

Ninth Life: An Interpretive Theory of the Ninth Amendment[†]

CHASE J. SANDERS*

TABLE OF CONTENTS

I. INTRODUCTION TO AN INTERPRETIVE THEORY	760
II. THE HISTORY OF THE NINTH AMENDMENT	763
<i>A. The First Constitutional Quandary</i>	763
<i>B. The Madisonian Resolution</i>	767
<i>C. Jurisprudential History</i>	769
III. AN INTERPRETIVE THEORY OF THE NINTH AMENDMENT	773
<i>A. The Ninth Amendment as Guardian of Unenumerated Rights</i>	773
1. A Review of the Incorporation Question and the Incorporation of the Ninth Amendment	774
2. Rights, Powers, and the Ninth Amendment's Constitutional Role	781
3. The Case for Judicial Recognition of Ninth Amendment Rights	788
a. The Meaningless Ninth Amendment Defense	791
b. The Judicial Unenforceability Defense	792
c. The Alternative Reference Defense	794
d. The Rule of Construction Defense	796
4. Conclusion	799
<i>B. The Nature of Ninth Amendment Rights</i>	799
1. The (Troublesome) Question of Natural Law	800
2. Ninth Amendment Rights as Defined by Lack of Substantive Harm	806
3. Conclusion	816
<i>C. Conclusion</i>	817
IV. APPLICATIONS	818
<i>A. Sexual Expression and Autonomy</i>	818
<i>B. Procreative Choice</i>	823
<i>C. Pornography and Obscenity</i>	826
<i>D. Other (Possible) First Amendment Misfits</i>	831
<i>E. Miscellaneous Ninth Amendment Candidates</i>	834
<i>F. A Final Note on Two Important Special Cases</i>	837
<i>G. Conclusion</i>	839
V. CONCLUSION	839
VI. EPILOGUE	842

[†] © Copyright 1994 by Chase J. Sanders. All rights reserved.

* Associate, Piper & Marbury, Baltimore, Maryland. J.D., Harvard University, 1992; M.P.P., Harvard University, 1992; B.A., University of Virginia, 1988.

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

UNITED STATES CONSTITUTION
AMENDMENT IX

I. INTRODUCTION TO AN INTERPRETIVE THEORY

In 1986, in *Bowers v. Hardwick*,¹ the Supreme Court upheld a Georgia statute criminalizing sodomy, thereby declining to recognize a fundamental constitutional right to engage in homosexual sex. Announcing that the right of privacy, recognized in earlier decisions involving procreative freedom, did not extend to homosexual activity, the Court disparaged sodomy as far less important than the "fundamental individual right to decide whether or not to beget or bear a child."² The Court, in short, proclaimed that sex for homosexuals is constitutionally less important than sex for heterosexuals.

In 1990, in *Cruzan v. Director, Missouri Department of Health*,³ the Court did recognize a fundamental constitutional "right to die," that is, to have life support systems disconnected under certain circumstances. The Court, however, analyzed the right not as a matter of privacy but as one of liberty. Citing its decision in *Bowers* to construe privacy narrowly, the Court quietly observed in a footnote: "We believe that [the right to refuse treatment] is more properly analyzed in terms of a Fourteenth Amendment liberty interest."⁴ Thus, in the space of just four years, the Supreme Court closed the privacy door on a right it disdained—homosexual sodomy—only to find itself forced to open a liberty window for a right it preferred—the right to die. What the Court could no longer do with "privacy" after *Bowers*, it chose to do with "liberty."⁵

These cases demonstrate how a significant portion of American constitutional rights jurisprudence has stagnated. As the contrast between *Bowers* and *Cruzan* illustrates, the Supreme Court continues to fumble for a coherent method of analyzing rights claims which appear strong, but which are not readily pigeonholed into specific constitutional provisions—so-called unenumerated rights. If, hypothetically, a state made it a crime to walk down the street, the Court would surely strike down the law as unconstitutional; but whether it would do so as a matter of privacy, liberty, or some other means is difficult to predict. All that can be said with certainty is that the Court would grope its way to the conclusion that the right to walk down the street is "fundamental," and is therefore constitutionally protected.

1. *Bowers*, 478 U.S. 186 (1986).

2. *Id.* at 190 (citation omitted).

3. *Cruzan*, 497 U.S. 261 (1990).

4. *Id.* at 279 n.7 (citation omitted).

5. Recognition of this interesting contrast between *Bowers* and *Cruzan* is owed to Martha Field, Professor Martha Field, Lecture at Harvard Law School (Oct. 11, 1991).

Indeed, "fundamentality" seems to be the one consistency in the Court's unenumerated rights jurisprudence. If the Court can deduce that an asserted right is "fundamental," it will protect that right, one way or another. Unfortunately, no one can identify the adhesive by which the fundamentality label sticks to certain rights and not others. What is clear is that the adhesive is fickle; for fear of diluting the "fundamentality" concept, the Court applies it sparingly. For every new right it recognizes, like the right to die, the Court rejects others, like homosexual sex. Thus unenumerated rights jurisprudence has stagnated at a relatively fixed bundle of rights. The New York law firm method of evaluating unenumerated rights continues—for every new right accepted as a full partner in the constitutional constellation, others are dismissed lest the partnership grow too fast and collapse under its own generosity.

This Article explores a largely unexplored constitutional provision which may significantly inform the current stagnation enveloping unenumerated rights. The Ninth Amendment to the Federal Constitution provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The text seems straightforward: the Constitution contemplates other rights besides those specifically listed in the first eight amendments and elsewhere. The Ninth Amendment, in other words, appears to speak to unenumerated rights. But for two centuries now the Ninth Amendment has played a negligible role in rights jurisprudence. Until 1965, only about ten Supreme Court decisions had even *mentioned* the Ninth Amendment, and *no* case has ever relied on the Amendment as an exclusive or even primary rule of decision.

There seems to be but one simple reason underlying the Ninth Amendment's neglect: it appears incapable of practical interpretation. No one has yet discovered a mechanism for empowering courts to identify the "other[] [rights] retained by the people" that does not dramatically swell the judiciary's head on the three-headed hydra of American government. So the courts have ignored the Ninth Amendment altogether. They have treated it as though it does not envision judicial protection for unenumerated rights at all, a notion which has gained credence through the inertia of its neglect. Sub silentio, the courts have gradually instilled the idea that there is, in fact, no such thing as Ninth Amendment rights. Predictably, this historical neglect of the Ninth Amendment has taken its toll, as the Amendment currently finds its credibility as a legitimate constitutional entity woefully damaged. As John Hart Ely writes, "[i]n sophisticated legal circles mentioning the Ninth Amendment is a surefire way to get a laugh."⁶

This Article braves the laughter, or at least the widespread skepticism surrounding the Ninth Amendment, out of a conviction that a constitutional provision should not be ignored simply because it is hard to interpret. This Article is devoted to the idea that the Ninth Amendment must mean *something*. As the very first Ninth Amendment thinker wrote, "[i]t must be

more than a mere net to catch fish in supposedly fishless water.”⁷ This Article therefore assumes the task of positing an interpretive theory of the Ninth Amendment. Specifically, this work will defend the following thesis: *The Ninth Amendment protects the right to engage in, and prevents governmental encroachment into, any activity or practice which entails no possibility of harm to either the actor or other people. Only the significant possibility of tangible physical or economic harm, not “harm” in the form of public disapproval or moral offense, can justify governmental intrusion under the Ninth Amendment.*

The Article supports this thesis as follows: Part II traces the history of the Ninth Amendment, both its enactment and its jurisprudential history. This historical study has two objectives. First, it describes the Ninth Amendment’s evolution in requisite detail (but no further) to reveal the clues which history offers for Ninth Amendment interpretation. Second, it provides this historical account objectively, so that critics might point out any contrary implications of the account.

Part III then relies on Part II to develop the actual thesis of the Article, the interpretive theory of the Ninth Amendment mentioned above. It does so in two sections. The first argues that the Framers intended the Ninth Amendment to command judicial protection for unenumerated constitutional rights. The second then derives the mechanism for identifying those rights. In addition to the history in Part II, both sections rely on other, more specific building blocks which are developed prior to the primary analysis in each section.

Part IV discusses how the interpretive theory of the Ninth Amendment constructed in Part III should apply in practice to certain selected areas of rights jurisprudence. Although, as it turns out, “Ninth Amendment rights” are actually a broad hodgepodge of largely unrelated liberties, Part IV focuses on a few specific and coherent areas of jurisprudence in order to magnify how and when the Ninth Amendment should, and should not, apply.

Part V concludes. Part VI, an epilogue, wonders how the Ninth Amendment theory advanced herein, if accepted, would mesh with or reorganize current rights jurisprudence. It grapples, in particular, with the Ninth Amendment’s compatibility with the concept of substantive due process.

Ely writes that “[i]f a principled approach to judicial enforcement of the Constitution’s open-ended provisions cannot be developed, one that is not hopelessly inconsistent with our nation’s commitment to representative democracy, responsible commentators must consider seriously the possibility that courts simply should stay away from them.”⁸ Many responsible commentators, and the courts, have apparently abandoned all attempts to develop a workable theory of Ninth Amendment interpretation, preferring instead to dismiss its open-endedness as incompatible with disciplined judicial review. But perhaps they have taken Ely’s advice prematurely. The Ninth Amendment

7. Knowlton H. Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L.J. 309, 323 (1936). Kelsey’s article is the first devoted exclusively to the Ninth Amendment.

8. ELY, *supra* note 6, at 41.

is, after all, part of the Constitution. Before throwing in the towel on its consistency with the American philosophy of government, we should make another attempt at reconciliation. This Article tries to do just that. This Article seeks Ninth life.

II. THE HISTORY OF THE NINTH AMENDMENT

Though conceived in the fertile womb of James Madison's mind—the same womb which produced many of the Constitution's most vibrant phrases—the Ninth Amendment was practically stillborn. It was a mere footnote to a compromise in a debate, a footnote which all agreed was obvious and which many thought redundant. But if this seems an inauspicious beginning for a clause portending broad implications for constitutional jurisprudence, the magnitude of both the compromise and the debate removes the apparent irony. The debate was the first great constitutional dispute; the compromise was none other than the Bill of Rights itself.

A. The First Constitutional Quandary

The hot summer's work of 1787 was drawing to a close when, on September 12, George Mason of Virginia stood up to propose to the Constitutional Convention in Philadelphia an idea which had theretofore been unmentioned: that a bill of rights be added to the nearly complete Constitution.⁹ Elbridge Gerry of Massachusetts supported the idea and moved to have a committee prepare such a document, but the Convention overwhelmingly rejected the motion.¹⁰ Various other delegates made similar attempts over the remaining three days of the Convention, all to no avail, and on September 15, 1787, the great Philadelphia Convention unanimously agreed to an unamended, proposed Constitution of the United States.¹¹ The Framers were exhausted but satisfied; only ratification by the states impeded the official formation of a Federal American Government.

Instead of fading, the debate over whether to include a bill of rights began in earnest in the state ratification conventions. The glaring absence of a bill of rights was attacked in nearly every state's convention and quickly emerged as the most formidable obstacle to ratification.¹² Many Anti-Federalists¹³

9. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 587 (Max Farrand ed., rev. ed. 1966 & Supp. 1987).

10. *Id.* at 588.

11. *Id.* at 604-40.

12. See generally THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1789 (Jonathon Elliot ed., 2d ed. 1836) [hereinafter Elliot's DEBATES].

13. While this is the name generally attributed to those Framers who opposed a strong central government, it is used here as shorthand for those opposed to the Constitution, since the Constitution provided for a much stronger central government than the failed Articles of Confederation. The term "Federalists" is likewise employed here in the narrow sense of those who favored ratification. The literalist will recognize that the names are ironic; since "federalism" connotes the division of power between units, a true "Federalist" would actually favor a weaker central government and an "Anti-

latched on to the omission of a bill of rights as the sole reason for opposing the Constitution, and even most Federalists were disturbed, if not deterred, by the unamended Constitution.¹⁴ The Anti-Federalists' clamor for a bill of rights, and the nuances of the debate, cannot be appreciated without an understanding of the prevailing political philosophy of the day.

The Framers were, almost to a man, disciples of John Locke.¹⁵ Locke theorized that while men "are naturally in . . . a state of perfect freedom . . . [and] equality,"¹⁶ they ultimately decide to "divest[] [themselves] of [their] natural liberty, and put[] on the bonds of civil society, [] by agreeing with other men to join and unite into a community for their comfortable, safe, and peaceable living one amongst another."¹⁷ According to Locke, free individuals create government to better enforce the "law of nature" that "no one ought to harm another in his life, health, liberty, or possessions."¹⁸ Locke saw the chief threat as against property: "the great and chief end . . . of men's uniting into common-wealths, and putting themselves under government, is the preservation of their property."¹⁹ However, Locke advocated only that "whosoever . . . unite into a community, must be understood to give up all the power, *necessary to the ends for which they unite into society*, to the majority of the community."²⁰ In other words, man does not forfeit all his rights upon entering into the "social compact," only those necessary for effective self-government. Man retains the remaining implications of his natural status as equal and independent.²¹

Against this background, the opponents of the Constitution argued that the omission of a bill of rights failed to protect man's "unalienable"²² freedoms from the newly formed Federal Government. Patrick Henry, the leading Anti-Federalist in the Virginia convention, pointed out the defect in stark contrast to both the Articles of Confederation and the various state constitutions:

It was expressly declared in our Confederation that every right was retained by the states, respectively, which was not given up to the government of

Federalist" would prefer a stronger one.

14. James F. Kelley, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. CHI. L. REV. 814, 817 (1966).

15. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 283 (1969); see Kelley, *supra* note 14, at 815. See generally Edward S. Corwin, *The Higher Law Background of American Constitutional Law*, 42 HARV. L. REV. 149, 365 (1928-1929).

16. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 8 (C.B. Macpherson ed., rev. ed. 1980) (6th ed. 1764) (emphasis omitted).

17. *Id.* at 52 (emphasis omitted).

18. *Id.* at 9.

19. *Id.* at 66 (emphasis omitted).

20. *Id.* at 53 (emphases omitted and added).

21. The reader is asked to forgive the brevity of this articulation of Lockean theory because a full exploration, while fascinating, is clearly beyond the scope of this work. This synopsis is adequate to illuminate the essence of the Framers' debate, and Locke, in any event, was one of only several important influences on the Framers. A discussion of some of the others, and of the particular question of natural law, is undertaken *infra* part III.B.1.

22. This is how Jefferson described man's natural entitlements in the Declaration of Independence, which reads like an essay in Lockean theory. Preserving the rights to "life, liberty, and the pursuit of happiness" is merely the most famous expression of what the Framers universally acknowledged was the *raison d'être* for government.

the United States. But there is no such thing here. You, therefore, by a natural and unavoidable implication, give up your rights to the general government.

. . . You have a bill of rights to defend you against the state government, which is bereaved of all power, and yet you have none against Congress, though in full and exclusive possession of all power!²³

The Federalists responded with two primary arguments.²⁴ First, they noted that Article I limited Congress' powers to those *enumerated*. Congress could only undertake that which the Constitution explicitly authorized, which most certainly did not include the trampling of man's natural rights. As Alexander Hamilton pointedly asked, "[W]hy 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 the press shall not be restrained, when no power is given by which restrictions may be imposed?"²⁵

Second, a corollary of the first argument was that a bill of rights would not only be redundant but *dangerous*, insofar as it would imply that those rights not listed were forfeited to the Federal Government. Federalists worried that an enumeration of "exceptions to powers which [were] not granted . . . would afford a colorable pretext to claim more than were granted."²⁶ As James Wilson urged on the floor of the Pennsylvania convention:

[I]n a government consisting of enumerated powers, such as is proposed for the United States, a bill of rights would not only be unnecessary, but, in my humble judgment, highly imprudent. . . . If we attempt an enumeration, every thing that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete.²⁷

The Anti-Federalists were not convinced by the first argument. Patrick Henry chided the idea of the redundancy of a bill of rights as an ivory tower exercise in abstract philosophizing. "When we see men of such talents and learning compelled to use their utmost abilities to convince themselves that there is no danger," he asked, "is it not sufficient to make us tremble?"²⁸ A writer in a New York newspaper was likewise unconvinced:

23. 3 Elliot's DEBATES, *supra* note 12, at 446. Henry was obviously skeptical that the structure of Article I, Section 8 could effectively limit Congress' powers.

24. The Federalists also advanced several secondary reasons why a bill of rights was not necessary. Among these were that several of the states' constitutions lacked bills of rights, yet no one thought the liberties of the citizens of those states were in jeopardy, and that the Constitution had already provided for several important rights, such as habeas corpus and the right to a jury trial in criminal cases. Eugene M. Van Loan, III, *Natural Rights and the Ninth Amendment*, 2 B.U. L. REV. 1, 5-6 (1968).

25. THE FEDERALIST NO. 84, at 513-14 (Alexander Hamilton) (Clinton Rossiter ed., 1961). For all the deference paid to the Federalist papers in two centuries of constitutional interpretation, it is easy to forget that the essays were hardly a neutral exposition, but constituted, in effect, a brief in favor of ratification. The Anti-Federalists were merely the poorer for lacking such eloquent advocates as Hamilton, Madison, and Jay.

26. *Id.* at 513.

27. 2 Elliot's DEBATES, *supra* note 12, at 436.

28. 3 Elliot's DEBATES, *supra* note 12, at 317.

The suggestion, that the liberty of the press is secure, because it is not in express words spoken of in the constitution, and that the trial by jury is not taken away, because it is not said in so many words and letters it is so, is puerile and unworthy of a man who pretends to reason.²⁹

The second argument, the imperfect enumeration scenario, gave the Anti-Federalists greater pause. Everyone agreed the enumeration would be imperfect.³⁰ Patrick Henry conceded that “[w]hen you go into an enumeration of your rights, and stop that enumeration, the inevitable conclusion is, that what is omitted is intended to be surrendered.”³¹

Nevertheless, Henry remained steadfast on a bill of rights, and he and George Mason led a faction at the Virginia convention to make ratification conditional on the addition of a bill of rights in the First Congress. Against this faction stood James Madison, Virginia’s leading Federalist, whose role as unofficial secretary of the Philadelphia Convention had earned him the title “Father of the Constitution.”³² Madison worried that other states would emulate such conditional ratification, so as a compromise he promised to introduce a series of amendments in the First Congress if Virginia would ratify unconditionally.³³

Meanwhile, the delegates to the Massachusetts convention had taken the initiative themselves. Massachusetts ratified the Constitution on February 6, 1788, but only after appending several proposed amendments which it hoped would “remove the fears and quiet the apprehensions of many of the good people of the commonwealth.”³⁴ South Carolina and New Hampshire thereafter did likewise. When the Virginia delegates followed this trend, the numerous concrete proposals that had accumulated suddenly made Madison’s promise to introduce a bill of rights into the First Congress meaningful. Madison was thus able to win over enough votes from Henry’s faction, and on June 25, 1788, Virginia narrowly (eighty-nine yeas to seventy-nine nays)³⁵ became the tenth state to ratify the new Constitution. While

29. Melancthon Smith, *An Address to the People of the State of New York*, in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 113-14 (Paul L. Ford ed., 1968).

30. James Wilson observed: “Enumerate all the rights of men! I am sure, sir, that no gentleman in the late Convention would have attempted such a thing.” 2 Elliot’s DEBATES, *supra* note 12, at 454. Congressman Sedgwick of Massachusetts, in a subsequent debate in the House of Representatives, responded to the proposed incorporation of a right to peaceably assemble: If the House is going to “descend to such minutiae,” the committee might as well “have gone into a very lengthy enumeration of rights; they might have declared that a man should have a right to wear his hat if he pleased; that he might get up when he pleased, and go to bed when he thought proper.” 1 ANNALS OF CONG. 731-32 (Joseph Gales & William Seaton eds., 1789) [hereinafter ANNALS].

31. 3 Elliot’s DEBATES, *supra* note 12, at 594.

32. Madison was too humble to accept the compliment: “You give me a credit to which I have no claim, in calling me ‘the writer of the Constitution of the U.S.’ This was not, like the fabled Goddess of Wisdom, the offspring of a single brain. It ought to be regarded as the work of many heads & many hands.” Letter from James Madison to William Cogswell (Mar. 10, 1834), in 9 THE WRITINGS OF JAMES MADISON 533 (Gaillard Hunt ed., 1910) (emphasis in original).

33. Kelley, *supra* note 14, at 819.

34. 2 Elliot’s DEBATES, *supra* note 12, at 177.

35. WINTON V. SOLBERG, THE CONSTITUTIONAL CONVENTION AND THE FORMATION OF THE UNION 375 (2d ed. 1990).

Virginia's vote was in one sense academic, New Hampshire's ratification four days earlier being the ninth and decisive one, Virginia and Massachusetts (the sixth to ratify) had once again led American history, this time by ensuring the development of a bill of rights.

B. *The Madisonian Resolution*

On May 4, 1789, Madison kept his promise to the Anti-Federalists by introducing into the first session of the House of Representatives nine resolutions. These resolutions, based on the states' proposals, comprised the clay from which the Bill of Rights would eventually be molded.³⁶

In acceding to the Anti-Federalists' demand for a bill of rights, Madison had of course flouted the Federalists' concern over the consequences of imperfect enumeration. But he believed he had a solution:

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 the admission of a bill of rights into this system; but,

36. Much has been made of James Madison's famous "switch" from a position opposed to a bill of rights to a position in favor of it. The evolution of his view is indeed interesting political history.

Jefferson had made his view known to Madison early. Offering his thoughts on the unamended Constitution which Madison had sent him, Jefferson wrote:

Let me now add what I do not like. First the omission of a bill of rights providing clearly, for freedom of religion, freedom of the press Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular; and what no just government should refuse, or rest on inference.

Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in 4 THE WRITINGS OF THOMAS JEFFERSON 473, 476-77 (Gaillard Hunt ed., 1892-99). As documented above, however, Madison proceeded to argue against a bill of rights in the Virginia ratification convention the following spring, a position on which the Anti-Federalists forced him to compromise. But then in the fall he wrote to Jefferson:

My own opinion has always been in favor of a bill of rights; provided it be so framed as not to imply powers not meant to be included in the enumeration. At the same time I have never thought the omission a material defect I have not viewed it in an important light.

Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 5 THE WRITINGS OF JAMES MADISON 271 (Gaillard Hunt ed., 1904) [hereinafter MADISON'S WRITINGS]. At some point over the ensuing winter Madison must have shored up his opinion, for his promise to work for a bill of rights was a major plank in his election campaign for the First Congress. Letter from James Madison to George Eve (Jan. 2, 1789), 5 MADISON'S WRITINGS, *supra* at 319 n.1. Madison also might have taken heed of Jefferson's thoughts on the Federalists' concern over imperfect enumeration. Upon hearing Madison's argument that "there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude," letter from James Madison to Thomas Jefferson (Oct. 17, 1788), 5 MADISON'S WRITINGS, *supra* at 271, Jefferson had responded: "Half a loaf is better than no bread. If we cannot secure all our rights, let us secure what we can." Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), in 14 THE PAPERS OF THOMAS JEFFERSON 660 (Julien P. Boyd ed., 1958). In any event, by the time Madison introduced his proposed amendments into the First House in the spring of 1789, "he had become strongly committed to them." Kelley, *supra* note 14, at 819 n.23.

Madison's change of mind may represent the first great political "flip-flop," but it more likely reflects the respect of a thoughtful man for the views of his constituents on a very important issue.

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.³⁷

The last clause of Madison's fourth resolution read as follows:

The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.³⁸

The First Congress then set out to decide whether Madison's resolutions would satisfy both the Anti-Federalists' demand for a bill of rights and the Federalists' concern over imperfect enumeration. The resolutions were sent to a House select committee³⁹ for review. On July 28, 1789, the committee reported its work back to the full House,⁴⁰ having approved the last clause of Madison's fourth resolution, and resubmitted it as:

The enumeration in this Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.⁴¹

One month later, on August 24, a House committee of the whole approved the select committee's version, at some point changing only the phrase "this Constitution" to "the Constitution."⁴² The House record reflects no debate over the proposed amendment save one objection by Elbridge Gerry of Massachusetts. Gerry had moved to substitute the word "impair" for "disparage," arguing that "the word 'disparage' was not of plain import," but his motion was not seconded.⁴³ From September 2 through September 9, the Senate then considered the proposed amendments. The Senate added merely a comma after the word "Constitution,"⁴⁴ to the House's version of the final

37. 1 ANNALS, *supra* note 30, at 439.

38. *Id.* at 435. Madison very likely derived this language from that of either the Virginia or New York state legislatures. Virginia's seventeenth proposed amendment to the Constitution read:

That those clauses which declare that Congress shall not exercise certain powers be not interpreted in any manner whatsoever to extend the powers of Congress.

But that they be construed as either making exceptions to the specified powers where this shall be the case, or otherwise as inserted merely for greater caution.

JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 664 (Gaillard Hunt & James B. Scott eds., 1987). New York's act of ratification contained this provision:

[T]hat those clauses in the said Constitution, which declare, that Congress shall not have or exercise certain Powers, do not imply that Congress is entitled to any Powers not given by the said Constitution; but such clauses are to be construed either as exceptions to certain specified Powers, or as inserted merely for greater Caution.

Id. at 666.

39. This committee consisted of 11 members, one from each state then in the Union (North Carolina and Rhode Island had not yet ratified). Madison represented Virginia.

40. *Id.* at 699.

41. 1 ANNALS, *supra* note 30, at 754.

42. *Id.* The House approved 16 other proposed amendments which the select committee had crafted out of Madison's original resolutions.

43. *Id.* (proceedings of Aug. 17, 1789).

44. Unfortunately, there is no record of the Senate's deliberations, since the Senate conducted its sessions in secret until 1793. See GEORGE H. HAYNES, THE SENATE OF THE UNITED STATES, ITS HISTORY AND PRACTICE 44 (1938).

clause of Madison's original fourth resolution, bringing the proposed amendment to its final and current form.

On September 25, 1789, the House and Senate issued a joint resolution concurring on twelve of the seventeen proposed amendments which the House had approved a month earlier.⁴⁵ The eleventh of these was the revised version of the final clause of Madison's original fourth resolution. Almost two years to the day after the Framers presented the unamended Constitution to the states for ratification, the task of ratification—this time of a proposed bill of rights—again fell to the states. The first two of the twelve proposed amendments would ultimately fail to win the states' approval, so Virginia appropriately became the decisive state to ratify the Bill of Rights on December 15, 1791, and these words became the Ninth Amendment to the Constitution of the United States:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.⁴⁶

C. Jurisprudential History

The judiciary's treatment of the Ninth Amendment divides neatly into two eras. Justice Goldberg's concurring opinion in the famous *Griswold v. Connecticut*⁴⁷ decision of 1965 marks the turning point from what may be called the B.C. era to, correspondingly, the A.D. era. In the B.C. (Before the Concurrence) era, the Ninth Amendment hid like a neglected child among its more popular sibling amendments in the Bill of Rights. The Supreme Court's B.C. era record in interpreting the Ninth Amendment is as scant as that of the House select committee which wrote it; until 1965, the Court mentioned the Ninth Amendment in fewer than ten cases.⁴⁸ In all but one of these, the references were brief and passing.

The one decision which remotely elaborated on the Ninth Amendment was *United Public Workers v. Mitchell*,⁴⁹ in which the Court rejected a constitutional challenge to the Hatch Act's prohibition on political activities by certain executive branch employees. The employees argued that the prohibi-

45. See Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 259 (1983).

46. U.S. CONST. amend. IX. For a concise chronology of the enactment of the Ninth Amendment, see Leslie W. Dunbar, *James Madison and the Ninth Amendment*, 42 VA. L. REV. 627 (1956).

47. *Griswold*, 381 U.S. 479, 486 (1965) (Goldberg, J., concurring).

