

detectors might know the suspect has a gun, surely to a greater degree of certainty than did the officer in *Adams*. But the information is worth less than it would be in a state with a traditional concealed weapons law because guns are not contraband, many more people may have them (and are licensed to have them) under these new laws, and there is less reason than ever to assume that the carrier of the weapon is dangerous. Thus we have a lesson about the unintended consequences of law making. Whatever the drafters of these new concealed weapons laws may have wanted—greater personal safety, easier access to weapons, deterrence of crime, or anything else—it is a good bet they did not want to make the job of law enforcement more complicated than it already is. And yet, when gun detectors finally reach the street, that is just what these laws will do.

CONCLUSION

A new surveillance technology is on the horizon. Electronic concealed weapons detection systems offer the promise of locating weapons, especially firearms, when concealed under clothing. Police may be able to operate the technology from distances up to thirty feet, allowing them an increased degree of safety.

How does this new technology fit into the Fourth Amendment? Setting these devices alongside existing doctrine, the closest analogies are to cases concerning nonintrusive methods (canine sniffs and chemical field tests) or airport weapons detection systems using magnetometers. Having compared these cases to the new gun detectors, we can see that there is no avoiding the larger Fourth Amendment questions. What kind of society is it that we want? How large a sphere of privacy are we, as people and citizens, entitled to expect? How shall we face and regulate not only law enforcement as it now exists, but law enforcement as it *will become*? Technology will inevitably continue to evolve, becoming capable of gathering ever more information with less intrusiveness. Failure to face these issues now means that we may not have the opportunity to face them in the future. These questions will be considered decided, for better or worse, and not open for reexamination.

The gun detection systems also afford us the opportunity to watch an approaching collision between two methods or policies, both aimed at controlling crime. The new concealed weapons detection laws will make gun detectors less useful, less able to do all that they are capable of doing, at least on a legal level. Thus, we end up thinking less about search and seizure than about lawmaking in general. It is difficult to know what all of the consequences of any change in the law might be as legislation is framed, passed, and signed into law. The new concealed weapons laws offer a cautionary tale: not every change in the statutory environment will bring about what we want. Indeed, we are likely to get some results that never occurred to us.

got n. 150 art.

A CRITICAL GUIDE TO THE NINTH AMENDMENT

Thomas B. McAfee*

INTRODUCTION—ANNIVERSARY OF CONFUSION

In the thirty years since the Supreme Court's decision in *Griswold v. Connecticut*,¹ thousands of law students each year have confronted a confusing debate over the meaning of the Ninth Amendment.² Writing for the majority in *Griswold*, Justice Douglas included the Ninth Amendment among the sources for deriving the "penumbral" right of privacy.³ More central to this article, in a separate concurrence Justice Goldberg contended that the Amendment provided a basis for the discovery of fundamental human rights beyond those included in the text of the Constitution and the Bill of Rights.⁴ In response, the dissenting Justices, Stewart and Black, argued that Goldberg's reliance on the Ninth Amendment was misplaced, and that, in expanding the reach of federal power, it actually turned the meaning and significance of the provision upside down.⁵ According to their reading, the Ninth Amendment was designed to preserve the federal structure of the Constitution, including the scheme of limited federal powers, to the end of securing the people's rights.⁶

For non-specialists, this debate can only be confusing, because none of the opinions provides enough evidence or reasoning for even the most educated reader to determine who has the better argument.⁷ Consequently, law

* Professor of Law, Southern Illinois University School of Law. I would like to thank my friend and colleague, Patrick J. Kelley, for commenting on prior drafts of this article, and Professor William Van Alstyne, both for commenting on this work and for inspiring it with his classic article, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1.

1. 381 U.S. 479 (1965).

2. The Ninth Amendment reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

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

4. *Id.* at 486-87 (Goldberg, J., concurring).

5. *Id.* at 519-20 (Black, J., dissenting) (commenting that it would go "far beyond" language of Ninth Amendment to grant Court veto powers over either state or federal lawmaking); *id.* at 529-31 (Stewart, J., dissenting) (applying Ninth Amendment in manner inconsistent with its express limitations on federal powers "is to turn somersaults with history").

