Boston College Law Review

Volume 38
Issue 1 *Number 1*

Article 4

12-1-1997

The Once and Future Ninth Amendment

Cameron S. Matheson

THE ONCE AND FUTURE NINTH AMENDMENT

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

U.S. CONST. amend. IX.

In 1965, in *Griswold v. Connecticut*, the United States Supreme Court established a constitutional right of privacy.[1] In that opinion, Justice Arthur Goldberg wrote a concurrence arguing that the right of privacy derives from the Ninth Amendment.[2] That year, Justice Goldberg had Stephen Breyer as his law clerk.[3] Breyer's role in drafting this opinion became an issue at his 1994 Senate Confirmation Hearings for appointment as an associate justice to the United States Supreme Court.[4]

Senator Howell Heflin, apparently interested in Breyer's views on the Ninth Amendment and the right of abortion, asked Judge Breyer about his clerking experience: "Supposedly . . . you wrote the first draft of Justice Goldberg's concurrence in Griswold v. Connecticut. Will you give us information pertaining to your participation in that opinion?"[5]

Breyer quickly cut short this line of questioning: "If you had worked for Justice Goldberg as I did, you would be fully aware that Justice Goldberg's drafts are Justice Goldberg's drafts. It was Justice Goldberg who absolutely had the thought, that his clerks implemented . . . ."[6]

Judge Breyer had already skirted giving his views on the Ninth Amendment during the previous day's hearings.[7] In response to a question from Senator Leahy regarding the source of unenumerated rights, Breyer explained Justice Goldberg's views rather than voice his own opinion.[8] Breyer offered that the Ninth Amendment prevents the

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[1] 381 U.S. 479, 485 (1965).

[2] *Id.* at 499 (Goldberg, J., concurring).

[3] Tony Mauro, *Sins of the Justice, Sins of the Clerk?*, CONN. L. TRIB., July 25, 1994, at 18.

[4] *Nomination of Stephen G. Breyer to be an Associate Justice of the Supreme Court of the United States, 1994: Hearings Before the Senate Comm. on the Judiciary*, 103d Cong. 166–67 (1994) [hereinafter *Breyer Hearings*].

[5] *Id.* at 200 (statement of Sen. Heflin).

[6] *Id.* (statement of Judge Breyer).

[7] *See id.* at 166–67.

[8] *See id.*

argument that the Bill of Rights represents an exclusive list of individual rights, stating:

> So there was a view in the Supreme Court for a while, really associated with Justice Black, that the only rights that were protected against the States' infringing them were those specifically listed in the first eight amendments and the word "liberty" in the 14th meant only those listed in the first eight, all of them and no others. But, said Justice Goldberg, your argument is doing just what the ninth amendment told you not to do. So do not argue that way. And once you do not argue that way, then you look at the word "liberty" in the 14th amendment, and you say it is designed to protect fundamental rights.[9]

Breyer did not say whether he agreed with Justice Goldberg's views.[10] He did say, however, that almost every Supreme Court justice since *Griswold* has accepted the existence of unenumerated fundamental rights protected by the Constitution.[11] Accordingly, one can presume Justice Breyer agrees with this interpretation as well.

Justice Breyer's hearings were not the first time questions arose concerning a Supreme Court nominee's interpretation of the Ninth Amendment.[12] In 1988, the Bork confirmation hearings generated considerable scholarly debate concerning the meaning of the Ninth Amendment.[13] In fact, Judge Bork's answers to questions regarding his view of the Ninth Amendment contributed to the Senate's refusal to confirm him.[14] Numerous articles, both prior and subsequent to the Bork hearings, have explored the text, the Framers' intent and the

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[9] *Breyer Hearings*, *supra* note 4, at 166 (statement of Judge Breyer).

[10] *See id.* (statement of Judge Breyer).

[11] *Id.* at 167 (statement of Judge Breyer).

[12] *See, e.g.*, *Afternoon Session of the Senate Judiciary Committee Hearing: Confirmation of Ruth Bader Ginsburg as Supreme Court Justice, reprinted in* FED. NEWS SERVICE, July 20, 1993 [hereinafter *Ginsburg Hearings*]; *Hearing of the Senate Judiciary Committee: Confirmation of David Souter to the Supreme Court*, 101st Cong. 276 (1990) [hereinafter *Souter Hearings*].

[13] *See generally, e.g.*, Raoul Berger, *Suzanna and the Ninth Amendment*, 1993 BYU L. REV. 51; Sanford Levinson, *Symposium on Interpreting the Ninth Amendment: Constitutional Rhetoric and the Ninth Amendment*, 64 CHI.-KENT. L. REV. 131 (1988); Thomas B. McAffee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215 (1990); Suzanna Sherry, *Commentary on the Symposium Interpreting the Ninth Amendment: The Ninth Amendment: Righting an Unwritten Constitution*, 64 CHI.-KENT. L. REV. 1001 (1988).

[14] Levinson, *supra* note 13, at 135. According to Levinson:

> Judge Bork was deprived of a seat on the Supreme Court largely because of his refusal to acknowledge the "unenumerated" right to privacy as being part of the set of constitutional rights legitimately enjoyed by Americans. It is, I think, accurate to describe Judge Bork's attitude toward the ninth amendment as one of disdain.

Id.

subsequent history of the Ninth Amendment in an attempt to determine its correct meaning.[15] In no case, however, did the fruits of this extensive research indicate the actual meaning of the Ninth Amendment because as Chief Justice Marshall noted in *Marbury v. Madison*, "it is emphatically the province and duty of the judicial department to say what the law is."[16] In effect, therefore, the Ninth Amendment currently means whatever the current Supreme Court says it means.[17]

Although the scholars' debates over the Ninth Amendment's meaning do not say what the law is, they do provide a background for understanding the views of the current Justices.[18] Scholars have taken two major positions regarding the meaning of the Ninth Amendment: the "unenumerated rights" view and the "limited government" view.[19] All nine current Supreme Court Justices adhere to a variant of one of these two views.[20]

Recent decisions by the Court indicate that it has harmonized the two main competing areas of interpretation underlying discussions of the Ninth Amendment.[21] The Court has successfully followed both underlying interpretations on different occasions by avoiding explicit discussion of the Ninth Amendment.[22] Specifically, the Court has examined the reach and scope of constitutional rights in the Fifth and Fourteenth Amendments, as well as the Commerce Clause.[23] The same general discussions in these cases lend themselves to similar conclusions with regard to the Ninth Amendment.[24]

This Note provides an introduction to the Ninth Amendment and examines its future based on the views of the current Supreme Court Justices. Part I provides a brief history of the Ninth Amendment before Griswold, focusing on the Framers' debate surrounding the inclusion of a bill of rights in the Constitution.[25] Part II examines the two major positions taken by scholars with regard to the Ninth Amend-

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[15] *See generally, e.g.*, Berger, *supra* note 13; Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223 (1983); Levinson, *supra* note 13; McAffee, *supra* note 13; Sherry, *supra* note 13.

[16] 5 U.S. (1 Cranch) 137, 177 (1803).

[17] *See id.*

[18] *See infra* notes 122–78 and accompanying text.

[19] *See generally, e.g.*, *supra* note 13 and sources cited therein.

[20] *See infra* notes 127–82.

[21] *Cf.* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2108 (1995) (affirmative action and Fifth and Fourteenth Amendments); United States v. Lopez, 115 S. Ct. 1624, 1634 (1995) (gun control and commerce clause); Planned Parenthood v. Casey, 505 U.S. 833, 846–47 (1992) (abortion and Fourteenth Amendment).