48. The major ones were: *Roth v. United States*, 354 U.S. 476, 492 (1957); *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948); *United Pub. 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), nullified by U.S. CONST. amend. XIII; and *Lessee of Livingston v. Moore*, 32 U.S. (7 Pet.) 469, 551 (1833) (in which the Court's reference to the "ninth article of amendment" may not even indicate the Ninth Amendment, but may refer instead to the ninth proposed amendment, the seventh amendment enacted).

49. *Mitchell*, 330 U.S. 75.

tion violated, inter alia, their Ninth Amendment rights. Writing for the Court, Justice Reed responded:

The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people. Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail.⁵⁰

Justice Reed obviously considered the Ninth Amendment to be no more than an echo of the Tenth.⁵¹ The Ninth Amendment's guarantee, whatever it was, was not offended if Congress had acted pursuant to a delegated power.⁵² Thus, the Court's first reading of the Ninth Amendment not only failed to undertake, but largely *precluded*, an inquiry into its central mysteries—the nature of, and the extent of constitutional protection for, the other rights “retained by the people.”

All this changed in June of 1965 when the Supreme Court handed down its decision in *Griswold v. Connecticut*.⁵³ In *Griswold*, the Court struck down as unconstitutional a Connecticut statute criminalizing the use of contraceptives. Justice Douglas opined for the majority that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”⁵⁴ Citing the First, Third, Fourth, Fifth, and Ninth Amendments, Douglas determined that the Connecticut statute compromised “a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.”⁵⁵ From this the majority deduced that the statute was unconstitutional, though as the dissent pointedly observed, “the Court does not say which of these Amendments, if any, it thinks is infringed by this Connecticut law.”⁵⁶

Justice Goldberg, joined by Chief Justice Warren and Justice Brennan, concurred in the result and issued what remains the most important judicial exposition of the Ninth Amendment. While Douglas had only listed the Ninth Amendment as one of several guarantees protecting privacy through “penumbra[l] emanations,” Goldberg wrote separately “to emphasize the relevance of that Amendment to the Court's holding.”⁵⁷ Goldberg asserted:

50. *Id.* at 95-96.

51. The Tenth Amendment reads: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” The purpose of the Tenth Amendment was to ensure that the states retained any legitimate governmental power that was not delegated to the Federal Government by the Constitution. U.S. CONST. amend. X.

52. The precise relationship between the Ninth and Tenth Amendments, and the competing concepts of Ninth Amendment “rights” and Tenth Amendment “powers,” turns out to be a subject of considerable controversy. For a detailed examination of this issue, see *infra* part III.A.2.

53. *Griswold*, 381 U.S. 479 (1965).

54. *Id.* at 484.

55. *Id.* at 485.

56. *Id.* at 528.

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

"The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments."⁵⁸

Goldberg briefly discussed the Ninth Amendment's genesis and quoted Madison's introduction of it to the House as a means for relieving the Federalists' concern.⁵⁹ Goldberg then quoted Justice Story: "[The Ninth Amendment] was manifestly introduced to prevent any perverse or ingenious misapplication of the well-known maxim, that an affirmation in particular cases implies a negation in all others; and, *e converso*, that a negation in particular cases implies an affirmation in all others."⁶⁰ Goldberg was thus able to fortify his initial assertion: "These statements of Madison and Story make clear that the Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people."⁶¹

But while Goldberg broke new ground in asserting that the Ninth Amendment protects unenumerated rights, he did not offer any novel ideas on disclosing the identity of those rights. Instead, he fell back on the elusive substantive due process "tests" for fundamental rights developed in the Court's early struggles with the incorporation dilemma.⁶² Goldberg concluded, "I agree fully with the Court that, applying these tests, the right of privacy is a fundamental personal right"⁶³

Goldberg's ruminations in *Griswold* launched the A.D. (After Discovery) era of Ninth Amendment jurisprudence. Since 1965, the Supreme Court has mentioned the Ninth Amendment in no fewer than twenty cases, usually citing

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

59. See *supra* text accompanying note 37.

60. *Griswold*, 381 U.S. at 490 (Goldberg, J., concurring) (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 651 (Melvin M. Bigelow ed., 5th ed. 1891)).

61. *Id.*

62. Among the tests Goldberg cited were: whether a right is "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934); and whether a right "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,'" *Powell v. Alabama*, 287 U.S. 45, 67 (1932). Goldberg did not cite the most famous of these malleable tests for fundamentality—Justice Cardozo's declaration that the right must be "implicit in the concept of ordered liberty." See, e.g., *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784, 793-94 (1969).

Ironically, while Goldberg almost certainly relied on these tests out of ignorance as to how to fashion a better one, doing so gave him a tactical advantage in rebutting the *Griswold* dissent. In their dissent, Justices Black and Stewart argued that Goldberg's interpretation of the Ninth Amendment "broaden[ed] the powers of this Court," 381 U.S. at 536. Goldberg's reliance on the incorporation tests as a means of effectuating the Ninth Amendment's guarantee positioned him to respond that his interpretation "serves to support what this Court has been doing in protecting fundamental rights" through the Due Process Clause of the Fourteenth Amendment. *Id.* at 493.

The incorporation debate and its implications for Ninth Amendment interpretation are discussed *infra* part III.A.1.

63. *Griswold*, 381 U.S. at 494.

Goldberg's *Griswold* concurrence.⁶⁴ The Amendment, moreover, has appeared in some of the Court's most famous A.D. era cases, including *Planned Parenthood v. Danforth*,⁶⁵ *Buckley v. Valeo*,⁶⁶ and *Bowers v. Hardwick*.⁶⁷

But the Court has never figured out exactly what to do with the curious treasure it discovered in *Griswold*. Despite the relative explosion of Ninth Amendment citations in the A.D. era, the references continue to be trivial. Indeed, the clause has yet to furnish a ground for decision. The closest the Court came was in *Richmond Newspapers, Inc. v. Virginia*,⁶⁸ in which the Court upheld the public's right to attend criminal trials through the media within the limits of the defendant's right to a fair hearing. Chief Justice Burger, writing for the majority, cited the Ninth Amendment to rebut Virginia's claim that the Constitution does not indicate a public right to attend trials⁶⁹—but the Court relied on the First and Fourteenth Amendments for its decision.

Nor has the Court hinted what might be the other rights "retained by the people." Justice Douglas flirted with this endeavor in his dissent in *Palmer v. Thompson*,⁷⁰ in which the Court narrowly upheld against an equal protection challenge a municipality's power to close several public swimming pools in order to avoid compliance with a desegregation order.⁷¹ Douglas argued cautiously:

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

. . . .

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?⁷²

This strange passage, though of dubious worth to the surrounding opinion, at least demonstrates one Justice's personal conviction that "pure air and pure water" are two of the rights protected by the Ninth Amendment. Of course, one can only wonder how Douglas derived these rights in particular, or if anything else—fire and earth, perhaps—is sufficiently pure to be so obviously protected by the Ninth Amendment.

64. Search of LEXIS (July 22, 1993). Lower federal courts and state courts, meanwhile, have referred to the Ninth Amendment in over a thousand cases. *Id.*

65. *Danforth*, 428 U.S. 52 (1976).

66. *Buckley*, 424 U.S. 1 (1976).

67. *Bowers*, 478 U.S. 186 (1986).

68. *Richmond Newspapers*, 448 U.S. 555 (1980).

69. *Id.* at 579 & n.15.

70. *Palmer*, 403 U.S. 217 (1971).

71. The majority in *Palmer* found substantive evidence for the lower court's determination that the city closed the pools for safety and economic reasons, and it did not explicitly find that the municipality was avoiding compliance. *Id.* at 225. Realistically, however, Jackson, Mississippi probably did close public pools in fact to avoid complying with the desegregation order.

72. *Id.* at 233-34.

The A.D. era has thus proved an illusory revolution for those who believed the Goldberg concurrence might vault the Ninth Amendment into constitutional prominence. If the Ninth Amendment was a stillborn footnote in a compromise Bill of Rights, its neglect remains pure, as the Court has offered neither a coherent vision of the Amendment's meaning nor any insight into the rights to which it refers. That task continues to be the province of the commentators.

III. AN INTERPRETIVE THEORY OF THE NINTH AMENDMENT

Two simple questions lie at the heart of any foray into the meaning of the Ninth Amendment. First, does the Ninth Amendment mandate judicial protection of unenumerated constitutional rights? Second, if so, what are those rights?

This Part attempts to answer these questions and, in so doing, to develop an interpretive theory of the Ninth Amendment. The contention will be that the answer to the first question is "yes" and that the answer to the second is that Ninth Amendment rights, too numerous to catalogue, include any activity which entails no threat of substantive harm. Thus, the thesis to be developed, as stated in Part I, is as follows: *The Ninth Amendment protects one's right to engage in, and prevents governmental encroachment into, any activity which entails no possibility of harm to either the actor or other people. Only the significant possibility of tangible physical or economic harm, not "harm" in the form of public disapproval or moral offense, can warrant governmental intrusion.*

This thesis may strike anyone familiar with established constitutional doctrine as radical. The reader is asked only to keep several points in mind. First, the development of coherent answers to the two central questions, it is hoped, will illuminate this thesis as the only logical reading of the Ninth Amendment. Second, and more important, *the analysis presented here is every bit intended to portray the Framers' original intent.* This work is not meant to represent constitutional revisionism, but rather it is designed to constitute an historical account of the Framers' intentions for the Ninth Amendment and the rights they would have had that Amendment protect. Finally, the implications of the thesis to be developed here, as will be shown in this Part and further in Part IV,⁷³ are not as far-reaching as they may seem.

A. The Ninth Amendment as Guardian of Unenumerated Rights

The commentators who have wrestled with the meaning of the Ninth Amendment have tended to focus on the first of the Amendment's two central questions: whether the Amendment protects unenumerated constitutional rights

73. Part IV is devoted exclusively to an examination of how the thesis advanced here would actually apply in various areas of fundamental rights jurisprudence.

at all.⁷⁴ Part III.A.3 attempts to derive an affirmative answer to that question, in light of the Ninth Amendment's history set forth above in Part II. Part III.A.1-2 develop the building blocks for that derivation. Part III.A.1 argues that the Ninth Amendment has been incorporated against the states, under either the most plausible interpretation of the Fourteenth Amendment, or as a matter of inference under existing jurisprudence. Given that the Ninth Amendment has been incorporated, Part III.A.2 can then develop the Ninth Amendment's contemporary, independent constitutional role through an examination of the competing concepts of rights and powers. This analysis, in turn, injects modern relevance into the actual derivation in Part III.A.3 that the Framers *did* intend the Ninth Amendment to protect unenumerated constitutional rights.

1. A Review of the Incorporation Question, and the Incorporation of the Ninth Amendment

It may seem illogical to ponder whether Ninth Amendment rights apply to the states before one even investigates such rights at all. However, this subsection will hopefully demonstrate that a "resolution" of the incorporation question, if not for all time then at least for purposes of this work, necessarily precedes an understanding of the Ninth Amendment's role in the constitutional hierarchy. The next subsection will then show how that understanding itself precedes the inquiry into whether the Ninth Amendment protects unenumerated rights. This subsection reviews the incorporation dilemma and contends that the Fourteenth Amendment *did* incorporate the entire Bill of Rights, including the yet-to-be-defined rights inherent in the Ninth Amendment.

The "incorporation" question refers to the classic debate over whether the Fourteenth Amendment holds state governments accountable to the strictures of the Bill of Rights. It is well known that the Framers of the Bill of Rights intended its provisions to apply only to the federal government, an intention which became constitutional law in *Barron v. Baltimore*.⁷⁵ The Framers trusted the states, through either their own bills of rights or governmental discretion, to adequately protect fundamental liberties.⁷⁶ Indeed, that the states would guard basic rights within their borders was simply assumed; it was the Congress about which the Framers worried. The Federalists argued, as shown in Part II, that since Congress would be limited to certain specified areas of power, there was no need for a federal bill of rights. When the Federalists finally succumbed to the Anti-Federalists' demand for a national bill of rights, everyone viewed it as merely a harmless extra check against the federal government.⁷⁷

74. Part III.A therefore benefits from the ideas of copious scholarly literature, whereas Part III.B, which seeks to determine the identity of unenumerated rights, must look more to the insights of natural law theorists and political philosophers.

75. *Barron*, 32 U.S. (7 Pet.) 243 (1833).

76. See *supra* part II; see also WOOD, *supra* note 15, at 271-73.

77. WOOD, *supra* note 15, at 542-43.

Whether the Fourteenth Amendment changed that reality has been the most controversial constitutional dispute in the century and a quarter since the Amendment's ratification.⁷⁸ The Supreme Court's fragmented incorporation jurisprudence reflects the controversy. After an initial "no" answer to the incorporation question, the twentieth century witnessed the Court reverse course by issuing a host of piecemeal decisions applying the Bill of Rights provisions to the states. In these cases, the Court would consider whether the Federal Bill of Rights provision in question, which the plaintiff or criminal defendant had shown to be offended by *state* action, was sufficiently fundamental to be incorporated against the states. If so, the provision was applied to the states through the Due Process Clause of the Fourteenth Amendment, on the theory that a state's violation of a fundamental right offended a *substantive* notion of the guarantee of due process, which the states now had to respect.

If this notion of "substantive due process" seems peculiar, even more dubious were the Court's "tests" for determining whether a Bill of Rights provision was fundamental. Among these were: whether a right is "so rooted in the traditions and conscience of our people as to be ranked as fundamental"⁷⁹ or "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,'"⁸⁰ whether a state's action "shocks the conscience,"⁸¹ or, the test most commonly cited, whether a right is "implicit in the concept of ordered liberty."⁸² However these tests worked, they apparently became more lenient over time; when the incorporation process finally halted with the passing of the Warren Court, the states found themselves bound by all the Bill of Rights provisions save five.

As most students of the issue agree, the Court's haphazard, selective incorporation process seems surely wrong.⁸³ The Fourteenth Amendment either incorporated the entire Bill of Rights, all at once, or it did not. Justice Black initiated the debate with a lengthy dissent in *Adamson v. California*,⁸⁴

78. The Fourteenth Amendment was ratified on July 9, 1868. Its first section provides: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV.

79. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

80. *Powell v. Alabama*, 287 U.S. 45, 67 (1932) (quoting *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926)).

81. *Rochin v. California*, 342 U.S. 165, 172 (1952).

82. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784, 793-94 (1969).

83. Justice Frankfurter derisively referred to the Court's process of selectively incorporating certain rights as "the slot machine theory . . . some are in and some are out." HENRY J. ABRAHAM, *FREEDOM AND THE COURT* 57 (4th ed. 1982).

84. *Adamson*, 332 U.S. 46 (1947) (holding the Fifth Amendment's guarantee against self-incrimination not applicable to the states), *overruled by Malloy v. Hogan*, 378 U.S. 1 (1964).

in which, through exhaustive research into the Fourteenth Amendment's legislative history, he concluded:

[O]ne of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states. With full knowledge of the import of the *Barron* decision, the Framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the constitutional rule that case had announced.⁸⁵

Charles Fairman quickly rebutted Black's analysis, arguing that Black had distorted the Fourteenth Amendment's legislative history.⁸⁶ The debate swung back and forth among numerous commentators over the years,⁸⁷ with John Hart Ely concluding "this is an argument no one can win."⁸⁸

But if some may never be satisfied, this Article views the evidence in favor of incorporation as exceedingly difficult to rebut, for two reasons. First is the legislative history. Representative John Bingham of Ohio, the Fourteenth Amendment's leading proponent in the House, cited on record the *Barron* ruling as "exactly what makes plain the necessity of adopting [the Fourteenth] Amendment."⁸⁹ Even more telling, in language which Ely notes "must give serious pause to anyone who would deny an intention to incorporate,"⁹⁰ Jacob Howard of Michigan, the leading advocate of the Fourteenth Amendment in the Senate, asserted during floor debates:

To these privileges and immunities [of Article IV, Section 2], whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution *The great object, therefore, of the first section of [the Fourteenth] amendment is to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.*⁹¹

This language is compelling. As one commentator sums up the legislative history:

[T]here seems little doubt that the Amendment's principal Framers and managers, Representative Bingham and Senator Howard, if not every member of the majority in the two houses of Congress, did believe the Bill

85. *Id.* at 71-72.

86. Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949); see also ABRAHAM, *supra* note 83, at 37.

87. See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977); RICHARD CORTNER, *THE SUPREME COURT AND THE SECOND BILL OF RIGHTS: THE FOURTEENTH AMENDMENT AND THE NATIONALIZATION OF THE CIVIL LIBERTIES* 45 (1981); J. B. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* (1956); Michael K. Curtis, *The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger*, 16 WAKE FOREST L. REV. 1 (1980); Louis Henkin, *Selective Incorporation in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963); Stanley Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation*, 2 STAN. L. REV. 140 (1949); Frank H. Walker, Jr., *Constitutional Law—Was It Intended that the Fourteenth Amendment Incorporate the Bill of Rights?*, 42 N.C. L. REV. (1964).

88. ELY, *supra* note 6, at 25.

89. *Cong. Globe*, 39th Cong., 1st Sess. 1089 (1866) [hereinafter *Globe*].

90. ELY, *supra* note 6, at 26.

91. *Globe*, *supra* note 89, at 2765-66 (emphasis added).

of Rights to be made generally applicable to the several states via Section 1. And *no* member of that Congress, before he voted on the Amendment, contradicted Bingham's and Howard's final statements to that extent.⁹²

The second evidentiary source of an intent to incorporate is the actual language of the Fourteenth Amendment. Because of the Court's reliance on the Due Process Clause as the mechanism for incorporation, that Clause has received the most scrutiny. As scholars have concluded, however, there are troubling problems with the Due Process Clause as the vehicle for incorporation. First, as noted above, the idea of "substantive due process" seems peculiar. It is difficult to envision how a procedural guarantee—that one shall be *duly processed* under the law—can carry substantive protection.⁹³ Even if it can, one can only wonder how to define or limit the substantive realm of a clause which, on its face, does not indicate that any such realm even exists.⁹⁴ A second problem lies in the fact that if the idea of substantive due process encompasses most of the Bill of Rights protections, then the Due Process Clause itself may be viewed as "shorthand" for the Bill of Rights. But if this were the case, then as Raoul Berger notes, the due process clause of the *Fifth* Amendment would have rendered the rest of the Bill of Rights superfluous.⁹⁵

However, the Fourteenth Amendment offers far stronger evidence than the Due Process Clause of the intent to incorporate. The Amendment also provides, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." This clause, it seems, was meant to do the work of incorporation.⁹⁶ Justice Black thought so, writing that the clause is an "eminently reasonable way of expressing the idea that henceforth the Bill of Rights shall apply to the States."⁹⁷ Indeed, given that the Bill of Rights provisions are undeniably "privileges or immunities of citizens of the United States," at least according to Senator Howard,⁹⁸ it would seem difficult to express the incorporation idea in plainer language.

Unfortunately, the Supreme Court never allowed the Privileges or Immunities Clause to take root as the guarantor of incorporation. In the

92. ABRAHAM, *supra* note 83, at 41 (emphasis in original).

93. The literature on the constitutional quirk of substantive due process is voluminous. While an examination of the concept is beyond the direct scope of this work, this work interfaces with substantive due process at several future points and concludes with some cursory ruminations on the subject as it relates to the Ninth Amendment. *See infra* part VI.

94. Hence the vagueness of the Court's "tests" for determining whether a right is sufficiently fundamental to fall within the ambit of "substantive due process." *See supra* text accompanying notes 79-82.

95. Raoul Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1, 13 (1980).

96. Recent scholarship supports this contention. *See, e.g.*, MICHAEL K. CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986); Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863 (1986).

97. *Duncan v. Louisiana*, 391 U.S. 145, 166 (1968) (Black, J., concurring).

98. *See supra* text accompanying note 91.

Slaughter-House Cases,⁹⁹ the Court faced the question of whether Louisiana could constitutionally ordain a monopoly in the slaughter-house industry, thereby putting all the state's butchers out of business. The butchers relied, inter alia, on the Privileges or Immunities Clause for the proposition that they must surely be free from such governmental intrusion under the Bill of Rights. The Court rejected this interpretation, opining that there are two kinds of citizenship: "a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual."¹⁰⁰ The Court held that the Privileges or Immunities Clause only protected citizens in their capacity as *federal* citizens, not as state citizens. With the exception of a few *bona fide* privileges and immunities which inhered in *national* citizenship and which the states could not abridge,¹⁰¹ states dealt with their residents as *state* citizens, and hence the Privileges or Immunities Clause offered those citizens no protection against state laws.

The Court thus wrote the Privileges or Immunities Clause out of existence in an opinion that remains the single greatest wrong turn on the road to a coherent constitutional structure. The opinion is ironic: while it dealt an initial blow to incorporation, it presaged the Court's irresistible temptation to engage in ad hoc determinations of which rights are truly fundamental, a temptation which would be the hallmark of the incorporation process that would eventually circumvent *Slaughter-House*. More importantly, the decision reduced the Privileges or Immunities Clause to a tautology. As long as a state did not venture into the small arena of *bona fide* privileges which national citizens enjoy, it could not possibly abridge "the privileges or immunities of citizens of the United States." As Justice Field wrote in dissent, this construction left the Privileges or Immunities Clause "a vain and idle enactment."¹⁰²

Absent *Slaughter-House*, the Privileges or Immunities Clause would seem the clear vehicle for incorporation, for the two remaining problems with the Clause's capability as that vehicle appear surmountable. First, the Clause only protects the "privileges or immunities of *citizens* of the United States." This would suggest that states could abridge the Bill of Rights protections as they applied to aliens. However, reading the Privileges or Immunities Clause in tandem with the Equal Protection Clause, which protects "persons," solves this problem. Second, Ely points out that if the Privileges or Immunities Clause incorporated the Bill of Rights in toto, there would have been no need to add the Due Process Clause to the Fourteenth Amendment, since it was

99. *Butchers' Benevolent Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 83 U.S. (16 Wall.) 36 (1873).

100. *Id.* at 74.

101. These privileges, as the Court listed them, did not resemble what one would commonly describe as fundamental rights today. Instead they included, for example, the privilege of free access to the nation's ports and navigable waters, habeas corpus, and the ability to come to the seat of government and conduct business. *Id.* at 79-80.

102. *Id.* at 96 (Field, J., dissenting).

already in the Fifth Amendment.¹⁰³ This problem is more difficult, but a possible answer may lie in the fact that due process is unique among the Bill of Rights provisions in that it specifies not a right but rather a guaranteed mode of analysis. The Due Process Clause of the Fifth Amendment commands the Federal Government to treat its citizens according to established procedures—in essence, to follow the rule of law. The Clause is thus in some sense antecedent to the rest of the Bill of Rights, which deal with specific instances of when the government may or may not deprive life, liberty, or property. The Framers of the Fourteenth Amendment may not have thought it redundant to specifically require the states to follow this same *modus operandi*. Together with the Privileges or Immunities Clause referring to the rest of the Bill of Rights, the Due Process Clause would force the states to respect the same scheme of procedural and substantive liberty that the original Framers devised for the federal government.

Slaughter-House should be overruled. Doing so would incorporate the remaining Bill of Rights provisions which did not make, as one writer called it, the “Honor Roll of Superior Rights”¹⁰⁴ during the capricious era of selective incorporation. More importantly, the elimination of *Slaughter-House* would legitimate the Privileges or Immunities Clause as the clear mechanism for incorporation, as both the plain language and legislative history of the Fourteenth Amendment suggest it is. This recognition would both shore up the credibility of the incorporation doctrine, a correct result which unfortunately has been tarnished by our skepticism of its difficult birth, and would undermine at least the historical, if not the present, necessity for the troubling concept of substantive due process.¹⁰⁵

For present purposes two questions remain. First, did the Framers of the Fourteenth Amendment intend to incorporate Ninth Amendment rights along with the rest of the Bill of Rights? Second, regardless of the answer to the first question, has the Court at some point actually incorporated the Ninth Amendment? As to the first question, there is no reason to assume the Framers intended to sever the Ninth Amendment from the Bill of Rights that was to be incorporated against the states, except for one problem. In his floor speech, Senator Howard observed that the rights that the Fourteenth Amendment now ordered the states to respect included the privileges and immunities of Article IV, Section Two¹⁰⁶ and the first *eight* amendments to the Constitution.¹⁰⁷ While this poses a problem for Ninth Amendment incorporation, Howard’s omission of Ninth Amendment rights appears not to have been calculated.

103. ELY, *supra* note 6, at 27.

104. ABRAHAM, *supra* note 83, at 57.

105. See *infra* part VI for speculation on whether the Ninth Amendment theory advanced would, or should, supplant substantive due process’s present jurisprudential role.

106. This section provides: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” U.S. CONST. art. IV, § 2.

107. See *supra* text accompanying note 91.

Howard's paramount concern was to protect the "great fundamental guarantees" in the Constitution. These included the privileges and immunities of Article IV, Section Two, "whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature"¹⁰⁸ At the time of Howard's statement, the primary source of guidance as to Article IV privileges and immunities was an earlier opinion in *Corfield v. Coryell*,¹⁰⁹ in which Justice Washington, sitting alone on Circuit, expounded:

What these fundamental privileges are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety¹¹⁰

Now, these guarantees seem to be of the same genre as those the Framers of the Ninth Amendment feared might be forfeited for lack of inclusion in the Bill of Rights—general rights to liberty, incapable of specific enumeration, yet not to be disparaged for lack of enumeration. For Howard, then, it seems that Article IV privileges and immunities and the first eight amendments encompassed the known corpus of fundamental rights, or at least were the clauses of choice from which to extract such rights. Thus, he probably omitted the Ninth Amendment from his list of guarantees that were to be incorporated against the states simply because he had forgotten it. As of 1868, the Ninth Amendment had never protected any additional fundamental rights. But given that Howard was prepared to incorporate Article IV privileges and immunities, even conceding their hostility to clear definition, it seems certain he would have incorporated these same kinds of rights as protected by another clause, one that, moreover, was in the Bill of Rights. The source of fundamental rights was irrelevant; what mattered was that all of them be incorporated. As Ely observes:

[T]he most plausible interpretation of the Privileges or Immunities Clause is, as it must be, the one suggested by its language—that it was a delegation to future constitutional decision-makers to protect certain rights that the document neither lists, at least not exhaustively, nor even in any specific way gives directions for finding.¹¹¹

Even if the Framers *intended* to incorporate Ninth Amendment rights, given the reality of *Slaughter-House* and incorporation through due process, has the Court *actually* incorporated the Ninth Amendment? The question is controversial, but it seems that *Griswold* did just that. In *Griswold*, the Court wrote, "[W]e are met with [a] wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment."¹¹² Since the Court went on to hold a state statute unconstitutional based, in part, on the Ninth Amendment, the

108. *Globe*, *supra* note 89, at 2765-66.

109. *Corfield*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

110. *Id.* at 551-52.

111. ELY, *supra* note 6, at 28.

112. *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965).

Court must have viewed the Ninth Amendment as a component of Fourteenth Amendment due process.

As a theoretical matter, this conclusion should not be disturbing. The Court has incorporated far less important rights than those implicated by the Ninth Amendment.¹¹³ But if this derivation of Ninth Amendment incorporation seems unsteady, Justice Goldberg's concurrence demonstrates the futility of trying to *deny* this inference:

I do not take the position of my Brother Black in his dissent in *Adamson v. California* . . . that the entire Bill of Rights is incorporated in the Fourteenth Amendment, and I do not mean to imply that the Ninth Amendment is applied against the States by the Fourteenth.¹¹⁴

But in the next paragraph:

[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.¹¹⁵

In other words, the Ninth Amendment instructs that more than just the first eight amendments are incorporated against the states, but its own directive is not itself incorporated. It preaches about state power but applies only to federal power.