6. *Id.* at 519-20 (Black, J., dissenting) (averring that Ninth Amendment was intended to limit federal powers to those expressly granted, or those necessary by implication); *id.* at 529-31 (Stewart, J., dissenting) (noting that Ninth Amendment makes clear that all rights and powers not explicitly delegated to federal government were retained by individuals and by states).

7. As if the fundamental debate about the original meaning and purpose of the Ninth Amendment was not confusing enough, the confusion is further enhanced by the difficulties presented by *Griswold*'s debate over incorporation of the Bill of Rights, *see id.* at 500 (Harlan, J., concurring) (stating belief that Fourteenth Amendment does not incorporate all protections derived from Bill of Rights), and Justice Goldberg's ultimate, rather equivocal reliance on the

Spk. 1 L.
Mail Code 6804
S-1
Carnegie, 211 62901

students typically fall back to their own presuppositions about the practice of judicial review when it comes time to assess this debate. Students who are sympathetic to an activist judiciary discovering rights beyond the ones specified in the text of the Constitution prefer Justice Goldberg's reading. Students opposed to such a judicial role are sympathetic to the thesis set forth by Justices Stewart and Black. Each group seems convinced that their own view "must" have been the view adopted by the Framers of the Constitution. While there exists fairly extensive literature expanding on this debate from *Griswold*,⁸ much of the literature is lengthy and involved, and virtually none of it is written with the uninitiated in mind.

Ninth Amendment, *see id.* at 491-92 (Goldberg, J., concurring) (maintaining that Ninth Amendment protects right of privacy, although such right is not enumerated in Bill of Rights). After initially claiming that the purpose of the Ninth Amendment was to confirm that "there are additional fundamental rights . . . which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments," *id.* at 488, Justice Goldberg clarified that it was not his view that "the Ninth Amendment constitutes an independent source of rights protected from infringement by either the States or the Federal Government." *Id.* at 492 (Goldberg, J., concurring). Rather, he claimed, the 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." *Id.* at 493 (Goldberg, J., concurring).

Although Justice Goldberg failed to explain why the Ninth Amendment might not be considered an "independent source" of constitutional rights, some commentators have suggested that this was because the Ninth Amendment merely states a "rule of construction" that presupposes that there are rights implicit in the social contract and which do not depend on recognition in the positive law text of the written Constitution. *See, e.g.,* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 776 n.14 (2d ed. 1988) (contending that it is erroneous to presume Ninth Amendment rights because Ninth Amendment acts as "rule about how to read the Constitution . . . nor a source of rights as such"). But the practical significance of such an analysis seems unclear, inasmuch as, to Justice Goldberg at least, such rights still appear to be candidates for judicial enforcement in the name of the Constitution, and hence might appropriately be referred to as "constitutional rights." Apparently, the point is only that they are viewed as preexisting rights that are "recognized" by the Constitution as being part of our fundamental law, rather than having their source in the Ninth Amendment or the Constitution, considered as a text. *Cf. Griswold*, 381 U.S. at 492 (Goldberg, J., concurring) (averring that Constitution's Framers intended Ninth Amendment to protect other fundamental, though unenumerated, rights).

Alternatively, Justice Goldberg may have preferred not to treat the Ninth Amendment as the "source" of nontextual fundamental rights. He may simply have believed that it seemed more fitting to use the Ninth Amendment to justify a particular conception of "due process" fundamental liberty (one not limited to rights enumerated in some constitutional text), rather than to warrant a sudden departure from decades of precedent grounding fundamental rights decisions in the due process clauses of the Fifth and Fourteenth Amendments. This article will evaluate the basic thrust of the arguments in the debate over the meaning of the Ninth Amendment. However, this article will not seek to resolve the further issue of whether, in Justice Goldberg's view, the Amendment should be viewed as the source of fundamental constitutional rights, or merely as a textual allusion to nontextual rights precisely because the practical significance of Justice Goldberg's "independent source" disclaimer is uncertain and the rationale of the point unclear. *See id.* (Goldberg, J., concurring) (disavowing that Ninth Amendment constitutes "independent source" of protectable rights).