[22] *See infra* notes 217–35 and accompanying text.

[23] *See supra* note 21 and cases cited therein.

[24] *See supra* note 21 and cases cited therein.

[25] *See infra* notes 30–52 and accompanying text.

ment, the "unenumerated rights" and "limited government" interpretations.[26] Part III presents an overview of *Griswold v. Connecticut* and subsequent cases mentioning the Ninth Amendment.[27] Part IV examines the current Supreme Court's views on the Ninth Amendment as expressed in the cases and confirmation hearings of the various Justices.[28] Part V explores the two potential courses that the Court might take in the future depending upon which view of the Ninth Amendment it adopts.[29] This Note concludes, however, that the Court has been following and will continue to follow both paths suggested by the two competing interpretations of the Ninth Amendment without explicitly mentioning that Amendment.

I. The Formation of the Ninth Amendment

On September 12, 1787, the delegates to the Constitutional Convention rejected a motion to create a committee to draft a bill of rights for inclusion in the Constitution.[30] Subsequently, the omission of a bill of rights became the centerpiece argument of the Antifederalists who opposed ratification of the Constitution.[31] The Antifederalists believed that the Constitution gave too much power to the federal government and saw the absence of a bill of rights as an absence of restraints on the federal government.[32]

In October of 1787, shortly after the Constitutional Convention adjourned, James Wilson, a leading Federalist, defended the Constitution and its lack of a bill of rights in a speech in the State House yard in Philadelphia.[33] Wilson argued that the Constitution did not need a bill of rights because the federal government would only have those powers specifically enumerated in the Constitution.[34] Wilson insisted that the Constitution did not grant the federal government the power to infringe upon people's fundamental rights.[35] In *The Federalist No. 84*, Alexander Hamilton further argued that inclusion of a bill of rights

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[26] *See infra* notes 53–92 and accompanying text.

[27] *See infra* notes 93–124 and accompanying text.

[28] *See infra* notes 125–82 and accompanying text.

[29] *See infra* notes 183–240 and accompanying text.

[30] 2 James Madison, Debates in the Federal Convention of 1787, at 557 (Gaillard Hunt & James Scott eds., Prometheus Books 1987).

[31] *See* McAffee, *supra* note 13, at 1227.

[32] *See id.* at 1228.

[33] 2 The Documentary History of the Ratification of the Constitution 167–72 (Merrill Jensen ed., State Historical Soc. of Wis. 1976) [hereinafter 2 Ratification of the Constitution], (James Wilson, Speech in the State House Yard, Oct. 6, 1787).

[34] *Id.* at 167–68.

[35] *Id.* at 168.

was not only unnecessary but dangerous.[36] In particular, Hamilton indicated that a list of prohibitions against the federal government would imply that only those prohibitions limited the government's power.[37]

In contrast, the Antifederalists pointed out that the Constitution already contained a list of restraints on government action in Article I, section 9.[38] If listing some rights retained by the people, such as habeas corpus, would imply that no other rights existed then, the Antifederalists argued, a bill of rights became even more necessary because the Constitution contained just such a list.[39] Thus, the Antifederalists used the Federalists' own arguments against them to emphasize the need for a bill of rights.[40]

The first true battle over including a bill of rights in the Constitution occurred in Pennsylvania in December of 1787.[41] The State ratified the Constitution, but a minority of the ratifying convention filed a report demanding the addition of a bill of rights to the Constitution.[42] Two months later Massachusetts ratified the Constitution but submitted a list of proposed amendments with its ratification.[43] Four of the five states that ratified the Constitution after Massachusetts, but before the Constitution went into effect, also submitted proposed amendments with their ratifications.[44]

With mounting pressure to amend the Constitution, James Madison promoted a bill of rights in the First Congress of the United States.[45] Madison drafted a proposed bill of rights, including what

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[36] THE FEDERALIST No. 84 (Alexander Hamilton).

[37] *Id.* Hamilton wrote:

> I go further and affirm that bills of rights, in the sense and in the extent in which they are contended for, are not only unnecessary in the proposed Constitution but would even be dangerous. They would contain various exceptions to powers which are not granted; and on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why for instance, should it be said, that the liberty of press shall not be restrained, when no power is given by which restrictions may be imposed?

Id.

[38] *See* A NUMBER OF LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN, *reprinted in* 2 THE COMPLETE ANTIFEDERALIST 248–49 (Herbert J. Storing ed., University of Chi. Press 1981).

[39] *See id.*

[40] *See* 2 RATIFICATION OF THE CONSTITUTION, *supra* note 33, at 427 (Robert Whitehall, Pennsylvania Ratifying Convention, Nov. 30, 1787).

[41] *See* McAffee, *supra* note 13, at 1235.

[42] *See id.*

[43] *See id.*

[44] *See id.* at 1235 n.76.

[45] *See id.* at 1236.

would later form the basis for the Ninth Amendment.[46] Madison later gave a speech to the First Congress explaining the purpose of this amendment.[47] Rather than clarify the amendment's meaning, however, this speech has generated continuing controversy.[48] Both proponents of the "unenumerated rights" view and proponents of the "limited government" view claim that Madison's speech supports their position.[49]

On September 25, 1789, the United States House of Representatives and Senate agreed on twelve amendments to the Constitution to present to the states for ratification.[50] The first two articles failed to win the approval of the states, and thus, article 11 became the Ninth Amendment.[51] On December 15, 1791, the Bill of Rights became law after the necessary three-fourths of the states ratified the ten amendments.[52]

II. The Scholars' Debate

Two interpretations of the Ninth Amendment dominate the current debate over its proper application.[53] First, the "unenumerated rights" view states that the Ninth Amendment protects judicially enforceable unenumerated rights.[54] In other words, the Ninth Amendment allows courts to enforce constitutional rights, such as the right to privacy, which are not actually written in the Constitution.[55]

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[46] *See* McAffee, *supra* note 13, at 1236–37.

[47] 1 Annals of Congress 439 (Joseph Gales ed., 1789). In presenting his initial draft, Madison said:

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

Id. (statement of James Madison).

[48] *See* McAffee, *supra* note 13, at 1237.

[49] *See* Levinson, *supra* note 13, at 141; McAffee, *supra* note 13, at 1285.

[50] *See* 1 Annals of Congress, *supra* note 47, at 916.

[51] Caplan, *supra* note 15, at 259. One of the two articles initially rejected received the necessary number of state ratifications in 1992, thus becoming the Twenty Seventh Amendment: "No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened." U.S. Const. amend. XXVII; *With Little Fanfare, Amendment Is Signed*, N.Y. Times, May 19, 1992, at A14.

[52] *See* Caplan, *supra* note 15, at 259.

[53] *See, e.g.*, *supra* note 13 and sources cited therein.

[54] *See* Sherry, *supra* note 13, at 1001.