The unworkability of this result both provides further evidence of the inferiority of incorporation through due process and indicates that the Ninth Amendment has in some manner been incorporated. It is simply not possible to conclude that the rights to which the Ninth Amendment refers have been incorporated while the Amendment itself has not. To argue otherwise would be to argue that search and seizure guarantees have been incorporated, but not the Fourth Amendment. The Fourteenth Amendment incorporates the Ninth Amendment, theoretically through the Privileges or Immunities Clause (along with the rest of the Bill of Rights), and legally through *Griswold* and inescapable inference. On this understanding, we can now examine more closely the Ninth Amendment's contemporary role in the constitutional hierarchy.

2. Rights, Powers, and the Ninth Amendment's Constitutional Role

A brief glance at the Bill of Rights indicates that two of the amendments are not like the others. Whereas the first eight amendments protect the enjoyment of certain specific liberties, the Ninth and Tenth Amendments speak in much broader terms. The Ninth Amendment refers to unspecified "rights," while the Tenth allocates "powers." Nearly every Ninth Amendment

113. See, e.g., *In re Oliver*, 333 U.S. 257 (1948) (incorporating the Sixth Amendment right to public trial and notice of charges).

114. *Griswold*, 381 U.S. at 492.

115. *Id.* at 493.

commentator has at least mentioned the curious relationship between the Ninth and Tenth Amendments, but they have drawn different conclusions. The next building block in the interpretive theory of the Ninth Amendment offered here seeks to clear up this confusion. For it is only through proper understanding of the interrelationship between rights and powers that one can grasp the Ninth Amendment's role vis-a-vis the Tenth and its function in contemporary constitutional adjudication. Given the fact of its incorporation, this subsection develops the Ninth Amendment's modern constitutional relevance.

The conventional wisdom on constitutional rights and powers has always been that they are corollaries of one another. Citizens' rights begin where government's powers end. As one writer noted:

Th[e] separation of rights and powers into the first nine and the tenth amendments, respectively, meant that the reach of governmental power, whether exercised through specific sections of the Constitution or through the necessary and proper clause, ended at the point where the scope of individual rights protected by the first nine amendments began; the two spheres were mutually exclusive.¹¹⁶

As Berger succinctly put it, Ninth Amendment rights and Tenth Amendment powers "are two sides of the same coin."¹¹⁷

This understanding would suggest that the Framers could have employed either of two routes to effectuate the basic constitutional premise of limiting the Federal¹¹⁸ Government's reach. The Framers could have affirmatively capped Congress' powers or broadly defined citizens' rights.¹¹⁹ As James Madison wrote in an oft-cited passage: "If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing, whether the latter be secured by declaring that they shall not be abridged, or that the former shall not be extended."¹²⁰ So far, all is well. The conception of rights and powers as mutually exclusive and, by implication, the exclusive substantive subjects of constitutional concern is logically pleasing.

The trouble began when revisionist scholars began noticing apparent inconsistencies in Madison's positions as well as disturbing implications of the conventional wisdom. Leslie Dunbar discovered that despite his stated neutrality on the alternative routes of limiting government's power, Madison preferred an amendment preserving rights over one limiting the Federal Government's powers.¹²¹ Dunbar also points to *The Federalist* No. 44, in which Madison strenuously argued for an expansive interpretation of the

116. Kelley, *supra* note 14, at 822.

117. Berger, *supra* note 95, at 3.

118. As discussed in the preceding subsection, the Framers were only concerned with limiting the powers of the Federal Government. The Bill of Rights would not be understood to limit the states' powers until the 20th century Court began reading the Fourteenth Amendment to "incorporate" the Bill of Rights provisions against state governments.

119. As it turned out, the Framers did both. They designed Article I, Section 8 to restrict Congress' jurisdiction to a few specific areas, then they appended a bill of rights—including the Ninth Amendment—to broadly protect citizens' freedoms.

120. 5 MADISON'S WRITINGS, *supra* note 36, at 431-32.

121. Dunbar, *supra* note 46, at 633 (citing a letter from Madison to Washington in which Madison rejected Edmund Randolph's preference for an amendment limiting the Federal Government's powers).

necessary and proper clause to give Congress broad means of achieving the ends of its delegated powers.¹²² This leads Dunbar to conclude:

Madison was trying . . . to avoid an antithesis. Not powers versus rights, but powers *and* rights.

. . . .
 . . . In fields where government is expressly commissioned to exercise powers, it is not limited except by express prohibitions or regulations; but in areas where powers are not expressly given, then no presumption of legitimacy attaches to the actions of government.¹²³

Ely is even more blunt with the conventional wisdom. He seems to think it obvious that the standard rights-powers conception is facially flawed. Ely writes: "A good deal of the debate over a bill of rights was marked by what we would today regard as a category mistake, a failure to recognize that rights and powers are not simply the absence of one another but that rights can cut across or 'trump' powers."¹²⁴

But the most withering attack on the "rights-powers conception" comes from Randy Barnett, who views debunking the conventional wisdom as a prerequisite to any kind of revisionist interpretation of the Ninth Amendment.¹²⁵ Barnett identifies three disturbing problems with the standard view of rights and powers as logically complementary. First, this conception would apparently render the Ninth and Tenth Amendments redundant. If the Tenth Amendment holds that the powers not delegated to the Congress are "reserved to the States . . . or to the people," why add another amendment, the Ninth, to state exactly the same point in a different manner—that people's rights reach beyond those enumerated and extend to the limits of federal power? Barnett points to Justice Reed's imprecise reference to "those rights, reserved by the Ninth and Tenth Amendments,"¹²⁶ and his general agglomeration of the two provisions as an illustration of "the confusion the rights-powers conception can cause."¹²⁷

Second, Barnett worries that the rights-powers conception strips the Ninth Amendment of any potential application. As long as the government can identify a legitimate power under which it has acted, there can be no

122. *Id.* at 635; see THE FEDERALIST NO. 44, at 285 (James Madison) (Clinton Rossiter ed., 1961) ("No axiom is more clearly established in law, or in reason, than that whatever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included.")

123. Dunbar, *supra* note 46, at 635-36 (emphasis in original).

124. ELY, *supra* note 6, at 36.

125. Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 6 (1988) [hereinafter Barnett, *Reconceiving*]. This section owes much of its thinking to stimuli fired by Barnett's provocative article. This Article, along with Barnett's other work, renders him a leading Ninth Amendment scholar. See THE RIGHTS RETAINED BY THE PEOPLE (Randy E. Barnett ed., 1989); Randy E. Barnett, *Foreword: The Ninth Amendment and Constitutional Legitimacy*, 64 CHI.-KENT L. REV. 37 (1988) (Foreword to *Symposium on Interpreting the Ninth Amendment*). While this subsection makes a spirited challenge to his rejection of the conventional rights-powers conception, subsequently, Barnett becomes an ally in positing the Ninth Amendment as a guarantor of unenumerated rights.

126. United Pub. Workers v. Mitchell, 330 U.S. 75, 96 (1946); see *supra* text accompanying note 50.

127. Barnett, *Reconceiving*, *supra* note 125, at 6.

trammeling of Ninth Amendment rights, because “in principle, at least, there can never be a conflict between a right and a power.”¹²⁸ Third, Barnett argues that the rights-powers conception as applied to the Ninth Amendment contradicts our understanding of how the rest of the Bill of Rights functions. Under the rights-powers conception, “even an enumerated right should never constrain an enumerated power,” because the enumeration of a power “cede[s] to the general government any potentially conflicting rights.”¹²⁹ Yet we know that this is not how the courts have interpreted the first eight amendments. For example, we recognize that the First Amendment would prohibit a ban on the interstate shipment of printing presses, even though Congress would be acting legitimately within its commerce power in enacting such a ban.

Despite these attacks by recent commentators, this Article takes the view that the rights-powers conception is not only defensible but remains the most plausible lens through which to view the substantive constitutional structure. It is unclear how either Dunbar’s or Ely’s contentions directly undermine the rights-powers conception. Dunbar finds evidence that Madison was no foe of a big central government, and that he saw room for both expansive governmental powers and individual rights. But it does not follow that the two spheres, as Madison viewed them, grew so big as to necessarily overlap. Ely, meanwhile, simply asserts his conclusion. Whether it is a “category mistake” to view rights and powers as non-intersecting complements is exactly what we are trying to prove.

Barnett’s challenges to the rights-powers conception, while more difficult, do not withstand scrutiny. His first challenge is the most important. Barnett’s worry that the rights-powers conception renders the Ninth Amendment a mere reiteration of the Tenth is legitimate until one recognizes that *such would only be true until incorporation*. Up until the time of incorporation, the Ninth and Tenth Amendments *were* redundant in that the Tenth Amendment forbade the Federal Government from venturing beyond its enumerated powers by reserving all other powers to the states, while the Ninth Amendment did the same by preserving a broad sphere of individual rights. As long as the states could still use *their own* powers to tamper with individual rights, as they assuredly could before incorporation, the Ninth Amendment could not possibly have done more than to protect individual rights from the *Federal* Government. Thus, prior to incorporation, Barnett is correct—it is impossible to conclude anything other than that the Ninth and Tenth Amendments had redundant purposes insofar as both sought to limit the Federal Government’s powers, though from different perspectives.

But once one concedes that the Ninth Amendment has been incorporated against the states, an independent function of the Amendment becomes clear—to protect individual rights against federal *and* state encroachment. The incorporation revolution eliminated the notion of states as all-powerful

128. *Id.*

129. *Id.* at 7.

entities; states must now respect individual rights. Just as the First Amendment now protects freedom of speech against the federal *and* state governments, the Ninth Amendment likewise protects unenumerated liberties—whatever one's theory of what they are—against both tiers of government. Thus, in protecting rights *against* the states, the Ninth Amendment in the post-incorporation era serves a distinctly different function from the Tenth Amendment, which reserves powers *to* the states.

Put another way, one can envision the Tenth Amendment as drawing a line through governmental powers. Prior to incorporation, on one side of this line were Congress' powers, and on the other side was an amorphous mix of individual rights and state powers. The Ninth Amendment drew no secondary distinction, since in this era state powers could trump individual rights. Upon incorporation, however, the Ninth Amendment drew a second line, this one between *all* governmental powers and individual rights. In the modern era, one can understand the Ninth Amendment, along with the first eight amendments, as delineating the boundary between the two spheres of rights and powers, while the Tenth Amendment further divides the powers sphere.¹³⁰

This analysis, of course, leaves a residual problem. Given that the Framers were operating in the pre-incorporation world, why would they adopt two amendments which, at the time, had redundant purposes? The answer lies in the Framers' extreme wariness of a strong central government. One must remember that, for the Framers, the entire Bill of Rights was redundant. The Federalists' first primary argument against a bill of rights, recall, was that it was unnecessary, for the Constitution's text was already thought to have capped Congress' powers. In capitulating to the Anti-Federalists, the Framers merely decided to err on the side of caution. As Madison said in introducing his original resolutions to the House, "[I]t is possible the abuse of the powers of the General Government may be guarded against in a more secure manner than is now done We have in this way something to gain, and, if we proceed with caution, nothing to lose."¹³¹

Viewed in this context, the redundancy of the Ninth and Tenth Amendments emerges as but a more particularized version of the general redundancy of the Bill of Rights. What may be ironic is that, contrary to Barnett's perception, if either amendment was viewed as redundant, it was the Tenth. As Madison observed later in his introductory speech, "[the words of the Tenth Amendment] may be considered superfluous. I admit they may be deemed unnecessary; but there can be no harm in making such a declaration, if gentlemen will allow the fact is as stated."¹³² The Supreme Court, for its part, found no greater purpose for the Tenth Amendment over the following century and a

130. At this point, it should be clear why a resolution of the question of Ninth Amendment incorporation necessarily preceded this subsection. The Ninth Amendment's incorporation undergirds its modern role as a bulwark against all governmental powers.

131. 1 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 448 (Joseph Gales & William Seaton eds., 1834).

132. *Id.* at 441.

half of jurisprudence, concluding flatly, "the Tenth Amendment . . . states but a truism that all is retained which has not been surrendered."¹³³

Before moving on to Barnett's other challenges to the rights-powers conception, a final puzzle remains in the relationship between the Ninth and Tenth Amendments. The Tenth Amendment states: "The powers not delegated to the United States . . . are reserved to the States respectively, *or to the people*." These last four words, by importing a role for "the people" in the allocation of powers, appear to blur the matrix of the Tenth Amendment as dividing governmental powers between Congress and the states while the Ninth Amendment safeguards people's rights. Russell Caplan resolves the dilemma by noting that the words reflect the Framers' belief in the Lockean ideal of the people as the final repository of all power.¹³⁴ As Locke wrote, "The people alone can appoint the form of the common-wealth . . ."¹³⁵ Caplan posits that the Tenth Amendment phrase "or to the people" is meant to indicate the one *power* which the people possess—the power to dissolve or reform government.¹³⁶ One could perhaps view this power as the ultimate Ninth Amendment right, which would obviate the need for the "or to the people" phrase in the Tenth Amendment. The idea of "a right to overthrow the government," however, sounds somewhat odd.

Once one recognizes the interface between Ninth Amendment rights and Tenth Amendment powers and the changes wrought by incorporation, Barnett's remaining two challenges to the rights-powers conception collapse. Barnett's second objection is that the Ninth Amendment lacks potential application so long as the government can identify a legitimate power under which it acts because rights and powers are incapable of conflict. But in the post-incorporation era, the Ninth Amendment would affirmatively protect rights in those areas where the federal government lacks an enumerated power and where the states likewise lack power *based on one's philosophy of incorporation*. That is, one could invoke the Ninth Amendment to protect any right that was both beyond the reach of Article I, Section 8 powers and which was also "implicit in the concept of ordered liberty," a matter of "fundamental fairness,"¹³⁷ or—the thesis to be developed in this Article—which entailed no possibility of tangible harm.

Barnett's third objection is that the rights-powers conception treats the Ninth Amendment differently from the first eight amendments, which limit the government's wielding of legitimate powers. The First Amendment, for example, prevents Congress from banning the interstate shipment of printing

133. *United States v. Darby*, 312 U.S. 100, 123-24 (1941).

134. Caplan, *supra* note 45, at 223.

135. LOCKE, *supra* note 16, § 141.

136. Caplan, *supra* note 45, at 264 n. 169 ("Reserved powers comprise the residual capacity of a people to form or re-form a government, not the particular liberties enjoyed *under* a government.") (emphasis in original); see also Norman Redlich, *Are There "Certain Rights . . . Retained by the People"?*, 37 N.Y.U. L. REV. 787 (1962).

137. These are two of the more common substantive due process "tests" which the Court developed to determine which of the Bill of Rights provisions were so indispensable to justice as to be applied against the states. See *supra* note 62.

presses, even though Congress would apparently be acting within its commerce power. But the Ninth Amendment, even under the rights-powers conception, would do the same. To use the *Griswold* example, the Ninth Amendment would preclude Congress from enacting a ban on the interstate shipment of condoms, even though again Congress would be drawing on its legitimate commerce power.

At the bottom of his objections, two aspects of the rights-powers conception of constitutional structure seem to trouble Barnett. The first is the reality that *a right can cap an enumerated power*. Barnett appears to have decided that the rights-powers conception precludes this conclusion, which leads him to develop an alternative "power-constraint conception." But it is unclear why the conception of rights and powers as mutually exclusive offends the notion of a right limiting a power. Barnett himself provides the answer:

One might try to salvage the rights-powers theory by claiming that there can be no clash between powers and rights because Congress has no power to violate a constitutional right. . . . This formulation of the rights-powers distinction would require an inquiry into the substance of constitutional rights to determine the extent of Congressional power. Moreover, this distinction does not provide an objection to including unenumerated rights in such an inquiry.¹³⁸

This seems correct.¹³⁹ A right can *cut off* a power without overlapping with it.¹⁴⁰ Congress' commerce power, for example, extends *up to the point* of banning interstate shipments of printing presses or condoms, at which point the First or Ninth Amendment cuts it off.

The second aspect of the rights-powers conception that appears to trouble Barnett, as the above quote illustrates, is the fact that *one must look to rights to determine the limit of powers*. Barnett would scrap the rights-powers conception for a "power-constraint conception" which *affirmatively* relies on rights to limit powers. But there is no reason why the rights-powers conception cannot employ this same device. While it would be nice if the mutually exclusive spheres of rights and powers would fully define themselves in self-evident fashion, they do not. And as Barnett correctly notes, it is impossible to look to powers to define rights. The rights to a speedy trial and against double jeopardy, he observes, are not capable of deduction merely by staring at Congress' enumerated powers.¹⁴¹

The only alternative, then, is to look to rights to limit powers. With this mindset, one realizes that the Framers specifically defined the rights to a speedy trial and against double jeopardy *precisely because* they are arbitrary cut-offs—but cut-offs nonetheless—in the government's power to try a

138. Barnett, *Reconceiving*, *supra* note 125, at 12 n.41.

139. Barnett obviously seeks to respond to scholars who argue that the Ninth Amendment does not protect unenumerated rights, but since that is not the contention here, the threat of unenumerated rights is an illusory barrier to the "salvation" of the rights-powers conception.

140. Ely, like Barnett, seems similarly unwilling to accept this conception, as manifested by his assertion that it is a "mistake" to view rights and powers as mutually exclusive. Instead, Ely insists that "rights . . . cut across or trump powers." ELY, *supra* note 6, at 36.

141. Barnett, *Reconceiving*, *supra* note 125, at 9.

suspected criminal. But to determine the rest of our entitlements under the first nine amendments, and to survey the limits of governmental powers, like the commerce power, that are potentially boundless, we need an affirmative effort at understanding the kinds of rights the Framers meant to protect. That is what any attempt at excavating the meaning of the Ninth Amendment is all about.

On the understanding of its incorporation, this subsection has developed the Ninth Amendment's modern, independent function—to protect individual rights against federal and state encroachment. We can now return to the immediate post-revolutionary era to derive the Framers' intentions for the Ninth Amendment, knowing those intentions will have contemporary significance.

3. The Case for Judicial Recognition of Ninth Amendment Rights

The Ninth Amendment states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."¹⁴² In other words, there are apparently other constitutional rights as deserving of judicial protection as those enumerated in the Bill of Rights or elsewhere. In light of the history of the Ninth Amendment examined in Part II, and on an understanding of the Amendment's modern constitutional relevance, this subsection argues that the Amendment means what it appears to say. The analysis is in two parts. First is the affirmative argument, the "prima facie case," if you will, that the Framers intended the courts to protect Ninth Amendment rights in the same manner as all others. Second is the argument in the negative, that the "affirmative defense" theories of those who would rob the Ninth Amendment of its apparent import are flawed. Insofar as the Amendment's language appears to rest the burden with the defense, the negative argument is the more important. If one can overcome the various contentions of the Ninth Amendment's detractors, the Amendment must achieve status as a full-fledged member of the Bill of Rights.

The Ninth Amendment's gestational chronology reveals the Framers' desire to protect the "other[rights] retained by the people" to the same degree as those enumerated in the first eight amendments. First, the Framers uniformly supported the Ninth Amendment. Recall the second strand of the debate over whether to enact a bill of rights. Doing so, it was feared, would be dangerous insofar as an imperfect enumeration might imply that all unenumerated rights had been forfeited to the government.¹⁴³ Both sides acknowledged the danger, because both knew the enumeration would be imperfect.¹⁴⁴ Only the Federalists, however, thought the concern fatal to the idea of a bill of rights; the Anti-Federalists were sufficiently scared of a powerful national govern-

142. U.S. CONST. amend. IX.

143. See *supra* text accompanying notes 26-27.

144. See *supra* text accompanying notes 30-31.

ment as to demand yet another check against that threat. Madison's Ninth Amendment, conceived explicitly to guard against the imperfect enumeration scenario,¹⁴⁵ was thus not an appeasement to either ideological wing of the Framers. It alleviated a concern which *all* shared, a concern which had become real when the Anti-Federalists won the debate over a bill of rights. The Bill of Rights was the compromise in the debate; the Ninth Amendment was not. On the contrary, the Framers welcomed the Ninth Amendment into the Bill of Rights without significant discussion.

Second, the Framers *did* generally intend the courts to protect the guarantees of the Bill of Rights. As Madison explained in introducing his original resolutions to the House:

If [rights] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.¹⁴⁶

Thus, because the Framers intended that the courts protect the Bill of Rights provisions, and because the Ninth Amendment was a well-received addition to that catalogue, the only avenue by which one can conclude that the Framers did *not* seek judicial guardianship of Ninth Amendment rights is to argue that the Framers intended to treat those rights differently from those in the first eight amendments.

Yet any logical reading of the evidence points in exactly the opposite direction. As its history shows, the *raison d'être* for the Ninth Amendment was the Framers' fear that imperfect enumeration would implicitly surrender the rights not enumerated to the government. To read Ninth Amendment rights as different—specifically, as less protected—from those in the first eight amendments is to *realize* the Framers' fear, not to guard against it. The imperfect enumeration scenario cast such an ominous shadow over the Bill of Rights as to threaten its enactment.¹⁴⁷ Given that the Ninth Amendment was the perceived *solution* to this spectre, it simply defies common sense to conclude that the Framers intended to accord the Ninth Amendment less respect than the rest of the Bill of Rights. As Barnett notes, "[I]nsofar as they believed in the judicial protection of rights, the Federalists' fear that enumerating rights would diminish other, unenumerated rights suggests only that they wanted these unenumerated rights protected every bit as much as the enumerated rights."¹⁴⁸

Now, one might wonder why, if the Framers intended Ninth Amendment rights to be on a par with the rest of the Bill of Rights, they lumped those rights into a vague, catch-all Ninth Amendment, relegating them to an apparent second class status behind the explicitly defined rights of the first

145. See *supra* text accompanying note 37.

146. 1 ANNALS, *supra* note 30, at 439.

147. See *supra* text accompanying notes 30-31.

148. Barnett, *supra* note 125, at 17.

eight amendments. The answer lies in the words of James Madison: "[T]he great object [of a bill of rights] is to limit and qualify the powers of Government, by excepting out of the grant of power those cases in which the Government ought not to act, or to act only in a particular mode."¹⁴⁹ In other words, as one writer interprets, Madison "seems to have thought of rights under two main headings. One, as stipulating agreed upon methods by which in particular cases the government shall exercise its powers. . . . Secondly, he thought of another class of rights as declarations of areas totally outside the province of government."¹⁵⁰ Rights of the first kind ("group-one rights"), as suggested in the preceding subsection, *had* to be specifically delineated because they represented arbitrary stopping points in various governmental powers. In this category, for example, are the rights delimiting the government's power to try suspected criminals (for example, double jeopardy, self-incrimination, and counsel) and the rights curtailing the government's power to raise an army (bearing of arms, involuntary quartering). Group-one rights demand articulation because they do not readily announce themselves as inherent in the basic premises of a free society.¹⁵¹

With respect to rights in the second group ("group-two rights"), the Framers simply thought it impossible to enumerate them all.¹⁵² Recall the Federalists' first objection to a bill of rights: It would be unnecessary because the Constitution affirmatively limited Congress' powers. This suggests that once the Anti-Federalists won the debate over a bill of rights, the Federalists probably would have preferred to limit the enumeration to only group-one rights, those that clarified governmental powers. There would be no need to enumerate the remaining multitude of general liberty interests that comprised group-two rights, for their very obviousness as concomitants of freedom placed them clearly beyond the reach of government.¹⁵³

The Anti-Federalists rejected this view, however, and insisted on enumerating some of the more elementary group-two rights: freedom of speech, religion, press, assembly, and redress of grievances. After two hundred years of specificity, these rights seem paramount today; but the Framers would have liked to enumerate more. They recognized, however, that no workable bill of rights could descend to the level of ensuring a man's right "to wear his hat if he pleased."¹⁵⁴ Thus, the Federalists indulged the Anti-Federalists' desire to enumerate general liberty rights only to the extent of one amendment, the First. They then used amendments Two through Eight to specify important group-one rights which bounded governmental powers, and they employed the

149. 1 ANNALS, *supra* note 30, at 437.

150. Dunbar, *supra* note 46, at 635; *see also* Caplan, *supra* note 45, at 257 n.142.

151. As Madison said of another group-one right, "Trial by jury cannot be considered as a natural right, but a right resulting from a social compact which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the pre-existent rights of nature." 1 ANNALS, *supra* note 30, at 437.

152. *See supra* note 30.

153. The reader will recall that Hamilton, for example, argued against the necessity of delineating such basic rights as freedom of the press. *See supra* text accompanying note 25.

154. 1 ANNALS, *supra* note 30, at 432.

Tenth to allocate powers between the Federal Government and the state governments. Against this backdrop, the Ninth Amendment's role in the Bill of Rights' structure becomes clear: to protect the remaining group-two general rights of liberty, which were simply too numerous to catalogue in their entirety.¹⁵⁵

Despite the apparent clarity of the Ninth Amendment's constitutional niche, critics of the Amendment have struggled mightily to derogate its role. Against the *prima facie* case for Ninth Amendment substance set forth above, critics have advanced four basic types of affirmative defenses. In ascending order of importance, they are: a) the Ninth Amendment means nothing or its meaning is incapable of ascertainment; b) there are Ninth Amendment rights, but they are judicially unenforceable; c) the Ninth Amendment refers not to federal constitutional rights but was adopted merely to preserve other pre-existing rights under state constitutions and laws; and d) the Ninth Amendment is merely a "rule of construction" and not an independent source of rights. These arguments are now examined in turn.

a. The Meaningless Ninth Amendment Defense

The most recent, and famous, champion of the "meaningless Ninth Amendment" defense is Robert Bork. Testifying to the Senate Judiciary Committee, Bork opined:

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.¹⁵⁶

The meaningless Ninth Amendment defense is at once both the hardest and the easiest defense to rebut. It is the hardest because, like a religious conviction, to the speaker it is simply irrefutable. No amount of historical, jurisprudential, or logical argument is likely to convince Bork of the Ninth Amendment's meaning, just as no eloquent presentation of the problem of evil will dissuade the zealot of the existence of God. The Ninth Amendment, like the Lord, works in mysterious ways.

The defense is the easiest to rebut because the Ninth Amendment fails to satisfy Bork's criteria for meaninglessness. There is no inkblot after the words "The enumeration in the Constitution." We have the full text of the sentence. We have historical and jurisprudential materials. We have a general understanding of the Framers' thoughts in enacting the Ninth Amendment, and we have our powers of reason. Most importantly, we have a constitutional

155. This analysis directly squares with Madison's original Ninth Amendment phraseology which provided that *enumerated* rights were to be construed "either as actual limitations of [governmental] powers, or as inserted merely for greater caution." 1 ANNALS, *supra* note 30, at 435. In other words, enumerated rights were either group-one rights or were group-two rights "inserted merely for greater caution." *Id.*

156. Robert H. Bork, *The Bork Disinformers*, WALL ST. J., Oct. 5, 1987, at 22.

command: "It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it."¹⁵⁷ True, the Ninth Amendment is a hard provision to decipher. But since we have enough to go on, it is our constitutional and intellectual duty to try.

b. The Judicial Unenforceability Defense

A second kind of argument in derogation of the Ninth Amendment is that the Framers did not intend Ninth Amendment rights to receive judicial protection from the courts. Raoul Berger has been the primary proponent of this defense. Berger writes:

To my mind, a right "retained" by the people and not described has not been embodied in the Constitution. Madison made clear that the retained rights were not assigned to the [F]ederal [G]overnment: to the contrary, he emphasized that they constitute an area in which "Government ought not to act." This means, in my judgment, that the courts have not been empowered to enforce the retained rights against either the federal government or the states.¹⁵⁸

In other words, Berger views it as an expansion of governmental power to give courts the ability to protect Ninth Amendment rights, yet the Framers designed the Ninth Amendment, as he correctly notes, to limit governmental power. This leads Berger to conclude:

In "retaining" the unenumerated rights, the people reserved to themselves power to add to or subtract from the rights enumerated in the Constitution by the process of amendment exclusively confided to them by [A]rticle V. If this be deemed supererogatory, be it remembered that according to Madison the ninth amendment itself was "inserted merely for greater caution."¹⁵⁹

The judicial unenforceability defense as stated by Berger is fatally flawed for several reasons. First, Berger's conclusion that the Ninth Amendment does nothing more than reiterate the people's ability to amend the Constitution borders on the ridiculous. He contends that if this renders the Ninth Amendment redundant, we should remember that it was "inserted merely for greater caution." This is flatly wrong. As the full text of Madison's original draft of the Ninth Amendment shows,¹⁶⁰ the "inserted merely for greater caution" phrase referred not to the Amendment itself but rather to any group-two general liberty rights that might find their way into the Bill of Rights. The first Federalist objection to a bill of rights indicates that these rights were most presumed not to require articulation, for they were the rights which the government had no expressed power to reach and which thus constituted the

157. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).