8. *See, e.g.,* Derrick A. Pope, *A Constitutional Window to Interpretive Reason: Or in Other Words . . . The Ninth Amendment*, 37 *How. L.J.* 441, 443-44 (1994) (noting discord in *Griswold*

Therefore, now, thirty years after *Griswold*, seems a good time to attempt to explain the debate so that non-specialists, including law students, might understand it, especially since the Ninth Amendment plays a central role in the ongoing debate over fundamental rights decision-making by the modern Supreme Court.⁹ For example, it is widely believed that Judge Bork's rejection of the reading of the Ninth Amendment espoused by Justice Goldberg in *Griswold* played an important role in the defeat of Bork's nomination to the Supreme Court.¹⁰ Equally as telling about the present importance of the Ninth Amendment, during the last decade a growing list of prominent constitutional lawyers and historians have offered the Ninth Amendment as "Exhibit A" to establish the case that the founding generation believed that our constitutional order included implied constitutional limitations on government, in favor of individual rights, and in addition to those specified in the Constitution's text.¹¹ Most of these scholars would

between Justice Douglas's "Bill of Rights expedition" and Justice Goldberg's endorsement of rights not explicitly mentioned in Constitution).

9. *See, e.g.,* *Hodgson v. Minnesota*, 497 U.S. 417, 447-48 (1990) (finding "integrity" of family unit protected by several constitutional provisions, including Ninth Amendment); *Bowers v. Hardwick*, 478 U.S. 186, 201 (1986) (Blackmun, J., dissenting) (recognizing that Ninth Amendment post-*Griswold* gives substance to Court's "understanding of privacy"); *Richmond Newspapers v. Virginia*, 448 U.S. 555, 579 & n.15 (1980) (noting that Court has acknowledged certain "unarticulated rights" implied in enumerated provisions of Constitution; finding in Ninth Amendment potential for "fundamental rights," not specifically articulated, but indispensable to enjoyment of other explicit rights of Constitution). *See also* Phoebe A. Haddon, *An Essay on the Ninth Amendment: Interpretation for the New World Order*, 2 *TEMP. POL. & CIV. RTS. L. REV.* 93, 93-94 (1992) (indicating that Supreme Court, although capable of finding unenumerated rights, has rarely applied Ninth Amendment when interpreting Constitution); *id.* at 117 (noting Supreme Court's reliance on history and tradition to narrowly confine rights that are "fundamental to existence" for many individuals outside of "dominant social culture").

10. *See, e.g.,* Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 *CHI.-KENT L. REV.* 131, 134-35 (1988) (contending that Judge Bork was deprived Supreme Court appointment, in part because he refused to acknowledge unenumerated constitutional right to privacy).

11. *See* Thomas B. McAfee, *Prolegomena to a Meaningful Debate of the "Unwritten Constitution" Thesis*, 61 *U. CIN. L. REV.* 107, 107 n.4 (1992), for citations to works published during the past decade on the implied limitations to government power and the expansion of individual rights. Since that list was compiled, the scholarly outpouring of works contending that the Ninth Amendment lends strong support to the existence of fundamental rights beyond the text of the Constitution has continued unabated. *See, e.g.,* CALVIN R. MASSEY, *SILENT RIGHTS: THE NINTH AMENDMENT AND THE CONSTITUTION'S UNENUMERATED RIGHTS* 114 (1995) (proposing that Ninth Amendment is better vehicle for recognizing enumerated rights than Due Process Clause); MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS* 63-69 (1994) (claiming that Ninth Amendment presupposes existence of unenumerated affirmative rights); LAURENCE H. TRIBE & MICHAEL C. DORF, *ON READING THE CONSTITUTION* 54-55, 110-11 (1991) (noting that Ninth Amendment is rule of construction, and reiterating that Constitution's failure to enumerate right does not foreclose its existence); Charles L. Black, Jr., "One Nation Indivisible": *Un-named Human Rights in the States*, 65 *ST. JOHN'S L. REV.* 17, 25 (1991) (Ninth Amendment commits United States to "protection of human rights generally"); David N. Mayer, *The Natural Rights Basis of the Ninth Amendment: A Reply to Professor McAfee*, 16 *S. ILL. U. L.J.* 313, 316-17 (1992) (noting that Madison's proposal for Ninth Amendment was intended to protect unenumerated rights, as well as to curb expansion of federal government's implied powers);