[55] *See id.*

Second, the "limited government" view states that the Ninth Amendment clarifies that the list of enumerated rights in the first eight amendments does not grant the federal government unenumerated powers.[56] In other words, no one can use the existence of the Bill of Rights to argue that the federal government has powers which the Constitution does not specifically list.[57] For example, proponents of the "limited government" view might contend that the Constitution does not give the federal government the power to appoint state court judges and the Due Process Clause of the Fifth Amendment cannot justify granting the federal government that power.[58]

Proponents of the "unenumerated rights" view support their position with three main arguments: a historical, a contextual and a textual argument.[59] The historical argument, based on the Framers' intent, claims that Federalists feared including a bill of rights in the Constitution for two reasons.[60] First, Wilson and Hamilton expressed the concern that a bill of rights would imply that the federal government had powers other than those enumerated.[61] Second, Madison expressed the concern that no list of rights could be comprehensive and that listing some rights would imply that no others existed.[62] According to the unenumerated rights position's historical argument, therefore, Madison drafted the Tenth Amendment to solve the first concern and the Ninth Amendment to solve the second concern.[63] Proponents of this argument thus conclude that the Ninth Amendment must protect unenumerated rights.[64]

The second argument in support of the "unenumerated rights" interpretation, the contextual argument, claims that the "limited government" argument renders the Ninth Amendment redundant because under that interpretation it would be identical to the Tenth Amendment.[65] The Tenth Amendment safeguards the system of enumerated powers by reserving to the states and the people all powers not expressly given to the federal government.[66] According to the

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[56] *See* McAffee, *supra* note 13, at 1307.

[57] *See id.*

[58] *See id.* One could argue that due process requires a centralized system of judicial appointments to ensure fairness. Under the "limited government" view, the federal government could not appoint state court judges, regardless of due process considerations, because the Constitution does not grant the federal government that power.

[59] *See* Levinson, *supra* note 13, at 140–42.

[60] *See id.* at 140–41.

[61] *See id.* at 140.

[62] *See id.* at 141.

[63] *See id.*

[64] *See* Sherry, *supra* note 13, at 1001.

[65] *See* Levinson, *supra* note 13, at 142.

[66] The Tenth Amendment states in its entirety: "The powers not delegated to the United

contextual argument of the unenumerated rights view, one should not read the Ninth Amendment as identical to the Tenth Amendment because as Chief Justice Marshall said, "[i]t cannot be presumed that any clause in the constitution is intended to be without effect."[67]

The third argument supporting the "unenumerated rights" view of the Ninth Amendment, the textual argument, claims that the plain meaning of the text supports the "unenumerated rights" view and refutes any "limited government" view.[68] Professor Sanford Levinson, a proponent of the "unenumerated rights" view, emphasizes the textual argument.[69] He states that the Ninth Amendment, "with its message, as plain as one might hope for given the vagaries of language," stands for the proposition "that the specification of some rights was not to be interpreted as denying the equal presence within the legal system of other, unenumerated rights."[70]

The textual argument underlying the "unenumerated rights" view further claims that the plain language of the Ninth Amendment forecloses the "limited government" view.[71] The Tenth Amendment refers to powers, while the Ninth refers to rights.[72] The Constitution does not assign the federal government power in certain areas even if legislation would not otherwise violate people's individual rights.[73] The Constitution does, however, grant power to the federal government in certain areas where legislation might violate individual rights.[74] Thus, the Tenth Amendment limits the federal government's power but does not protect individual rights.[75] By contrast, under this textual argument, the Ninth Amendment protects the rights of the people by limiting the means that the federal government can choose to achieve enumerated powers.[76] This textual difference, therefore, signifies to the "unenumerated rights" adherents that the Ninth Amendment limits the government in a substantially different way than the Tenth Amendment.[77]

States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

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

[68] *See* Levinson, *supra* note 13, at 141.

[69] *Id.*

[70] *Id.*

[71] *See id.* at 142.

[72] *See id.*

[73] *See* Levinson, *supra* note 13, at 142.

[74] *See id.*

[75] *See id.*

[76] *See id.*

[77] *See id.* at 142–43.

Proponents of the "limited government" view also support their position with historical, contextual and textual arguments.[78] The historical "limited government" argument states that the key to discovering the meaning of the Ninth Amendment lies in the debate over the inclusion of a bill of rights in the Constitution.[79] According to the "limited government" view, Federalists feared including a bill of rights in the Constitution for only one reason.[80] Wilson, Hamilton and Madison all expressed concern that the inclusion of a bill of rights would imply that the federal government had powers beyond those enumerated in the Constitution.[81] According to the "limited government" proponents, Madison's speech explaining the purpose of the Ninth Amendment does not refer to affirmative unenumerated rights, but rather raises the concern that enumerating exceptions to federal power would imply that powers not denied by the bill of rights would be "assigned into the hands of the General Government."[82] "Limited government" proponents argue that Madison proposed the Ninth Amendment as a remedy to this concern.[83]

The second argument in support of the "limited government" interpretation, the contextual argument, claims that the "limited government" interpretation does not render the Ninth Amendment superfluous because the "limited government" view does distinguish between the Ninth and Tenth Amendments.[84] According to this interpretation, the Tenth Amendment clarified that the federal government was one of enumerated powers.[85] The Framers designed the Constitution as a limited grant of power to the federal government.[86] Before inclusion of the Tenth Amendment, the Constitution did not explicitly state the limited nature of its grant of power; however, Article I had hinted at this design.[87] According to proponents of the "limited government" view, the Ninth Amendment clarified that the Bill of Rights in no way altered the federal system of enumerated powers.[88] Thus, proponents

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[78] *See generally* McAffee, *supra* note 13.

[79] *See id.* at 1237.

[80] *See id.* at 1250, 1259–60, 1285.

[81] *See id.*

[82] *Id.* at 1285; *see also supra* note 45 and accompanying text (discussing Madison's speech on Ninth Amendment).

[83] *See* McAffee, *supra* note 13, at 1283–85.

[84] *See id.* at 1306–07.

[85] *See id.* at 1307.

[86] *See supra* notes 33–37 and accompanying text.

[87] *See* Article I, Section 1, which states in pertinent part: "All legislative Powers *herein granted* shall be vested in a Congress of the United States . . . ." U.S. CONST. art. I, § 1 (emphasis added).

[88] *See* McAffee, *supra* note 13, at 1307.

of the "limited government" view contend that the Tenth Amendment remedied the threat posed by the lack of an express constitutional provision stating that the federal government could exercise only enumerated powers while the Ninth Amendment remedied the threat posed by a bill of rights.[89]

The third argument supporting the "limited government" view of the Ninth Amendment, the textual argument, claims that the Ninth Amendment limits the federal government to its enumerated powers despite the fact that it refers to "rights" and the "people."[90] According to the "limited government" view, the Framers used the terms "powers" and "rights" almost interchangeably: "Federalists referred to the 'rights of the people' as 'powers reserved'. . . [and Antifederalists argued that] rights not expressly reserved were implicitly granted as government powers. . . ."[91] Because of the way in which the Framers used language, therefore, some commentators conclude that the text of the Ninth Amendment does not foreclose the "limited government" interpretation.[92]

III. The Ninth Amendment's Rebirth

From the time of its ratification until 1965, the Supreme Court only dealt with the Ninth Amendment seven times.[93] On none of those occasions did the Court explicitly present its construction of the Amendment.[94] For example, in 1833, in *Lessee of Livingston v. Moore*, the United States Supreme Court held valid a lien placed on a parcel of land by Pennsylvania.[95] The Court dismissed the petitioner's Ninth Amendment claim, stating that the Ninth Amendment did not apply to the states.[96]

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[89] *See id.*

[90] *See id.* at 1246.

[91] *Id.* at 1247.