158. Berger, *supra* note 95, at 20 (quoting Madison's introductory speech to the House).

159. *Id.* at 14.

160. 1 ANNALS, *supra* note 30, at 435.

areas in which "Government ought not to act."¹⁶¹ Thus, any group-two liberty rights which, from Madison's 1789 perspective, ultimately made the Bill of Rights would have been "inserted merely for greater caution." As it turns out, some of these rights did in fact show up as the five basic rights of the First Amendment.

Second, Berger's thesis that judicial enforcement of rights expands governmental powers is simply mistaken. Berger correctly identifies the Ninth Amendment as referring to those rights (group-two or general liberty rights) where, in Madison's words, "Government ought not to act."¹⁶² But by taking the quote out of context, Berger overlooks the fact that, by the word "Government," Madison meant the legislature and the executive, *not* the judiciary. The full text of Madison's quote is as follows:

[T]he great object [of a bill of rights] is to limit and qualify the powers of Government, by excepting out of the grant of power those cases in which the Government ought not to act, or to act only in a particular mode. [The states have] point[ed] these exceptions sometimes against the abuse of the executive power, sometimes against the legislative, and, in some cases, against the community itself; or, in other words, against the majority in favor of the minority.¹⁶³

Notably absent from this passage is the judiciary, indicating that Madison did not view a court's protection of a right to be an exercise in governmental power. The Framers understood the common-sense notion that judicial enforcement is a necessary concomitant of a meaningful right, not an extra governmental power.¹⁶⁴ A contrary conclusion would not square with Madison's view, mentioned above and stated only seven paragraphs later in his speech, that, "If [rights] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights."¹⁶⁵

Finally, the judicial unenforceability defense, as advanced by Berger or anyone else, unavoidably contradicts the Ninth Amendment's plain language. As Barnett observes: "To concede that enumerated rights are judicially

161. See *supra* text accompanying notes 149-55.

162. See *supra* text accompanying note 158.

163. 1 ANNALS, *supra* note 30, at 437.

164. See, e.g., Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1169 (1987) (discussing the Founders' belief that "for every violation of a right there exists a legal remedy").

165. 1 ANNALS, *supra* note 30, at 439. While the whole passage, see *supra* text accompanying note 146, would appear to destroy Berger's thesis, Berger responds by emphasizing the words "expressly stipulated" as implying judicial protection only for the first eight amendments. Berger, *supra* note 95, at 9. However, there is no reason to assume that Madison meant "expressly stipulated" to exclude Ninth Amendment rights. The phrase instead appears to refer to *all* rights, including Ninth Amendment rights which were not individually listed only because they were too numerous. Moreover, one could play Berger's game by emphasizing part of the preceding sentence, that courts "will be an impenetrable bulwark against every assumption of power in the *Legislative or Executive*," 1 ANNALS, *supra* note 30, at 439 (emphasis added), to suggest that the exclusion of the judiciary indicates that Madison did not view judicial ability to enforce rights as tantamount to governmental power.

enforceable power constraints,¹⁶⁶ but unenumerated rights are not, is . . . surely to 'disparage' them, if not to 'deny' them altogether. Denying judicial protection to the unenumerated rights effectively surrenders them up to the general government."¹⁶⁷ Indeed, one can only wonder what the Framers would have thought of the judicial unenforceability reading of the Ninth Amendment. Madison explicitly introduced the Ninth Amendment to "guard against" the implication that unenumerated rights had been relinquished to the government. As Barnett points out, the judicial unenforceability defense would *manifest* that very implication by leaving protection of Ninth Amendment rights in the unwieldy hands of the executive and legislature. Insofar as Ninth Amendment rights demand the "independence and coherence best promised by the judicial process"¹⁶⁸ even more than other rights, the judicial unenforceability result would seem an especially severe "disparagement" of Ninth Amendment rights vis-a-vis their counterparts in the first eight amendments.

c. The Alternative Reference Defense

A third defense offered to rebut the *prima facie* meaning of the Ninth Amendment is that the Amendment refers not to federal constitutional rights but merely preserves pre-existing rights under state laws and constitutions. The primary advocate of this "alternative reference" defense is Russell Caplan,¹⁶⁹ who writes:

For the federalists, the Bill of Rights was a concession to skeptics, merely making explicit the protection of rights that had always been implicit. The unenumerated rights retained under the ninth amendment were to continue in force as before, as the operative laws of the states. Unenumerated rights were not federal rights, as were enumerated rights, but represented the persistence of the "legislative regulation" of the states.¹⁷⁰

166. The reader may recall that this is how Barnett likes to envision rights. *See supra* text accompanying note 138.

167. Barnett, *Reconceiving*, *supra* note 125, at 21; *see also* Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 HASTINGS L.J. 305, 305 (1987) ("If the reserved rights are not to be denied or disparaged by the enumeration of other rights, but only enumerated rights may be judicially enforced, the reserved rights necessarily shrivel. If this is not disparagement, . . . then the concept has been drained of all meaning.")

168. Lawrence G. Sager, *You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth. But What on Earth Can You Do with the Ninth Amendment?*, 64 CHI.-KENT L. REV. 239, 252 (1988). Sager writes:

Legitimate claims of constitutional right that do not enjoy an explicit textual provenance are especially needy of the independence and coherence best promised by the judicial process: independence because constitutional rights that do not announce themselves may be especially vulnerable to neglect; and coherence because the identification of such rights should depend on the judgment that they are of a piece with the broader jurisprudence of the Constitution.

Id.

169. Perhaps sensing the inadequacy of his "meaningless Ninth Amendment" defense after being rejected by the Senate, Robert Bork has converted to this view. *See* ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 184 (1990).

170. Caplan, *supra* note 45, at 243.

Caplan frames the historical evidence to assert that Madison was referring to state and common law rights when he stated, "I believe that the great mass of the people who opposed [the Constitution], disliked it because it did not contain effectual provisions against encroachments on particular rights."¹⁷¹ This allows Caplan to conclude that the Ninth Amendment was designed not to embrace further federal rights, but "to guarantee that rights protected under state law would not be construed as supplanted by federal law merely because they were not expressly listed in the Constitution."¹⁷²

The flaw in the alternative reference defense is its failure to recognize that the Ninth Amendment's fundamental mission was to prevent the arrogation of power by a strong *central* government. As documented above, the Framers drafted the Ninth Amendment to state from a rights perspective what the Tenth Amendment stated from a powers perspective: that the Congress was not to go beyond its enumerated powers.¹⁷³ The whole purpose behind the Bill of Rights was to saddle Congress with a second check, besides the enumerated powers structure of Article I, that would prevent it from trammeling the people's rights.

The degree to which *states* protected rights was irrelevant to the Framers' thinking in enacting the federal Bill of Rights. That is, even assuming states protected *no* rights, the Framers still would not have permitted Congress' powers to extend beyond those of Article I. If Caplan were correct in his thesis that the Ninth Amendment was meant only to protect pre-existing state law rights, the Federal Government, acting pursuant to a legitimate power, could trammel any right not enumerated in either the first eight amendments or in state laws. In the area of unenumerated rights, Congress would be free to roam. This, of course, is exactly what the Framers sought to avoid. As shown above, the Second through Eighth Amendments were designed to specify where Congress was to act "only in a particular mode." The First and Ninth were designed to specify where "Government ought not to act" at all.¹⁷⁴

From a broader perspective, the alternative reference defense raises disturbing supremacy implications. As one writer notes:

[If] the [N]inth [A]mendment actually immunizes state-granted rights from being undone by Congress as a matter of positive law, . . . this would give artful state lawmakers the ability to insulate almost any state law from federal legislative preemption . . . Also, were this its purport, the ninth amendment would have addressed the enumerated powers of Congress, not the enumerated rights which were plainly intended to limit those powers.¹⁷⁵

Here again, as the writer points out, the alternative reference defense misses the essence of the Ninth Amendment's function as federal power constraint

171. *Id.* at 253 (quoting 1 ANNALS, *supra* note 30, at 450).

172. *Id.* at 254.

173. See discussion *supra* part III.A.2.

174. See *supra* text accompanying notes 149-55.

175. Sager, *supra* note 168, at 244.

through its design as federal rights guarantor. Had the Framers desired to make state rights supreme, a possibility they actually debated,¹⁷⁶ they surely would have employed different language in both the Ninth Amendment and the Supremacy Clause. As it is, however, the Ninth Amendment's wording can indicate only that the Framers sought to keep Congress from the realm of unenumerated rights.

d. The Rule of Construction Defense

A final kind of defense advanced against the Ninth Amendment's prima facie meaning is that the Amendment represents nothing more than a rule of constitutional construction. This defense is both the most important and the most common; for those who would explain away the Ninth Amendment, there is nothing easier than to reduce it to a "rule of construction." The problems with this defense begin immediately, however, because the commentators disagree over what construction the Amendment commands. Leslie Dunbar writes:

[T]he [N]inth [A]mendment . . . instructs the courts to act on the principle that rights are not created by law, and do not require legal recognition for their exercise. . . . The answer to the judge who wrote that the Constitution "does not confer any rights except in the instances where those rights are specifically enumerated," is that the Constitution does not *confer* any rights at all.¹⁷⁷

By contrast, James Kelley observes:

[W]hether one reads the history of the ninth as foreclosing the "imperfect enumeration" theory, or as attempting [to preclude the first eight amendments from being read narrowly], the amendment clearly remains a rule of construction with the purpose of obviating the possibility of interpreting the first eight amendments as exclusive. It is not, as its history indicates, either a source or a summary of those unenumerated rights.¹⁷⁸

While Dunbar reads the Ninth Amendment to state the grandiose fact of natural law, Kelley sees it as a mundane instruction that rights are not confined to narrow interpretations of the first eight amendments. Though neither writer offers explicit guidance on how one might determine other rights, Dunbar's Ninth Amendment apparently directs courts to look to the heavens, while Kelley's Ninth Amendment tells judges to look anywhere beyond the plain language of the first eight amendments. The writers agree only that the Ninth Amendment neither "confers" nor is a "source" of unenumerated rights.

No matter which version of the rule of construction defense one prefers, the irony which undermines the defense is invariably the same. Every rule of construction theory recognizes the Ninth Amendment to hold that unenumerated

176. See 2 Elliot's DEBATES, *supra* note 12, at 545.

177. Dunbar, *supra* note 46, at 641 (quoting *Ex Parte Kurth*, 28 F. Supp. 258, 264 (S.D. Ca. 1939)) (emphasis in original).

178. Kelley, *supra* note 14, at 825.

ated rights *exist*, but none allows the Amendment to serve as the constitutional means of protecting those rights. The result is that, under this theory, courts would be unable to protect unenumerated rights that could not be fairly inferred from any constitutional provision, *even if everyone agreed those rights to be valid*. The irony which undoes the defense is that in these cases, the Ninth Amendment's rule of construction would be impossible to fulfill. Courts, lacking the constitutional net to catch them, would be reduced to helplessly watching rights float past. The Ninth Amendment's "rule of construction" would effectively become a taunt.¹⁷⁹

This cannot be what the Framers had in mind for the Ninth Amendment. Like the judicial unenforceability defense, the rule of construction defense treats Ninth Amendment rights as different from those in the first eight amendments, thereby disparaging Ninth Amendment rights. Whereas the judicial unenforceability defense disparages Ninth Amendment rights by denying them legal protection, the rule of construction defense does the same by denying them constitutional grounding. Both defenses ignore the Ninth Amendment's unambiguous instruction.

While the judicial unenforceability defense resulted, at least in Berger's case, from a misconceived notion of governmental powers, the development of the rule of construction defense points to a larger, more pernicious force at work in the continuing disparagement of Ninth Amendment rights. Kelley demonstrates this force in the reasoning that induces him to reject the Ninth Amendment as an independent safeguard of unenumerated rights. Criticizing Goldberg's *Griswold* opinion that the Ninth Amendment protects marital privacy, Kelley writes: "So straightforward—and to some so appealing—is this conclusion that the unarticulated premise is almost missed. The premise is that the right of privacy in marriage is classifiable, like freedom of religion or the right to a jury trial, as a fundamental right."¹⁸⁰ It is Kelley, however, not Goldberg, who reads an "unarticulated premise" into Goldberg's opinion—that a right must necessarily be "fundamental" before it can receive constitutional protection. Kelley rejects Goldberg's reasoning because there is nothing which tells us that marital privacy is fundamental, unlike freedom of religion and trial by jury, which are presumably fundamental because they are listed in the first eight amendments. But why must marital privacy be "fundamental" to receive constitutional protection? How would a court *ever* deduce that an unenumerated right is fundamental?

Kelley is not alone. Nearly everyone accepts "fundamentality" as a prerequisite for recognition of an unenumerated constitutional right. Yet while fundamentality may be an appropriate criterion in other modes of unenumer-

179. One could respond by speculating that there would never be a right that could not be stuffed into *some* constitutional provision; there is, after all, the old stand-by of substantive due process liberty. But it is hard to believe that the Framers drafted the Ninth Amendment, or any constitutional provision for that matter, with a view towards ballooning the scope of another constitutional provision, especially one as tenuous as substantive due process. Indeed, Part VI examines the possibility that the Ninth Amendment moves toward *eliminating*, as opposed to fueling, the need for substantive due process.

180. Kelley, *supra* note 14, at 830.

ated rights jurisprudence, such as substantive due process, there is nothing in the Ninth Amendment's history which suggests that *Ninth Amendment* rights must be fundamental before they can receive judicial cognizance. In cases where rights cut off governmental powers (group-one rights), the degree to which a right is fundamental should of course bear on a court's decision as to where the right cuts off the power. Because free speech is clearly fundamental, for example, it would cut off the government's commerce power to ban interstate shipments of printing presses, though it might not cut off the power to ban dissemination of instructions for building a hydrogen bomb.¹⁸¹

But in those cases where a right implicates no governmental power at all, that is, *where pure group-two rights are concerned, the "fundamentality" of the right at issue is irrelevant.* In these pure cases in which, in Madison's words, "Government ought not to act," the relative importance of the right in question has no bearing on the dispositive fact that government is without power to interfere in the exercise of the right. Thus the Framers contemplated constitutional protection for a man's "right to wear his hat if he pleased,"¹⁸² yet we would hardly consider such a right fundamental. Similarly, Goldberg's *Griswold* concurrence is correct because marital privacy, like the right to wear a hat, is a pure group-two right in which the government lacks power to interfere. Whether or not marital privacy is "fundamental" is immaterial.¹⁸³

Insofar as the Framers, as demonstrated above, designed the Ninth Amendment *specifically* to protect these group-two rights that fall outside the ambit of governmental power, the notion of fundamentality as a prerequisite for constitutional status stands as the greatest impediment to Ninth Amendment renaissance. If our jurisprudence continues to insist on a showing that an asserted unenumerated right is fundamental, and the primary index of fundamentality is enumeration, then we will continue to make an end run around the Ninth Amendment's instruction. Of course, we do recognize *some* unenumerated rights to be constitutionally protected, but we have only done so in each case after struggling with the question of whether they are fundamental. It is in this way that our rights jurisprudence, as hypothesized in Part I, has become stuck at a fixed bundle of rights. Our constitutional decision makers are reluctant to expand the category of "fundamental rights," for too much expansion, they fear, would undermine credibility in the concept of "fundamental" and thereby trivialize the Constitution.

181. See *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979). The careful reader will observe this illustration as contradictory, since free speech is cited here as an example of a group-one right, but is referred to above as one of the five enumerated group-two rights of the First Amendment. The answer must be that while the Framers generally contemplated it as a group-two right, there are instances in which it necessarily cuts off an expanded federal commerce power or state power.

182. See *supra* note 30.

183. By now, most people would probably agree that marital privacy *is* "fundamental." But the Supreme Court has decided that fundamentality is lost in the short leap from heterosexual marital privacy to homosexual privacy. In *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Court declined to protect homosexual privacy based solely on its determination that there is no fundamental right to engage in homosexual sodomy. Whatever one thinks of this determination, it illustrates how the fate of unenumerated rights hinges in large measure, if not entirely, on the quest for fundamentality.

Yet it does not trivialize the Constitution to see it as protecting simple freedoms, like the right to wear a hat, which do not seem fundamental when viewed in isolation. This is because the importance of a right cannot matter if the government is without power to affect it. Because it is these kinds of independent, general liberty rights the Ninth Amendment is designed to protect, the fundamentality requirement continues to frustrate the Amendment's mission. To put it mildly, it "disparages" unenumerated rights to make them meet a high standard of fundamentality with enough clarity to persuade a reticent Court to expand the fundamental rights category. So long as one continues to embrace a constitutional mindset that reads a fundamentality hurdle into group-two rights, one will systematically ignore the Ninth Amendment's message and commit precisely the imperfect enumeration error that all the Framers feared.

4. Conclusion

This section has hopefully derived a satisfactory affirmative answer to the first central question surrounding the Ninth Amendment, whether it mandates judicial protection of unenumerated constitutional rights. After deriving that the Ninth Amendment has been incorporated, a fact which confers on it an independent, contemporary, constitutional role as rights guarantor against all levels of government, we have seen strong *prima facie* evidence that the Framers did contemplate judicial protection for unenumerated rights. Since none of the proffered "affirmative defenses" compellingly rebuts this evidence, we are left with the conclusion that the Ninth Amendment does indeed safeguard unenumerated rights. Specifically, the Amendment protects pure "group-two" rights where government is without power to act.

The next question is, what are those rights? The question is difficult because of the fact of incorporation. Before incorporation, one could have developed a coherent portrait of the Congressional no-power realm, and thus of pure group-two Ninth Amendment rights, merely by studying the enumerated powers of Article I. After incorporation, one must reconcile two conflicting realities: states must respect the "privileges or immunities" of federal citizens, yet state governments wield all remaining powers besides those in Article I. How does one determine what is a pure group-two general liberty right, where a government possessed of all powers has no power? This is the task of the next section.

B. The Nature of Ninth Amendment Rights

There is an ample if not abundant historical record from which to derive a reasonably satisfactory answer to the first central Ninth Amendment question, whether it contemplates protection of unenumerated rights, and more than a few scholars, as demonstrated above, have offered their thoughts on that question. The corollary question, however, of the nature of Ninth Amendment rights invariably both stumps the commentators and defies easy deduction

from the Framers' bequest to recorded history. Like the smart-aleck first grader who challenges every assertion he hears with "Oh yeah? Prove it!", Ninth Amendment critics have ever flustered proponents of unenumerated rights with the wry response, "Oh yeah? What are those rights?"

There is little by way of history or reasonable inference which *directly* addresses Ninth Amendment rights. There is, however, at least a scant record of tangentially related materials which provides a start. These materials consist more of political philosophy than of law, for the Ninth Amendment was an acknowledgment of rights premised on philosophical, as opposed to historical, beliefs. From these materials, this section attempts, in Part III.B.2, to grope its way toward a theory of Ninth Amendment rights: they are the rights to engage in any activity which does not entail the significant possibility of tangible physical or economic harm to either the actor or others. The threat of moral harm alone does *not* overcome Ninth Amendment protection. With a harder task and fewer tools, this section will necessarily be less satisfactory than the previous one. Rather than positing a definitive case, however, this section pursues a more humble goal: to offer an opening gambit plausible enough to launch serious academic debate on Ninth Amendment rights. But first, as in the previous section, we need a building block on which to construct the derivation.

1. The (Troublesome) Question of Natural Law

Natural law is a topic which sounds constitutional alarms. The idea that a higher law exists which controls the interpretation of even the most fundamental man-made legal documents—in our case the Constitution—is disturbing in its malleability. Unfortunately, it is simply not open to dispute that *the Framers unequivocally believed in natural rights and law*. For our purposes, the operative question surrounding natural law is not *whether* but *how* the Framers' views on the subject informed their conception of constitutional rights. The honest constitutional interpreter, particularly the "original intent" advocate, must face this question squarely; hence it is with this question in mind, specifically as it pertains to the Ninth Amendment, that this subsection explores the texture of the Framers' natural law ideals.

The Framers' belief in natural law was rooted primarily in the work of three influential English legal philosophers: Edward Coke, John Locke, and William Blackstone. Lord Coke's *Institutes*, published in 1628, constituted the definitive treatise on the English common law, at least until Blackstone's *Commentaries* of 1765. Coke, however, left his most important legacy in the famous *Dr. Bonham's Case*,¹⁸⁴ which invalidated an Act of Parliament under which the London College of Physicians had revoked Dr. Bonham's medical license. Coke wrote:

And it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adudge them to be utterly

184. *Bonham's*, 77 Eng. Rep. 638 (1610).

void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void.¹⁸⁵

As Corwin notes, while Coke's decision primarily presaged the idea of judicial review, "[c]ommon right and reason' is, in short, something fundamental, something permanent; it is higher law."¹⁸⁶

Locke's influence on the Framers was greater. In his *Second Treatise of Government*, published in 1690, Locke undertook to stem the tumult of seventeenth century England by providing King William of Orange and the ruling class with "the beginning and end of a discourse concerning government."¹⁸⁷ Locke posited that, antecedent to the formation of government, man lives in a state of nature. In this state of nature, which is a state of perfect liberty, there is a fundamental "law of nature" which binds everyone: "that, being all *equal and independent*, no one ought to harm another in his life, health, liberty, or possessions."¹⁸⁸ Locke theorized that, despite the blissful liberty of the state of nature, men would ultimately sacrifice that perfect liberty and unite into society, so that they might better protect their property against the deviants who violated the law of nature. Through established law, indifferent judges, and executive power, society would more efficaciously achieve the objective of protecting property than men could alone.¹⁸⁹

To construct this society, Locke argued, men would have to *voluntarily* opt out of the state of nature and into a "social compact."¹⁹⁰ To do so, men "must be understood to give up all the power *necessary to the ends for which they unite into society*, to the majority of the community . . ."¹⁹¹ The qualification was crucial for the Framers: Men were to sacrifice *as little of their natural freedom as necessary* to achieve the goals of the commonwealth. Finally, like Coke, Locke also saw a role for judicial review:

The [legislature] . . . cannot assume to itself a power to rule by extemporary arbitrary decrees For the law of nature being unwritten, and so nowhere to be found but in the minds of men, they who through passion or interest shall miscite or misapply it, cannot so easily be convinced of their mistake where there is no established judge.¹⁹²

William Blackstone reinforced the central Lockean themes in his *Commentaries*, published in 1765, writing, "[T]he principal aim of society is to protect individuals in the enjoyment of [the natural liberty of mankind], which [was]

185. *Id.* at 652.

186. Corwin, *supra* note 15, at 370. Corwin then proceeds to trace the degree to which Coke's writings permeated early American legal decisions.

187. LOCKE, *supra* note 16, at 5.

188. *Id.* § 6 (emphasis added).

189. *Id.* §§ 124-127.

190. *Id.* § 122; *see also id.* §§ 119-121 (discussing the requisite level of consent citizens would have to provide).

191. *Id.* § 99 (emphasis added).

192. *Id.* § 136.

vested in them by the immutable laws of nature."¹⁹³ Blackstone likewise affirmed Locke's crucial proviso as to the degree to which man was to forfeit his natural liberty: "Political . . . , or civil, liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (*and no farther*) as is necessary and expedient for the general advantage of the publick."¹⁹⁴ Blackstone offered an interesting example of the distinction between permissible and impermissible laws:

Thus the statute of king Edward IV, which forbad the fine gentlemen of those times . . . to wear pikes upon their shoes or boots of more than two inches in length, was a law that savoured of oppression; because, however ridiculous the fashion then in use might appear, the restraining it by pecuniary penalties could serve no purpose of common utility. But the statute of king Charles II, which prescribes a thing seemingly as indifferent; viz. a dress for the dead, who are all ordered to be buried in woollen; is a law consistent with public liberty, for it encourages the staple trade, on which in great measure depends the universal good of the nation.¹⁹⁵

Blackstone concluded, "[This] system of laws, is alone calculated to maintain civil liberty, which leaves the subject entire master of his own conduct, except in those points wherein the public good requires some direction or restraint."¹⁹⁶

The evidence of the influence on the Framers, in the period leading up to the Constitution, of natural law theorists such as Coke, Locke, Blackstone, and others is copious. From Samuel Adams: "Among 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."¹⁹⁷ James Madison indicated his belief in natural rights when speaking of the right to trial by jury: "Trial by jury cannot be considered as a natural right, but a right resulting from a social compact which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the *pre-existent rights of nature*."¹⁹⁸ Alexander Hamilton indicated similar beliefs: "The sacred rights of mankind are not to be rummaged for, among old parchments, or musty records. They are written, as with a sun beam, in the whole *volume* of human nature, by the hand of the divinity itself; and can never be erased or obscured by mortal power."¹⁹⁹ Finally, John Adams assured the people as President, You have "Rights antecedent to all earthly governments—Rights

193. William Blackstone, *Commentaries* 1:120-41 (1765), in 5 THE FOUNDERS' CONSTITUTION 388, 388 (Philip B. Kurland & Ralph Lerner eds., 1987).

194. *Id.* (emphasis added).

195. *Id.* at 389.

196. *Id.*

197. Samuel Adams, *The Rights of the Colonists* 20 Nov. 1772, *Writings* 2:350-59, in 5 THE FOUNDERS' CONSTITUTION, *supra* note 193, at 394, 395.

198. James Madison, *Speech to the House Explaining His Proposed Amendments and His Notes for the Amendment Speech*, in THE RIGHTS RETAINED BY THE PEOPLE, *supra* note 125, at 51, 57 (emphasis added).

199. Alexander Hamilton, *The Farmer Refuted, &c.* (New York Feb. 23, 1775), in 1 THE PAPERS OF ALEXANDER HAMILTON 81, 122 (Harold C. Syrett ed., 1961) (emphasis in original).

that cannot be repealed or restrained by human laws—rights derived from the great Legislator of the universe.”²⁰⁰

The Framers did not espouse their natural law beliefs merely rhetorically; they enacted their political philosophy into law in numerous documents preceding the Constitution. The most famous example is, of course, the Declaration of Independence:

When in the Course of human Events, it becomes necessary for one People to dissolve the Political Bands which have connected them with another, and to assume among the Powers of the Earth, the separate and equal Station to which the Laws of Nature and of Nature’s God entitle them, a decent Respect to the opinions of mankind requires that they should declare the causes which impel them to the Separation.