concur with Professor Laurence Tribe's bold claim that the Ninth Amendment is "a uniquely central text in any attempt to take seriously the process of *construing* the Constitution."¹²

Oddly enough, at the time *Griswold* was decided many people saw Justice Goldberg's opinion as presenting a somewhat novel claim about the significance and relevance of the Ninth Amendment. In a celebrated work published some years later, John Hart Ely referred to the construction defended by Justices Stewart and Black as the "received account" of the Amendment, and observed that constitutional arguments based on the Ninth Amendment had been viewed as a joke in scholarly circles.¹³ It appears that Black and Stewart had proffered the traditional understanding of the Amendment.¹⁴ But times change, and it seems accurate to say that the majority of commentators in recent years have endorsed the reading offered by Justice Goldberg.¹⁵ Clearly, however, the debate over the original meaning of the Ninth Amendment continues,¹⁶ and the Ninth Amendment's original

meaning has too many important implications for our constitutional order to warrant undue reliance on scholarly head-counting as a substitute for careful consideration of the textual and historical issues.

I. THE COMPETING TRADITIONS: A SUMMARY

Commentators who have rejected the conventional understanding of the Ninth Amendment—the one defended by Justices Black and Stewart—have emphasized three main objections which will be summarized here and more fully treated hereafter. First, the conventional understanding is said to be inconsistent with the plain meaning of the text, which refers to unenumerated "rights" rather than to the structure of the federal government. One doubts that a provision which speaks about rights could be about preserving the Constitution's scheme of limited federal powers.¹⁷ Second, the conventional understanding does not provide an adequate account for the history which led to the adoption of the Ninth Amendment. The Ninth Amendment was adopted, we are told, to reassure those who viewed the proposed federal Bill of Rights as a threat to rights that otherwise might be omitted from the adopted amendments.¹⁸ Third, the conventional understanding renders the Ninth Amendment superfluous because it is made redundant by the Tenth Amendment. The Tenth Amendment guarantees that the powers not granted to the national government are reserved to the states, and some argue that the traditional understanding of the Ninth Amendment reads the Amendment as duplicating that same function.¹⁹

The traditional view of the Ninth Amendment, however, can only be understood when placed against the backdrop of the arguments used to defend the decision of the Constitution's framers to omit a bill of rights. This defense focused on the crucial role the structure of the federal government was intended to play in securing the people's rights. In September of 1787, the Convention which drafted the Constitution rejected a proposal to establish a committee to draft a bill of rights for the new Constitution, as well as a subsequent call for a provision guaranteeing freedom of the press.²⁰ An im-

Constitutional Democracy, 64 CHI.-KENT L. REV. 89, 94-95 (1988) (unenumerated rights protected by Ninth Amendment may stem from many sources, but not from any judge's personal views); Arthur E. Wilmarth, Jr., *The Original Purpose of the Bill of Rights: James Madison and the Founders' Search for a Workable Balance Between Federal and State Power*, 26 AM. CRIM. L. REV. 1261, 1297-98, 1301-03 (1989) (Ninth Amendment reserved to people unenumerated rights which were to be defined in each state; Ninth and Tenth Amendments were intended to work in tandem to curb expansion of federal powers).

17. See *infra* notes 20-25 and accompanying text for a discussion of the rights-focused interpretation of the Amendment.

18. See *infra* notes 40-52 and accompanying text for a discussion of the Federalists' objections to the Bill of Rights as dangerous and a possible threat to individual rights.

19. 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." U.S. CONST. amend. X. See *infra* notes 101-11 and accompanying text for an explanation of the redundancy argument and responses to it.