[92] *See id.*

[93] *See* Caplan, *supra* note 15, at 224 n.5. According to Caplan: "[d]uring this first period there were only the most glancing judicial and scholarly references to the ninth amendment, with no explicit construction of the amendment by the Supreme Court in the seven cases that represent the sum total of the Court's pronouncements on the amendment prior to 1965." *Id.*; *see* Roth v. United States, 354 U.S. 476, 492 (1957); Woods v. Cloyd W. Miller Co., 333 U.S. 138, 144 (1948); United Public Workers v. Mitchell, 330 U.S. 75, 94–95 (1947); Tennessee Elec. Power Co. v. TVA, 306 U.S. 118, 143–44 (1939); Ashwander v. TVA, 297 U.S. 288, 330–31 (1936); Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 511 (1857) (Campbell, J., concurring); Lessee of Livingston v. Moore, 32 U.S. (7 Pet.) 469, 551–52 (1833).

[94] *See* Caplan, *supra* note 15, at 224 n.5.

[95] 32 U.S. (7 Pet.) at 552.

[96] *Id.* at 551–52.

In 1965, in *Griswold v. Connecticut*, the United States Supreme Court held a statute prohibiting the use of contraceptives unconstitutional because it violated the right to privacy.[97] A jury convicted the appellants of aiding married couples in using contraceptives.[98] The Court held that because of the nature of the laws in question, the appellants had standing to raise the constitutional rights of married couples.[99] In reaching its decision, the *Griswold* Court recognized a constitutional right of marital privacy and invalidated the statute as a violation of that right.[100]

The plaintiff, Griswold, was the Executive Director of the Planned Parenthood League of Connecticut.[101] The other appellant, Buxon, served as Medical Director for Planned Parenthood at its Center in New Haven.[102] They gave information, instruction and medical advice to married persons and prescribed contraceptives to such couples.[103] Authorities arrested appellants on November 10, 1961, for violating sections 53–32 and 54–196 of the General Statutes of Connecticut, which prohibited assisting others in the use of birth control.[104] The appellants were found guilty as accessories and fined $100 each.[105]

Writing for the majority, Justice Douglas held that the Connecticut law violated the United States Constitution.[106] He reasoned that specific provisions in the Bill of Rights have penumbras that give them substance.[107] According to the Court, some of these provisions, including sections of the First, Third, Fourth, Fifth and Ninth Amendments, create zones of privacy.[108] The Court reasoned that one of these zones of privacy protects the marital relationship.[109] The *Griswold* Court con-

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[97] 381 U.S. 479, 485 (1965).

[98] *See id.* at 480.

[99] *Id.* at 481.

[100] *Id.* at 485.

[101] *See id.* at 480.

[102] *See Griswold*, 381 U.S. at 480.

[103] *See id.*

[104] *See id.* The Connecticut statute provided: "Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender." CONN. GEN. STAT. § 54–196 (1958). The principal offense in this case was § 53–32, which provided:

> Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.

Id. § 53–32.

[105] *See Griswold*, 381 U.S. at 480.

[106] *Id.* at 485.

[107] *Id.* at 484.

[108] *Id.*

[109] *Id.* at 485–86.

cluded that the Connecticut law violated this zone of privacy by preventing married couples from using birth control and was therefore unconstitutional.[110]

In his concurrence, Justice Goldberg, joined by Chief Justice Warren and Justice Brennan, emphasized the relevance of the Ninth Amendment to the Court's recognition of a right of marital privacy.[111] Justice Goldberg argued that the language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that enforceable fundamental rights existed beyond those listed in the first eight amendments.[112] According to Goldberg, the Framers intended the Ninth Amendment to quiet fears that a list of specifically enumerated rights could not cover all essential rights and that the specific mention of certain rights would deny the protection of others.[113]

Justice Goldberg claimed that the Ninth Amendment does not constitute an independent source of rights.[114] According to Justice Goldberg, the Ninth Amendment lends strong support to the argument that the word liberty in the Fifth and Fourteenth Amendments includes more than just those rights listed in the first eight amendments.[115] Applying this reading of the Ninth Amendment to the case at hand, Goldberg argued that to hold that a state may violate a basic and fundamental right such as the right of marital privacy because the first eight amendments to the Constitution do not include that right would ignore and violate the Ninth Amendment.[116]

In a dissent, Justice Stewart, joined by Justice Black, argued that Justice Goldberg's interpretation of the Ninth Amendment "turn[s] somersaults with history."[117] Justice Stewart argued that the Ninth Amendment clarified that the Bill of Rights did not alter the plan that the federal government wielded only enumerated powers.[118] Justice Stewart claimed that "the idea that a federal court could ever use the Ninth Amendment to annul a law passed by the elected representatives of the people of the State of Connecticut would have caused James Madison no little wonder."[119]

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[110] *Griswold*, 381 U.S. at 485.
[111] *Id.* at 487 (Goldberg, J., concurring).
[112] *Id.* at 488 (Goldberg, J., concurring).
[113] *Id.* at 488–89 (Goldberg, J., concurring).
[114] *Id.* at 492 (Goldberg, J., concurring).
[115] *Griswold*, 381 U.S. at 493 (Goldberg, J., concurring).
[116] *Id.* at 491 (Goldberg, J., concurring).
[117] *Id.* at 529 (Stewart, J., dissenting).
[118] *Id.* at 529–30 (Stewart, J., dissenting).
[119] *Id.* at 530 (Stewart, J., dissenting).

Ironically, after *Griswold*, Justice Douglas, not Justice Goldberg, became the leading proponent on the Court for the use of the Ninth Amendment.[120] In 1971, in *Palmer v. Thompson*, Douglas argued in dissent that the Ninth Amendment forbade the closing of municipal pools to avoid integration even if the closure affected all racial groups equally.[121] In 1973, in *Doe v. Bolton*, Douglas argued, in a concurrence striking down abortion regulations, that the Ninth Amendment allowed no exceptions to the right of privacy.[122] Finally, in 1974, in *Lubin v. Panish*, Douglas argued in a concurrence that the right to vote in state election stems from the Ninth Amendment.[123] Since Justice Douglas retired, however, the Ninth Amendment has received diminished attention from the Court.[124]

IV. The Ninth According to the Current Nine

None of the current United States Supreme Court Justices served on the Court at the time of the *Griswold* decision.[125] Accordingly, one must ascertain their views on the Ninth Amendment from subsequent Court decisions or from statements made at their confirmation hearings. At the outset, one should note that the Justices do not remain bound by the statements made at their confirmation hearings, and arguably, they are also not bound by their statements in prior cases. Their positions, therefore, may change in future opinions. Nevertheless, based on an examination of past cases and confirmation hearings, one can discern that all the members of the Court have stated opinions concerning the Ninth Amendment.[126]

All nine current Justices have discussed the Ninth Amendment in a way that conforms to either the "unenumerated rights" or "limited government" view.[127] Four Justices—Stevens, O'Connor, Kennedy and

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[120] *See, e.g.*, Lubin v. Panish, 415 U.S. 709, 721 n.* (1974) (Douglas, J., concurring); Doe v. Bolton, 410 U.S. 179, 210–11 (1973) (Douglas, J., concurring); Palmer v. Thompson, 403 U.S. 217, 233–34, 237–39 (1971) (Douglas, J., dissenting).

[121] *Palmer*, 403 U.S. at 233–34, 237–39 (Douglas, J., dissenting).

[122] *See Bolton*, 410 U.S. at 210–11 (Douglas, J., concurring).

[123] *Lubin*, 415 U.S. at 721 n.* (Douglas, J., concurring).