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 Happiness.²⁰¹

From the Declaration and Resolves of the Continental Congress, October 14, 1774:

THAT the inhabitants of the English colonies in North-America, by the immutable laws of nature, the principles of the English constitution, and the several charters or compacts, have the following RIGHTS.—

Resolved, N. C. D. 1. THAT they are entitled to life, liberty, and property: and they have never ceded to any sovereign power whatever, a right to dispose of either without their consent.²⁰²

From the Virginia Declaration of Rights (adopted June 12, 1776):

THAT all Men are by Nature equally free and independent, and have certain inherent Rights, of which, when they enter into a State of Society, they cannot, by any Compact, deprive or divest their Posterity; namely, the Enjoyment of Life and Liberty, with the Means of acquiring and possessing Property, and pursuing and obtaining Happiness and Safety.²⁰³

The latter passage illustrates an important feature of the Framers’ belief in natural law: to some extent, it was utterly unalienable, incapable of relinquishment even by constitutional decree. As one writer notes, “Madison and the other [Framers] were guided by a philosophical tradition dictating that power over certain rights *could not* be delegated to *any* government.”²⁰⁴

This, then, is the natural law background which colored the Framers’ constitutional blueprint. The Framers came to Philadelphia in the summer of 1787 with the goal of constructing a government consistent with these

200. Corwin, *supra* note 15, at 399-400 (quoting 3 ADAMS, LIFE AND WORKS 448-64 (C.F. Adams ed. 1850)).

201. THE DECLARATION OF INDEPENDENCE paras. 1-2 (U.S. 1776).

202. UNITED STATES CONGRESS, *The Bill of Rights [and] a List of Grievances, reprinted in A DECENT RESPECT TO THE OPINIONS OF MANKIND: CONGRESSIONAL STATE PAPERS 1774-1776* 49, 53 (James H. Hutson ed., 1975).

203. THE VIRGINIA DECLARATION OF RIGHTS para. I (June 12, 1776), *reprinted in THE AMERICAN BEGINNINGS* 1, 1 (Virginia Commission on Constitutional Government ed., 1961).

204. Van Loan, *supra* note 24, at 161 (emphasis in original). For a further catalogue of revolutionary era legal formulations of natural law, see Sherry, *supra* note 164, at 1133.

principles. Insofar as natural law was divinely ordained, however, the Framers assumed that a constitution could merely reiterate natural law, not formulate it. As Suzanna Sherry writes:

By 1787, . . . Americans had a clear vision of the nature of a constitution as a species of fundamental law. Like natural law and laws or traditions that had existed since time immemorial, it could be used to invalidate positive law, but again like natural law and those long-established laws and traditions, a constitution was not itself seen as positive, enacted law but rather as a declaration of first principles.²⁰⁵

Sherry contends that what was novel about the American Constitution was *not* that it paid homage to and was premised upon higher law—this was beyond question—but that, in contrast to the dominant view up until 1787, the Constitution itself might enact new fundamental law. In other words, the real ideological revolution which occurred over the summer of 1787 lay in the recognition that a constitution could become positive law of a higher level, intended to supplement and give practical force to natural law.²⁰⁶ The Framers did *not*, however, intend the Constitution to wholly *supplant* higher law; rather, they expected natural law to continue to condemn repugnant laws which the Constitution did not expressly prohibit.²⁰⁷

How, then, does the Ninth Amendment fit into this conception of the Constitution? The answer should be clear: *The Ninth Amendment was the mechanism by which the Framers avoided the implication of fully supplanting natural law.* The Ninth Amendment, in short, was to constantly remind us of the last resort to natural law. Sherry writes:

Consideration of the sparse legislative history of the [N]inth [A]mendment together with the debates over the rest of the Bill of Rights . . . suggests two related conclusions. First, . . . the founding generation envisioned natural rights beyond those protected by the first eight amendments. Second, the Framers of the Bill of Rights did not expect the Constitution to be read as the sole source of fundamental law. Both of these conclusions are consistent with the pre-1787 natural law tradition²⁰⁸

John Kaminski argues that the founders built the Ninth Amendment with the specific natural law formulation of the Declaration of Independence in mind:

205. Sherry, *supra* note 164, at 1146.

206. *Id.* at 1155. Sherry writes:

In creating the notion of the Constitution as popularly enacted positive law, the Framers had invented an idea that perfectly suited their liberal needs. . . . The Constitution, although derived originally from the people, thus became a source of law to be imposed from above rather than dependent on the continuing support of the population. This transition, in turn, coincides with the transition from a unified “regime,” where law and morality are intertwined and formulated by the community, to a more limited “government,” which separates law (imposed on the community) from morality.

Id.

207. *Id.* at 1158. Sherry stated that the Framers “apparently contemplated that laws not prohibited by the Constitution might still be invalid as contrary to natural law.” *Id.* (citing a debate at the Philadelphia convention in which several delegates argued against the necessity of a prohibition on *ex post facto* laws, insofar as everyone would surely recognize these to be facially void).

208. *Id.* at 1166.

The Founders realized that no statesman could list every liberty in a bill of rights, so they wrote the Ninth Amendment to affirm the natural rights doctrines of the Declaration of Independence. As a statement that unspecified natural rights exist that are not to be abrogated, the Ninth Amendment stands as a silent sentinel guarding liberties not otherwise named in the Constitution.²⁰⁹

Whatever particular phraseology of natural law the Framers pondered in August of 1789, as Corwin observes, the Ninth Amendment was indispensable to their conception of the Constitution: "The Ninth Amendment . . . illustrates this theory [of natural law] perfectly [Ninth Amendment rights] owe nothing to their recognition in the Constitution—such recognition was necessary if the Constitution was to be regarded as complete."²¹⁰

This natural law foundation of the Ninth Amendment and of the Bill of Rights in general leaves little room to doubt that the Framers envisioned a broad constellation of unenumerated constitutional rights. Though strict constructionists will squirm, "[m]odern philosophical skepticism about rights is simply beside the point."²¹¹ The honest constitutional student, *particularly* the strict constructionist of the "original intent" school, must theorize as to the kinds of rights the Founders would have respected under "natural law."

But first, a caveat. The reader may quiver with trepidation as to what the next subsection will bring. Will a renovated Ninth Amendment, empowered by natural law, threaten a return to *Lochner*?²¹² Will it prophecy the development of an imperial judiciary? While these questions are frightening, the reader is asked to approach the process of deriving Ninth Amendment rights with an open mind because, as stated at the outset of this work and as by now hopefully apparent, this work seeks to develop an "original intent" conception of Ninth Amendment rights. Any such conception, though founded on natural law, is founded on the *Framers'* natural law. Thus, one might ask the nervous skeptic: Would the *Framers* have deliberately left Congress and the states powerless to regulate economic affairs? Would the *Framers*, ever so fearful of unchecked tyranny, have developed a system hinging on the supremacy of an unelected judiciary? The answers to these questions seem clear. The challenge, then, is to develop a conception of Ninth Amendment rights that is workable enough to honor the Framers' understanding of natural law, to the extent they intended to incorporate that understanding into the

209. John P. Kaminski, *Restoring the Declaration of Independence: Natural Rights and the Ninth Amendment*, in THE BILL OF RIGHTS 141, 150 (Jon Kukla ed., 1987).

210. Corwin, *supra* note 15, at 152-53.

211. Randy E. Barnett, *Introduction: James Madison's Ninth Amendment*, in THE RIGHTS RETAINED BY THE PEOPLE, *supra* note 125, at 1, 34; see also George E. Garvey, Comment, *Unenumerated Rights—Substantive Due Process, the Ninth Amendment, and John Stuart Mill*, 1971 WIS. L. REV. 922, 933 (1971) ("If the Court is going to protect rights which the Framers of the Constitution meant to be protected, it must deal with 'natural' or 'inherent' rights no matter how difficult it might be in the modern milieu.") (footnote omitted).

212. *Lochner v. New York*, 198 U.S. 45 (1905), *overruled by West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

Ninth Amendment, while repressing the demon of malleability that inheres in natural law as a generic concept.

2. Ninth Amendment Rights as Defined by Lack of Substantive Harm

Against the natural law background which the Framers brought to bear on the Constitution, this subsection attempts to derive a workable conception of the rights the Framers sought to protect with the Ninth Amendment. This subsection concludes that the Ninth Amendment protects the right to engage in any activity which entails no threat of substantive physical²¹³ or economic harm to either the actor or others. The threat of "moral harm," in the form of public disapproval or outrage over a particular practice, is *not* sufficient to remove Ninth Amendment protection.

The analysis reaches this conclusion from two directions: First, by a positive derivation, which deduces the thesis advanced here as the essence of the rights the Framers had in mind in formulating the Ninth Amendment; second, by a negative derivation, based on the argument that anything short of the conclusion posited here—that government must show tangible harm to overcome Ninth Amendment protection—would both ignore the Framers' natural law beliefs and deprive the Ninth Amendment of any meaning whatsoever. The thesis advanced here, it turns out, is the shortest possible step forward from our current, uncomfortable posture of Ninth Amendment neglect.²¹⁴

213. "Physical" harm, for purposes of this work, includes emotional harm, mental distress, loss of consortium, pain and suffering, etc.

214. At the outset, a general disclaimer is in order. This subsection relies more on political philosophy than law, for the Framers' conception of Ninth Amendment rights was rooted in their political philosophy as opposed to their legal history. Yet one might wonder how the Constitution can require resort to extra-textual materials, not to mention extra-legal ones, for its interpretation. The Constitution, it seems, should be capable of understanding by the average layperson; the only required background should be facility with logical argument and a general understanding of constitutional history. Instead, resort to political and moral philosophy has become the norm in modern constitutional interpretation. As Bork writes:

To understand the new constitutions being built in the law schools, it is necessary to be a philosopher, at least an amateur one. If the literature were to be taken seriously, it would be necessary for lawyers and judges to study the vast outpouring of words that comes from the law professors and to choose among their methodologies. . . . The reader is supposed to be familiar with utilitarianism, contractarianism, Mill, Derrida, Habermas, positivism, formalism, Rawls, Nozick, and the literature of radical feminism. . . . Working lawyers and judges can only despair in the realization that they will never be able to master even a significant fraction of what they are given to understand to be a very important body of theory.

BORK, *supra* note 169, at 134.

This Article agrees with Bork on this point. As a matter of chronology, if nothing else, modern philosophy simply cannot provide the exclusive, or even an indispensable, tool of constitutional construction. While resort to philosophy can never be considered necessary, however, philosophy may be useful when it sheds light on *the Framers'* conception of the Constitution they were enacting. That is, to the extent one can argue that the Framers would have endorsed a particular philosophical tenet, that tenet becomes a viable aid in constitutional interpretation. To that end, this Article employs philosophy in what may be its most defensible use: to illuminate the Framers' belief in the vague concept of natural law and how that concept informed Ninth Amendment rights.

Before proceeding with the positive derivation, we can first dispose of a large category of rights which the Ninth Amendment *cannot* be read to protect—so-called “positive” rights, or rights which entail affirmative obligations by government to citizens. This conclusion, of course, will disappoint egalitarian liberals,²¹⁵ who hope that the Ninth Amendment might one day compel welfare rights or other duties by government to its less well-off citizens. Whatever the moral worthiness of such obligations, they must remain legislative, for the Ninth Amendment’s history simply does not support the concept of positive rights. Recall Madison’s introduction of the Ninth Amendment to the House: he offered it as a means of “guard[ing] against” the threat of imperfect enumeration.²¹⁶ The Ninth Amendment was a means of *limiting government*, first the Federal Government, then, after incorporation, state governments.²¹⁷ Specifically, the Framers designed the Ninth Amendment to protect those rights that fall *completely outside* governmental powers, or what have here been called group-two rights, as opposed to group-one rights, which confine the government’s exercise of certain powers and which are specifically enumerated in the first eight amendments.²¹⁸

It should be obvious that this understanding of Ninth Amendment rights is simply incompatible with the idea that the Ninth Amendment protects positive rights. If the Ninth Amendment limits governmental powers by reserving rights government *cannot reach*, it cannot follow that among those rights are rights which government must create, refine, and enforce. The Ninth Amendment cannot simultaneously limit governmental powers and expand them. One could counter by arguing that welfare rights, for example, need not expand governmental powers because the Framers may have conceived of an ascertainable, minimum standard of living as part of their natural law beliefs, a standard which the government has no power to alter but which the Ninth Amendment merely forces it to implement. The problems with this argument are readily apparent. First, even were such a standard truly ascertainable and the government’s function merely one of implementation, the very act of implementation greatly expands governmental powers. This is increasingly so in the modern administrative state, an era marked by growing bureaucratic power.

More importantly, the idea that the Framers conceived of a governmental obligation to provide a minimum standard of living is inconsistent with everything we know of their natural law beliefs. People opt out of a state of nature, the Framers thought, to better protect their property. The decision to opt out is difficult, as people must forfeit some of their natural liberty over to government to reap the advantages of the social compact. However, people only forfeit that amount of liberty necessary to establish government as an enforcement mechanism of the “law of nature” that “no one ought to harm

215. As opposed to libertarian liberals, who disparage positive rights.

216. See *supra* part II.B.

217. See *supra* text accompanying note 130.

218. See *supra* text accompanying notes 149-55.

another in his life, health, liberty, or possessions."²¹⁹ This formulation of natural law simply does not square with the idea of affirmative governmental obligations. Nowhere does Locke suggest that people opt out of the state of nature to help those less fortunate. They do so, rather, to make everyone *more* fortunate, by protecting individual toils from those who would, through deviant means, derogate the concept of individual self-sufficiency. Whatever the modern relevance of this conception of society, it is the one the Framers espoused, which is enough to preclude any original intent argument for Ninth Amendment protection of positive rights.²²⁰

What actual rights, then, did the Framers envision the Ninth Amendment to protect? Recall the Framers' vision of the central purpose of government: to better enforce, in Locke's words, the "law of nature" that "no one ought to harm another in his life, health, liberty, or possessions."²²¹ As demonstrated above, the Framers believed, under the tutelage of Locke and Blackstone, that when individuals enter into the social compact, they give up whatever freedom is necessary to achieve the goals of the commonwealth, *but no more*.²²² The goal of the commonwealth being "to protect individuals in the enjoyment of [their natural liberty],"²²³ or to enforce the law of nature that "no one ought to harm another,"²²⁴ it follows that *man need only sacrifice that degree of liberty necessary to prevent him from harming others*. To forsake one's liberty over oneself, in activities entailing no harm for others, would go farther than enforcement of the law of nature requires. In other words, empowering government to regulate activities entailing no threat of harm to others, and which could therefore *not possibly* violate the law of nature, would be to forfeit a sphere of freedom whose sacrifice would not accrue to the "general advantage of the publick."²²⁵ This would intrude upon the Blackstonian concept of civil liberty.

Accepting that the Framers embraced this philosophical construct of liberty, one may still wonder why it falls to the Ninth Amendment to enforce it. The answer lies in the fact that the Framers designed the Ninth Amendment to protect those group-two, general liberty rights where "Government ought not to act."²²⁶ Rights where government *ought* not act, it seems clear, are those where government *need* not act. Government need not act over any liberty which does not threaten others, for government's function is to keep its citizens from harming one another and thereby to permit them enjoyment of

219. LOCKE, *supra* note 16, § 6; *see also supra* text accompanying note 188.

220. Randy Barnett, cited throughout this work as a leading proponent of Ninth Amendment protection for unenumerated rights, agrees with this conclusion. "[Positive rights] require[] the appropriation and expenditure of tax revenues, and [they] cannot be implemented by judicial negation. [Such rights] cannot plausibly be cast as either a presumptive immunity from government interference with rightful conduct or as a restriction on the means by which government pursues a permissible end." Barnett, *supra* note 211, at 1, 46.

221. LOCKE, *supra* note 16, § 6 (emphasis added); *see also supra* text accompanying notes 187-92.

222. *See supra* text accompanying notes 187-96.

223. Blackstone, *supra* note 193, at 388.

224. LOCKE, *supra* note 16, § 6; *see also supra* text accompanying note 188.

225. Blackstone, *supra* note 193, at 388.

226. Madison, *supra* note 198, at 58; *see also supra* text accompanying notes 143-55.

the remainder of their natural liberty, that which they did not forfeit to government. Thus, when government reaches into the sphere of harmless activities, it infringes the very rights it is created to protect. Such over-extension states a classic violation of natural law, which, in turn, condemns the regulation through its constitutional vehicle, the Ninth Amendment.²²⁷

Put differently, the Ninth Amendment prohibits governmental intrusion into harmless activities because these activities give content to Madison's conception of areas in which "[g]overnment ought not to act." Harmless activities are the basis of what has heretofore been referred to as "group-two, general liberty rights," which the Ninth Amendment protects. By protecting this area of freedom—whether it be referred to as group-two general liberty rights, harmless activities, or areas in which government ought not act—the Ninth Amendment confines government to its natural law role of keeping people from harming one another.

This conception of Ninth Amendment rights not only comports with the amendment's history and purpose, it also meshes with a heretofore unexamined sentiment of the Framers. In his speech introducing his proposals for the Bill of Rights to the House, Madison spoke of the relative degrees of danger inherent in each branch of government:

In our Government it is, perhaps, less necessary to guard against the abuse in the executive department than any other; because it is not the stronger branch of the system, but the weaker. It therefore must be levelled against the legislative, for it is the most powerful, and most likely to be abused, because it is under the least control. . . . But I confess that I do conceive, that in a Government modified like this of the United States, the great danger lies rather in the abuse of the community than in the legislative body. The prescriptions in favor of liberty ought to be levelled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power. But this is not found in either the executive or legislative departments of Government, but in the body of the people, operating by the majority against the minority.²²⁸

Madison saw the potential tyranny of the majority as posing an even greater threat to liberty than either of the main branches of government—and we have seen how much the Framers feared government. Thomas Jefferson observed similarly: "[A]ll, too, will bear in mind the sacred principle that, though the will of the majority is in all cases to prevail, that will, to be rightful, must be reasonable. Let the minority possess their equal rights which equal law must protect . . . and to violate would be oppression."²²⁹

How, then, would Madison and Jefferson have checked the majority or, in Jefferson's words, how would they have determined if the majority's will was "reasonable?" Ninth Amendment protection for harmless activities seems to be one clear answer. Of the two kinds of rights Madison envisioned, group-

227. See *supra* text accompanying notes 208-10.

228. James Madison, *Speech to the House Explaining His Proposed Amendments and His Notes for the Amendment Speech*, in *THE RIGHTS RETAINED BY THE PEOPLE*, *supra* note 125, at 58.

229. THOMAS JEFFERSON, *First Inaugural Address*, in THOMAS JEFFERSON 492-93 (M. Peterson ed., 1984).

two rights seem more vulnerable to the tyrannical majority. True, one can conceive of a majority trammeling group-one rights (for example, by demanding that a heinous criminal be hung without a trial, or that a valuable piece of property be taken without compensation). But the specter of the tyrannical majority seems most fearsome in the thought of a majority forbidding certain conduct or intruding into private sanctuaries. Madison and Jefferson, in short, probably worried most about majorities bringing the government into areas in which it did not belong. The Ninth Amendment, along with the other group-two, general liberty rights spelled out in the First Amendment, was created to combat precisely this sort of intrusion.

Two more steps are yet required to reach the conclusion that the Ninth Amendment protects the right to engage in activities entailing no tangible physical or economic harm to either the actor or others.²³⁰ The first step will be the more controversial: why must the harm be physical or economic? Why is popular moral outrage an insufficient harm to warrant governmental regulation? The questions are difficult, but the answers are found in the Framers' natural law beliefs. Consider Blackstone's example that a law prohibiting pikes of a certain length on one's boots would be invalid. What if there were moral outrage over the practice of wearing pikes on one's boots? "[H]owever ridiculous the fashion then in use might appear," Blackstone says, such a law "could serve no purpose of common utility" and could therefore not be sustained.²³¹ The rule, according to Blackstone, is that a person must be left the "*entire master of his own conduct*, except in those points wherein the public good requires some direction or restraint."²³²

It is, to be sure, a long leap from pikes on boots to some of the practices for which one might seek Ninth Amendment protection today, such as consensual homosexual conduct. But other natural law references by the Framers affirm the conclusion that the harm involved must amount to more than the disdain of others. In the Declaration of Independence, Jefferson conceived of a right to the "pursuit of Happiness."²³³ The drafters of the Virginia Constitution announced a right to "the Enjoyment of Life and Liberty, with the Means of . . . pursuing and obtaining happiness."²³⁴ These examples do not portray the Framers as a group tolerant of invasions on liberty for no greater reason than a majority's distaste for how a minority enjoys its freedom.

230. Actually, there are three steps. A threshold question is why must the harm be, as variously described, tangible, real, substantive, or significant? The obvious answer is that if the harm posed is de minimis, the intrusion on personal liberty to regulate that harm is simply not warranted. This work also assumes that the Framers would have recognized the doctrine of pretext, under which governmental invasion of personal liberty ostensibly to prevent harm, but in reality to further the guise of preventing harm, but in reality being used to further some other invidious cause, is not tolerated. The adjectives "tangible," "real," "substantive," "significant," and the like are meant here to indicate non-de minimis and non-pretextual harms.

231. Blackstone, *supra* note 193 and accompanying text.

232. Blackstone, *supra* note 193 (emphasis added); see *supra* text accompanying note 196.

233. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

234. THE VIRGINIA DECLARATION OF RIGHTS, *supra* note 203, at para. I.

Still, might it not possibly improve the “public good” or “common utility” to ban morally unpopular conduct, if citizens are truly upset by the thought of it taking place? John Stuart Mill responds as follows:

[t]here is a sphere of action in which society, as distinguished from the individual, has, if any, only an indirect interest: comprehending all that portion of a person's life and conduct which affects only himself or, if it also affects others, only with their free, voluntary, and undeceived consent and participation. . . . This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience in the most comprehensive sense, liberty of thought and feeling, absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological. . . . Secondly, *the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character, of doing as we like, subject to such consequences as may follow, without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong.* Thirdly, from this liberty of each individual follows the liberty, within the same limits, of combination among individuals; freedom to unite *for any purpose not involving harm to others*: the persons combining being supposed to be of full age and not forced or deceived.

No society in which these liberties are not, on the whole, respected is free, whatever may be its form of government; and none is completely free in which they do not exist absolute and unqualified. The only freedom which deserves the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, or mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves than by compelling each to live as seems good to the rest.²³⁵

Though Mill's philosophy postdates the Constitution by a century, the Framers, it seems, would have endorsed his conception of “the appropriate region of human liberty.”²³⁶ Because of their fear of government and their natural law beliefs, *the Framers sought the freest possible society that could co-exist with a functioning government*, a government, that is, that protects property and keeps its citizens from harm. According to Mill, a society which does not respect “that portion of a person's life and conduct which affects only himself” is not free at all.²³⁷ The Framers may not have argued this far, but given their paramount goal of maximizing freedom, they probably would have respected this sphere of autonomy affecting only one's self, no matter how “foolish, perverse, or wrong” some minority conduct was perceived to be.²³⁸

Alas, resort to latter-day philosophy will still not satisfy the skeptic. No matter how strong the Framers' penchant for liberty, critics will charge that

235. JOHN S. MILL, ON LIBERTY 11-12 (Elizabeth Rapaport ed., Hackett Pub. Co. 1978) (emphasis added and omitted).

236. *Id.* at 11.

237. *Id.* at 12.

238. *Id.* at 12. For another acknowledgment of Mill's work as a plausible Ninth Amendment standard, see Garvey, *supra* note 211, at 932-36.

they would never have knowingly ratified constitutional protection for, *inter alia*, homosexual conduct, pornography, or flag-burning. Perhaps, then, it is now appropriate to develop the conception of Ninth Amendment rights advanced here from a negative direction. By working backwards from the status quo of Ninth Amendment neglect, one can firm up the distinction posited between "moral harm" and other harms as respectively insufficient and sufficient grounds for governmental intrusion on liberty.²³⁹ Consider the following musings of Robert Bork:

[P]hysical danger does not exhaust the categories of harms society may seek to prevent by legislation, and no activity that society thinks immoral is victimless. Knowledge that an activity is taking place is a harm to those who find it profoundly immoral.

. . . There is vast confusion upon this point. In the seminar on constitutional theory I taught with Alex Bickel, I took the position at one time that it was no business of society what conduct that did not harm another person took place out of sight. . . . Bickel posed a hypothetical. Suppose, he said, that on an offshore island there lived a man who raised puppies entirely for the pleasure of torturing them to death. The rest of us are not required to witness the torture, nor can we hear the screams of the animals. We just know what is taking place and we are appalled. Can it be that we have no right, constitutionally or morally, to enact legislation against such conduct and to enforce it against the sadist? . . . Bickel was right. Moral outrage is a sufficient ground for prohibitory legislation.

Many people will argue that Bickel's hypothetical does not at all resemble a law [for example] against consensual homosexual sodomy since cruelty to animals is involved in the former. We have already dealt with that argument. There is no objection to the torturing of puppies for pleasure except that it outrages our morality. There is, indeed, no objection to forcible rape in the home or to the sexual abuse of a child there, except a moral objection. But, it will be said, those cases do not involve consent or do not involve a consent the person is mature enough to give intelligently. Those are not objections to the comparison. They are merely statements that the speaker perceives a moral distinction in consent. But the perception of a moral distinction does not affect the point being made that morality, standing alone, is a sufficient rationale to support legislation. In fact, for most people, consent does not solve everything: they would favor laws punishing the torture of a consenting masochist or the provision of cocaine to a willing purchaser. . . . If a majority of my fellow citizens decide that the cases [involving consent versus the cases involving non-consent], while not alike, are nevertheless similar enough so that both actions should be made criminal, while I may disagree with them morally, the fact that I am a judge does not mean that I am entitled to displace their moral judgment with my own.²⁴⁰

Bork appears to make two main points in this passage, one of which is right and one of which is wrong. His correct point is that *all* law is based on notions of morality; that law is, in essence, a spectrum on which we separate and categorize different species of laws by perceived moral differences in

239. This argument may appeal to those who are dubious of the positive derivation just undertaken but believe that the Framers intended something more than neglect for the Ninth Amendment.

240. BORK, *supra* note 169, at 123-24.

their aims. One might recognize roughly three regions of the spectrum:²⁴¹ the harm region, which includes laws designed to prevent tangible harm to *others*; the paternalist region, which includes laws designed to prevent actors from tangibly harming *themselves*; and the legal moralist region, which includes laws designed to prohibit conduct giving *moral offense* to others.²⁴²

Bork's error is his determination of where to draw the line. Bork argues that since law's legitimacy derives from the people's notions of morality, those notions must always be respected, and thus the correct place to draw the line is not to draw it. Whatever the people feel is immoral, they are entitled to eliminate by prohibitory law; Bork would therefore only invalidate laws that directly contravene some clearly worded and narrowly understood constitutional provision. He is wrong for two reasons. First, he ignores the harm done to *victims* of prohibitory legislation, that is, those whose activities are proscribed, and thus he fails to weigh the *relative* moral effects that a legislature must consider in enacting law. To use his and Bickel's examples, in enacting laws against the torturing of puppies or forcible rape, a legislature would crudely reason that the harm prevented (to puppies and rape victims) outweighs the harm created (to torturers and rapists). Indeed, in the rape case, the harm prevented is so extreme that one need not consider the "harm" created in forbidding rapists from pursuing any desire they may have to rape.

Consider, by contrast, a law against consensual homosexual sodomy. Bork asserts that the harm *prevented* (to people who will be able to rest easy knowing sodomy is not occurring) is sufficient to justify the prohibitory legislation. He utterly fails, however, to consider the harm *created* (to homosexuals) and its magnitude relative to the harm prevented. When one compares the harm prevented (conduct that people do not even see) to the harm created (deprivation of a primary means of sexual expression for a significant percentage of the population), one might conclude that it would be illegitimate for a legislature to enact prohibitory legislation based solely on the majority's notion of morality.

This analysis is emphatically not meant to import utilitarian considerations into what has clearly been a rights-based discourse. Rather, it is meant to illustrate Bork's conceptual failure to pay homage to the *other* moral effects of prohibitory legislation, the effects on its "victims." The problem is that one does not often think in these terms; when one considers prohibitory legislation aimed at harm that is at all tangible, which is almost always the kind of harm one addresses, one tends not to think about the *created* "harm" that comes from removing an activity from the "victim's" repertoire of liberty. But just because one does not frequently have occasion to apply the proper analysis does not mean one can forget it. Because people take the earth's gravity for granted, they live under a normal expectation that moving objects will

241. This spectrum would apply only to what may be crudely called "negative" law, which is law that does not establish, or provide the procedural machinery for, governmental provision of services or other non-regulatory undertakings.