20. McAfee, *supra* note 16, at 1227.

Randall R. Murphy, *The Framers' Evolutionary Perception of Rights: Using International Human Rights Norms as a Source for Discovery of Ninth Amendment Rights*, 21 STETSON L. REV. 423, 426 (1992) (Ninth Amendment should be foundation for incorporation of individual rights into body of constitutionally protected liberties); Chase J. Sanders, *Ninth Life: An Interpretive Theory of the Ninth Amendment*, 69 IND. L.J. 759, 762 (1994) (Ninth Amendment designed to protect unenumerated rights); Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171, 179-82 (1992) (Ninth Amendment and analogs in states' constitutions evince intent to safeguard inalienable rights); John C. Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967, 969 (1993) (Framers of Fourteenth Amendment saw Ninth Amendment as means to extend protections of Privileges and Immunities Clause to rights beyond those in first eight Amendments).

12. Laurence H. Tribe, *Contrasting Constitutional Visions: Of Real and Unreal Differences*, 22 HARV. C.R.-C.L. L. REV. 95, 100 (1987). See *infra* Part VI for a discussion of the significance of arguments grounded in the Ninth Amendment to recent scholarly debate over the very nature of our constitutional order.

13. JOHN H. ELY, *DEMOCRACY AND DISTRUST* 34 (1980). Ely suggested that novel rights arguments could be greeted with: "What are you planning to rely on to support that argument, Lester, the Ninth Amendment?" *Id.*

14. For the "traditional understanding" of the Ninth Amendment, see *United Pub. Workers v. Mitchell*, 330 U.S. 75, 95-96 (1947) (rights reserved under Ninth Amendment must yield to valid exercise of power granted to federal government).

15. See *supra* note 11 for several proponents of the "fundamental rights" reading of the Ninth Amendment.

16. Several relatively recent works have criticized the "fundamental rights" interpretation of the Ninth Amendment. See, e.g., James H. Hutson, *The Bill of Rights in the American Revolutionary Experience, in A CULTURE OF RIGHTS: THE BILL OF RIGHTS IN PHILOSOPHY, POLITICS, AND LAW — 1791-1991* 62, 89-95 (Michael J. Lacey & Knud Haakonson eds., 1991) (Ninth Amendment is reservation against unlimited federal power and not repository of natural rights); Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239, 315-17 (1989) (unenumerated rights referred to in Ninth Amendment are defined by limits on Federal Constitutional authority); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 269-73 (1988) (Ninth Amendment not intended to "provide for an ongoing and unpredictable redefinition of rights"); Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1221 (1990) (Ninth Amendment protects rights reserved residually from powers explicitly granted to federal government); Michael W. McConnell, *A Moral Realist Defense of*

portant delegate to the Convention, Roger Sherman, stated what became a standard refrain, arguing that a free press provision was "unnecessary" because "[t]he power of Congress does not extend to the Press."²¹ Stating the same point more generally, George Washington later explained that the proposed Constitution did not need a Bill of Rights because "the people evidently retained every thing which they did not in express terms give up."²²

Once one grasps that the Constitution's scheme of limited powers was viewed as a rights-protecting mechanism by the Constitution's drafters, the force of the three objections reviewed above is called into doubt. First, while it is true that the text of the Ninth Amendment refers to "rights," not "powers," proponents of the traditional view explain that the "other" rights "retained by the people" are defined by reference to the enumerated powers. They consist of all the rights and interests which the people hold as a residuum from the limited powers granted to the national government.²³ The traditional understanding therefore does not rest on a view of the Ninth Amendment as being only about the structure of government rather than being about rights in an important sense. Second, it is also true that those who opposed including a bill of rights objected that it might pose a threat to the rights omitted from its enumeration.²⁴ Proponents of the traditional view, however, contend that those arguments, read in context, express the concern that listing specific limitations on government powers, in favor of rights, might be understood as recognizing unlimited power everywhere else.²⁵ This inference of unlimited power, subject only to specific limitations named in the bill of rights, would effectively destroy the original scheme of securing many rights by granting only limited powers.

