *supra* note 282, at 1078 (“[The Founders] of the Bill of Rights recognized the natural rights enumerated in the Declaration of Independence. . . .”).

288. Macedo, *supra* note 195, at 40.

289. Berger, *supra* note 273, at 26.

290. *Id.*; *see also* Massey, *supra* note 166, at 343 (noting that the Founders “conceived of both enumerated and unenumerated rights as consisting of positive and natural rights.”); Pope, *supra* note 154, at 450 (“The Ninth Amendment says, in effect, to look for guidance in the natural law.”).

291. Wachtler, *supra* note 166, at 599 (citing 5 THE FOUNDER’S CONSTITUTION, *supra* note 282, at 395-99).

rights issues, it was based upon some prior principle. The Ninth Amendment did not come out of thin air and the 1700's are nowhere near the start of human existence. Accordingly, a historical understanding of the principles behind the Ninth Amendment provide support for interpreting it.

An examination of Ninth Amendment principles is important because natural law theorists presuppose that it is a basic moral and metaphysical truth "that all human beings possess natural rights."²⁹² Rights and freedoms are ultimate values and the creation of a system of laws necessarily involves curtailing these rights and restrictions on human freedom.²⁹³ Since people by nature are free, equal, and independent, no one can be put out of this estate and subjected to the political power of another without consenting to it.²⁹⁴ Therefore, any governmental assertion of power must be justified by referring to its pursuit of achieving the peace and security of its citizenry.²⁹⁵

One can at least make a strong case that unenumerated rights were understood to derive from the natural rights doctrine.²⁹⁶ The philosophical context in which the Constitution and the Ninth Amendment were written indicates that the rights retained in the Ninth Amendment are natural rights.²⁹⁷ Therefore, natural law's textual home is the Ninth Amendment.²⁹⁸ Consequently, the Ninth Amendment occupies a unique place in the law because it provides a positive law basis for a natural rights theory.²⁹⁹ Bruce N. Morton explained how the Ninth Amendment's text adopted natural rights law:

The meaning of [the Ninth Amendment] is not subject to reasonable dispute. The key word is "retained." Human beings have rights which precede (temporally and logically)

292. Morton, *supra* note 166, at 719.

293. *Id.* at 728.

294. *Id.* (quoting JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* § 6 (Bobbs-Merrill ed., 1952) (1690).

295. *Id.* at 731.

296. Steven J. Heyman, *Natural Rights, Positivism and the Ninth Amendment: A Response to McAfee*, 16 S. ILL. U. L.J. 327, 332 (1992).

297. Saunders, *supra* note 286, at 823 (citing PATTERSON, *supra* note 224, at 19 ("The Ninth Amendment . . . is a basic statement of the inherent natural rights of the individual. . ."); see also Berger, *supra* note 200, at 1521 (citing BARNETT, *supra* note 6, at 6 (stating that natural rights are identified with the rights retained by the people in the Ninth Amendment); Massey, *supra* note 166, at 322 ("[T]he Ninth Amendment was intended . . . to serve as a barrier to encroachment upon natural rights. . ."); Sanders, *supra* note 3, at 805 ("As a statement that . . . natural rights . . . are not to be abrogated, the Ninth Amendment . . . [is] a silent sentinel guarding liberties not otherwise named in the Constitution.")).

298. Calvin R. Massey, *The Natural Law Component of the Ninth Amendment*, 61 U. CIN. L. REV. 49, 50 (1992); see also Levy, *supra* note 207, at 2724 ("[T]he entire corpus of *jus cogens humanum* norms is incorporated into the Constitution through the Ninth Amendment.") (emphasis added).

299. Hampton, *supra* note 166, at 367.

those explicitly conferred by this Constitution; they are the natural rights possessed by all human beings independently of human fiat. Specific constitutional provisions do not, and could not, affect these rights.³⁰⁰

The interplay between natural rights and constitutional rights is reminiscent of the chicken and egg argument – which came first: natural rights or constitutional rights. Here, though, it is a little more obvious: the Constitution was based on the idea that natural rights existed.³⁰¹ Therefore, the Ninth Amendment ensures a description of natural rights exists in the Constitution. It was, and remains, carefully worded to prevent the sort of denial of rights that we see more and more often. By enacting a mechanism to evaluate Ninth Amendment unenumerated rights claims, the causal link between natural rights theory adopted in the Ninth Amendment and its application to current (and future) legal issues will be complete. Thus, natural rights principles effectuated through the Ninth Amendment will enshrine natural rights to the people, thereby curtailing the denial of those very rights.

These natural rights principles are not confined to the boundaries of philosophy and theory. The principle that human beings retain natural rights is a part of the law. Natural law rested at the foundation of several early decisions of the Supreme Court, most notably when the Court considered the rights of individuals.³⁰² In *Calder v. Bull*,³⁰³ retroactive civil laws did not violate the Ex Post Facto Clause.³⁰⁴ The Court stated, “[a]n act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be

300. Morton, *supra* note 146, at 751. Morton stated:

[T]he presumption is not in favor of governmental authority, but rather, against it. Because natural rights are presumed to have been retained by the people unless a basis for their delegation to the government can be specifically demonstrated, this theory places substantial and general limitations on the power of government. Because the legislative power is exercised, in Locke’s political theory, by a democratically elected majority, this limitation is, *ipso facto*, upon the power of the democratically elected majority.

Id. at 731; see also Mayer, *supra* note 285, at 325 (citing David N. Mayer, *The Jurisprudence of Christopher G. Tiedeman: A Study in the Failure of Laissez-Faire Constitutionalism*, 55 Mo. L. Rev. 93 (1990)) (advocating judicial enforcement of the unwritten constitution through natural law based laissez-faire constitutionalism).

301. Morton, *supra* note 146, at 714.

302. Wachtler, *supra* note 166, at 611 (citing *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796)); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810); *United States v. Fisher*, 6 U.S. (2 Cranch) 358 (1805); *Marbury*, 5 U.S. (1 Cranch) 137; see also Hampton, *supra* note 166, at 351 (citing 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230) (noting that fundamental principles include the right to pursue and obtain happiness and safety)).

303. 3 U.S. (Dall.) 386 (1798).

304. *Id.* at 393.

considered a rightful exercise of legislative authority.’”³⁰⁵ In *Fletcher v. Peck*,³⁰⁶ the Court used the Contract Clause to invalidate a Georgia statute that reclaimed lands previously granted by a bribed legislature.³⁰⁷ The Court stated that the statute would also violate “the general principles which are common to our free institutions.”³⁰⁸ In *Wilkinson v. Leland*,³⁰⁹ Justice Story concluded:

The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming that the power to violate and disregard them — a power so repugnant to the common principles of justice and civil liberty — lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people.³¹⁰

Natural law principles, while waning, extended to decisions in the late Nineteenth Century. In *Citizens' Savings & Loan Ass'n v. Topeka*,³¹¹ the Court conceded that there are rights in every free government beyond the State's control that ensure the existence of the social compact and must be respected by the government.³¹² The Court believed that the social compact limited government power.³¹³ Furthermore, it did not restrict itself to aspects of the social compact found in the Constitution's text; instead, it argued in terms of theoretical principles.³¹⁴ This conveys a balance between the Constitution's text and the natural law principles it was based upon. A wholly textual vision of rights ignores the natural law principles creating the text itself. In *Munn v. Illinois*,³¹⁵ the Court concluded that although a body

305. John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967, 1001 (1993) (quoting *Calder*, 3 U.S. (3 Dall.) at 388) (emphasis omitted). Yoo also indicates that in *Terret v. Taylor*, 13 U.S. (9 Cranch) 43 (1815), the Court invalidated a Virginia law that dispossessed the Episcopal Church of land. The Court felt the law was inconsistent with the right of citizens to the free enjoyment of their property legally acquired. *Id.* at 1001; see also *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) (Wilson, J., concurring) (the right of an individual to sue another state was upheld and states, like individuals, are bound by laws through compact); Marks, *supra* note 153, at 479 (citing *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 255 (1796) (Patterson, J., concurring) (confiscating property in times of war is incompatible with principles of justice and policy, moral sense, reason and natural equity)).