242. For a more detailed account of how one might define the spectrum of "negative" law, see JOEL FEINBERG, *HARM TO SELF* xvi-xviii (Oxford 1984).

eventually fall. Astronomers, however, must remember Newton's law that objects actually move in a straight line unless acted upon by some external force. Similarly, in those relatively rare cases when one deals with very tenuous harms as justification for prohibitory legislation against freedoms, one must remember that the resulting harm may be comparatively larger. Bork fails to remember this and overzealously asserts that the people's "moral outrage is a sufficient ground for prohibitory legislation."²⁴³

A second reason why Bork is wrong is more important, and should speak to him on his own terms: his conclusion contravenes the original intent of the Framers. Recall the spectrum of negative law posited above. Bork contends that the harm, paternalist, and legal moralist regions are all within the legitimate, constitutional reach of legislatures. As just discussed, this means that a legislative majority could outlaw any practice to which it is morally opposed. Thus, Bork would have no choice but to uphold a law prohibiting marriage between blond men and brunette women—or for that matter a law prohibiting marriage altogether. While nearly everyone would condemn such laws as prohibiting harmless activity between consenting adults, Bork would inform them that they "merely perceive[] a moral distinction in consent, [b]ut the perception of a moral distinction does not affect the point being made that morality, standing alone, is a sufficient rationale to support legislation."²⁴⁴ The problem for Bork is, the *Framers* perceived a moral distinction in consent, and they wrote it into the Constitution with the Ninth Amendment. They did so precisely because Bork's view would render government *all-powerful*, for no sphere of freedom, save the specific prohibitions of the first eight amendments, would be off limits to legislation.

The evidence presented earlier, both as to the Framers' natural law views and the origins of the Ninth Amendment, can leave no question that Bork's view is not what the Framers intended. The *last* thing the Framers wanted was an all-powerful government; their paramount concern was to *limit* government. The Framers were deathly afraid of implying that unenumerated rights had been surrendered to the general government;²⁴⁵ they conceived of areas in which "[g]overnment ought not to act;"²⁴⁶ they viewed government as wielding only that power necessary to keep people from harming one another;²⁴⁷ and they worried especially about tyranny of the majority.²⁴⁸ None of this comports with the notion that a legislature can outlaw any practice a majority dislikes. If the Framers thought pikes on boots were protected, surely they thought likewise for marriage between blonds and brunettes—and for marriage itself.

We have just seen that Bork's view—that the best place to draw the line on the spectrum of negative laws is not to draw it—would eviscerate the

243. BORK, *supra* note 169, at 123-24.

244. *Id.*

245. See *supra* text accompanying notes 26-31.

246. See *supra* text accompanying note 162.

247. See *supra* text accompanying notes 188, 191, 194.

248. See *supra* text accompanying notes 228-29.

Framers' natural law beliefs by empowering legislatures to trammel all kinds of unenumerated rights. But the question remains, how *does* one give content to the Framers' philosophical conception of liberty? One might reason as follows: because Bork's theory that courts should *never* interfere with legislatures (save in cases involving the first eight amendments) fails to square with original intent, *some* interference must be in order. This entails giving *some* content to natural law, and thus giving *some* "bite" to the Ninth Amendment. Because judicial interference with legislatures through the Ninth Amendment is anti-majoritarian, and because natural law is a dangerously malleable concept, one is justifiably chary of giving more democracy away than absolutely necessary to satisfy the Framers' intent. Hence, one should cautiously take the *least ambitious possible* step forward from the current posture of Ninth Amendment neglect, which would entail removing from legislative reach the least compelling region on the spectrum of negative laws—the legal moralist region. That is, the shortest step one can take, in order to afford some meaning to the Framers' natural law beliefs, is to go from a position of leaving everything within legislative reach (which we have just seen to offend those beliefs) to a position of removing legislatures' power to prevent moral harms.

This is the essence of the negative derivation of the conception of Ninth Amendment rights advanced here. One could argue that there are less ambitious steps than removal of the entire realm of (physically) harmless activities from legislative reach. One could, for example, protect only those personal practices deemed to be "fundamental." But aside from the obvious problem this formulation creates in determining fundamentality, nothing in the historical record suggests the Framers would have discriminated among rights they perceived to be natural rights. Those rights whose forfeiture offered nothing to the "general advantage of the publick," or which did not better equip the state to enforce the law of nature, were natural rights. And all natural rights were to be protected, not just the important ones. Hence, it is not an ambitious enough step to protect only "fundamental" harmless personal activities. Such a step does not fully comport with the Framers' intent.²⁴⁹

The alert reader will remember that, from the vantage point of Ninth Amendment protection for harmless activities, two leaps were required to reach the conclusion advanced here that the Ninth Amendment protects those activities entailing no physical²⁵⁰ harm to either the actor or others. The first leap, by far the most important, has just been discussed, that of why moral harm is insufficient. The second leap is why an actor cannot harm *himself*. The question seems compelling, because Locke's law of nature commanded

249. This merely reinforces, from another direction, the earlier exposition of how the constitutional decision-makers' frantic quest for fundamentality in unenumerated rights jurisprudence systematically impedes proper interpretation of the Ninth Amendment. See discussion *supra* part III.A.3.d.

250. When used alone, "physical" harm also includes economic harm, which essentially refers to harm to property, a category Locke and the Framers clearly envisioned to be a proper subject of state protection.

only that “no one ought to harm *another*,”²⁵¹ and Mill’s work, of course, is famously anti-paternalist.

The question has been reserved until now because the negative derivation offers the answer. It would be yet a further step forward to empower the Ninth Amendment to remove the paternalist region of the spectrum of “negative” law from legislative reach. Unlike the first step, that of removing the legal moralist region, it is unclear that one must withhold the additional area of paternalist laws²⁵² from legislatures to bring constitutional adjudication in line with the Framers’ intent. True, Locke’s law of nature referred only to harm to others, as did Mill’s work. But Mill, of course, cannot directly shed light on the Framers’ beliefs, and Blackstone opined that law, to be legitimate, must accrue to “the general advantage of the publick” or to the “public good.”²⁵³

It is certainly possible, then, that the Framers conceived the liberty to harm *oneself* as detracting from the *public* good, for in harming oneself one would be removing one’s labors or other assets from collective social enterprises. Thus it is possible that the Framers would have forbidden harm to oneself, consistent with their natural law beliefs. People will disagree over the likelihood of this, and the historical record probably does not permit a definite answer. What is important, however, is that it is not *essential* to fulfillment of the Framers’ basic natural law ideals to take the step of removing paternalist laws from legislative reach, so one need not take it. Given a fairly ambiguous historical record on this point, it seems one can preserve representative democracy in the area of paternalist laws without realizing the Framers’ fears of tyrannical majorities and the implicit forfeiture of unenumerated rights.

3. Conclusion

One arrives, then, by negative deduction from the status quo at the conclusion that one must take a single, and only a single, step forward to give meaningful content to the Framers’ natural law beliefs. The preceding positive derivation supports this conclusion by suggesting that the rights the Framers had in mind for the Ninth Amendment—the rights to engage in those activities which entail no tangible harm to either the actor or others—are exactly those protected in removing that first, least ambitious category of legal moralist laws from legislative reach.

In terms of understanding, and being comfortable with, the doctrine at work behind the Ninth Amendment, this conclusion allows two important realizations. First, it fulfills the relationship posited earlier between the Ninth Amendment and natural law. The Ninth Amendment is the mechanism by

251. LOCKE, *supra* note 16, II § 6, at 9 (emphasis added).

252. “Paternalist laws,” or the paternalist region of the spectrum, is here meant to indicate the realm of *purely* paternalist laws, that is, laws whose object is to protect only the actor and not others. Any law which also protected others would fall into the harm region.

253. Blackstone, *supra* note 193, at 388-89.

which the Framers preserved the last resort to natural law in the Constitution. If a regulation violates no specific constitutional language but infringes upon physically harmless conduct, thereby exceeding the proper bounds of governmental power, it is violative of natural law and is therefore unconstitutional via the Ninth Amendment.

Second, this conclusion should eliminate contemporary fears of natural law. *Lochner*²⁵⁴ cannot return. Because the governmental acts it prohibited were aimed at significant economic harm, *Lochner* was premised on an erroneous view of natural law. Nor will the judiciary become the imperial plunderer of democracy. Our legislatures do not often address problems involving no tangible harm, for such situations are not usually viewed as problems at all. Only in those relatively rare instances when a majority attempts to prohibit a minority practice portending no tangible harm does the Ninth Amendment stir from its usual slumber, staying the hand of an overzealous legislature that would transgress the legitimate realm of democratic authority.

C. Conclusion

This Part has attempted to develop a workable interpretive theory of the Ninth Amendment. Part III.A showed that the Ninth Amendment applies to both federal and state government, which gives the Amendment an independent, contemporary, constitutional function. Part III.A.3's demonstration that the Framers did contemplate judicial protection for unenumerated Ninth Amendment rights therefore has modern relevance. Part III.B surveyed the Framers' natural law beliefs to develop a conception of Ninth Amendment rights themselves.

The interpretive theory posited by this Part, then, was as follows: *The Ninth Amendment protects unenumerated constitutional rights. It protects the right to engage in any activity or practice that entails no tangible physical or economic harm to either the actor or others. Moral harm, in the form of public disapproval or outrage over a particular practice, is insufficient to overcome Ninth Amendment protection.* This formulation gives content to the line, posited in Part III.A.2, that the Ninth Amendment draws between all governmental powers and individual rights. It defines the Ninth Amendment's modern constitutional mission of protecting harmless individual liberties from governmental encroachment at any level. It specifies the area where, in James Madison's words, "[g]overnment ought not to act." This work now turns to some of those areas, to show how the Ninth Amendment would operate in practice.

254. *Lochner v. New York*, 198 U.S. 45 (1905), *overruled by West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

IV. APPLICATIONS

So far the discussion has been frustratingly abstract. It is now appropriate to briefly survey how the interpretive theory of the Ninth Amendment developed in Part III would practically apply to specific areas of rights jurisprudence. This Part examines four discrete areas of jurisprudence that would constitute primary arenas of Ninth Amendment applicability, followed by a few miscellaneous examples. In each category, the analysis will attempt to furnish examples of cases that the Ninth Amendment would protect and cases the Ninth Amendment would not protect, and the reasoning underlying that protection, followed by examples of cases to which the Ninth Amendment would *not* extend. This Part concludes by addressing two important special cases seriatim.

While the examples in this Part are not exhaustive, the thesis advanced in Part III would have the Ninth Amendment tackle some of the most controversial issues in constitutional law. The reader may thus question how the Ninth Amendment, heretofore neglected, suddenly addresses all the "hard cases" or, worse, whether the thesis deliberately "dumps" these cases into the Ninth Amendment for resolution in some indeterminate manner. The analysis in this Part will hopefully illustrate that the latter concern is unwarranted. As to the former concern, the examples themselves will show that the Ninth Amendment addresses many "hard cases" simply because one most consistently finds "hardness" in those cases presenting no tangible harm but a genuinely outraged majority.

A. *Sexual Expression and Autonomy*

Cases dealing with sexual expression and autonomy present an area of jurisprudence ripe for Ninth Amendment protection. In contrast to cases involving *reproductive* autonomy (considered in the next section), the Supreme Court's decisions in the area of sexual autonomy are both fewer and older and thus have lacked the benefit of the privacy analysis developed in *Griswold v. Connecticut*²⁵⁵ and expanded in *Roe v. Wade*²⁵⁶ and the surrounding contraception cases.²⁵⁷

There is, however, one important exception. In 1986, in the now famous case of *Bowers v. Hardwick*,²⁵⁸ the Court decided that there is no fundamental right to engage in homosexual sodomy, upholding Georgia's anti-sodomy statute. Relying on the fact that twenty-five states still criminalized consensual sodomy, the Court wrote:

[T]o claim that a right to engage in such conduct is . . . "implicit in the concept of ordered liberty" is, at best, facetious

255. *Griswold*, 381 U.S. 479, 485-86 (1965).

256. *Roe*, 410 U.S. 113, 152-56 (1973).

257. *See, e.g., Carey v. Population Services Int'l*, 431 U.S. 678 (1977); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

258. *Bowers*, 478 U.S. 186 (1986); *see supra* text accompanying notes 1-2.

... [R]espondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.²⁵⁹

Four justices dissented, with Justice Stevens writing, “[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.”²⁶⁰

The *Bowers* decision is one of the most criticized of the modern era, and with good reason. It is flawed on several grounds, including the majority’s sua sponte decision to condemn only homosexual sodomy (the statute prohibited all sodomy) as well as its narrow concern, almost an obsession, with the practice of sodomy itself, which broke with the earlier tradition of analyzing whether a larger right to privacy protects the disputed conduct.

The quoted portions, however, emphasize what is pertinent here. *Bowers* exemplifies conduct that is quintessentially the type sought to be carved out in Part III: private, consensual, homosexual sodomy clearly entails no tangible physical or economic harm to either the actors or others.²⁶¹ The Court, however, commits Bork’s error. Reasoning that since all law is based in morality, the Court concludes that it must respect laws representing “essentially moral choices.” This ignores what the Framers felt to be their natural law obligation to remove harmless personal practices from legislative reach. The Framers sought to immunize such practices because they perceived “essentially moral choices” as beyond the purview of government’s legitimate power to keep citizens from harming one another.

The Court’s fear that the judiciary will be “very busy indeed” were it to invalidate all laws against physically harmless activity is unfounded; such laws are in fact relatively rare and generally confined to a few specific jurisprudential areas. Finally, Stevens’ dissent implies a separate ground for condemnation of “essentially moral choices,” insofar as they often discriminate upon some invidious criterion. Just as anti-miscegenation statutes tacitly discriminate against minorities, anti-sodomy statutes disproportionately affect homosexuals. If there is any case deserving of Ninth Amendment protection

259. *Bowers*, 478 U.S. at 194, 196.

260. *Id.* at 216 (Stevens, J. dissenting) (citing *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down Virginia’s anti-miscegenation statute)).

261. In the age of AIDS, some may dispute this assertion. This argument will be addressed in the discussion of prostitution, which follows shortly. *See infra* note 266.

under the theory advanced in Part III, it is *Bowers*.²⁶² The Ninth Amendment must protect consensual, homosexual sodomy.

With the exception of *Bowers*, the Court has not had recent occasion to consider prohibitions on sexual expression and autonomy. Some of its older holdings, however, as well as many of the dusty statutes still residing in state codes, seem susceptible to Ninth Amendment scrutiny. One example is adultery. Adultery prohibitions, which many states still retain, appear to proscribe conduct entailing no tangible harm and which should thus be protected by the Ninth Amendment. The standard rejoinder is that such laws protect the victims of adultery, the deceived spouses, and thus involve governmental prevention of a *specific* harm, as opposed to merely a general harm to the moral majority. This does not answer the fact, however, that the harm remains purely moral. It is not the state's place to redress private grievances of spouses through general legislation, because such legislation would often be overbroad: it would prohibit, for example, the "open" marriage, in which spouses fully disclose, and even encourage, their partners to have extra-marital affairs. One may respond that this result would be good, for such open marriages are inherently degenerate. But this would represent yet another attempt by a self-righteous majority to prohibit conduct whose only "harm" consists in offending that majority. One might argue that the "proper" beneficiaries of anti-adultery laws are deceived spouses who have been genuinely, emotionally hurt by their partners' infidelity. Traditional state tort claims, such as for intentional infliction of emotional distress, would offer a preferable remedy to blunt adultery laws. While some aggrieved spouses may feel vindicated to see their mates incarcerated, adultery statutes, as just discussed, would criminalize much consensual conduct in their wake.

The argument gets tougher with laws against polygamy. In *Reynolds v. United States*,²⁶³ the Court sustained a federal statute prohibiting polygamy against a free exercise challenge, finding that Congress has power "to reach actions . . . in violation of social duties or subversive of good order."²⁶⁴ "Social duties" and "good order" are nothing more than nineteenth-century code for practices which morally offend a majority. Whether polygamy should be sustained as a matter of free exercise is debatable. But insofar as people *voluntarily* enter into polygamous arrangements, it seems clear that the practice entails no tangible harm and thus that its prohibition is a Ninth Amendment violation.

The counterargument here would be that anti-polygamy laws prevent not merely a moral harm to society but a specific harm to the victims of polygamy, usually women, in that those who find themselves in competition

262. Indeed, a survey of the literature would probably yield *Bowers* as the single most cited candidate for protection under *any* theory of the Ninth Amendment. Respondent Hardwick in fact advanced the Ninth Amendment as requiring at least an "articulated rationale by government" for such a pervasive law, but the Court rejected this claim. Respondent's Petition for Rehearing at 9, *Bowers* (No. 85-140).

263. *Reynolds*, 98 U.S. 145 (1878).

264. *Id.* at 164.

for the attentions of a spouse must necessarily suffer at least psychological harm, such as reduced self-esteem or other problems. Can psychological harm really follow, however, if one truly believes in the propriety of one's lifestyle, as early Mormons, for example, believed in polygamy? Under the thesis advanced here, a litigant would have to show an affirmative answer to this question, which appears dubious, to sustain an anti-polygamy statute against Ninth Amendment attack.

The argument almost becomes odious with laws against incest. Again, however, while the idea of sex between close family members will strike most readers as extremely repugnant, the Ninth Amendment should protect incestuous sex as nothing more than a practice which a majority, albeit a large one, finds offensive. The counterargument will be the same as with polygamy, that incest must surely result in psychological harm to the participants. But again, if the parties possess a strongly held conviction in the propriety of their actions, emanating perhaps from a religious belief, and certain other qualifications attach—no minors are involved, and participation is uncoerced—society should not intrude on this conduct simply because it harbors different feelings about appropriate interpersonal relations.

A pause might be in order to address an argument which government advances against *all* these behaviors (sodomy, adultery, polygamy, and incest) and against others to which Ninth Amendment protection would extend under similar logic (fornication and cohabitation). This argument is that government has a legitimate interest in preserving the traditional family unit and (inapplicable to sodomy) in deterring illegitimate births. There are two problems with this argument. First, empirical studies show that the prohibitory laws in question often do not actually advance the interests asserted.²⁶⁵ Butressing these studies is the fact that statutes of this genre are among the least enforced, which suggests either that such statutes do not achieve their purported objectives, else the states would enforce them, or that their efficacy is irrelevant, because the states decline to enforce them anyway.

Second, and more important, while government often claims an interest in preserving the traditional family unit and in deterring illegitimate births, the question never asked is: why? The key words are "traditional" and "illegitimate." Wedded, two-parent families are "traditional" only because past majorities have deemed them morally proper, and children out of wedlock are "illegitimate" only because past majorities have considered them so from a moral standpoint. But "illegitimate" children and non-"traditional" families entail no harm to society, except perhaps in complicating census forms. And inasmuch as non-"traditional" families and out-of-wedlock births continue to grow, government is finding that its moral majority, the very premise of its interests, is eroding. When government argues for preserving "traditional" families and for deterring "illegitimate" children, it struggles, at best, to avert moral offense to an ever-thinning present majority, or it quite possibly seeks

265. See, e.g., Note, *Fornication, Cohabitation, and the Constitution*, 77 MICH. L. REV. 252, 301-05 (1978).

to indulge the moral whims of *past* majorities. The Ninth Amendment as interpreted here would forbid either effort.

Prostitution laws and anti-incestual marriage statutes constitute prohibitions which would move closer to the fringes of Ninth Amendment protection. In the case of the former, the government would have a strong claim that prohibitions on prostitution are necessary to prevent the spread of disease, an interest made more compelling with the onset of AIDS. The Ninth Amendment advocate would respond that there exists a less restrictive alternative, namely, that government could require safe sexual practices. The government, however, could reasonably point out the difficulty of enforcing such restrictions—though prostitution laws themselves seem susceptible to the same charge.²⁶⁶ In the case of anti-incestual marriage statutes, the government would cite the scientific evidence that children of related people disproportionately suffer birth defects. The constitutional merit of the claim would depend on the strength of this evidence; were the harm to children of related parents merely *de minimis*, it should not overcome Ninth Amendment protection for the otherwise harmless, and very personal, decision to marry whomever one chooses.

To complete the spectrum, government could still legitimately outlaw numerous other sexual practices under the Ninth Amendment theory advanced here. These would include any sexual activities involving minors, whom society judges insufficiently mature to consent to such practices. Statutory rape laws, for instance, would clearly survive Ninth Amendment scrutiny. Similarly, a majority could also criminalize bestiality, which involves animals as unwilling participants and therefore entails tangible harm.²⁶⁷ Also, since the Ninth Amendment theory propounded here is not paternalistic, a state could erect barriers to consensual sexual conduct entailing harm, such as particular sadistic or masochistic practices. The Ninth Amendment would not offer a legal inoculation to those who would harm themselves or others. It would, however, provide shelter against a majority's conformist disdain for benign expressions of sexual autonomy.

266. Even if the disease-control rationale worked against prostitution, it would *not* defeat Ninth Amendment protection for sodomy. For disease to spread, sexually active people must have multiple partners. While multiple partnership is the essence of prostitution, homosexual sodomy, when confined to a monogamous relationship, is no more dangerous than heterosexual sex. Thus, while safe sex requirements (that is, condoms) constitute the *only* less restrictive alternative to laws against prostitution, individuals who engage in sodomy have the second alternative of remaining faithful to one partner.

Some might argue that because many homosexuals will not do so, anti-sodomy statutes are warranted. But the same argument could be used against heterosexual sex, which can also spread disease outside of monogamous relationships. Hence, one could only rest a denial of Ninth Amendment protection for sodomy on the slightly increased risk of exposure that anal sex presents over vaginal sex, a "harm" that clearly classifies as *de minimis*, especially when one considers that vaginal sex poses other risks (that is, it can transmit other diseases besides AIDS) that sodomy does not.

267. The reader will recall that tangible physical harm includes emotional harm. *See supra* note 213. While it may seem silly to think in terms of an animal's emotional distress, there can be no doubt that bestiality, even where it does not physically injure the animal, harmfully traumatizes it in some manner.

B. Procreative Choice

If prohibitions on sexual expression and autonomy constitute a primary exemplar of impermissible governmental regulation, restrictions on procreative choice represent a close corollary. Both seek to regulate sexual conduct in the name of promoting traditional values, the former directly, the latter indirectly. In the procreative choice area, though one must wade through governmental arguments aimed at specific procreative practices, one will usually discover the same intentions at work as in the area of sexual expression.

The classic procreative choice case is, of course, *Griswold v. Connecticut*,²⁶⁸ in which the Supreme Court struck down a state statute prohibiting married couples from using birth control. This regulation was so egregious that, if Connecticut had an articulable rationale for its law, the Court did not bother to mention it. While the majority struck down the statute based on Justice Douglas' famous "emanations" and "penumbras" formulation,²⁶⁹ Justice Goldberg's concurrence argued that the Ninth Amendment played the decisive constitutional role by illuminating the fact that the Framers intended due process "liberty" to encompass more than the first eight amendments.²⁷⁰ Both routes, it seems, were circuitous. The Ninth Amendment as interpreted here would independently prohibit such a statute, for private, marital use of birth control represents archetypally harmless conduct.

More interesting is the decision in *Eisenstadt v. Baird*,²⁷¹ in which the Supreme Court confronted a more plausible governmental rationale. In *Eisenstadt*, the Court overturned a Massachusetts statute criminalizing the sale or distribution of contraceptives except to *married* persons by physicians or pharmacists. The state contended that the rationale for the law was to contain illegitimacy by discouraging sex among the unmarried. As observed above, a state's goal in preventing illegitimacy is merely one example of a governmental effort to spare a majority from moral harm. The same, however, is true for the goal of discouraging sex among the unmarried. Both illegitimate children and extra-marital sex are harmless phenomena, for their perceived harmfulness inheres solely in detracting from traditional means of thinking about the social fabric. Thus, in *Eisenstadt*, the state sought to control one moral harm by targeting another. While the Court invalidated this attempt by recognizing discrimination against the unmarried, the Ninth Amendment would have prohibited this law insofar as the harms it targeted, both directly and indirectly, were purely moral.

*Carey v. Population Services International*²⁷² presents a more difficult case. In *Carey*, the Supreme Court invalidated a provision of a New York statute preventing anyone other than licensed pharmacists from distributing

268. *Griswold*, 381 U.S. 479 (1965). As the sole major source of actual Ninth Amendment jurisprudence, *Griswold* is discussed extensively in part II.C.

269. See *supra* text accompanying notes 53-56.

270. See *supra* text accompanying notes 58-61; see also *supra* text accompanying note 115.

271. *Eisenstadt*, 405 U.S. 438 (1972).

272. *Carey*, 431 U.S. 678 (1977).

contraceptives to adults. Relying on *Griswold* and *Eisenstadt*, the Court reasoned that burdening the sale of contraception constituted an indirect means of impermissibly burdening its use. The Ninth Amendment theory advanced here would probably yield the same result, for it would seem to violate that theory for a state to burden, as well as prohibit, a harmless activity.²⁷³

But the troublesome provision of the statute was one which prohibited the sale or distribution of contraceptives to minors. While a majority of seven Justices struck down the provision, four thought the state could not infringe the privacy interests even of minors without showing a significant interest, which the deterrence of underage sex was not. Three Justices disagreed, seeing different flaws in the statute. The latter three believed that a state could exercise substantial control over the reproductive autonomy of minors, but that, as Justice White argued, the state had shown no nexus between the contraception ban and the goal of deterring sex. Justice Stevens reasoned in addition, "It is almost unprecedented . . . for a State to require that an ill-advised act by a minor give rise to greater risk of irreparable harm than a similar act by an adult."²⁷⁴

As the concurring Justices demonstrate, New York's contraception statute as it pertained to minors appeared profoundly unwise as public policy. Insofar as its aim seems permissible, however, the Ninth Amendment theory expounded here would likely not invalidate such a provision. This is because government *does* have a legitimate interest in regulating *minors'* participation in behavior entailing no tangible harm.²⁷⁵ While society may not forbid physically harmless activities to adults, it may forbid such activities to children when it believes those activities to be of a character beyond the grasp of the typical child's maturity level. The distinction between impermissible adult regulation and permissible child regulation is an important one to understand. Consistent with the Framers' intentions, the Ninth Amendment forbids governmental intrusion into adult behavior entailing nothing more than moral harm to others. By contrast, the Ninth Amendment does not forbid government to regulate some of these same practices when engaged in by children, when society legitimately perceives that children who engage in them might suffer tangible harm as a result of their inability to comprehend the responsibilities attending those activities.

It is *not* that the Ninth Amendment allows government to prohibit children from giving moral offense; rather the Ninth Amendment recognizes that, because of the actors' differing maturity levels, some activities which would entail only moral harm to others when engaged in by adults—and thus off-limits to regulation—would entail tangible harm to the actors themselves when

273. The Court also invalidated a portion of the statute criminalizing the advertisement or display of contraceptives as an impermissible infringement of free speech. *Id.* at 700-02.

274. *Id.* at 714 (Stevens, J., concurring).