Finally, once it is understood that the purpose of the Ninth Amendment is to preclude an inference against the rights-protective scheme of limited powers from the enumeration of specific rights, it becomes clear that the very general language of the Tenth Amendment does not address the feared inference at all. In contrast to the Ninth Amendment, the Tenth Amendment grew out of the concerns of those who opposed the Constitution, that it had failed to make explicit the idea that all powers not granted were reserved to the people and the states. So the two provisions are not truly redundant,

21. 2 JAMES MADISON, DEBATES IN THE FEDERAL CONVENTION OF 1787 565 (Gaillard Hunt & James Scott eds., 1987).

22. Letter from George Washington to Lafayette, in 29 THE WRITINGS OF GEORGE WASHINGTON 475, 478 (John Fitzpatrick ed., 1939). The Federalists often pointed to the precedent of the Articles of Confederation which relied on the limited grant of powers to the nation and omitted a bill of rights. See, e.g., THE FEDERALIST No. 38, at 247 (James Madison) (Jacob Cooke ed., 1961) ("Is a Bill of Rights essential to liberty? The Confederation had no Bill of Rights.").

23. See *infra* notes 31-33 and accompanying text for a discussion of the Ninth Amendment as governing the residual rights not granted in the enumerated and limited federal powers.

24. See *infra* notes 41-48 and accompanying text for a discussion of James Wilson's salient objections to the inclusion of a bill of rights in the Constitution because it would threaten to relinquish to the government any rights absent from the specific enumeration.

25. See *infra* notes 108-12 and accompanying text for an example of traditionalist arguments.

even though they both serve to more fully secure the concept of limited powers embodied in Article I of the Constitution.

Parts II through V, which follow, will trace these arguments in more detail. Part VI will take up the question as to the significance of the Ninth Amendment debate for modern constitutional thought and for the practice of judicial review. Part VII contains a selected bibliography of additional works to consult on topics addressed in this article.

II. THE NINTH AMENDMENT TEXT

Some think that the Ninth Amendment debate in *Griswold* can be resolved by simply reading the text²⁶ of the Amendment, especially in light of the general historical context of eighteenth century legal and political thought.²⁷ To the modern reader, the Ninth Amendment seems quite plainly to recognize rights in addition to those secured by the text of the Constitution and the Bill of Rights. After all, the Ninth Amendment refers to rights "retained by the people" beyond those "enumerat[ed]" in the Constitution's text. We also know that eighteenth century thinkers believed in natural rights and that Americans had also been acquainted with customary rights under an unwritten English constitution.²⁸

Equally important for modern scholars, the reading defended by Justices Black and Stewart appears to make no sense of the text. One scholar went so far as to say that no amount of evidence can "turn a clause about 'rights retained by the people' into one allocating powers between the state and federal governments."²⁹ And so some thinkers have come to identify the Ninth Amendment with the natural rights tradition and the unwritten rights of the English constitution.³⁰ This is the reading of the Ninth Amendment invoked by Justice Goldberg's concurrence in *Griswold v. Connecticut*.

26. Cf., Douglas Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review*, 59 TEX. L. REV. 343, 352 (1981) (reviewing JOHN H. ELY, DEMOCRACY AND DISTRUST (1980)) (arguing that text of amendments, not their legislative history, is law to be followed); Stephen Macedo, *Reasons, Rhetoric, and the Ninth Amendment: A Comment on Sanford Levinson*, 64 CHI.-KENT L. REV. 163, 168 (1988) (source of unenumerated rights is found in detailed reading of other Constitutional provisions; therefore, Ninth Amendment's meaning is plain).

27. See Calvin R. Massey, *The Natural Law Component of the Ninth Amendment*, 61 U. CIN. L. REV. 49, 52-79 (1992) (tracing legal and political concepts that were incorporated into Ninth Amendment).

28. *Id.* at 94 (noting that Framers perceived Ninth Amendment as sole means to prevent "bloat" of delegated powers to government, and thus preserve natural rights for citizens); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1129-30 (1987) (noting that colonists relied heavily on English rhetoric, and amorphous nature of English unwritten law).