[124] Since 1975, the Court has only mentioned the Ninth Amendment substantively on four occasions: Planned Parenthood v. Casey, 505 U.S. 833, 1000 (1992) (Scalia, J., dissenting); Bowers v. Hardwick, 478 U.S. 186, 201 (1986) (Blackmun, J., dissenting); Massachusetts v. Upton, 466 U.S. 727, 737 (1984) (Stevens, J., concurring in judgment); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 579 n.15 (1980) (plurality); *id.* at 605 (Rehnquist, J., dissenting).

[125] *See* Griswold v. Connecticut, 381 U.S. 479, 479 (1965).

[126] *See infra* notes 131–79 and accompanying text.

[127] *See infra* notes 131–79 and accompanying text.

Breyer—apparently adhere to the "unenumerated rights" view.[128] Two Justices—Souter and Ginsburg—appear to accept both views.[129] Three Justices—Rehnquist, Scalia and Thomas—apparently adhere to the "limited government" view.[130]

The most senior adherent to the "unenumerated rights" view, Justice Stevens, has the most extensive record of opinions concerning his views on the Ninth Amendment. In 1984, in *Massachusetts v. Upton*, Justice Stevens authored an opinion concurring in the Court's judgment.[131] The majority held that the Massachusetts police had sufficient probable cause to obtain a search warrant.[132] Justice Stevens argued that the Massachusetts Supreme Judicial Court disparaged the rights of the people of Massachusetts by judging the probable cause requirement under the federal standard rather than the state standard, which might have afforded the defendant more expansive rights.[133] Justice Stevens stated:

> In my view, the court below . . . permitted the enumeration of certain rights in the Fourth Amendment to disparage the rights retained by the people of Massachusetts under Art. 14 of the Massachusetts Declaration of Rights. . . . Whatever protections Art. 14 does confer are surely disparaged when the Supreme Judicial Court of Massachusetts refuses to adjudicate their very existence because of the enumeration of certain rights in the Constitution of the United States.[134]

Stevens argued that the court below ignored the Ninth Amendment which the Framers had written to prevent the government from claiming "powers not granted in derogation of the people's rights."[135]

This quoted phrase, as well as Steven's argument that the lower court violated the Ninth Amendment, could coincide with either view of the Ninth Amendment. It could coincide with the "limited government" view as expressed by Professor Russell Caplan.[136] Caplan argued that the Ninth Amendment does not justify the creation of unenumer-

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[128] *See infra* notes 132–60 and accompanying text.
[129] *See infra* notes 160–70 and accompanying text.
[130] *See infra* notes 171–79 and accompanying text.
[131] 466 U.S. 727, 735–39 (1984) (Stevens, J., concurring in judgment).
[132] *Id.* at 734.
[133] *Id.* at 737–38 (Stevens, J., concurring in judgment).
[134] *Id.* (Stevens, J., concurring in judgment).
[135] *Id.* at 737 (Stevens, J., concurring in judgment).
[136] *See* Caplan, *supra* note 15, at 264.

ated constitutional rights, but instead clarifies that neither the Constitution nor the Bill of Rights abolished individual rights guaranteed by state law.[137] Although Stevens's concurrence could coincide with this version of the "limited government" view, when viewed in light of other opinions that Stevens joined, it becomes apparent that Stevens adheres to the "unenumerated rights" interpretation of the Ninth Amendment.[138]

In 1986, in *Bowers v. Hardwick*, Justice Stevens joined a dissent written by Justice Blackmun.[139] In *Bowers*, the majority denied the existence of a Fourteenth Amendment due process right to engage in homosexual sodomy and refused to consider whether the challenged statute violated any other provision of the Constitution.[140] The dissent disagreed with the majority's refusal to consider whether the statute violated the Ninth Amendment.[141] By joining in this dissent, Justice Stevens clearly indicated a belief that the Ninth Amendment permits the Court to protect unenumerated rights from state violations.[142]

In 1980, in *Richmond Newspapers, Inc. v. Virginia*, Justice Stevens joined a plurality opinion written by Chief Justice Burger holding that the First Amendment implicitly guarantees the right to attend criminal trials.[143] The plurality justified recognizing this unenumerated right by noting that the Court had previously recognized other unenumerated fundamental rights because they were indispensable to the enjoyment of enumerated rights.[144] The plurality explained that the Court had thus resolved the concern that led Madison to author the Ninth Amendment, i.e., that one could interpret the listing of certain rights as excluding others.[145] This opinion, agreed to by Justice Stevens, coincided with Justice Goldberg's view that the Ninth Amendment justifies using other provisions of the Constitution to recognize judicially enforceable unenumerated constitutional rights.[146]

Justice O'Connor, another adherent to the "unenumerated rights" view, expressed her interpretation of the Ninth Amendment during her confirmation hearings.[147] Senator Leahy asked Judge O'Connor

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[137] *See id.*

[138] *See supra* notes 131–46 and accompanying text.

[139] 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting).

[140] *Id.* at 196 n.8 (Blackmun, J., dissenting).

[141] *Id.* at 201 (Blackmun, J., dissenting).

[142] *See id.* (Blackmun, J., dissenting).

[143] 448 U.S. 555, 580 (1980).

[144] *Id.*

[145] *Id.* at 579 n.15.

[146] *See supra* notes 8–9 and accompanying text.

[147] *Nomination of Sandra Day O'Connor: Hearings Before the Comm. on the Judiciary, United*

her opinion of the Court's establishment of a right of privacy.[148] Justice O'Connor indicated that she accepted the fact.[149] O'Connor went on to say that although courts had not pinned the right of privacy to the Ninth Amendment, the Ninth Amendment acknowledged that people have unenumerated rights.[150] O'Connor's testimony indicated that she believes the Ninth Amendment could be a source of unenumerated rights but that unenumerated rights could also derive from other constitutional provisions.[151]

A third adherent to the "unenumerated rights" view, Justice Kennedy made remarks during his confirmation hearings indicating his agreement with a version of the "unenumerated rights" interpretation of the Ninth Amendment.[152] Kennedy testified that the Framers of the Ninth Amendment believed that the first eight amendments did not constitute an exhaustive list of rights.[153] He also testified that the Court currently treats the Ninth Amendment as a reserve clause that it will use if other sections in the Constitution, such as the Due Process Clause, appear inadequate for the Court's decision.[154] Accordingly, Kennedy's testimony indicated that he believes the Court can use the Ninth Amendment to enforce unenumerated rights.[155]

A fourth adherent to the "unenumerated rights" view, Justice Breyer has not yet had an opportunity on the Court to state his view of the Ninth Amendment. His statements at his confirmation hearings, however, as well as his likely involvement in the *Griswold* opinion, indicate that he subscribes to a version of the Ninth Amendment supported by the "unenumerated rights" interpretation.[156] At his hearings, Breyer described Justice Goldberg's view of the Ninth Amendment, but one could interpret his statement as voicing his agreement with that view.[157] A statement by Breyer's co-clerk, Stephen Goldstein,

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States Senate, Ninety-Seventh Congress, First Session, on the Nomination of Judge Sandra Day O'Connor of Arizona to Serve as an Associate Justice of the Supreme Court of the United States, 97th Cong. 172 (1981) [hereinafter *O'Connor Hearings*].

[148] *Id.* at 171–72.

[149] *Id.* at 172.

[150] *Id.*

[151] *See id.*

[152] *See* Levinson, *supra* note 13, at 135 n.19.