306. 10 U.S. (6 Cranch) 87 (1810).

307. Yoo, *supra* note 305, at 1001.

308. *Id.* at 1001.

309. 27 U.S. (2 Pet.) 627 (1829).

310. *Id.* at 657.

311. 87 U.S. (1 Wall.) 655 (1874).

312. *Id.* at 662-63.

313. Saunders, *supra* note 286, at 818.

314. *Id.*

315. 94 U.S. 113 (1876).

politic is a social compact wherein the whole people covenants with each citizen that all shall be governed by laws for the common good, it does not confer power upon the whole people to control rights that are purely and exclusively private.³¹⁶ Once again the Court offered a clear view that the legislature's power is limited under the social compact, and once again these limitations did not appear to be confined to those in the Constitution's text.³¹⁷

Accordingly, the text of the Constitution is not an exclusive source for determining the existence of unenumerated rights. The text is the appropriate starting point and its meaning cannot be violated; however, an evaluation of the existence of unenumerated rights cannot be forever entombed in the text of the Ninth Amendment. Supplementing the text with the natural law theory it was premised upon and subsequent case law that applies those principles conforms to the text and further explains the law, thereby strengthening the text.³¹⁸ Leaving the text without the foundation of natural rights could place its meaning in jeopardy. A wholly textualist approach provides the weakest restraints on judges and is an inappropriate invitation to judicial creativity because broadly phrased terms allow judges to utilize those provisions however desired.³¹⁹ An active role for the judiciary in the identification and articulation of unenumerated rights gives the Ninth Amendment its literal meaning in light of the Founders' natural law tradition: there are fundamental rights that exist outside the Constitution that deserve as much protection as enumerated rights.³²⁰

Natural law also advances a form of legal thought ensuring that affirmative rights retained by the people are not unnecessarily, or in current times, unconstitutionally infringed upon.³²¹ The major task of jurisprudence is to continually assess legal restrictions to determine when they exceed the permissible boundaries of tacit consent, and infringe upon substantive natural rights, which are always retained by the people and cannot be bargained away.³²²

This pronouncement builds on the theory of natural law and natural rights and mandates a form of jurisprudence ensuring the survival of natural law and natural rights. In our system of government, this commandment is essential because the judiciary determines whether

316. *Id.* at 124 (quoting the preamble to Part I, Article 12 of the Commonwealth of Massachusetts).

317. Saunders, *supra* note 286, at 818.

318. This does not mean that I agree (or disagree) with all the judicial decisions based upon natural law principles. It means, however, that I agree with courts invoking natural law principles in their analysis.

319. David A. Strauss, *The New Textualism In Constitutional Law*, 66 GEO. WASH. L. REV. 1153, 1157 (1998).

320. Wachtler, *supra* note 166, at 610.

321. Morton, *supra* note 146, at 732.

322. *Id.* at 732. Since society is committed to government by consent, "society must accept an active role for the judiciary." Saunders, *supra* note 286, at 813.

an unenumerated right exists under the Constitution.³²³ If the judiciary does not apply a legal analysis adopting natural law principles as persuasive components in evaluating the law, the principles of natural law will not be applied, but will remain as dormant philosophical doctrines.

E. The Correct Approach to Evaluate Unenumerated Rights Claims

Some may regard the Ninth Amendment as a recent discovery and some may have forgotten it, but since 1791 it has been a basic part of the Constitution that federal judges are sworn to uphold.³²⁴ It is "a uniquely central text in any attempt to take seriously the process of construing the Constitution."³²⁵ Through the text of the Ninth Amendment we can see that "the law is not static"³²⁶ and that "every contingency that might threaten individual rights"³²⁷ was not foreseen at the enactment of the Constitution.³²⁸ This text-based commandment for progressive legal thought proclaims that the law of nature will be progressive in its operation and effects; thus cotemporary society will evolve in the future to produce even better results.³²⁹

The Ninth Amendment incorporates unenumerated rights into the Constitution, directly protecting them from state action³³⁰ through the Privileges and Immunities Clause of the Fourteenth Amendment.³³¹ The Ninth Amendment is not a rule of construction, but rather a recognition of other rights³³² containing a "fountain of law."³³³ A reasonable interpretation of the Ninth Amendment includes the theory that it "could sanction an unlimited range" of unenumerated rights.³³⁴

The meaning of the Ninth Amendment may be clear, but its implications for constitutional adjudication are not.³³⁵ The Ninth Amendment's text does not prescribe how to determine what unenumerated rights are. Because the text does not enunciate a standard, we have to

323. See Wachtler, *supra* note 166, at 597.

324. Griswold, 381 U.S. at 491 (Goldberg, J., concurring); see also U.S. CONST. art. VI (requiring federal judges to take an oath or affirmation that they uphold the Constitution).

325. Tribe, *supra* note 60, at 100.

326. Mitchell, *supra* note 56, at 1728.

327. *Id.*

328. *Id.*

329. Wilson, *supra* note 282, at 126-27.

330. See generally Mitchell, *supra* note 56, at 1731.

331. U.S. CONST. amend. XIV, § 1. The Privileges and Immunities Clause of the Fourteenth Amendment states that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." *Id.*

332. Paust, *supra* note 166, at 254.

333. Caplan, *supra* note 231, at 226 (quoting CHARLES LUND BLACK, DECISION ACCORDING TO LAW 44 n.47 (1981)).

334. Thapa, *supra* note 187, at 142.

335. Berger, *supra* note 200, at 1511 (citing BARNETT, *supra* note 6, at 4).

develop some useful, text-based methodology to discover the actual content of these rights.³³⁶ At first glance, this appears to be a constitutional conundrum. In reality though, it is once again a brilliant portrayal of humbleness in the Constitution. If the Founders could not determine what all the rights retained by the people were in the 1700's, how could they enunciate what legal standard to apply to evaluate unenumerated rights issues? Because no textual basis exists to determine what an unenumerated right is, a test must be developed to determine whether something is an unenumerated right within the context of the Ninth Amendment.

To evaluate whether or not an alleged unenumerated right exists under the Ninth Amendment, another dreaded three-part constitutional law test must be adopted. While I see law school students exasperating as they hear of another three-part constitutional law inquiry, unfortunately there needs to be one here. It is as follows: First, is the alleged right governed by any other provision of the Constitution? If so, then that provision applies, the three-part test ends, and there is no Ninth Amendment issue.³³⁷ If no other portion of the Constitution governs the alleged right, then step two occurs. If step two applies, then the Court determines whether the alleged right was considered a right retained by the people at the enactment of the Constitution, or if it has evolved into a right that is currently retained by the people. If a preponderance of the evidence shows that, at either time period, the people have not retained the right, then it is not a right retained by the people. If at either point in history, however, a preponderance of the evidence shows the right was retained by the people, then it is considered an enumerated right. Under the third step, the Court establishes a standard of review. A rational basis test applies to a non-right, wherein the challenger has the burden of proving that the law in question is not rationally related to a legitimate government interest.³³⁸ A strict scrutiny test applies to an unenumerated right, wherein the government has the burden of proving that the law in question is narrowly tailored to meet a compelling interest.³³⁹

Step one is a gatekeeper, which prevents a reviewing court from spending any unnecessary time reviewing a non-Ninth Amendment

336. See generally Paust, *supra* note 166, at 235 (noting that the courts have a responsibility to secure the rights guaranteed by the Ninth Amendment through "rational and policy-serving judicial decision-making").

337. The first step of my analysis is similar to the first step in The Honorable Robert W. Sweet & Edward A. Harris, *Just and Unjust Wars: The War on the War on Drugs — Some Moral and Constitutional Dimensions of the War on Drugs*, 87 NW. U. L. REV. 1302, 1361-62 (1993) (reviewing THOMAS SZASZ, *OUR RIGHT TO DRUGS: THE CASE FOR A FREE MARKET* (Praeger Publishers ed., 1992)).