29. Laycock, *supra* note 26, at 352.

30. See, e.g., Massey, *supra* note 27, at 53-54 (noting that early Americans associated inherited rights with English constitution, and with natural "rights of Englishmen"); Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 HASTINGS L.J. 305, 321-22 (1987) (noting that Ninth Amendment serves as barrier to federal encroachment on people's "natural rights").

Modern readers, however, can easily miss or discount an alternative understanding of an amendment's text because of their distance from the founding period. The "other" rights referred to in the Ninth Amendment, which some have called unenumerated rights, are not necessarily rights derived from sources beyond the text of the Constitution. Rights can be secured by the written Constitution itself without those rights being "enumerated" in its text. In fact, as we have noted, the Constitution's key defenders during the struggle over ratification contended that Article I of the proposed Constitution constituted a "bill of rights" because it granted by enumeration only limited powers to the national government and thereby "retained" a vast range of rights against federal intrusion.³¹ The other rights "retained by the people" could simply allude to the many rights and interests which the people did not grant when they granted limited, specifically enumerated powers in Article I of the Constitution. Since the people did not grant these powers in the written Constitution expressing their will, they "retained" them. In their *Griswold* dissents, Justices Stewart and Black contended that it was the many rights retained by the system of enumerated powers, secured by (but not "enumerated" in) the text of the Constitution, that constituted the "other" rights "retained by the people," as referred to in the Ninth Amendment.³²

The text of the Ninth Amendment, then, can hardly resolve the *Griswold* debate because it can be read in two different ways. Similarly, there is no canon of construction that will quickly resolve the apparent ambiguity in the text. For example, there is no clear textual antecedent of the Amendment, whether legal or extra-legal, with which the Amendment might be read.³³ The text itself could refer to unwritten limitations on powers granted to government, as Justice Goldberg proposed, or to rights reserved as a resid-

31. See 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 151, 153 (Jonathan Elliot ed., 2d ed. 1866) (Dr. Charles Jarvis, Massachusetts Ratifying Convention, Feb. 4, 1788, commenting that "by positively securing what is not expressly delegated," Article I of the proposed Constitution provides "an explicit reservation of every right and privilege which is nearest and most agreeable to the people") [hereinafter ELIOT'S DEBATES].

32. See *supra* notes 5-6 and accompanying text for a discussion of Justice Stewart's and Justice Black's arguments in *Griswold* about the applications of the Ninth Amendment.

33. See BERNARD SCHWARTZ, THE GREAT RIGHTS OF MANKIND 198-99 (expand. ed. 1992). As Professor Schwartz observed, the Ninth Amendment is the only provision contained in the Bill of Rights that has no clear antecedent in the English constitution, the common law, the revolutionary period, or the Articles of Confederation. *Id.* By contrast, Professor Black's stark claim that the Declaration of Independence is "an obvious precursor" of the Ninth Amendment, and thus operates *in pari materia* with it, simply assumes what must be established. See Black, *supra* note 11, at 26. In fact, the historical evidence strongly supports the view that the Ninth Amendment was drafted to address a particular concern about the structural protection offered to rights by the Constitution as originally drafted and bears no relationship to the Declaration of Independence's allusion to inalienable rights. See Sotirios A. Barber, *The Ninth Amendment: Inkblot or Another Hard Nut to Crack?*, 64 CHI.-KENT L. REV. 67, 68-71 (1988) (discussing Ninth Amendment and inalienable rights); see also Harry V. Jaffa, *Slaying the Dragon of Bad Originalism: Jaffa Answers Cooper*, 1995 PUB. INT. L. REV. 209, 213 (author's response to review of his ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION: A DISPUTED QUESTION (1994))

uum of the specific powers granted the national government, as suggested by Justices Stewart and Black. The only prospect for clarifying the intended meaning of the text is to look with greater care at the historical context of its adoption. Two specific strategies present themselves: (1) we can review the ratification debates leading to the Ninth Amendment to discover the "mischief" the Amendment was intended to remedy; and (2) we can review the Amendment's drafting history to determine whether it sheds light on what was thought to be the "remedy" for the perceived mischief.³⁴ When these resources are fully tapped, and the ratification-era debate, which is well-known and widely accepted as culminating in the Ninth Amendment, is accurately explicated, it becomes possible to resolve the apparent ambiguity of the Ninth Amendment's text.