[153] *See id.*

[154] *See id.*

[155] *See id.*

[156] *See supra* notes 2–11 and accompanying text.

[157] *See supra* notes 8–11 and accompanying text.

further supports the idea that Breyer agreed with Justice Goldberg's view of the Ninth Amendment:

> There weren't too many changes after Breyer did the first draft. . . . He came up with what he came up with, and Goldberg ran with it. It was clearly Goldberg's decisions, but neither of us disagreed with it. We thought it was a good idea and should be expounded.[158]

Although inconclusive, no evidence contradicts the theory that Justice Breyer accepts Justice Goldberg's interpretation of the Ninth Amendment, i.e., that the Ninth Amendment justifies the Court's use of the liberty component of the Fifth and Fourteenth Amendments to protect unenumerated fundamental rights.[159]

A possible adherent to both views, Justice Souter remarked during his confirmation hearings that he agrees with the "unenumerated rights" interpretation of the Ninth Amendment.[160] He identified himself as a proponent of that view based upon the "somewhat obvious and straightforward meaning of the text."[161] He also stated, however, that he had no reason "to question the scholarship which has interpreted one intent of the Ninth Amendment as simply being the protection of, or the preservation of, the state Bills of Rights which proceeded it."[162] Justice Souter seems, therefore, to accept both views of the Ninth Amendment without any inconsistencies. His version of the "unenumerated rights" interpretation apparently coincides with Justice Goldberg's.[163] When asked the source of unenumerated rights, Justice Souter responded: "[T]he appropriate place to focus a question about the existence of a particular unenumerated right is with reference to the liberty clause of the Fourteenth or of the Fifth Amendment."[164]

During her confirmation hearings, another possible adherent to both views of the Ninth Amendment, Justice Ruth Bader Ginsburg, explained that the Framers included the Ninth Amendment because of their fear that people might understand the first eight amendments "as not stating everything that is."[165] This statement, while ambiguous,

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[158] Mauro, *supra* note 3, at 18.
[159] *See supra* notes 8–11 and accompanying text.
[160] *Souter Hearings*, *supra* note 12, at 276.
[161] *Id.* at 55.
[162] *Id.*
[163] *See supra* notes 111–15 and accompanying text.
[164] *Souter Hearings*, *supra* note 12, at 276.
[165] *Ginsburg Hearings*, *supra* note 12.

seems to follow the "unenumerated rights" interpretation of the Ninth Amendment.[166] The quote coincides with the "unenumerated rights" historical argument that the Framers feared that no list of rights could be comprehensive.[167] Justice Ginsburg appears to follow Justice Goldberg's version of the "unenumerated rights" view, i.e., she identified the sources of unenumerated rights as the Declaration of Independence and the liberty component of the Fifth Amendment.[168] Justice Ginsburg may also agree to a certain extent with the "limited government" view because during her confirmation hearings she emphasized that the Bill of Rights does not grant rights, but rather limits the government's power.[169] Like Justice Souter, Justice Ginsburg's testimony indicated that, without being inconsistent, she accepts both interpretations of the Ninth Amendment.[170]

An adherent of the "limited government" view of the Ninth Amendment, Chief Justice Rehnquist has expressed his view of the Ninth Amendment in two decisions during his tenure on the Court.[171] In a dissent to the majority decision in *Richmond Newspapers*, Justice Rehnquist argued against the plurality's interpretation of the Ninth Amendment: "And I most certainly do not believe that the Ninth Amendment confers upon us any such power to review orders of state trial judges closing trials in such situations."[172] Justice Rehnquist therefore disagrees with the "unenumerated rights" interpretation.[173] A later opinion joined by the current Chief Justice affirms this position.[174]

In 1992, in *Planned Parenthood v. Casey*, Chief Justice Rehnquist and Justice Thomas joined Justice Scalia in dissent.[175] The *Casey* Court upheld the right of a woman to choose to have an abortion as a liberty interest protected under the Due Process Clause of the Fourteenth Amendment.[176] The dissenters argued against the existence of such unenumerated rights: "Why even the Ninth Amendment . . . is, despite our contrary understanding for almost 200 years, a literally boundless source of additional, unnamed, unhinted-at 'rights,' definable and

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[166] *See supra* note 62 and accompanying text.

[167] *See supra* note 62 and accompanying text.

[168] *Ginsburg Hearings*, *supra* note 12.

[169] *See id.*

[170] *See id.*

[171] *See* Planned Parenthood v. Casey, 505 U.S. 833, 1000 (1992) (Scalia, J., dissenting); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 605 (1980) (Rehnquist, J., dissenting).

[172] 448 U.S. at 605 (Rehnquist, J., dissenting).

[173] *See id.* (Rehnquist, J., dissenting).

[174] *See Casey*, 505 U.S. at 979–1002 (Scalia, J., dissenting).

[175] *Id.* (Scalia, J., dissenting).

[176] *Id.* at 846.

enforceable by us, through 'reasoned judgment.'"[177] These three Justices apparently find the "unenumerated rights" view of the Ninth Amendment contemptible.[178] Because they reject the "unenumerated rights" view, presumably they would agree with the "limited government" view.[179]

Thus, four Justices—Stevens, O'Connor, Breyer and Kennedy—believe that the Ninth Amendment allows the Court to enforce unenumerated rights.[180] Three Justices—Rehnquist, Scalia and Thomas—presumably believe that the Ninth Amendment means that the Bill of Rights does not give the federal government unenumerated powers.[181] Two Justices—Souter and Ginsburg—appear to accept both views.[182] Accordingly, it appears that one could find a majority of the Court accepting each interpretation of the Ninth Amendment.

V. The Future of the Ninth Amendment

The current Supreme Court has apparently harmonized the "unenumerated rights" and the "limited government" interpretations of the Ninth Amendment.[183] Each interpretation of the Ninth Amendment suggests a course the Court should follow; nevertheless, the Court seems to follow both.[184] Based on the Court's recent silence concerning the Ninth Amendment, however, it appears that the Court has not actively chosen to follow both paths, but rather that the Court has decided not to exclude either possibility.[185]

Under the "unenumerated rights" interpretation, the Court should expand individual liberties by recognizing unenumerated rights.[186] Three different variations of this interpretation suggest various ways in which the Court could do this.[187] First, the Ninth Amendment could provide an independent source for fundamental unenumerated rights.[188] Justices Stevens, O'Connor and Kennedy may hold

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[177] *Id.* at 1000 (Scalia, J., dissenting).

[178] *See id.* (Scalia, J., dissenting).

[179] *See supra* notes 78–92 and accompanying text.

[180] *See supra* notes 128–59 and accompanying text.

[181] *See supra* notes 171–79 and accompanying text.

[182] *See supra* notes 160–70 and accompanying text.

[183] *See supra* note 21 and cases cited therein.

[184] *See id.*

[185] *See id.*

[186] *See supra* notes 54–55 and accompanying text.

[187] *See, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 579 n.15 (1980); Griswold v. Connecticut, 381 U.S. 479, 492–93 (1965) (Goldberg, J., concurring).