338. See generally *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997).

339. *Id.* at 721.

claim. If another portion of the Constitution governs the legal question, then that portion of the Constitution applies. The only hurdle in this step is resolving current precedent supporting substantive due process under the Fourteenth Amendment. In other words, an argument can be made that if the Fourteenth Amendment encompasses a substantive due process component, then that provision should apply to determine if an unenumerated right exists. While substantive due process is current law, and deserves a good degree of *stare decisis* treatment, one need look no further than the text of the Fourteenth Amendment and the Ninth Amendment. If an unenumerated right is alleged, then the Ninth Amendment clearly governs that question. The Due Process Clause of the Fourteenth Amendment has its mandate – provide fair procedures when the state is attempting to deny life, liberty, or property.³⁴⁰ *Stare decisis* is not an inexorable command when interpreting the Constitution.³⁴¹ In constitutional cases, it is at its weakest³⁴² because it is always possible to appeal behind doctrinal precedent in order to challenge current wisdom with what the Constitution's text commands.³⁴³ While the doctrine of *stare decisis* demands some special justification for a departure from longstanding precedent,³⁴⁴ we must remember that:

A judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors have put on it.³⁴⁵

340. U.S. CONST. amend. XIV.

341. *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (citing *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997); *Agostini v. Felton*, 521 U.S. 203, 235 (1997)); see also *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405-08 (1932) (Brandeis, J., dissenting) (stating that *stare decisis* is not a universal inexorable command).

342. Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 704 (1999) (quoting *Agostini*, 521 U.S. at 235-38).

343. H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 697 (1987).

344. *Dickerson*, 530 U.S. at 443 (citing *U.S. v. Int'l Bus. Machs. Corp.*, 517 U.S. 843, 856 (1996)).

345. *South Carolina v. Gathers*, 490 U.S. 805, 825 (1989) (Scalia, J., dissenting) (quoting Justice Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949)); see also Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 29-30 (1994) (arguing that judicial power includes a structural inference that the Constitution is supreme over all competing sources of law); Lee, *supra* note 342, at 704 n.318 (citing *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring) (stating that the only correct rule of decision is the "Constitution itself and not what we have said about it"); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 319 n.349 (1994) ("[Judges are bound to interpret the law as they understand it], not as it has been understood by others.").

In federal constitutional cases, where correction through legislative action is practically impossible, the Supreme Court has often overruled its earlier decisions.³⁴⁶ Essentially, the Court bows to the lessons of experience and the force of better reasoning, recognizing the process of trial and error is appropriate in the judicial function.³⁴⁷

Step two provides a court with a list of criteria to evaluate an unenumerated right issue. Since fundamental rights are catalogued in documents the American people have formally or informally ratified,³⁴⁸ an evaluation of an unenumerated right issue must look to this diverse range of sources. This provides a more document-supported approach that invites judges to canvass non-judicial legal sources, state and federal law, state constitutions, and other related sources for epistemic guidance.³⁴⁹ The sources reflect society's view of the alleged unenumerated right from before the beginning of our nation up to the present time. They provide insight into the view of the alleged right from the Constitution and all three branches of state and federal government. The factors also increase the chance of recognizing the right when a high level of liberty is denied by a law curtailing the alleged right, while balancing that notion by decreasing the chance of recognizing the right when it presents a substantial risk of harm to others. The sources are not limited to government or legal items that may exclude important and pertinent views of the behavior in question. The view of those most committed to analyzing the issue are valued, as well as the view of the world community. The guiding principle upon which the Constitution was formed, natural law theory, also provides insight as to whether the alleged right conforms with the ideals upon which the Founders based our system of government.

Specifically, courts should look to the following sources to determine if an unenumerated right exists under the Ninth Amendment: (1) does the alleged right fit within the overall structure and meaning of the Bill of Rights; (2) what is the status of federal and state laws governing the alleged right and related behavior; (3) what is the level of enforcement of those laws; (4) what is the status of case law regarding the related behavior; (5) what is the level of liberty prohibited by the law in question;³⁵⁰ (6) what is the level of potential social harm

346. *Burnet*, 285 U.S. at 406.

347. *Id.*

348. Amar, *supra* note 59, at 123. While Amar discussed fundamental rights and their protection under the Privileges and Immunities Clause of the Fourteenth Amendment, I believe the Ninth Amendment governs unenumerated rights and the Privileges and Immunities Clause incorporates those rights against the states.

349. *Id.*

350. Marc C. Niles states that the appropriate question posed in Ninth Amendment adjudication should be "whether government action that places a significant burden on the expression of personal autonomy or freedom is motivated by an unconstitutional interest in controlling private action or private choices." Niles, *supra* note 13, at 124. An unenumerated right need

prevented by the law in question;³⁵¹ (7) what is the view of the behavior through scholarly sources and documents; (8) what is the world's view of the behavior;³⁵² and (9) whether the alleged right is consistent with natural law principles.

The overall structure and meaning of the Constitution provides a text-based standard to determine if the right at issue is similar enough to other rights protected to warrant recognition as an unenumerated right. Justice Thurgood Marshall explained a similar process of comparing non-constitutional interests to specific constitutional guarantees by determining that as the nexus between a specific constitutional guarantee and a non-constitutional interest draws closer, the non-con-

not be a private action or choice to exist. The text of the amendment mentions nothing in regard to public versus private rights. The right of an instructor to teach foreign languages and of a student's parents to engage them so as to instruct their child was protected by substantive due process. *Meyer v. Nebraska*, 262 U.S. 390 (1922). The parents' decision may be their private choice, but allowing an instructor to teach a topic to a group of students in a public school is not a private right. Recent references to the Ninth Amendment and enumerated or fundamental rights are not related to private rights. The Ninth Amendment supported a First Amendment right for the press to attend criminal trials, which are held before the public in a public setting. Justice Douglas claimed there is an unenumerated right to pure air and water, and to vote in state elections. *Lubin v. Panish*, 415 U.S. 709, 721 n.* (1974); *Palmer v. Thompson*, 403 U.S. 217, 233-34 (1971) (Douglas, J., dissenting). Those rights are available to the public by public bodies, and are accessible in public settings. Moreover, many enumerated rights are public in nature. *See* U.S. CONST. amend. I (freedom to exercise religion, free speech, freedom of the press, right of peaceful assembly); U.S. CONST. amend. VI (accused receives *public* criminal trial). Accordingly, it is textually inaccurate to value only privacy oriented unenumerated rights, thus, I measure the level of liberty deprived by a law, not the level of privacy deprived by a law.

351. Niles argues that private and public boundaries "should be viewed as conveying the distinction between acts that pose a potential public threat and acts that do not." Niles, *supra* note 13, at 125. An unenumerated right can exist and pose a public threat. For example, if the right to use contraceptives and the right to an abortion were granted under the Ninth Amendment, a potential harm (albeit extremely remote) could be the elimination of the human population in the United States if all people use contraceptives and/or all pregnant women have abortions. Potential harms also derive from enumerated constitutional rights. *See* U.S. CONST. amend. I (controversial free speech inciting negative reaction, division, or violence); U.S. CONST. amend. IV (suppressing evidence may allow guilty persons to go unpunished); U.S. CONST. amend. V (suppressing incriminating statements may allow guilty persons to go unpunished); U.S. CONST. amend. VI (dismissing case for violating speedy trial rights may allow guilty persons to go unpunished); U.S. CONST. amend. VIII (granting bail may allow guilty persons to go unpunished if they flee). Because unenumerated rights can exist that pose a potential harm, I only weigh the level of potential harm prevented as one component of my criteria. The risk of potential harm is not dispositive regarding unenumerated rights issues.
352. *See generally* Murphy, *supra* note 166, at 481 (noting that the statements and practices of the international community give status to a right that should be protected from legislative encroachment by the United States' courts).

stitutional interest becomes more fundamental.³⁵³ Next, a review of federal and state law announces the elected legislatures' view, shedding light on how people viewed the issue throughout history. The enforcement of the law, however, may be the most telling factor. Some old laws remain on the books even though they are rarely, if ever, enforced.³⁵⁴ This provides the most current example of the people's view of the law, as it shows whether the legislature is pushing for enforcement, whether the executive is actually enforcing it, and how the people are reacting to that enforcement.³⁵⁵ As the law prohibits more liberty, less deference should be given to the law. However, as the law prevents more harm to others, less deference should be given to the alleged right.