275. Even the four Justice plurality on this issue conceded that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults." *Id.* at 692 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944)).

engaged in by children. The Ninth Amendment thesis developed here, in other words, applies equally to children and adults. The Amendment merely permits government to conceive of a greater range of activities which may entail harm to children *as actors* than would be permissible for adults. The Amendment, in short, allows government greater paternalistic leeway over children. It is *not* the case, however, that the Ninth Amendment would *never* protect children. The Amendment would prevent intrusion into low-responsibility practices which, even when carried out by children, could entail no more than moral offense to others.²⁷⁶

To continue the analysis of procreative choice regulations, voluntary sterilization exemplifies a practice that would hover at the fringes of Ninth Amendment protection. In forbidding sterilization, government would argue for the prevention of irreparable, tangible harm that results when a woman permanently renounces her ability to bear children. The harm could manifest itself as a later change of mind, or merely in the medical risk attendant upon an unnecessary surgical procedure. Women would respond that the procedure is harmless, and that the government's argument could apply as well to cosmetic surgery. Insofar as both alleged harms of sterilization appear de minimis, the medical risk for obvious reasons and the change-of-mind risk because women consider it, the Ninth Amendment probably would protect voluntary sterilization.²⁷⁷

The Ninth Amendment would not, by contrast, enforce positive governmental obligations in the procreative choice area, for instance, to publicly finance contraception for poor women.²⁷⁸ Nor would it extend to regulation aimed at tangible harm, such as efforts to limit a mother's behavior during pregnancy, which would be premised upon harm to the fetus.²⁷⁹ While

276. Interestingly, while attempting to prevent minors from obtaining contraception, New York simultaneously allowed 14-year-old females to marry (with the consent of their parents and a family court judge). Justice Powell joined Justices Stevens and White in the concurring opinion on the contraceptive-ban-for-minors provision, in part arguing that such a ban invaded the privacy of 14- and 15-year-old girls who exercised their legal right to marry. That Powell would have to strike down a regulation which he admitted in theory a state could adopt, in order to allow fulfillment of a different, unregulated yet more responsibility-entailing right, may be a testament to New York's misguided prioritization of the responsibilities minors can handle.

277. See, e.g., *Hathaway v. Worcester City Hosp.*, 475 F.2d 701 (1st Cir. 1973).

278. The question of what constitutes positive versus negative governmental obligations would plague Ninth Amendment jurisprudence as it does other areas. While public financing of contraception is clearly a positive obligation the Ninth Amendment would not require, *Andrews v. Drew Municipal Separate School District*, 507 F.2d 611 (5th Cir. 1975), presents a harder procreative choice case implicating this problem. In *Andrews*, the court considered a school district's rule preventing unwed mothers from being teacher's aides. The school board argued that unwed parents, when hired as teachers, constituted immoral role models and exacerbated the problem of teen pregnancy. The court nonetheless struck down the rule as a matter of equal protection and substantive due process. The Ninth Amendment would probably yield the same result, for the state relied on a moral harm to support its regulation. The case is difficult, however, to the extent that a government job might be viewed as a benefit to which the Ninth Amendment would not attach. While employment law increasingly treats jobs as entitlements, government would certainly remain free under the Ninth Amendment to promote its moral views through the selective distribution of benefits.

279. At this point, the reader will be wondering about abortion. Because this particular issue, though clearly one of procreative choice, has achieved such important status in the constellation of *all* prospective liberties, it is deferred, with one other important practice, for separate consideration at the

procreative freedoms have been among those our substantive due process jurisprudence has frequently recognized as "fundamental," the Ninth Amendment as interpreted here, the reader will recall, is unconcerned with fundamentality.²⁸⁰ It seeks to prevent government from regulating harmless activities of *any* import; as to regulation of potentially harmful activities that are nonetheless "fundamental" to those who would engage in them, it is silent.

C. Pornography and Obscenity

The two arenas of Ninth Amendment applicability explored above would seem to corroborate a conclusion the reader may have drawn by the end of Part III. The conclusion is that the Amendment as interpreted here would apply to freedoms historically analyzed under the concept of substantive due process.²⁸¹ But if the Ninth Amendment overlaps most capaciously with substantive due process, it does, however, reinforce other sources of constitutional liberties, particularly First Amendment protection for freedom of expression.²⁸² Thus, the next realm to be examined is pornography and obscenity, for juxtaposed with its implications for procreative choice and sexual expression, the Ninth Amendment's applicability to pornography illustrates how its command reaches across various areas of rights jurisprudence. This juxtaposition may also expose some artificiality in the categorization of rights jurisprudence. Though pornography involves the same essential harmless activities as procreative choice and sexual expression, the courts have analyzed it not as a matter of substantive due process, but under the entirely different rubric of the First Amendment.

The Court issued its major pornography decisions in the companion cases of *Miller v. California*²⁸³ and *Paris Adult Theatre I v. Slaton*.²⁸⁴ In the former, a California man's conviction for mailing pornographic brochures prompted the Court to formulate a standard by which states may regulate sexually explicit material consistent with the First Amendment. While *Miller* remains doctrinally important, *Paris* is of more present relevance, for in that case, the Court expounded on the possible state interests in regulating

conclusion of this Part.

280. See *supra* text accompanying notes 180-83, 249.

281. That the Ninth Amendment shares much of its jurisdiction with substantive due process makes sense, as both provisions are aimed at protecting unenumerated rights. The provisions differ only in how they protect those rights; the absence of tangible harm triggers the Ninth Amendment, while substantive due process relies on a showing of fundamentality.

282. Of course, this merely squares with the idea developed in Part III that the Ninth Amendment is similar to the First Amendment—and to substantive due process, though whether the Framers contemplated such a provision is questionable—in the sense that all three protect group-two, general liberty rights, those where government is without power to act. This idea suggests that First Amendment freedoms, more than any others (save substantive due process ones), will occasionally be candidates for Ninth Amendment protection as well. While this Part has room to explore only a few such candidates from the freedom of expression realm, the Amendment may also apply to the occasional freedom of the press, religion, or association issue.

283. *Miller*, 413 U.S. 15 (1973).

284. *Paris*, 413 U.S. 49 (1973).

pornography. In *Paris*, the Court considered Georgia's injunction against the showing of pornographic films in a theatre which, by way of large signs, clearly prohibited minors and informed patrons of the nature of the theatre's films.

In upholding the injunction, the Court found that permissible state interests could exceed those of protecting minors and non-consenting adults from exposure to pornography. These "include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself."²⁸⁵ The Court explained that although no conclusive correlation had ever been established between pornography and crime, a state legislature could permissibly *speculate* upon such a link, just as Congress speculates, for example, on the harms prevented by securities and antitrust laws and on the aesthetic benefits of environmental regulations. The Court concluded:

The issue in this context goes beyond whether someone, or even the majority, considers the conduct depicted as "wrong" or "sinful." The States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize, in Mr. Chief Justice Warren's words, the States' "right . . . to maintain a decent society."²⁸⁶

Despite relatively stronger reasoning in *Paris* vis-à-vis the unsupported gesture to state autonomy in *Bowers* and the maligned methodology of *Griswold*, prohibitions on orderly viewing of pornography violate the Ninth Amendment theory advanced here as much as the similar endeavors in the sexual expression and procreative choice areas explored above. All three areas involve private, consensual conduct entailing no tangible harm. *Paris* correctly recognizes protecting minors and nonconsenting adults from exposure to pornography as permissible state interests. Both of these interests seek to forestall tangible harm, the former by preventing the potential stimulation of undeveloped minds into erratic or harmful behavior, the latter by preventing emotional assault on those who would not view explicit sexual material.

But the *Paris* Court's remaining hypotheses as to governmental interests in suppressing pornography do not survive Ninth Amendment scrutiny. First, the Court suggests that "the interest of the public in the quality of life and the total community environment"²⁸⁷ might sustain a pornography prohibition. But this constitutes nothing more than impermissible deference to the majority's moral views. Pornography, either in theatres or otherwise in the stream of commerce, does not tangibly derogate either "quality of life" or the "total community environment"; it merely offends, without physically harming, those who find explicit sex distasteful. Pornography opponents will

285. *Id.* at 58.

286. *Id.* at 69 (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting)).

287. *Id.* at 58.

quickly object, pointing to the "secondary effects" such as increased incidence of crime surrounding enterprises dealing in pornography.²⁸⁸

The problem with this view is that it implicitly posits pornographic enterprises as the causal agent of secondary effects and therefore improperly penalizes them for being so. First, as a practical matter, "secondary effects" may already exist in the localities in which pornographic enterprises must locate. Most jurisdictions have restrictive zoning laws for adult bookstores and movie theatres,²⁸⁹ the unsurprising effect of which is to force such enterprises into pre-existing economically disadvantaged areas. Other economic enterprises—those the state deems "legitimate"—simply avoid these areas, taking with them any hope of dispelling the secondary effects in the disadvantaged areas through normal market forces.²⁹⁰ Secondly, even if one assumes that pornographic enterprises in some manner attract undesirable elements, this assumption does not itself indict pornography as the causal agent of those elements, but only raises two further questions. First, with what undesirable effects are we so concerned? The most common "secondary effect" of pornographic enterprises is increased prostitution, though as argued above prostitution itself may be protected Ninth Amendment conduct which, if legalized and regulated, need not significantly blemish a community.

Second, may a state prohibit a practice simply because its adherents reflect a slightly higher "undesirability" level than the general population? To be sure, surveys may show that those who patronize pornographic establishments have a higher rate of criminal activity than the community as a whole. The same, however, could be found of the bikers' bar on Main Street or the burger joint at the poorly lit downtown intersection. Insofar as "secondary effects" could plague numerous other establishments besides pornographic ones, governmental reliance on "secondary effects" as a basis for prohibitory legislation *only* of pornographic enterprises seems a clear case of impermissible underinclusion rooted in moral bias. The Ninth Amendment forbids this, and it will continue to reject the "secondary effects" argument until someone can show a true causal link between pornography and tangibly harmful secondary effects, rather than a disguised form of the already overt, but constitutionally insufficient, link between pornography and moral harm.

Neither does the Ninth Amendment accept the *Paris* Court's remaining hypotheses as to state interests which could uphold anti-pornography legislation. The Court indicates that an interest in "the tone of commerce in the great city centers, and, possibly, the public safety itself"²⁹¹ could

288. This view has recently gained legal currency. In *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991), one Justice relied on hypothetical "secondary effects" to uphold a ban on nude dancing, even though the state had not advanced this rationale as an interest behind its statute. *Id.* at 2468 (Souter, J., concurring).

289. The Court has approved this situation. *See, e.g., Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young v. American Mini Theatres*, 427 U.S. 50 (1976).

290. I discuss the flaws in the notion of "secondary effects" more thoroughly in Chase J. Sanders, *Bearing the First Amendment's Crosses: An Analysis of State v. Sheldon*, 53 MD. L. REV. (forthcoming 1994).

291. *Paris*, 413 U.S. 49, 58 (1973).

legitimately warrant a state's suppression of pornography. The first of these is nearly farcical. Given the manner in which the Court has permitted the federal commerce power to expand, if the "tone of commerce" ever became a serious interest available to state governments in supporting legislation, states would find themselves free to regulate in every conceivable area of life. *Paris* was decided only a year after *Eisenstadt v. Baird*,²⁹² and the Court's membership did not change between these cases; yet no one would seriously suggest that the prohibitions on distributing contraceptives struck down in *Eisenstadt* would have been saved if only Massachusetts had thought to champion the integrity of its "tone of commerce." Also, as suggested above, states already protect the "tone of commerce" of their cities by zoning pornographic enterprises into isolated, economically depressed locales.

The second of these interests, protection of the public safety, if true, would of course satisfy the Ninth Amendment insofar as it seeks to prevent tangible harm. The Court's error lies in its willingness to permit a state to *speculate* as to this harm. As the Court acknowledges, no study has ever demonstrated a causal link between the viewing of pornography and increased incidence of crime or other tangible harm.²⁹³ The failure of affirmative efforts to do so distinguishes regulation of pornography from the other examples cited by the Court, for no one doubts that securities, antitrust, and environmental regulations *do* prevent harm. In these areas, while the harms are not readily calculable, they clearly exist and are more than *de minimis*. Pornography opponents cannot make the same claim.

As far as the Ninth Amendment is concerned, the lone conceivable hope for anti-pornography advocates may lie in the language of *American Booksellers Ass'n v. Hudnut*.²⁹⁴ In *Hudnut*, the Seventh Circuit struck down Indianapolis' anti-pornography ordinance in a decision that is interesting for two reasons. First, in contrast to the more common, *Paris*-type arguments, the state in *Hudnut* advanced the claim that *pornography itself* was the harm to be prevented, as opposed to its secondary effects. The state claimed that pornography was the injury insofar as it perpetuated a medium which both led and encouraged men to view and treat women as naturally submissive, given that pornography portrays women as unreluctant participants in enacting male fantasies.²⁹⁵

292. *Eisenstadt*, 405 U.S. 438 (1972); see *supra* text following note 271.

293. This has remained true in the 20 years since *Paris*, despite intense efforts in the mid-1980's by the Justice Department under Attorney General Edwin Meese to find just such a link. ATT'Y GENERAL'S COMM'N ON PORNOGRAPHY FINAL REPORT, U.S. DEP'T OF JUSTICE (1986).

294. *Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

295. *Id.* at 328.

Whatever the worth of this claim,²⁹⁶ the state could not substantiate it. Indeed, it is doubtful that a state could ever substantiate such a claim. Not only does much pornography fail to depict women in submissive roles, social scientists will be hard pressed to definitively ground men's attitudes toward women in the messages men receive from pornography. The important point, however, is that *could such a claim ever be proven*, it would overcome Ninth Amendment protection. The perpetuation of male degradation of women seems plainly a tangible harm which the Ninth Amendment allows a state to prevent.

Ironically, even should pornography opponents ever be able to make this proof, the First Amendment may still erect a barrier to pornography prohibitions. This is the second interesting feature of *Hudnut*. The *Hudnut* court rejected the city's claim that pornography was itself a legitimate harm for the reason that, if true, "this simply demonstrates the power of pornography as speech."²⁹⁷ The court stated that pornography's alleged suggestions that men treat women in a certain fashion do not differ from Hitler's exhortations of Germans to treat Jews in a certain fashion. Both are speech; society must rely on countervailing speech to rebut.

This, however, is a troubling ramification of what seems a rather artificial categorization of pornography as part of First Amendment jurisprudence in the first place. Pornography is not expressive in the same manner as Hitler and other overt political speakers. Nor does pornography appear to harbor an unarticulated message, as do art and literature. While definitive proof of tangibly harmful effects of pornography may be unlikely, should such proof ever develop, it would be unfortunate for society to countenance tangible harm to half its citizens in the name of protecting a dubious form of "expression."²⁹⁸ Pornography, it seems, is simply better analyzed under a Ninth Amendment quality-of-harms calculus than under the First Amendment's *O'Brien* test for permissible restrictions on expression. Pornography is thus, as suggested at the outset of this section, an important exemplar of Ninth Amendment applicability. It demonstrates how the Ninth Amendment theory developed here may offer a more appropriate constitutional niche for certain freedoms (an idea explored further in the next section), and how it may improve present rights jurisprudence by drawing lines more sensible in their restrictiveness, as well as by drawing those more tolerant in their expansiveness.

296. The literature on both sides is copious and growing. See, e.g., ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN 14-18, 53-56 (1989); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 40-45, 171-74 (1987); cf. Lisa Duggan et al., *False Promises: Feminist Antipornography Legislation in the U.S.*, in WOMEN AGAINST CENSORSHIP 130 (Varda Burstyn ed., 1985); Carole S. Vance, *Pleasure and Danger: Toward a Politics of Sexuality*, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 1 (Carole S. Vance ed., 1984).

297. *Hudnut*, 771 F.2d at 329.

298. For a recent articulation of the view that pornography prohibitions may not affront free expression norms, see *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2463 (1991) (Scalia, J., concurring).

In any event, as things stand, the Ninth Amendment must protect the private²⁹⁹ viewing of pornography by consenting adults as a harmless activity.³⁰⁰ Indeed, pornography's essential harmlessness, above and beyond even the responsibilities entailed by sexual and procreative freedom, may have prodded the *Paris* Court to strain for its conclusion that more than moral harm to the majority is at stake in a state's regulation of pornography. "The States have the power to make a *morally neutral judgment*," the Court declared, "that . . . obscene material . . . has a tendency to injure the community."³⁰¹ For the various reasons discussed above, such a judgment is, in fact, hardly morally neutral.

For reasons which should by now be clear, the Ninth Amendment would not protect commerce in child pornography.³⁰² And cases involving indecent speech over the telephone or radio would fall at the fringes of Ninth Amendment protection.³⁰³ The former violates the Amendment if minors could feasibly be excluded from the activity. The latter presents an indecency case that is better analyzed under the First Amendment, given the palpable expressive aim of radio speech as compared to "phone sex" and other pornographic media that are only marginally, if at all, expressive. At bottom, however, the realm of jurisprudence dealing with pornography and sexual obscenity shares with those concerning sexual expression and procreative choice the essential element of sexual self-indulgence. Where such self-indulgence is private and consensual, pornography, like sexual expression and procreative choice, constitutes a harmless activity and hence a clear candidate for constitutional protection under the Ninth Amendment theory developed in Part III.

D. Other (Possible) First Amendment Misfits

The preceding exploration of the Ninth Amendment's applicability to pornography illustrated how that Amendment may prove a preferable guarantor of some rights currently analyzed under the First Amendment. It is not surprising that the First and Ninth Amendments may share jurisdiction³⁰⁴ to the extent that Part III succeeds in developing the idea that both protect group-two, general liberty rights where government is without power to act.³⁰⁵ This section briefly continues this theme by examining two other

299. "Private" is used here to connote only the requirement that unwilling viewers not be subjected to pornography. Thus the viewing of pornography in public theatres or of nude dancers in public bars is "private," so long as such establishments warn inadvertent patrons of the nature of the activities inside.

300. Most recently, this view would nullify the decision in *Barnes v. Glen Theatre*, 111 S. Ct. 2456 (upholding Indiana statute prohibiting nude dancing).

301. *Paris*, 413 U.S. 49, 69 (1973) (emphasis added); see *supra* text accompanying note 286.

302. See, e.g., *Osborne v. Ohio*, 495 U.S. 103 (1990); *New York v. Ferber*, 458 U.S. 747 (1982).

303. See, e.g., *Sable Communications v. FCC*, 492 U.S. 115 (1989); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

304. See *supra* note 281.

305. See *supra* text accompanying notes 149-55.

(possible) First Amendment misfits that may be better analyzed under the Ninth Amendment: flag-burning and "fighting words."

In *Texas v. Johnson*,³⁰⁶ the Supreme Court struck down a Texas statute prohibiting flag "desecration," defined as mistreatment "in a way that the actor knows will seriously offend"³⁰⁷ onlookers. A year later in *United States v. Eichman*,³⁰⁸ the Court invalidated the Flag Protection Act of 1989. The Act was Congress' "content-neutral" response to *Johnson*, which criminalized flag mutilation without express regard to the response of observers. In each case, the majority determined that government impermissibly sought to suppress the communicative value of flag-burning, regardless of whether it articulated the prohibition in content-neutral terms. The Court found that government could not protect the flag without concomitantly withholding some of the expressive value in its destruction, for the symbol is so powerful as to be incapable of full divorce from its connotation. The flag-burning prohibitions, therefore, removed a subject from the marketplace of ideas on account of its content, and hence violated the First Amendment.

The dissenters vociferously countered with two basic arguments. First, they contended that the flag-burning prohibitions attempted to suppress not a targeted idea, but merely a particular means of expressing that idea. Government, one dissenter argued, has a "legitimate interest in preserving the quality of an important national asset."³⁰⁹ Second, the dissenters wondered whether flag-burning constituted speech at all. Initially, they likened it to fighting words, "the equivalent of an inarticulate grunt or roar that . . . [is not meant] to express any particular idea, but to antagonize others."³¹⁰ Alternatively, the dissent contended that protesters had burned flags to convey so many different messages over the years that the Act had lost any fixed meaning, indicating its prohibition was necessarily content-neutral.³¹¹

Might flag-burning be better analyzed under the Ninth Amendment? The Ninth Amendment theory advanced here would confirm the *Johnson* and *Eichman* results, for with flag-burning prohibitions, government seeks only to soothe a majority's moral outrage. The Ninth Amendment would not except flag-burning because the majority is large and the outrage is deep.³¹² The advantage Ninth Amendment analysis would confer on the flag-burning cases is that, quite simply, the decisions would not be as close. The Ninth

306. *Johnson*, 491 U.S. 397 (1989).

307. *Id.* at 400 n.1.

308. *Eichman*, 496 U.S. 310 (1990).

309. *Johnson*, 491 U.S. at 438 (Stevens, J., dissenting).

310. *Id.* at 432 (Rehnquist, C.J., dissenting) (alteration in original).

311. *Eichman*, 496 U.S. at 320-21 (Stevens, J., dissenting) ("The idea expressed by a particular act of flag burning is necessarily dependent on the temporal and political context in which it occurs. . . . The ideas expressed by flag burners are thus various and often ambiguous.")

312. Some may contend that the outrage is so deep as to cross the line between moral affront and emotional assault, which, as noted throughout, qualifies as tangible harm. While this line may blur in some places, it seems that only *individually directed* actions can produce emotional assault. Emotional assault occurs when an aggressor capitalizes on a particular person's circumstances to plunder his mental stability. By contrast, public communication, without tangibly harmful action, can only "assault" by denouncing norms of morality. It therefore cannot truly assault at all, but can only give moral offense.

Amendment would not recognize the powerful second argument of the dissent,³¹³ which seriously jeopardizes the integrity of the majority's First Amendment holdings. That is, even if flag-burning is conduct as opposed to speech, the conduct would remain harmless and therefore protected by the Ninth Amendment; whereas the same assumption would destroy First Amendment protection.

Because the communicative aspect of flag-burning seems genuine, flag-burning may properly belong to the First Amendment and not the Ninth. Indeed, flag-burning may present the prototypical First Amendment case. If this is so, however, the flag-burning cases illustrate how a properly functioning Ninth Amendment might at least serve to reinforce close decisions which generate controversy. It does, after all, elevate constitutional confidence when two Bill of Rights provisions adduce the same result.

The advantage the Ninth Amendment might bring to the flag-burning cases is clearer in the case of "fighting words." In *Chaplinsky v. New Hampshire*,³¹⁴ the Court upheld a state's conviction of a Jehovah's Witness who had verbally accosted a city marshal under a state statute prohibiting the direction of "offensive, derisive, or annoying word[s] . . . or . . . name[s]"³¹⁵ at persons in public places. The Court determined that the First Amendment did not protect "fighting words"³¹⁶—

[T]hose which by their very utterance inflict injury or tend to incite an immediate breach of the peace. . . . [S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.³¹⁶

The Ninth Amendment would probably demand a contrary result. The "social interest in order and morality," cannot alone support prohibitory legislation. The Ninth Amendment as interpreted here would condone New Hampshire's statute only if "fighting words" create tangible harm. But this does not seem the case: fighting words themselves do not create tangible harm; rather, they provoke the listener into creating it. Fighting words statutes thus prosecute the giver of moral offense for the tangible harm the receiver of that offense may create, which does not comport with the Ninth Amendment. Now, the counter-argument, as the *Chaplinsky* Court observes, is that fighting words *themselves* create tangible harm by provoking an essentially involuntary reaction from the listener. Fighting words constitute an act of pure conduct, akin to throwing the first punch, which incites an immediate breach of the peace.

313. The Ninth Amendment *would* recognize the dissent's first argument, that government has an interest in protecting the "quality of an important national asset," assuming that this argument validly translates into an interest in preventing tangible harm. This assumption seems unwarranted. Since flags themselves are private property, no public "national asset" is at stake, and in any event the "quality" of the flag appears incapable of sustaining tangible damage.

314. *Chaplinsky*, 315 U.S. 568 (1942).

315. *Id.* at 569.

316. *Id.* at 572.

This argument perfectly illustrates the potentially harmful effects of misplaced jurisprudence. Under the First Amendment speech-conduct rubric, fighting words do appear to be conduct and therefore unprotected. But our careful focus on the proper First Amendment analysis blinds us to another norm by which we usually abide, namely, that individuals are responsible for controlling their own actions. The "involuntariness" we perceive in the response to fighting words does not comport with our usual assumption that free will intervenes in the decision to engage in criminal acts. Thus, in concentrating on getting the "right" result under the First Amendment, we may get the wrong result under common notions of criminal justice.

Indeed, most scholars would now admit a "gut" intuition that *Chaplinsky* was incorrectly decided, though the First Amendment offers no basis for this instinct, since fighting words do smack more of conduct than of speech. Conversely, the Ninth Amendment *does* provide constitutional grounding for this instinct, for it offers a mode of analysis by which we can evaluate conduct, without being sidetracked by the fact that the conduct at issue is not speech. The suggestion of this section, then, and an implicit suggestion of the previous one, is that the constitutional analysis does not end when the First Amendment decides that an activity is conduct as opposed to speech. One must then evaluate the conduct, against the Ninth Amendment to ensure that, in our haste to protect speech, we do not permit government to prohibit *harmless* conduct deserving of constitutional protection. Pornography, flag-burning, and "fighting words" jurisprudence would all profit from this realization.³¹⁷

E. Miscellaneous Ninth Amendment Candidates

Sexual expression, procreative choice, pornography, and other conduct bordering on speech represent but small subsets of the vast realm of harmless activities. While other cases from this realm have found their way into constitutional jurisprudence, they have done so mostly in a piecemeal fashion. This is because the areas of activity from which these cases arise do not usually imply the consistent moral threat to society that, for instance, pornography presents. But the Ninth Amendment does not apply just to consistently morally threatening activities; it offers sanctuary to any conduct which the government cannot identify as portending tangible harm. The Framers, after all, considered natural law to protect a man's "right to wear his hat if he pleased,"³¹⁸ as well as boot pikes of any length.³¹⁹ This section,

317. For an interesting hybrid of the flag-burning and "fighting words" cases, see *R.A.V. v. City of St. Paul, Minn.*, 112 S. Ct. 2538 (1992). In *R.A.V.*, the Supreme Court employed a complicated analysis to void a municipal statute prohibiting cross burning—a result it could have reached more easily under the Ninth Amendment theory presented here. See also Sanders, *supra* note 290 (discussing *R.A.V.* and the inherent contradictions in the "fighting words" doctrine and arguing that the Supreme Court should abandon both its "fighting words" and "secondary effects" doctrines).

318. See *supra* note 30 and text accompanying note 182.

319. See *supra* text accompanying notes 195, 230-31.

then, offers a final sampling of other possible Ninth Amendment candidates; they share no common trait except as harmless practices that have stumbled into legal dispute.

One such practice is the selection of one's living arrangements. In *Village of Belle Terre v. Boraas*,³²⁰ the Court upheld a village ordinance restricting land use to one-family households, which served to exclude fraternity and other multiple-dwelling houses. The Court rejected six college students' claim of a right to choose household companions, finding that "boarding houses, fraternity houses, and the like present urban problems."³²¹ The Court thus decided, in essence, that the "secondary effects" of multiple-dwelling houses permit a state to regulate fraternity houses in the same manner as adult movie theatres. This argument is weaker than in the pornography context, for fraternity houses do not even *arguably* attract significant crime. A state, it seems, may not constitutionally prohibit a certain practice merely because it might result in a slightly above-average rate of disturbing-the-peace citations. The Ninth Amendment would command a different result in *Belle Terre*, for the choice of one's living mates is harmless, private conduct with no tangibly deleterious externalities.³²²

Another harmless practice is the selection of one's name. The Supreme Court has twice allowed decisions to stand upholding state statutes requiring a woman to use her husband's surname to obtain a driver's license.³²³ It is difficult to speculate on what harms these states sought to prevent in prohibiting women from using their own surnames. The states probably intended to enhance administrative convenience by requiring couples to register under one appellation, but entry of an additional name into a database clearly poses de minimis harm, if such is "harm" at all. The Court has pointed out another problem with such a rationale: "[A]ny statutory scheme which draws a sharp line between the sexes, *solely* for the purpose of achieving administrative convenience, necessarily commands 'dissimilar treatment for men and women who are . . . similarly situated,' and therefore involves the 'very kind of arbitrary legislative choice forbidden by the [Constitution].'"³²⁴ In this case, the Ninth Amendment would protect the palpably harmless practice of selecting one's own name.³²⁵

320. *Boraas*, 416 U.S. 1 (1974).

321. *Id.* at 9.