[188] *Compare* Lubin v. Panish, 415 U.S. 709, 721 n.* (1974) (Douglas, J., concurring) *with Griswold*, 381 U.S. at 492–93 (Goldberg, J., concurring).

this view.[189] In *Bowers*, Justice Stevens felt that the Court should have considered whether the statute violated the Ninth Amendment itself.[190] In her confirmation hearings, Justice O'Connor said that courts had not pinned the right of privacy to the Ninth Amendment, thus implying that courts could do so.[191] In his confirmation hearing, Justice Kennedy said the Court could use the Ninth Amendment if other constitutional provisions proved inadequate.[192]

Second, the Ninth Amendment could justify finding unenumerated rights in the term "liberty" in the Fifth and Fourteenth Amendments.[193] Justices Souter, Ginsburg and Breyer may hold this view, as statements from their confirmation hearings indicate.[194]

Third, the Ninth Amendment could justify finding unenumerated rights in any provision of the Constitution that allows for an expansive reading.[195] Justice Stevens may hold this view, as his joining of the *Richmond Newspapers* plurality indicates.[196] The plurality in *Richmond Newspapers* used the Ninth Amendment to justify recognizing a constitutional right to a public trial under the First Amendment.[197] Justice O'Connor's testimony also implied that she holds this view.[198] She said that courts have not pinned the right of privacy to the Ninth Amendment; therefore, she believes courts have pinned it to some other constitutional provision.[199]

The third variation of the "unenumerated rights" view seems to function as the default position.[200] Proponents of all three variations agree that the Court can enforce unenumerated constitutional rights but differ on the precise source.[201] Because all constitutional rights by definition stem from a provision of the Constitution, all the Justices

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[189] *See supra* notes 128–55 and accompanying text.

[190] *See* Bowers v. Hardwick, 470 U.S. 186, 201 (1986) (Blackmun, J., dissenting).

[191] *See O'Connor Hearings*, *supra* note 147, at 172.

[192] *See* Levinson, *supra* note 13, at 135 n.19.

[193] *See Griswold*, 381 U.S. at 493 (Goldberg, J., concurring).

[194] *See supra* notes 157–70 and accompanying text.

[195] *See Richmond Newspapers*, 448 U.S. at 579 & n.15.

[196] *See id.*; *supra* notes 143–46 and accompanying text.

[197] *See Richmond Newspapers*, 448 U.S. at 579 & n.15, 580.

[198] *See O'Connor Hearings*, *supra* note 147, at 172.

[199] *See id.*

[200] *See, e.g.*, *Griswold*, 381 U.S. at 483 (right to privacy stems from penumbras of multiple amendments); NAACP v. Alabama, 357 U.S. 449, 460 (1958) (right to associate stems from First Amendment); Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (equal protection clause read into Fifth Amendment).

[201] *See supra* notes 188–99 and accompanying text.

who accept the "unenumerated rights" view of the Ninth Amendment appear willing to accept the third variation.[202]

Under the "limited government" interpretation, the Court should expand individual liberty by preventing the federal government from exceeding its enumerated powers.[203] The Court could thus enforce the spirit of the Ninth Amendment through expanded use of the Tenth Amendment.[204] The Court would only need to invoke the Ninth Amendment itself if the federal government claimed that the Bill of Rights gave it the authority to exceed its enumerated powers.[205] The Court has never decided a case on those grounds.

The paths suggested by the competing interpretations of the Ninth Amendment could lead to polar opposite results in some cases. For instance, a proponent of the "unenumerated rights" view could argue that the Ninth Amendment justifies the recognition of a Fifth Amendment due process right to good health, requiring the federal government to establish national health insurance. A proponent of the "limited government" view could counter that *because* of the Ninth Amendment, the Fifth Amendment cannot justify the creation of national health insurance because that is not an enumerated power of the federal government.

Conflicts such as this will result if the Court considers recognizing affirmative constitutional rights, i.e., rights that require government action rather than prohibit it. Any proposed constitutional right that requires the federal government to exercise an unenumerated power will result in a direct conflict between the two interpretations of the Ninth Amendment.[206] This may help explain why the Court has never recognized an affirmative constitutional right despite the fact that it has recognized numerous unenumerated rights.[207] The unenumerated

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[202] *Cf. Griswold*, 381 U.S. at 483 (right to privacy stems from penumbras of multiple amendments); NAACP v. Alabama, 357 U.S. at 460 (right to associate stems from First Amendment); *Bolling*, 347 U.S. at 499 (equal protection clause read into Fifth Amendment).

[203] *See supra* notes 56–57 and accompanying text.

[204] *Compare* McAffee, *supra* note 13, at 1307 (under "limited government" view, Ninth Amendment acts as more specific version of Tenth Amendment) *with* Levinson, *supra* note 13, at 142 (under "limited government" view, Ninth and Tenth Amendments are identical).

[205] *See* McAffee, *supra* note 13, at 1307.

[206] *Cf. id.*; Levinson, *supra* note 13, at 141.

[207] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 153 (1973) (recognizing right to abortion); Loving v. Virginia, 388 U.S. 1, 12 (1967) (recognizing right to marry); *Griswold*, 381 U.S. at 483 (recognizing right to privacy); NAACP v. Alabama, 357 U.S. at 460 (recognizing right to associate); *Bolling*, 347 U.S. at 499 (recognizing federal equal protection).

rights that the Court has recognized have all restricted government action rather than requiring it.[208]

Parties have asked the Court to recognize affirmative constitutional rights, but the Court has gone out if its way to avoid doing so.[209] In 1969, in *Shapiro v. Thompson*, appellees asked the Supreme Court to make wealth a suspect classification or to make welfare a fundamental right.[210] Either decision could have led to the type of Ninth Amendment clash mentioned above. The Court instead recognized a constitutional right to travel.[211]

Even at the height of the Court's concern over wealth classifications, the Court did not hold that the government had an affirmative constitutional duty to guarantee subsistence to those in need.[212] In other areas, such as abortion, where the Court has held that a fundamental right exists, the Court has specified the lack of a right to government action: "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those barriers not of its own creation."[213]

The paths suggested by the two interpretations of the Ninth Amendment, however, need not conflict in most cases.[214] A proponent of the "unenumerated rights" interpretation could consistently enforce the Tenth Amendment and a proponent of the "limited government" view could find unenumerated rights in the Due Process provisions or other constitutional clauses.[215] For instance, a justice who believes that the right to privacy stems from the Ninth Amendment could also believe that the federal government does not have the constitutional authority to regulate primary or secondary schools, thus stating a position which under the right factual circumstances follows both paths. This view follows the "unenumerated rights" path by accepting an unenumerated right, privacy. This view also follows the "limited government" view by accepting that the federal government does not have an unenumerated power, the power to regulate schools. Likewise,

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[208] *See, e.g.*, *Roe*, 410 U.S. at 153 (government cannot outlaw all abortions); *Loving*, 388 U.S. at 12 (government cannot outlaw interracial marriages); *Griswold*, 381 U.S. at 484 (government cannot outlaw contraceptives); *Bolling*, 347 U.S. at 499 (federal government cannot racially segregate schools).

[209] *See* Shapiro v. Thompson, 394 U.S. 618, 629 (1969) (right to travel).

[210] Telephone Interview with Charles Baron, Professor, Boston College Law School (Mar. 21, 1996).

[211] *Shapiro*, 394 U.S. at 629.

[212] GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 743 (5th ed. 1991).

[213] Harris v. McRae, 448 U.S. 297, 316 (1980).

[214] *See supra* notes 160–70 and accompanying text.

[215] *See* United States v. Lopez, 115 S. Ct. 1624, 1634 (1995) (Justices O'Connor and Kennedy,

a justice who believes that the federal government has consistently exceeded the bounds of the Commerce Clause since 1937 could also believe that the First Amendment includes the right to associate. This view follows the "limited government" view by accepting that the federal government does not have an unenumerated power, the power to regulate non-interstate commerce. This view also follows the "unenumerated rights" path by accepting an unenumerated right, association.