Finally, more deference should be given to the right if it conforms with natural law principles, the theory upon which the Constitution was grounded. This guarantees that the ideals creating the Constitution forever speak to the question of whether an unenumerated right exists. Adjudicating unenumerated rights issues without reference to, and persuasive support from natural law principles eliminate the very thought process and logical deduction that established unenumerated rights in the first place.

If an analysis of those factors shows our society recognized the alleged right as being fundamental in the late 1700's or it has been subsequently recognized, and it is not a right that has been subsequently revoked by society, then it should be considered an unenumerated right today. In other words, the action or behavior may not have been sanctioned in the 1700's, but as society grew and changed, it became accepted as a right retained by the people. This ensures that today's legal issues are governed by today's attitudes. For the Ninth Amendment does not prescribe that unenumerated rights were forever determined in the 1700's: it does not say, "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people at this time."³⁵⁶ The "at this time" language is not present. Therefore, there is no text setting or limiting the time period when rights can form or be recognized. In fact, to place an arbitrary line in the sand fixing when unenumerated rights can be recognized would be a clear-cut case of judicial activism, in which a court would legislate a new provision into the Ninth Amendment.

Step three provides the standard of review when evaluating an unenumerated right issue. If the Ninth Amendment recognizes an

353. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 102-03 (1972) (Marshall, J., dissenting).

354. *See generally Poe*, 367 U.S. 497.

355. *See generally Bowers*, 478 U.S. at 187; *Griswold*, 381 U.S. at 479; *Poe*, 367 U.S. at 501.

356. U.S. CONST. amend. IX.

unenumerated right, it must be considered "fundamental," thus, warranting strict scrutiny review. The Ninth Amendment's text mandates treatment of unspecified, unenumerated rights on par with enumerated rights.³⁵⁷ The terms "inalienable" or "fundamental" are not found in the first ten amendments when referring to a protected right.³⁵⁸ Why then would the Framers limit Ninth Amendment rights to those that are not considered fundamental?³⁵⁹ A fair reading of the Ninth Amendment, along with the rest of the Bill of Rights, leads to the conclusion that all of the rights protected by the amendments were considered fundamental when they were ratified.³⁶⁰ Concluding that unenumerated rights are deserving of protection only when they are embraced by a social consensus relegates them to a distinctly lower and more suspect status than enumerated rights – a status barely entitled to respect and not subject to full veneration.³⁶¹ If an enumerated right is not recognized, courts will then apply the rational basis test to review the law in question, giving tremendous deference to the law and almost assuredly upholding it. This is standard practice now when no showing of a fundamental right is proven.³⁶²

My approach will not "open the Pandora's box of judicial review"³⁶³ or "provide 'a bottomless well in which the judiciary can dip for the formation of undreamed of 'rights' in their limitless discretion.'"³⁶⁴ These fears are halted at the door of this approach. By applying a filter step first, I defer non-Ninth Amendment issues to their appropriate constitutional standard, thereby, limiting the number and type of unenumerated rights claims. The second step sets forth a firm standard of determining whether or not unenumerated rights exist, which binds lawyers and judges to similar principles. These principles will now have added foundation and force because they will attach to the amendment that formulated them, instead of an amendment establishing no such principles. This prevents a shifting form of jurisprudence wherein the standards and ideals governing the adjudication of unenumerated rights are transferred to the procedural components of the Due Process Clause of the Fourteenth Amendment. When that flawed transfer is prevented, a more structured and organized approach to determining unenumerated rights evolves because the analytical mechanism meets the confines of the Ninth Amendment. Through that process, I am able to propose a more exacting methodology to govern unenumerated rights than is currently available in

357. Massey, *supra* note 166, at 343.

358. Murphy, *supra* note 166, at 456.

359. *Id.*

360. *Id.*

361. Tribe, *supra* note 60, at 106.

362. See *U.S. v. Brandon*, 158 F.3d 947, 956 (7th Cir. 1998); *King v. Edgar*, 1996 U.S. Dist. LEXIS 17999, *13 (N.D. Ill. 1996).

363. Barnett, *supra* note 182, at 22; see also Thapa, *supra* note 187, at 155.

364. Barnett, *supra* note 182, at 22 (quoting Berger, *supra* note 273, at 2).

substantive due process jurisprudence. Accordingly, this approach decreases the chances of incorrect jurisprudence on both sides of the unenumerated rights debate. My approach limits the ability of the bench to ignore valid unenumerated rights, while at the same time eliminating a vague pronouncement that would allow for judges to grant unenumerated rights at a whim.

The cornerstone of this formulation rests with the even playing field established in the second step of my analysis. By setting a preponderance of evidence standard, there is no presumption that an unenumerated right exists, nor is there a presumption one does not exist. To set a standard of proof above a preponderance of the evidence on the government to prove an unenumerated right does not exist would fail to follow the text of the Ninth Amendment because it does not indicate or infer that the particular unenumerated right at issue exists. The amendment only states that there are other rights retained by the people.³⁶⁵ There is no presumption of liberty that requires states to show that legislation infringing upon the citizen's liberty was a necessary exercise of its police power.³⁶⁶ The presumption of an unenumerated right "exalts the individual over the state, contrary to the Founders' design."³⁶⁷ To place a burden on the government would give rights advocates an inappropriate head start no matter how fruitful or fruitless their unenumerated right claim is. Because I do not give rights advocates a head start and a presumption that the alleged unenumerated right exists, there is an affirmative check on allowing for unending grants of unenumerated rights. On the other hand, to set a standard of proof above a preponderance of the evidence upon the individual challenger to prove an unenumerated right exists would fail to follow the text of the Ninth Amendment as well. A citizen should not have to overcome any burden or proof-based obstacle favoring the government to validate an unenumerated right. That would give non-text-based deference to the government and presume, to some degree, before any analysis takes place that the people do not retain the alleged unenumerated right. This flies in the face of the Ninth Amendment. If the people retain the unenumerated right, it is recognized. If the people do not retain it, it will not be recognized. Any burden of proof aiding either government regulation or right recognition fails to meet the tenets of the Ninth Amendment.

365. U.S. CONST. amend. IX.

366. Berger, *supra* note 200, at 1509 (quoting BARNETT, *supra* note 6, at 10, 12).

367. *Id.*

IV. INACCURACIES IN THE TRADITIONAL APPROACH TO INTERPRETING THE NINTH AMENDMENT

A. *The Traditional Approach's Theory*

The traditional view of the Ninth Amendment ignores its text for a conservative-based jurisprudence. Traditionalists argue that the Ninth Amendment does not protect any substantive rights beyond those expressly enumerated in the first eight amendments.³⁶⁸ This approach argues that "[t]he amendments to the Constitution proposed by the several state conventions forbade an inference of extended powers from specific limitations on powers. These proposals powerfully reinforce the conclusion that the mischief that Federalists feared was the subversion of the scheme of enumerated powers and residual rights."³⁶⁹ The traditional approach places an inappropriate reliance on Madison's statement that "if a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing."³⁷⁰ That view contends that the Tenth Amendment, which states, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people,"³⁷¹ lends support, if not authoritative weight, to their position.³⁷² The traditional approach proclaims that the Ninth and Tenth Amendments are two sides of the same coin,³⁷³ thereby forever placing a division between powers allotted to government and rights retained by the people.³⁷⁴ The traditional approach proposes that the Ninth Amendment's retained rights allude to the

368. Cooper, *supra* note 195; Phillip Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239, 315-17 (1989); Richard Kay, *Adherence to Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 269-73 (1988); Thomas B. McAfee, *The Bill of Rights, Social Contract Theory, and the Rights Retained by the People*, 16 S. ILL. U. L.J. 267 (1992); Siegel, *supra* note 177, at 533 (citing McAfee, *supra* note 180); Arthur Wilmarth, Jr., *The Original Purpose of the Bill of Rights*, 26 AM. CRIM. L. REV. 1261, 1287-89, 1297-98, 1301-03 (1989).