322. Just three years later, illustrating its bias against certain practices (like pornography and fraternities) and the impact of its concern with secondary effects, the Court reached a different conclusion when an ordinance similar to that in *Belle Terre* prevented a grandmother from living with her two grandsons. Had the grandsons been brothers instead of cousins, the ordinance would have allowed the arrangement. The Court struck down the ordinance, as applied, as a matter of substantive due process. *See Moore v. East Cleveland*, 431 U.S. 494 (1977).

323. *See Whitlow v. Hodges*, 539 F.2d 582 (6th Cir.), *cert. denied* 429 U.S. 1029 (1976); *Forbush v. Wallace*, 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd per curiam*, 405 U.S. 970 (1972).

324. *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (quoting *Reed v. Reed*, 404 U.S. 71, 76-77 (1971)) (emphasis in original).

325. This case may offer a rare example of where proper application of the Ninth Amendment might supplant equal protection analysis, insofar as equal protection would probably constitute these plaintiffs' best current legal theory.

Another arena of harmless conduct, broader than the two just discussed, involves the construction of one's persona. In *Rappaport v. Katz*,³²⁶ a federal court refused to consider two women's complaint that they were prevented from dressing as they pleased, and from declining to exchange rings, at their weddings. The women wanted to wear pants, believing with their husbands-to-be that pants on brides connoted matrimonial equality, but the New York City Clerk's dress guidelines required that "the bride must wear a dress or skirt and blouse—no slacks."³²⁷ One of the couples also preferred not to exchange rings, which the guidelines also prohibited. Of course, even the most imaginative government attorney could not seriously advance an interest behind such guidelines—except for preserving the morally uplifting vision of brides in flowing gowns, adorned with shiny rings. The court dismissed the complaint because "[f]ederal judges have too much to do to become involved in this type of dispute"³²⁸ With as little effort, the court could have invalidated the guidelines under the Ninth Amendment.

*Kelley v. Johnson*³²⁹ presents a harder case involving the right to construct one's persona. In *Kelley*, the Supreme Court upheld regulations limiting the length of male police officers' hair, sideburns, and mustaches, and prohibiting beards and goatees. The Court reasoned that a state could regulate the appearance of its law enforcement personnel, even if private citizens enjoyed a right to remain free of such regulation. Finding no rationale at all to support the regulation, two Justices dissented, noting, "In taking control over a citizen's personal appearance, the government forces him to sacrifice substantial elements of his integrity and identity as well."³³⁰ The dissent correctly recognized that the regulation intruded upon the officers' ability to construct their individual personas. Whether the Ninth Amendment would permit such an intrusion would turn on a government showing of tangible harm, perhaps reduced morale among citizens or even the officers themselves as a result of unkempt appearances. Such a harm seems suspicious, but plausible. The Ninth Amendment probably would not, however, permit government to regulate such personal behavior as physical appearance with respect to its employees who worked alone, or in positions with minimal external contact.

Finally, another harmless practice is that which some have called the most fundamental right of all: the right to marry. In *Zablocki v. Redhail*,³³¹ the

The courts, incidentally, have a somewhat better record in allowing parents the freedom to name their children as they wish. See, e.g., *Jech v. Burch*, 466 F. Supp. 714 (D. Haw. 1979) (overturning a statute requiring a legitimate child to be given its father's surname, allowing parents to compose a new last name for their child); *Rio v. Rio*, 504 N.Y.S.2d 959 (1986) (rejecting father's claim that a legitimate child be given only his surname, permitting mother to give the child a hyphenated last name consisting of both parents' surnames).

326. *Rappaport*, 380 F. Supp. 808 (S.D.N.Y. 1974).

327. *Id.* at 808.

328. *Id.* at 812.

329. *Kelley*, 425 U.S. 238 (1976).

330. *Id.* at 251 (Marshall, J., dissenting).

331. *Zablocki*, 434 U.S. 374 (1978).

Supreme Court struck down a Wisconsin statute prohibiting persons under court-ordered child support obligations from marrying without court permission, which hinged on an applicant's showing that he was meeting his obligations.³³² The Court believed that the scheme impermissibly burdened the fundamental right to marry, observing that states had clearly less restrictive, and more effective, means of enforcing child support obligations.³³³

The Ninth Amendment would produce the same result. Just as current jurisprudence frowns on the undue burdening of rights, the Ninth Amendment would not permit government to prohibit harmless practices as a means of achieving unrelated objectives. A contrary result would permit a state to withhold as collateral *any* harmless practice, until the recipient of the involuntary "loan" fulfilled certain obligations.³³⁴ Under such "loans," a state would prohibit harmless activities not for the tangible harms they create—they are, by definition, harmless—but for the tangible harms *other activities* create. Hence, government would essentially be prohibiting harmless activities *for no reason at all*, for to prevent the tangible harms of other activities, it should restrict those activities directly. The Ninth Amendment theory advanced here would forbid government to use harmless activities as a lever, because mere juxtaposition against a tangible harm does not turn a harmless activity into a harmful one.

F. A Final Note on Two Important Special Cases

While the scope of this Part has obviously precluded review of many potential Ninth Amendment applications, two may stand out as egregiously omitted. Abortion and euthanasia are among the most controversial practices in the Constitution's modern domain, and they spark much moral outrage which may seem to implicate the Ninth Amendment. This Part should therefore not close without sketching the receptivity of the Ninth Amendment theory expounded in Part III to these vexing issues.

The Ninth Amendment theory developed here would not protect the right to an abortion. The reason is straightforward. Through abortion regulations, a state seeks to prevent tangible harm to fetuses, which is sufficient to satisfy the Ninth Amendment. Despite its contentiousness, the abortion debate rests on two largely undisputed premises. First, nearly everyone acknowledges that fetal life is some "lesser" form of life than fully born, mature human life. Pro-choice advocates acknowledge this explicitly, by insisting that maternal liberty

332. *Id.* The Court invalidated the statute under the Equal Protection Clause, citing discrimination in the singling out of such a narrow class of citizens. Justice Stewart concurred on the ground that the law makes such classifications constantly, that marriage is fundamental, and therefore protected, as a matter of substantive due process. *Id.* at 391-93 (Stewart, J., concurring).

333. *Id.* Such alternatives included garnishing wages, civil contempt proceedings, and criminal penalties.

334. Under the state's theory in *Zablocki*, a state could apparently outlaw sexual intercourse for those with unpaid parking tickets.

must prevail over fetal life. Pro-life advocates acknowledge it implicitly, by declining to champion the death penalty or life imprisonment for those who abort fetuses, as they would for murderers of born humans. Second, nearly everyone also agrees that fetal life, even the moment after conception, is something valuable. Legal disputes over frozen embryos and medical warnings to women early in pregnancy, among other things, reflect this judgment.

What confounds the abortion issue is lack of consensus as to what to derive from the first point of non-dispute, that is, on the degree to which the "lesser" quality of fetal life morally permits women to affect it. The second point of non-dispute, however, satisfies the Ninth Amendment. Since everyone agrees fetal life to be something valuable, it follows that its destruction represents tangible harm. Unlike many of the practices reviewed in this Part, moral outrage alone does not accompany the practice of abortion; tangible harm to the fetus follows as well. If abortion is to be constitutionally protected, it must therefore emanate from constitutional text or reasoning of a different character from the harm-based analysis of the Ninth Amendment.³³⁵

The Ninth Amendment theory developed here would also not protect the right to die. Euthanasia is simply abortion's end-of-life counterpart. Just as one must pass through a lesser form of life stage upon entering life, many must pass through a similar stage upon departing life. The euthanasia issue therefore rests on the same two points of non-dispute as abortion: life in the "persistent vegetative state" is of a somewhat lesser quality than more active life, but it is nonetheless valuable. As in the abortion case, the debate emerges over lack of consensus on the moral lesson of the first of these undisputed points. Again, however, the second point of non-dispute disposes of the Ninth Amendment question. Because life in the "persistent vegetative state" represents something valuable, something slightly better than death, its termination would manifest tangible harm, which a state may prohibit without offending the Ninth Amendment.

The right to die, like the right to an abortion, may be constitutionally protected by some other provision;³³⁶ if not, there are strong reasons for legislatures to secure both rights. The Ninth Amendment's silence on these two important personal interests, however, should reassure the skeptics described at the outset of this Part that the Amendment does not, in fact, resolve all the "hard cases," at least not in a way that many progressives or civil libertarians may prefer.

335. See *Roe v. Wade*, 410 U.S. 113 (1973). *But see* *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992); *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989).

336. See *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990), in which five Justices recognized a substantive due process right to die, but held that a state may require clear and convincing evidence of the person's wish to do so.

G. Conclusion

The applications surveyed in this Part hopefully shed light on the mechanics of the interpretive theory of the Ninth Amendment constructed in Part III. As noted above, this survey cannot be exhaustive, and the reader should remember that this Part has focused on a few disparate areas of jurisprudence in order to magnify how rights jurisprudence in general would profit from the Ninth Amendment interpretation urged here. By and large, however, most candidates for Ninth Amendment protection would appear as isolated instances of misplaced governmental intervention into harmless practices, as the examples in Part IV.E. may reflect. Legal discourse might therefore struggle with the notion of coherent "Ninth Amendment rights," but this is appropriate for an Amendment intended not to protect a discernible arena of conduct but to provide a final, natural law check on government through broad preservation of "other[rights] retained by the people."³³⁷

V. CONCLUSION

In his dissent in *Palmer v. Thompson*, Justice Douglas apprehensively offered his intuition that "the right to pure air and pure water may well be rights 'retained by the people' under the Ninth Amendment."³³⁸ If the interpretive theory of the Ninth Amendment developed in this Article is valid, Justice Douglas' instinct was correct. Since an individual's reasonable use of air and water does not entail harm to others, the Ninth Amendment would preclude government from regulating that use.³³⁹ This result will seem curious, though, to the reader still adjusting to the idea of a vibrant Ninth Amendment. A constitutional right to air? One does not usually think in these terms, because it seems silly to imagine governmental intrusion upon such a "right." Nonetheless, if pressed, many would probably admit to an instinct, like Justice Douglas', that the Constitution must somehow protect the right to breathe.

The interpretive theory of the Ninth Amendment developed in this Article merely brings to light the legal mechanism which validates that instinct. That mechanism is the Ninth Amendment, whose simple mission is to prevent government from regulating harmless practices. Part IV focused on discrete, controversial areas of rights jurisprudence in an effort to survey the Ninth Amendment's reach. But some of those areas, like pornography and "fighting words," may lie toward the fringes of Ninth Amendment protection. The core of Ninth Amendment rights consists in the quotidian liberties one takes for granted, precisely because they are perfectly harmless. The right to breathe. The right to eat. The right to walk down the street. The right to go to the

337. U.S. CONST. amend. IX.

338. *Palmer v. Thompson*, 403 U.S. 217, 233-34 (1971).

339. The obvious exception would be in severe drought situations, in which excessive water consumption *could* harm others. In such situations, of course, government would be justified in regulating water intake.

movies. The right to marry, to have children, to travel. These are quintessential Ninth Amendment rights. They are the rights which the Framers could not possibly enumerate, but which they sought to protect from implicit surrender to government through the Ninth Amendment. These rights are the harmless practices which comprise our residual liberty, having transferred to government the power to keep us from harming one another in an increasingly crowded and dangerous society.

Now, if the Ninth Amendment protects the right to marry and to breathe and to walk down the street, if it protects this vast realm of ordinary harmless practices, then some basic re-thinking of unenumerated rights jurisprudence seems in order. If all these liberties are off-limits to government regulation, then we might appropriately begin to think in terms of a *presumption* of freedom. As Randy Barnett writes,

We [must] either accept the presumption that in pursuing happiness persons may do whatever is not justly prohibited, or we are left with a presumption that the government may do whatever is not expressly prohibited. The presence of the Ninth Amendment in the Constitution strongly supports the first of these two presumptions.³⁴⁰

The practical impact of a presumption of liberty created by the Ninth Amendment may not frequently be evident. This is because courts would need to consciously consider this presumption in evaluating only unenumerated rights, insofar as they would still have their usual modes of analysis under the specific constitutional provisions. Currently, however, courts analyze unenumerated rights claims, which never enjoy the benefit of "strict scrutiny," against a presumption of governmental power. Under a presumption of liberty, when a litigant asserts an unenumerated right, the Ninth Amendment would require the reviewing court to *begin* its analysis by *presuming* that the right is protected, for its unenumerated quality would indicate that it may be a group-two, general liberty right which entails no harm. Only if government could show the regulation in question to address tangible harm should the court move beyond the threshold Ninth Amendment inquiry.

If its practical applications would be few, the intellectual import of a presumption of liberty would be quite profound, for this presumption would directly redress the current stagnation surrounding unenumerated rights posited at the outset of this work. The Ninth Amendment theory developed herein offers the means of analyzing, or at least of beginning to analyze, unenumerated rights claims which the Supreme Court currently lacks. Under this theory, in evaluating rights which entail no tangible harm, no longer would the Court need to decide whether an asserted right is "fundamental." The Ninth Amendment is indifferent to fundamentality, because if an activity is harmless its importance cannot affect its residence in the arena of personal, residual liberty. Only if the asserted unenumerated right were potentially harmful would the Court justifiably look to other factors, such as fundamentality, in applying its usual jurisprudential methods.

340. Barnett, *supra* note 125, at 37.

The problem the Ninth Amendment theory developed in this Article will face, of course, is that constitutional discourse, because of its perceived importance, is naturally wary of dramatic new interpretations of obscure provisions. But the theory here is only “new” in the sense that it has heretofore been neglected. The skeptical reader need only consider the consequences of perpetuating that neglect. Since rights and powers represent the universe of substantive constitutional concern, if we do not presume individual freedom to dwell in the interstices of the Constitution’s specific language, then as Barnett notes we must presume governmental power to live there instead. This is Robert Bork’s presumption. Bork writes:

Once, after I had given a talk on the Constitution at a law school, a student approached and asked whether I thought the Constitution prevented a state from abolishing marriage. I said no, the Constitution assumed that the American people were not about to engage in despotic insanities and did not bother to protect against every imaginable instance of them. He replied that he could not accept a constitutional theory that did not prevent the criminalization of marriage. It would have been proper to respond that in any society that had reached such a degenerate state of totalitarianism, one which the Cambodian Khmer Rouge would find admirable, it would hardly matter what constitutional theory one held; the Constitution would have long since been swept aside and the Justices consigned to reeducation camps, if not worse. The actual Constitution does not forbid every ghastly hypothetical law, and once you begin to invent doctrine that does, you will create an unconfined judicial power.³⁴¹

Bork’s view expresses the cataclysm which could theoretically result from a presumption of governmental power. Bork accepts this presumption because of his conclusion that, under a presumption of individual liberty, judges will run amok inventing doctrine to forbid “ghastly hypothetical law[s].” But by positing in modern English the very workable Ninth Amendment rule the Framers embraced, this Article has attempted to show that Bork’s conclusion is unwarranted. A law is only “ghastly” (and is probably hypothetical) if it regulates liberties entailing no tangible harm. Such laws constitute purposeless or nefarious intrusion into citizens’ residual liberty, and are thereby despotic; they reduce overall public welfare. By contrast, when government exercises its legitimate power, it raises public welfare by preventing citizens from harming one another.

If this seems like elementary political philosophy, it is. But it was this philosophy which informed the development of the Constitution, and particularly, as shown herein, the Ninth Amendment. Hence it requires no elaborate or judicially empowering doctrine to prevent ghastly laws. It merely requires adherence to this philosophy, which the Framers constitutionalized with the Ninth Amendment, which itself operates via the theory developed in this Article. The Ninth Amendment is the Constitution’s simple mechanism for forbidding ghastly laws. Through the Ninth Amendment, the Framers designed the Constitution specifically to preclude “despotic insanities” in

341. BORK, *supra* note 169, at 234.

order to protect minorities from majorities. They designed the Constitution precisely to avoid a "degenerate state of totalitarianism," and to prevent its being "swept aside" except through the legitimate processes of Article V.

This Article began with the contrasting cases of *Bowers v. Hardwick* and *Cruzan v. Director, Missouri Department of Health*. As discussed in Part IV, the Ninth Amendment would forbid the anti-sodomy statute in *Bowers*—truly a ghastly law—while allowing the euthanasia regulation in *Cruzan*.³⁴² The simple, workable reason is that the latter addresses tangible harm, while the former does not. That the Supreme Court got these results exactly backwards shows its need for a fresh approach to unenumerated rights jurisprudence, one based on a presumption of liberty. One writer envisions this presumption as islands of government powers "surrounded by a sea of individual rights," as opposed to the current conception of "rights as islands surrounded by a sea of government powers."³⁴³ As Bork's pessimistic opinion of the Constitution's fragility shows, the current conception threatens to drown our liberties, should the sea of governmental powers ever rise in a flood of irrational democracy. But under a presumption of freedom, at worst, isolated drops of liberty would occasionally become stuck on the shoals of overextended governmental powers. In those instances, the Ninth Amendment would awaken to keep those powers in check. Out of the sea of individual liberty crawls Ninth life.

VI. EPILOGUE

In one respect, this Article has been difficult to write. Because of its frequent interface with other rules of rights jurisprudence, the interpretive theory of the Ninth Amendment developed in this Article has been hard to present as a self-contained entity. The thesis has been that the Ninth Amendment protects all harmless practices from governmental intervention, but our current jurisprudence, as Part IV showed, analyzes harmless practices under varying constitutional provisions and methodologies. How, then, might the Ninth Amendment theory developed in this Article comport with, or even reorganize, present rights jurisprudence? Herewith are some preliminary ideas:

- As the analysis in Part IV.C. and Part IV.D. began to suggest, present jurisprudence sometimes pushes freedoms into odd constitutional categories. It reviews pornography and obscenity, for example, under the First Amendment, though explicit sex and profanity seem curious forms of "expression." The Ninth Amendment theory developed here may allow the courts to drain some of the fluid from the First Amendment expression category, and perhaps others, which the courts seem to have filled to excess precisely because they

342. The statute in *Cruzan* might nevertheless be a bad idea, and perhaps even forbidden by some other constitutional provision. The Ninth Amendment indicates only that it is within the initial arena of governmental power.

343. STEPHEN MACEDO, *THE NEW RIGHT V. THE CONSTITUTION* 91 (rev. ed. 1987).

have lacked meaningful Ninth Amendment review and have been uncomfortable with substantive due process.

- Might the Ninth Amendment allow us to rid constitutional discourse of the “right to privacy”? Privacy itself is usually not as much the concern as the sanctity of the activity we wish to practice in private. No one suggests, for instance, that the law should excuse privately conducted murders. The Ninth Amendment offers a workable rule for evaluating the activity itself, which addresses the heart of an issue more expediently than a focus on privacy.

- Does the Ninth Amendment theory developed here portend equal protection ramifications? If pornography is a protected Ninth Amendment right, such would seem to cast a shadow on present jurisprudence allowing a municipality to discriminatorily zone those who would practice that right into restricted, invariably poorer areas of town.

- The Ninth Amendment theory developed here seems to reaffirm several well-established constitutional rules. First, since personal practices will usually entail less harm than social or economic activities, the Ninth Amendment squares with Justice Stone’s famous footnote four in *United States v. Carolene Products Co.*,³⁴⁴ which suggests heightened judicial scrutiny of legislation affecting civil rights. Specifically, if an asserted civil right were unenumerated, the Ninth Amendment would require the reviewing court to *presume* its harmlessness until the government could demonstrate potential harm.

Second, the Ninth Amendment seems to mesh with the “rational basis” standard for review of economic and social legislation. If a court finds a regulation completely irrational, it is probably because the regulation does not prevent any harm, which would violate the Ninth Amendment.

Third, the Ninth Amendment also appears to comport with the “less restrictive alternative” rule of jurisprudence. If government can prevent a targeted harm through a lesser intrusion upon liberty, the Ninth Amendment commands it to do so, for otherwise the regulation infringes liberty to the extent of the excess prohibition entailing no concomitant reduction in harm.

- Finally, the most vexing but important area of interrelationship between the Ninth Amendment and current jurisprudence is the Amendment’s compatibility with the concept of “substantive due process.” Substantive due process had its genesis in Chief Justice Taney’s determined effort to find a constitutional right to own slaves in the notorious *Dred Scott v. Sandford*³⁴⁵ decision. Perpetuated by the *Lochner* era and in the Court’s circuitous incorporation machinery, substantive due process’ current appeal remains rooted in the common sense notion that legislatures should not be able to enact seriously intrusive laws which pass constitutional muster if only they are fairly enforced, as pure procedural due process would permit.

Originally, this Article intended to argue that, in light of the theory developed herein, substantive due process was both a historical oddity and a

344. *Carolene Products*, 304 U.S. 144, 152 n.4 (1938).

345. *Dred Scott*, 60 U.S. (19 How.) 393 (1857), nullified by U.S. CONST. amend. XIII.

modern menace without which rights jurisprudence could survive. The reasoning would have been as follows: historically, substantive due process was unnecessary because the Framers of the Fourteenth Amendment contemplated that incorporation would occur through the Privileges or Immunities Clause. (Hence the exposition in Part III.A.1, longer than necessary for the thesis of this Article, of the incorporation debate and its proper resolution.) Thus, the only true historical legacy of substantive due process would be *Dred Scott* and the *Lochner* era—unwanted babies we should gladly discard with the bathwater.

As for present jurisprudence, the argument would have been, we could henceforth resist substantive due process because, under the interpretive theory advanced here, the Ninth Amendment would now occupy much of its current province. The Ninth Amendment would preclude government from enacting intrusive regulation lacking legitimate preventive ends, and it would do so in clearly workable fashion through the harm principle. By contrast, as a plethora of literature thoroughly documents, there appears to be no principled means of checking the notion of substantive due process, at least to the extent its jurisdiction ventures beyond that of the Ninth Amendment. Once one crosses the harm line and acknowledges rights which forestall government's legitimate power to prevent harm, nothing in the word "liberty" preceding the words "due process of law" appears to instruct the judiciary how to find such rights.³⁴⁶

The tools were thus in place to dispense with the concept of substantive due process entirely, and the temptation to do so was strong. Proper application of the Ninth Amendment would finally return the due process clauses to their intended procedural interpretation, dispelling the inherent contradiction of "substantive due process."³⁴⁷ Eliminating substantive due process would restore to the clauses their majestic reminder that we are a government of laws, and not of people, and would eviscerate the foundations of *Dred Scott* and *Lochner* without affecting the proper mechanism for incorporation of the Bill of Rights.

346. In his famous footnote six in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), Justice Scalia posits the most recent, and probably the best, attempt to limit the concept of substantive due process. Justice Scalia argues that one should "refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." *Id.* at 127 n.6. Justice Scalia's view merely refines the common intuition that the most plausible means of limiting substantive due process is to focus on the historical treatment of the right in question. Justice Scalia would have a court reviewing an asserted substantive due process right examine the historical basis for that right at its narrowest and most specific level; for example, he would urge a court to analyze the sodomy statute in *Bowers* in terms of history's treatment of sodomy, and not in terms of history's treatment of homosexuality, privacy, or any other more general tradition.

As a means of workably and justly limiting substantive due process, Scalia's view seems to suffer from two fatal defects. First, as Bork notes, "the limitation will prove no restriction at all when there is only a general, unfocused tradition to be found." BORK, *supra* note 169, at 240. Second, Justice Scalia's view still hinges on using history as a means of analyzing current rights claims. But as Justice Holmes observed, "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV." O.W. HOLMES, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

347. As Ely notes, "[T]here is simply no avoiding the fact that the word that follows 'due' is 'process.'" ELY, *supra* note 6, at 18.

Then, however, second thoughts set in as to the contemporary necessity for substantive due process. The area of non-overlap between the Ninth Amendment and substantive due process loomed large; it would include all conceivable and existing, but unenumerated, rights to engage in practices entailing tangible harm. Thus, disposing of substantive due process would dispose of constitutional rights to die, or to an abortion, or to be free from lifestyle restrictions during pregnancy. Despite the Ninth Amendment theory advanced herein, some of the rights we consider among our most truly fundamental would remain dependent upon substantive due process for their existence.

The most important question which this Article raises, then, is whether the Ninth Amendment theory developed here would *wholly supplant* substantive due process, as opposed merely to supplementing it. If an activity entails tangible harm, does that always constitute an adequate basis for governmental regulation? Should we rely only on democratic wisdom to protect "rights" we consider important but which entail tangible harm, like abortion and euthanasia?

As it goes to print, this Article is leaning back toward its original "yes" answers to these questions. In addition to the theoretical appeal of eliminating substantive due process described above, there are two other reasons for doing so. First, if the Ninth Amendment and substantive due process were to co-exist, then substantive due process would apply only to those activities which entail tangible harm but which are "fundamental" or have some other indicia of worthiness as constitutional rights. This approach would be dangerous in its duality. In evaluating unenumerated rights, courts would face the temptation to trivialize the importance of Ninth Amendment harm determinations, and to err on the side of finding harm. This is because they would be conscious of the "fundamentality" net of substantive due process which would save any important rights incorrectly identified as potentially harmful. Meanwhile, some apparently unimportant, but perfectly harmless, activities—in other words, some Ninth Amendment rights—would slip through the jurisprudential cracks. Under the continuing existence of substantive due process, the very fact that courts would still make occasional "fundamentality" determinations would perpetuate the allure of that criterion to a dangerously enticing extent.

A second reason to disdain substantive due process is that its central mission seems as dubious as its method. One might envision the universe of rights as organized into the following matrix:

THE UNIVERSE OF RIGHTS

	<i>Enumerated</i>	<i>Unenumerated</i>
<i>Group-one rights (cap powers):</i>	specific provisions besides First Amendment	(Substantive Due Process?)
<i>Group-two rights (no government power):</i>	First Amendment rights	Ninth Amendment rights

The reader will recall the analysis in Part III, which posited that the Framers, after enumerating a few of the most basic general liberties in the First Amendment, crafted the Ninth Amendment to protect the remaining unenumerated multitude of group-two rights, where government is without power to act. Meanwhile, they adopted the Second through Eighth Amendments to enumerate various group-one rights, which cap government's legitimate powers. The Framers spent seven amendments on group-one rights because those rights require enumeration more than their group-two counterparts; since their design is to cap *legitimate* powers, as opposed to specifying areas of no power, they must announce rather precisely where the rights brake the powers.

Yet substantive due process essentially attempts to define a category of *unenumerated* group-one rights. That is, it attempts to brake legitimate governmental powers without the benefit of textual guidance as to where to do so. This seems a dubious enterprise. In *Roe v. Wade*,³⁴⁸ for example, the Court found a substantive due process, unenumerated, group-one right to an abortion, which was to cap government's legitimate power to protect life at the line of fetal viability. Short of that line, government could not exercise its legitimate power to protect life, even though that power would have been legitimately aimed at preventing harm. The inherent arbitrariness of this decision has exposed *Roe* to two decades of constant criticism.

The exclusionary rule presents an even more compelling example. If any species of unenumerated group-one rights appears capable of discernment, it would seem to be those which directly support *enumerated* group-one rights. The exclusionary rule, incorporated against the states by way of substantive due process in *Mapp v. Ohio*,³⁴⁹ would seem to constitute a direct and obvious, unenumerated group-one remedy for violations of the Fourth Amendment's enumerated group-one right to be free from unreasonable searches and seizures. Yet even the exclusionary rule has been the focus of repeated attack, and the Court has whittled it down.³⁵⁰ In sum, the concept of unenumerated group-one rights, which comprises the sole remaining

348. *Roe*, 410 U.S. 113 (1973).

349. *Mapp*, 367 U.S. 643 (1961).

350. *See, e.g.*, United States v. Leon, 468 U.S. 897 (1984) (allowing good faith exceptions to the exclusionary rule).

province of substantive due process under the theory advanced here, may be an oxymoron which the Framers did not envision.

Like the rest of these afterthoughts, the Ninth Amendment's compatibility with substantive due process requires further reflection; at a glance, however, the incentive to eliminate the latter from constitutional jurisprudence seems powerful.