This harmonizing of the two views appears to be the approach a majority of the Court has followed.[216] A majority of the Court currently believes that the Due Process Clauses protect unenumerated rights.[217] A majority of the current Court also believes that it can independently enforce the Tenth Amendment.[218]

In 1995, in *Adarand v. Pena*, the United States Supreme Court held that courts must subject federal race-based policies to strict scrutiny.[219] The Court had previously applied strict scrutiny to state race-based policies in accordance with the Equal Protection Clause of the Fourteenth Amendment.[220] The Fourteenth Amendment only limits state behavior; thus, the text of the Constitution does not impose an equal protection limitation on the federal government because the Fifth Amendment lacks an equal protection clause.[221] In 1954, however, in *Bolling v. Sharpe*, the Court recognized an unenumerated right, holding that the Due Process Clause of the Fifth Amendment contained an implicit equal protection component.[222] The *Adarand* Court implicitly used this unenumerated federal equal protection clause to impose strict scrutiny on federal race-based programs.[223]

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adherents to the "unenumerated rights" view, joined Court's opinion limiting government); Adarand Constructor's, Inc. v. Pena, 115 S. Ct. 2097, 2108 (1995) (Justices Rehnquist, Scalia and Thomas, adherents to the "limited government" view, joined Court's opinion affirming existence of unenumerated right).

[216] *See Adarand*, 115 S. Ct. at 2108 (majority affirms existence of unenumerated right to equal protection from federal government); *Lopez*, 115 S. Ct. at 1634 (majority limits government holding that Congress exceeded its Commerce Clause power); Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992) (majority affirms existence of unenumerated right to choose to have abortion).

[217] *See Adarand*, 115 S. Ct. at 2107–08; *Casey*, 505 U.S. at 846.

[218] *See Lopez*, 115 S. Ct. at 1634. The majority did not explicitly refer to the Tenth Amendment. By holding that Congress lacked authority to pass a statute, however, the Court implicitly invoked the Tenth Amendment. *Id.*

[219] *Adarand*, 115 S. Ct. at 2113.

[220] *See* City of Richmond v. Croson, 488 U.S. 469, 493–94 (1989).

[221] The Fourteenth Amendment states in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[222] *See Bolling*, 347 U.S. at 499.

[223] *See Adarand*, 115 S. Ct. at 2108, 2113.

In 1992, in *Planned Parenthood v. Casey*, the United States Supreme Court reaffirmed the existence of an unenumerated Due Process liberty interest in a woman's choice to have an abortion.[224] Planned Parenthood challenged the constitutionality of five provisions of a Pennsylvania statute that presented barriers to a woman's ability to receive an abortion.[225] The Court upheld all but one provision that it struck down as an undue burden.[226] Although the majority did not mention the Ninth Amendment, its decision clearly comported with Justice Goldberg's view that the Ninth Amendment justifies using the term "liberty" in the Due Process Clause to protect unenumerated fundamental rights.[227] As noted earlier, the dissent mentioned the Ninth Amendment, arguing that it does not create or justify the creation of unenumerated rights.[228]

In 1995, in *United States v. Lopez*, the United States Supreme Court held that the Gun-Free School Zone Act violated the Tenth Amendment because it exceeded Congress's Commerce Clause power.[229] The trial court convicted Lopez of violating a federal law prohibiting carrying a gun within a school zone.[230] The United States Supreme Court held that Congress did not have the constitutional authority to enact such a law because of the lack of a substantial relationship between the activity involved and interstate commerce.[231] Although *Lopez* did not involve the Ninth Amendment, it did evince the Court's willingness to act in conformity with the "limited government" interpretation of the Ninth Amendment by limiting the federal government to its enumerated powers.[232]

In none of these three cases did the majority cite the Ninth Amendment as a justification for its decision.[233] All three decisions, however, conform to one of the suggested paths of an interpretation of the Ninth Amendment.[234] The question remains why the Court does not use the Ninth Amendment to bolster the justification of its decisions.

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[224] *Casey*, 505 U.S. at 846.

[225] *See id.* at 845.

[226] *Id.* at 879–901.

[227] *See Griswold*, 381 U.S. at 493 (Goldberg, J., concurring).

[228] *See Casey*, 505 U.S. at 1000 (Scalia, J., dissenting).

[229] *See Lopez*, 115 S. Ct. at 1634.

[230] *See id.* at 1626.

[231] *Id.*

[232] *See id.* at 1634.

[233] *See generally Adarand*, 115 S. Ct. 2097; *Lopez*, 115 S. Ct. 1624; *Casey*, 505 U.S. 833.

[234] *Compare Adarand*, 115 S. Ct. 2097 *and Lopez*, 115 S. Ct. 1624 *and Casey*, 505 U.S. 833 *with supra* notes 54–57 and accompanying text.

Two answers suggest themselves. First, the Court may not mention the Ninth Amendment because the Court views it as irrelevant to the case. Although this may be the obvious reason, it does not conflict with a second reason suggested by Professor Caplan.[235] Caplan has suggested that the Court does not discuss the Ninth Amendment because it has become so ingrained in constitutional theory as to become unnecessary to discuss:

> The ninth amendment, therefore, has become obscure precisely because of its own success. Its actual significance taken for granted as obvious, its role in the ratification controversy forgotten, the amendment uniquely fulfills one of the aspirations Madison held for a bill of rights. "The political truths declared in that solemn manner," he wrote to Jefferson, "acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion."[236]

To their proponents, both interpretations of the Ninth Amendment might appear so obvious that one need not mention the Ninth Amendment in order to justify its use through another provision of the Constitution.[237] This obviousness allows the Court to use the Ninth Amendment without mentioning it, thus not committing itself to either interpretation. This allows the Court to follow both interpretations without controversy.

In the future, the Court will probably continue on its current path. Based on the views of the current members, the Court will continue to accept the existence of unenumerated rights such as the right of privacy.[238] The Court will also prevent the federal government from exceeding its enumerated powers.[239] Most importantly, the Court will avoid creating a conflict between the two interpretations of the Ninth Amendment by not recognizing positive rights and by not identifying the Ninth Amendment.[240]

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[235] *See* Caplan, *supra* note 15, at 267–68.
[236] *Id.*
[237] *See id.*
[238] *See Casey*, 505 U.S. at 846.
[239] *See Lopez*, 115 S. Ct. at 1634.
[240] *See Shapiro*, 394 U.S. at 629.

Conclusion

Throughout its history, the Ninth Amendment has had brief periods of fame followed by lengthy periods of obscurity. The Ninth Amendment played a central role in the debate surrounding inclusion of a bill of rights in the Constitution. It then went virtually unnoticed for one hundred seventy-four years. In 1965, Justice Goldberg, with the help of Stephen Breyer, brought the Ninth Amendment out of obscurity. Over the last thirty years, the Ninth Amendment has slowly faded back into obscurity; however, one can still feel its presence underlying some of the most highly publicized Court decisions.

Even without citing or consciously considering it, the Ninth Amendment plays a pivotal role in all Court decisions concerning unenumerated rights or the scope of the federal government's power. It justifies the existence of unenumerated rights and simultaneously limits the scope of the federal government's power. The Ninth Amendment will most likely continue to play this role without ever being cited by a majority of the current Court.

Cameron S. Matheson