369. McAfee, *supra* note 180, at 1277. Similarly, Earl Maltz said:

Admittedly, the amendment does seem to suggest that the [F]ramers believed that people possessed rights other than those specifically enumerated in the Constitution. At the same time, however, the language does not indicate that those rights were to be protected by the Constitution, but rather from the remainder of the Constitution.

Siegel, *supra* note 177, at 534 (quoting Earl Maltz, *Unenumerated Rights and Originalist Methodology*, in BARNETT, *supra* note 6, at 265) (emphasis added).

370. Paust, *supra* note 166, at 244 (quoting James F. Kelley, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. CHI. L. REV. 814, 822 n.36 (1966) (quoting 5 WRITINGS OF JAMES MADISON 431-32 (G. Hunt ed., 1904))).

371. U.S. CONST. amend. X.

372. See generally McAfee, *supra* note 201, at 356-65.

373. Raoul Berger, *The Ninth Amendment*, 66 COLUM. L. REV. 1, 3 (1987).

374. See McAfee, *supra* note 180, at 1307. This perspective believes the Ninth and Tenth Amendments each secure the design of enumerated powers and reserved rights and powers against the threats perceived to flow from listing

people's collective and individual rights retained by virtue of the Constitution's grant of limited, enumerated powers to the federal government.³⁷⁵ This surmises that it would be nonsensical to apply the Ninth Amendment to the states because limits of the federal government's enumerated powers define the rights retained under the amendment.³⁷⁶ This leads the traditional approach to an abstract conclusion that there are no affirmative unenumerated rights and that the purpose of the Ninth Amendment is to reduce federal power³⁷⁷ and "secure the rights reserved by the Constitution's enu-

exceptions to powers not granted and relying on implication rather than express reservation. *Id.* See generally Berger, *supra* note 373.

375. Thomas B. McAfee, *The Federal System as Bill of Rights: Original Understandings, Modern Misreadings*, 43 VILL. L. REV. 17, 19 (1998) (citing *Criswold*, 381 U.S. at 519-20 (Black, J., dissenting)).

376. Cooper, *supra* note 195, at 76. Charles J. Cooper concluded the Ninth Amendment expresses "that the federal government is one of delegated powers, and that the enumeration of those powers is a guarantee that the American people enjoy unenumerated, and therefore, *innumerable*, rights against the federal government." *Id.* at 63-64; see also Slaughter, *supra* note 174, at 109-10. This view proposed "[t]he [N]inth [A]mendment was drafted to ensure that the identification and protection of 'other' fundamental rights are to remain in the domain of state law, where they resided under the Articles of Confederation." *Id.*

377. McAfee, *supra* note 375, at 26-27. Russell L. Caplan provided another structural reading of the Ninth Amendment. He concluded:

It is . . . incorrect . . . to view the [N]inth [A]mendment as creating rights that may be asserted against either a state or the federal government, because the amendment neither creates new rights nor alters the status of pre-existing rights. Instead, 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.

Caplan, *supra* note 231, at 228.

"Bork maintains that the Ninth Amendment 'appears to serve a parallel function by guaranteeing that the rights of the people specified already in state constitutions were not cast in doubt by the fact that only a limited set of rights was guaranteed by the federal charter.'" Pope, *supra* note 154, at 449 (quoting BORK, *supra* note 15, at 185). The text of the Ninth Amendment quickly refutes Caplan's and Bork's premise. Nothing in the language of the amendment designates individual rights as being sustained, as is, under state constitutions. A collective right or rights reading of the Ninth Amendment also exists. Akhil Reed Amar determined:

[T]he most obvious and unalienable right underlying the Ninth Amendment is the collective right of We the People to alter or abolish government, through the distinctly American device of the constitutional convention . . .

To see the Ninth as centrally about countermajoritarian individual rights - such as privacy - is to engage in anachronism.

Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1200 (1991).

Nothing in the language of the amendment points to a collective right of the people to alter or abolish the government through the constitutional convention. If that was to be the meaning of the Ninth Amendment, would

merated powers scheme."³⁷⁸

When "interpreting the Constitution, 'real effect should be given to all the words it uses.'³⁷⁹ Therefore, it is inappropriate to state that "[t]he Ninth Amendment was not intended to add anything to the meaning of the remaining articles in the Constitution."³⁸⁰ To circumvent the clear meaning of the text, the traditional approach erroneously advocates placing the text "in its historical context"³⁸¹ or searching for "the meaning that would have been the most natural to those who framed it."³⁸² That position fails because it places one appropriate supporting doctrine, historical context, and one inappropriate mechanism, the Founders' intent, above and beyond the text.

As stated above, a consensus of the intent of all those involved in drafting, debating, and ratifying the Ninth Amendment cannot be found; thus, intent is excluded from the analysis. The traditional approach's Ninth Amendment text-skipping analysis argues that "[t]he Constitution's proponents' belief that limited powers offered important security to the people does not imply that they would have agreed to an open ended affirmative-rights provision to be enforced by the courts."³⁸³ There is no need to examine what *implication* can be made from a *belief* in a government of limited powers when analyzing the Ninth Amendment. Implications and beliefs are unnecessary when interpreting the plain meaning of the Ninth Amendment. The text of the Ninth Amendment prevents denying or disparaging unenumerated rights retained by the people. Accordingly, the amendment contains an open-ended affirmative rights provision that renders proposed beliefs on government structure and power to have neither

not language stating that proposition, or at least something remotely close to it, have been chosen instead of the current text? Another approach suggests that additional unenumerated rights exist, "but . . . that these rights do not achieve constitutional status and are therefore not deserving of constitutional protection." Mitchell, *supra* note 56, at 1728-29. Lawrence E. Mitchell effectively rebutted that position:

This approach raises several troubling questions. How are these enumerated rights insured against denial or disparagement? Against whom, if not the government created and limited by the Constitution, is protection against denial or disparagement needed? And if these unenumerated rights lack constitutional status, why is it necessary to acknowledge them in the Constitution? This approach ignores the first step in constitutional interpretation; it ignores the text.

Id. at 1729.

378. McAfee, *supra* note 201, at 380.

379. Barnett, *supra* note 182, at 2 (quoting *Griswold*, 381 U.S. at 491 (Goldberg, J., concurring)).

380. Thapa, *supra* note 187, at 152 n.80 (quoting EDWARD DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 63-64 (1957)).

381. McAfee, *supra* note 180, at 1225.

382. *Id.* at 1224.

383. McAfee, *supra* note 375, at 26 n.30.

authoritative nor persuasive weight.³⁸⁴ Historical understanding can supplement legal methodology in order to understand the atmosphere and circumstances surrounding the adoption of the Ninth Amendment.³⁸⁵ This study, however, cannot trump or obviate an analysis of the plain meaning of the Ninth Amendment's text. History only places that meaning in its proper act and scene. History is susceptible to varying interpretations, while the rather explicit text of the Ninth Amendment is far less susceptible to varying interpretation.

The traditional approach also ignores that history is an ongoing process. The Ninth Amendment did not apply to the states at its adoption.³⁸⁶ However, the Privileges and Immunities Clause of the Fourteenth Amendment applies it to the states.³⁸⁷

Next, the traditional approach argues that affirmative rights proponents do not see the federal structure and a national government of limited powers as an alternative, indirect way of securing liberty.³⁸⁸ Although individual liberty can, and is, indirectly preserved through a national government of limited powers, the direct protection of individual liberty through the unenumerated rights retained in the Ninth Amendment is a necessity.

The traditional approach also claims that the first eight amendments of the United States Constitution limit federal power; thus, one cannot read the Ninth Amendment to confer unlimited federal judicial power to create new rights.³⁸⁹ This assessment is incorrect on three fronts. First, the Ninth Amendment does not confer *unlimited* federal judicial power because the text and principles of the Ninth Amendment establish the boundaries of unenumerated rights claims. The federal judiciary has the ability to determine if an unenumerated right exists based upon whether the behavior in question was or is an unenumerated right through the structure and principles set forth in the analytical approach I described above.³⁹⁰ Second, the Ninth Amendment does not allow judges to *create* new rights – the text of the Ninth Amendment states that the people already retain them.³⁹¹ Third, the first eight amendments limit federal power, as does the Ninth Amendment, by preventing the government from denying or disparaging unenumerated rights retained by the people.³⁹²

If traditionalists are so concerned with a limited federal government and preserving individual liberty, then why do they resist an affirmative rights reading of the Ninth Amendment that decreases

384. Barnett, *supra* note 182, at 1.

385. McAfee, *supra* note 180, at 1225.

386. U.S. CONST. amend. XIV.

387. See *Criswold*, 381 U.S. at 493; see also McAfee, *supra* note 201, at 350.

388. McAfee, *supra* note 375, at 25.

389. Berger, *supra* note 200, at 1510-11.

390. See *supra* Part III.E.

391. Morton, *supra* note 146, at 752.

392. U.S. CONST. amend. I-IX.

federal power and prevents federal intrusion upon individual liberty? Affirmative rights and federalism, in this context, are not mutually exclusive concepts. The Ninth Amendment authorizes a continual check on federal power by ensuring that the people retain unenumerated rights.³⁹³ The traditional analysis of the Ninth Amendment, while posited at affirming liberty through the structure of limited federal powers, allows for a bigger federal government with large regulatory powers that directly encroaches upon individual liberty. This leaves traditionalists susceptible to the same credibility criticism that originalists receive regarding Ninth Amendment interpretation.³⁹⁴ Traditionalists propose a Ninth Amendment interpretative theory, based on limited federal power, which negates the Ninth Amendment's explicit command for decreased federal control and increases the amount of federal power.³⁹⁵ The traditionalist approach, therefore, appears to be a political, result-oriented doctrine that is truly meant to limit individual autonomy under the Ninth Amendment through a conservative jurisprudence.

If a traditionalist can only state that "the traditional reading of the [N]inth [A]mendment has at least as compelling textual and doctrinal credentials as the doctrine of substantive due process,"³⁹⁶ she has not established much of a foundation to support her premise. Thomas A. McAfee,³⁹⁷ a leading proponent of the traditional view, completes a thorough analysis, devoid of textual underpinnings, that inaccurately emphasizes a historical understanding of the Ninth Amendment.³⁹⁸ He improperly relies on Madison's writings, speeches, drafts, other Founders' statements, state proposals, and the Tenth Amendment to reach his conclusion.³⁹⁹ This legal paradigm attempting to determine the meaning of the Ninth Amendment is inadequate because, as McAfee admits:

If the originalist does not justify historically his choice among the historical options, his arguments will be completely unpersuasive because they are logically defective: without historical justification for his choice, his "use" of history is nothing but a normative conclusion decorated with

393. See Saunders, *supra* note 286, at 818.

394. See *supra* notes 171-86 and accompanying text.

395. See *supra* notes 389-92 and accompanying text.

396. McAfee, *supra* note 180, at 1315.

397. Thomas B. McAfee currently teaches American Legal History, First Amendment Rights, and Constitutional Law at the Boyd School of Law. Boyd School of Law Faculty Page, available at http://www.Law.unlv.edu/faculty/fac_mcafee_text.html (last visited Jan. 31, 2003). He was previously a professor at Southern Illinois School of Law teaching similar subject matter. *Id.* McAfee has published several articles in this subject area. *Id.* In 2000, his most recent book, *Inherent Rights, the Written Constitution, and Popular Sovereignty—The Founders' Understanding* was published.

398. See generally McAfee, *supra* note 180.

399. *Id.*

quotations from the [F]ounders. If he denies or ignores the existence of other plausible historical viewpoints, he adds deception to fallacy.⁴⁰⁰

Based on that backdrop, McAfee challenges affirmative rights proponents to:

either (1) show grounds for concluding that there is no connection between the state convention proposals and the ratification debates or Madison's drafting of the Ninth Amendment, or (2) that at some point during the process of drafting and revising the amendment, Madison or other members of Congress altered their visions of the amendment.⁴⁰¹

The easiest and most authoritative way to rebut this challenge is to assert that it is improper to attempt to get inside the minds, actions, and behaviors of proponents of state convention proposals, Madison, or other members of Congress. As stated earlier, we do not know what the overwhelming majority of persons involved in the adoption of the Ninth Amendment believed its intent to be because "the Constitution was not written and ratified by a single actor with clear motivations, but by many participants, most of whom left little or no record of their intentions."⁴⁰² Because we do not know what many persons believed the Ninth Amendment to mean, how can McAfee assert that affirmative rights advocates must then show that Madison or other members of Congress altered their vision of it? Even if we had a clear consensus of what all persons believed the Ninth Amendment to mean, the amendment's treatment in the House and Senate cannot be determined.⁴⁰³ Yet, McAfee wants the affirmative rights advocate to superimpose herself in those debates to determine if any person altered their vision of what the amendment would do, even though the affirmative rights advocate most likely does not know what any person's original vision was to begin with.

Furthermore, no textual basis exists for insisting that the Ninth Amendment be read with the Tenth Amendment to conclude that the Ninth Amendment protects unenumerated rights, and the historical record on this point is inconclusive.⁴⁰⁴ Moreover, we must remember that debates separated the original text, which initially combined the Ninth and Tenth Amendments, into two separate amendments, with two separate commandments.⁴⁰⁵ However, the traditionalist approach argues that "[t]he [N]inth [A]mendment does not specify what rights it protects other than by its reference to the enumerated *powers*

400. *Id.* at 1277 (quoting Powell, *supra* note 343, at 689).

401. *Id.* at 1277-78.

402. Mitchell, *supra* note 56, at 1721.

403. *See supra* notes 258-62 and accompanying text.

404. Mitchell, *supra* note 56, at 1728.

405. *See supra* notes 249-52 and accompanying text.

of the federal government.’”⁴⁰⁶ Proponents of this view believe that the Founders used the terms “rights” and “powers” interchangeably.⁴⁰⁷ This belief is incorrect, because it construes the Ninth Amendment to mean nothing more than what is stated in the Tenth Amendment.⁴⁰⁸ The Tenth Amendment speaks of reserved “powers,” not “rights” – by contrast, the Ninth Amendment speaks only of “rights”, not of “powers.”⁴⁰⁹ Recognizing that the people retain certain rights does not lead to a conclusion that the states retain certain powers.⁴¹⁰ Construing the Ninth Amendment as just another version of the message set out in the Tenth Amendment would make the drafting of the Ninth Amendment a meaningless exercise.⁴¹¹ Traditionalists do not read the two amendments together; they erase the text of the Ninth Amendment and replace it with the text of the Tenth Amendment, leaving two duplicate amendments in the Constitution. Therefore, the traditionalists place the limited government, reserved powers methodology that they prefer under the heading of the Ninth Amendment, which essentially eliminates the Ninth Amendment’s true text and meaning.

B. State Constitution Provisions Rebutting the Traditional Approach

State constitutions further verify that the Ninth Amendment was meant to ensure affirmative rights, not the federal government’s structure of limited powers. The text and history of state constitutions verify the affirmative rights reading of the Ninth Amendment because, as Suzanna Sherry stated:

After the Bill of Rights was ratified in 1791, language similar to the Ninth Amendment began appearing in *state* constitutions. Throughout the [N]ineteenth [C]entury, states drafting new constitutions included language mirroring the Ninth Amendment’s protection of unenumerated rights. It is obvious that state constitutions do not need a provision safeguarding federalism; the language thus must be interpreted in some other way.⁴¹²

The existence of these Ninth Amendment analogues in state constitutions directly undermines the view that the Ninth Amendment is a

406. Cooper, *supra* note 195, at 80.

407. McAfee, *supra* note 180, at 1247.

408. BARNETT, *supra* note 6, at 8.

409. *Id.*

410. Mitchell, *supra* note 56, at 1728.

411. Eric M. Axler, *The Power of the Preamble and the Ninth Amendment: The Restoration of the People’s Unenumerated Rights*, 24 SETON HALL LEGIS. J. 431, 467 (2000) (citing Massey, *supra* note 166, at 307).

412. Sherry, *supra* note 205, at 1151; *see also* Axler, *supra* note 411, at 467-68 (“[S]tates have adopted language similar to the Ninth Amendment in their own constitutions, and [thus], there is no reason to provide in a state constitution that the federal government is restricted to its limited powers.”).

rule of construction.⁴¹³ The presence of Ninth Amendment analogues in state constitutions shows an understanding that the amendment's language is a declaration in favor of rights against the government.⁴¹⁴ Even an advocate of a traditional approach admits that it is difficult to understand why any state would borrow a constitutional provision signifying that the federal government is of limited, delegated powers that leaves the states with plenary power.⁴¹⁵

Thirty-two states currently have state constitutional provisions paralleling the Ninth Amendment of the United States Constitution, and the wording in these provisions is strikingly similar to the Ninth Amendment.⁴¹⁶ Even a cursory review reveals that the Ninth Amendment is certainly the example on which these provisions were based. The provisions also mirror the Ninth Amendment in regard to their placement in state constitutions. Just as the Ninth Amendment is located towards the end of the Bill of Rights, the state constitutional provisions are generally placed towards the end of a declaration or bill of rights in the first article of the state constitution.⁴¹⁷ This positioning is significant because it suggests the amendment's role is as a reservations clause for unenumerated rights.⁴¹⁸ If these amendments operated as rules of construction, then we would expect them to be placed after the articles vesting the legislative, executive, and judicial powers.⁴¹⁹ The placement of state unenumerated rights provisions toward the end of a declaration of rights shows that these states believed the Ninth Amendment preserved any rights that had not been previously enumerated in the Constitution.⁴²⁰

These state constitutional provisions provide authoritative support for an affirmative rights reading of the Ninth Amendment. The Ninth

413. Yoo, *supra* note 305, at 1009.

414. *Id.*

415. Louis Karl Bonham, *Unenumerated Rights Clauses in State Constitutions*, 63 *TEX. L. REV.* 1321, 1331 (1985).

416. For a thorough treatment of the similarities between the states' constitutional provisions and the Ninth Amendment, see Yoo, *supra* note 305 and Appendix I.

417. See generally Yoo, *supra* note 305, at 1010.

418. *Id.*

419. *Id.*

420. See generally *id.* at 1013. New Jersey Constitution provides, "This enumeration of rights and privileges shall not be construed to impair or deny others retained by the people." N.J. CONST. art. I, § 21. New Jersey entitles their provision a "Savings clause." *Id.* The title further indicates that the provision saves other rights and privileges not enumerated in the New Jersey Constitution. If the provision only meant that the enumeration of rights and privileges were excepted out of state government intrusion, then the provision could be entitled the "Structure clause" or the "Rights/Powers clause." If the provision is meant to create a line in the sand between the enumerated rights of the people and the areas in which state government can operate, then there is nothing to save – all rights of the people and powers of the state government are forever established, absent a state constitutional amendment.

Amendment recognizes the existence of unenumerated rights.⁴²¹ The federal government cannot unconstitutionally infringe upon these unenumerated rights, just as the federal government cannot unconstitutionally infringe upon enumerated rights.⁴²² State constitutional provisions paralleling the Ninth Amendment grant state citizens unenumerated rights. State governments cannot unconstitutionally infringe upon them, just as state governments cannot unconstitutionally infringe upon enumerated rights. This interpretation of the Ninth Amendment and its state counterparts follows the text of the constitutional provisions and provides a logical, flowing methodology corroborating the balance of power between federal and state government.⁴²³ The traditional view deletes and adds text to these provisions and creates an illogical methodology wherein the Ninth Amendment grants the states plenary power and the majority of states redundantly announce that same point in their own constitutions.⁴²⁴

Kansas and Ohio's Ninth Amendment analogues defeat the traditional approach's conjunctive reading of the Ninth and Tenth Amendment. They state, "[t]his enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers, . . . not herein delegated, remain with the people."⁴²⁵ That text illustrates the distinction between rights and powers. If rights and powers are interchangeable, and refer to essentially the same thing, why do Kansas and Ohio feel the need to announce a *rights* provision and a *powers* provision in their constitutions? The powers language, coupled with the rights language, shows that the rights retained by the people were different than the delegated powers.⁴²⁶ Since *rights* and *powers* provisions were both put within one amendment, they cannot be interchangeable terms. If the text of the Ninth Amendment places a line in the sand between protected rights and government power, then why is the Tenth Amendment ratified as a separate amendment regarding powers, not rights? Kansas and Ohio's constitutions display how the traditional reading of the Ninth Amendment creates and eliminates constitutional text not provided for in the language of the

421. *Supra* notes 165-70 and accompanying text.

422. *Supra* notes 206-08 and accompanying text.

423. Unfortunately, a large number of state judiciaries have also either ignored their unenumerated rights constitutional provision or adopted an incorrect interpretation of it. This publication is dedicated to the interpretation of the federal Ninth Amendment, not its state counterparts. For a review of how different states have interpreted their unenumerated rights provisions throughout history see Louis Karl Bonham, *Unenumerated Rights Clauses in State Constitutions*, 63 TEX. L. REV. 1321 (1985).

424. *See supra* note 412-15 and accompanying text.

425. KAN. CONST. art. I, § 20; OHIO CONST. art. I, § 20.

426. Yoo, *supra* note 305, at 1012-13. For a thorough review of Ohio's unenumerated rights state constitutional history see *supra* note 425 at 1011-13.

Ninth Amendment by deleting *rights* language and inserting *powers* language.

Four state constitutions, eight times less than the number of states who adopt a Ninth Amendment like provision, contain language satisfying the traditional interpretation of the Ninth Amendment of the United States Constitution.⁴²⁷ Kentucky's constitution provides, "[t]o guard against transgression of the high powers which we have delegated, We Declare that everything in this Bill of Rights is excepted out of the general powers of government, and shall forever remain inviolate; and all laws contrary thereto, or contrary to this Constitution, shall be void."⁴²⁸ Almost identically, the Texas constitution provides, "[t]o guard against transgressions of the high powers herein delegated, we declare that everything in this 'Bill of Rights' is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto, or to the following provisions, shall be void."⁴²⁹ Similarly, the North Dakota constitution provides, "[t]o guard against transgression of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate."⁴³⁰ Pennsylvania's constitution, virtually mirroring North Dakota's constitution, provides "[t]o guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate."⁴³¹

These provisions satisfy the traditional perspective. The plain language announces that everything in a state bill of rights is excepted out of the powers of state government and shall forever remain inviolate. This language creates the traditionalist's perpetual line in the sand between the rights of the people and the powers granted to the state government. Under these state constitutions, there are no unenumerated state rights available to the people. However, in reference to Ninth Amendment interpretation, these state constitutional provisions show that when the people desire to create a traditional approach to rights and powers they complete that goal through language fulfilling that proposition that is distinct from the language contained in the Ninth Amendment, or the thirty-two state constitutions paralleling the Ninth Amendment.

The text of the Kentucky, Texas, North Dakota, and Pennsylvania state constitution pronouncements would satisfy the traditional interpretation. These amendments provide that the government does not have power over matters protected by a state bill of rights. These con-

427. See *supra* notes 405-08 and *infra* notes 416 and Appendix 1.

428. KY. CONST. § 26.

429. TEX. CONST. art. I, § 29.

430. N.D. CONST. art. I, § 20.

431. PA. CONST. art. I, § 25.

stitutions place a structural line between individual liberties protected by a state bill of rights and the remaining powers of state government. The constitutional text of Kentucky, Pennsylvania, North Dakota, and Texas does not indicate that the people retain unenumerated rights.

These state constitutional provisions are perfect examples of the textually unsound traditional reading of the Ninth Amendment of the United States Constitution. Their text expresses that everything in the state bill of rights is excepted out of the general powers of state government; thus, there is no reference to other rights outside those enumerated in a state bill of rights.

The Ninth Amendment has an entirely different text and meaning when it reads, “[t]he enumeration in this Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”⁴³² The text of the amendment clearly indicates that the people retain other rights. Obviously, these other rights must be outside the Bill of Rights if they are not enumerated within them. Accordingly, the text of the Ninth Amendment cannot be read as a structural statement allotting the people a sealed set of protections in the Bill of Rights. If the Founders wanted to close the number and amount of rights of the people, they would have adopted text reflecting that meaning. The traditional state constitution provisions are perfect examples of that kind of text, which is completely different from the text of the Ninth Amendment.

Fourteen states do not have a constitutional provision adopting language mirroring the Ninth Amendment of the United States Constitution or the traditional approach.⁴³³ Those state constitutions’ are silent on this issue. However, because the Privileges and Immunities Clause of the Fourteenth Amendment applies the Ninth Amendment to the states, those states cannot unconstitutionally infringe upon an unenumerated federal constitutional right.

V. CONCLUSION

An objective reading of the Ninth Amendment should lead to an almost universal conclusion – unenumerated rights exist outside those enumerated in the Constitution. But it is amazing how the legal community creates complex issues. Instead of following the Ninth Amendment’s text, the United States Supreme Court created the substantive due process tall-tale, and it continues to this day. As we move forward with this legal lie, the law’s nose grows and grows. It keeps trying to cover its tracks with more and more fibs. But the law’s conscience suffers with each fib. If the United States Supreme Court

432. U.S. CONST. amend. IX.

433. CONN. CONST.; DEL. CONST.; IND. CONST.; MASS. CONST.; MINN. CONST.; MO. CONST.; N.H. CONST.; N.Y. CONST.; S.C. CONST.; S.D. CONST.; TENN. CONST.; VT. CONST.; W. VA. CONST.; WISC. CONST.

comes clean, admits its substantive due process fabrication and revitalizes the Ninth Amendment, a great burden will be removed from its shoulders. The Court would then follow the text of the Ninth Amendment as the constitutional provision to determine unenumerated rights, thereby ending substantive due process's weak construction and ever changing standards and boundaries. Furthermore, this common sense idea of following the Ninth Amendment's language would lead the Court to apply the Ninth Amendment (and the entire Bill of Rights) to the states because no state can abridge the privileges and immunities of its citizens; thus, eliminating the unpredictable and inconsistent incorporation doctrine. By following the Ninth Amendment's text, and placing political and personal views aside, two non-textual doctrines are killed with one stone.

Consequently, a rare opportunity arises – a modern day chance to establish a clear, text-based jurisprudence. This is first accomplished by filtering out non-Ninth Amendment claims from any Ninth Amendment analysis. Then an adjudication of an unenumerated right claim should follow the encompassing views of the Constitution; state, federal, and world governments; experts in the particular field; and the natural law principles our nation's Founders believed. If the alleged right exists, government intrusion upon the right will be extremely limited. This creates a clear legal paradigm where we must start and adhere to the Ninth Amendment's text; recognize valid unenumerated rights through an evaluation of the alleged rights throughout history; allow the judiciary to determine when an unenumerated right has been unconstitutionally abridged; and resist the devilish temptation to follow James Madison's alleged intent behind the amendment. When that occurs, the Ninth Amendment will be revitalized and substantive due process will cease and desist.

APPENDIX I

The state provisions are as follows: ALABAMA STATES: "That this enumeration of certain rights shall not impair or deny others retained by the people. . . ." ALA. CONST. art. I, § 36; ALASKA STATES: "The enumeration of rights in this constitution shall not impair or deny others retained by the people." ALASKA CONST. art. I, § 21; ARIZONA STATES: "The enumeration in this Constitution of certain rights shall not be construed to deny others retained by the people." ARIZ. CONST. art. 2, § 33; ARKANSAS STATES: "This enumeration of rights shall not be construed to deny or disparage others retained by the people and to guard against any encroachments on the rights herein retained. . . ." ARK. CONST. art. II, § 29; CALIFORNIA STATES: "This declaration of rights may not be construed to impair or deny others retained by the people." CAL. CONST. art. I, § 24; COLORADO STATES: "The enumeration in this constitution of certain rights shall not be construed to deny, impair or disparage others retained by the people." COLO. CONST. art. II, § 28; FLORIDA STATES: "The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people." FLA. CONST. art. I, § 1; GEORGIA STATES: "The enumeration of rights herein contained as a part of this Constitution shall not be construed to deny to the people any inherent rights which they may have hitherto enjoyed." GA. CONST. art. I, § 1, para. 28; HAWAII STATES: "The enumeration of rights and privileges shall not be construed to impair or deny others retained by the people." HAW. CONST. art. I, § 22; IDAHO STATES: "This enumeration of rights shall not be construed to impair or deny others retained by the people." IDAHO CONST. art. I, § 21; ILLINOIS STATES: "The enumeration in this Constitution of certain rights shall not be construed to deny or disparage others retained by the individual citizens of the State." ILL. CONST. art. I, § 24; IOWA STATES: "This enumeration of rights shall not be construed to impair or deny others, retained by the people." IOWA CONST. art. I, § 25; KANSAS STATES: "This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers not herein delegated remain with the people." KAN. CONST. art. I, § 20; LOUISIANA STATES: "The enumeration in this constitution of certain rights shall not deny or disparage other rights retained by the individual citizens of the state." LA. CONST. art. I, § 24; MAINE STATES: "The enumeration of certain rights shall not impair nor deny others retained by the people." ME. CONST. art. I, § 24; MARYLAND STATES: "This enumeration of Rights shall not be construed to impair or deny others retained by the People." MD. CONST. art. 45; MICHIGAN STATES: "The enumeration in this Constitution of certain rights shall not be construed to deny or disparage others retained by the people." MICH. CONST. art. I, § 1.I(23); MISSISSIPPI STATES: "The enumeration of rights in this constitution shall not be construed to deny and impair others retained by, and inherent in, the people."

MISS. CONST. art. III, § 32; MONTANA STATES: "The enumeration in this constitution of certain rights shall not be construed to deny, impair, or disparage others retained by the people." MONT. CONST. art. II, § 34; NEBRASKA STATES: "This enumeration of rights shall not be construed to impair or deny others, retained by the people, and all powers not herein delegated, remain with the people." NEB. CONST. art. I, § 26; NEVADA STATES: "This enumeration of rights shall not be construed to impair or deny others retained by the people." NEV. CONST. art. I, § 20; NEW JERSEY STATES: "This enumeration of rights and privileges shall not be construed to impair or deny others retained by the people." N.J. CONST. art. I, para. 21; NEW MEXICO STATES: "The enumeration in this constitution of certain rights shall not be construed to deny, impair or disparage others retained by the people." N.M. CONST. art. II, § 23; NORTH CAROLINA STATES: "The enumeration of rights in this Article shall not be construed to impair or deny others retained by the people." N.C. CONST. art. I, § 36; OHIO STATES: "This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers, not herein delegated, remain with the people." OHIO CONST. art. I, § 20; OKLAHOMA STATES: "The enumeration in this Constitution of certain rights shall not be construed to deny, impair, or disparage others retained by the people." OKLA. CONST. art. II, § 33; OREGON STATES: "This enumeration of rights, and privileges shall not be construed to impair or deny others retained by the people." OR. CONST. art. I, § 33; RHODE ISLAND STATES: "The enumeration of the foregoing rights shall not be construed to impair or deny others retained by the people." R.I. CONST. art II, § 24; UTAH STATES: "This enumeration of rights shall not be construed to impair or deny others retained by the people." UTAH CONST. art. I, § 25; VIRGINIA STATES: "The rights enumerated in this Bill of Rights shall not be construed to limit other rights of the people not therein expressed." VA. CONST. art I, § 17; WASHINGTON STATES: "The enumeration in this Constitution of certain rights shall not be construed to deny others retained by the people." WASH. CONST. art. I, § 30; and WYOMING STATES: "The enumeration in this constitution, of certain rights shall not be construed to deny, impair, or disparage others retained by the people." WYO. CONST. art. I, § 36.