III. THE "MISCHIEF" TO BE REMEDIED

Virtually all commentators have agreed that the Ninth Amendment is the progeny of the intense debate over the merits of the Convention's decision not to include a bill of rights as the nation considered whether to ratify the Constitution.³⁵ Those who opposed the Constitution, known as Antifederalists, contended that the omission of a bill of rights portended governmental tyranny because the national government had been granted greatly expanded powers under the proposed Constitution.³⁶ On the other hand, the Constitution's proponents, known as Federalists, replied that a bill of rights was not essential under the proposed Federal Constitution because the national government was a government with only limited power to pursue a few national ends.³⁷ They argued that the specific powers enumerated in Article I, even with the Necessary and Proper Clause figured in, could not properly be construed to permit encroachment on the fundamental rights that had been guaranteed in the declarations of rights of the state constitutions.³⁸ In the long run, the Antifederalists carried the day, and the Constitution was ratified in several states based on the understanding that the adoption of a bill of rights would be an important priority under the new government.³⁹

Commentators have agreed that the Ninth Amendment was an attempted response to an additional argument advanced against inclusion of a

(finding it impossible to reconcile inalienable rights reserved for individuals under Declaration of Independence with slave ownership as originally permitted under Constitution).

34. These have been the standard techniques of common law statutory construction at least since *Heydon's Case*, which enjoined interpreters to determine "the mischief and defect" in the prior law, and then to seek the "remedy" which the legislature "appointed to cure the disease . . ." 76 Eng. Rep. 637, 638 (K.B. 1584). In general, judges were to construe the statute so as to "suppress the mischief" and "advance the remedy." *Id.*

35. See McAfee, *supra* note 16, at 1248-50 for confirmation of the near-universal agreement that the Ninth Amendment is linked to this debate.

36. See *id.* at 1228-29 for an overview of the Antifederalists' arguments.

37. *Id.* at 1230-32.

38. See *id.* at 1230-31 (citing James Wilson's statement that "everything which is not given is reserved").

39. *Id.* at 1235-36.

bill of rights. The Constitution's Federalist defenders contended that a bill of rights was not merely unnecessary, but actually dangerous.⁴⁰ The danger they perceived was that the rights enumerated in a bill of rights would be taken as the only rights retained by the people. The question that divides modern commentators concerns exactly what the advocates of the Federalist argument meant by their words. In an oft-quoted statement of this objection to a bill of rights before the Pennsylvania Ratifying Convention, James Wilson contended: "If we attempt an enumeration [of rights], everything 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 government; and the rights of the people would be rendered incomplete."⁴¹ Just as with the final text of the Amendment, the question is whether the rights which Wilson and others feared would be threatened were non-textual, implied limitations on government, as some have suggested,⁴² or the system of rights secured by the enumeration of powers in Article I of the Constitution.

Read with care, Wilson's argument is properly understood as expressing the fear that the Bill of Rights would destroy Article I's enumerated powers system for securing rights. Notice, first, that the feared evil was that an enumeration of rights would throw "all implied power into the scale of government."⁴³ The mere loss of unwritten limitations on government because of a failure to include them in an enumeration would hardly throw "all implied power" to government. On the other hand, in the seldom-quoted sentence which follows this assertion, Wilson contrasted this possible outcome with Article I's enumeration of the powers of the government, which, he said, "reserves all implied power to the people."⁴⁴ Read in context, then, Wilson's concern is that interpreters would construe the inclusion of a Bill of Rights as the exclusive statement of what the people intended to reserve to themselves in establishing the national government. In other words, he feared that it would reverse the ordinary inference of Article I's enumerated powers scheme.⁴⁵

40. See 1 ANNALS OF CONG. 439 (Joseph Gales ed., 1789) (enumerating specific exceptions to granted power would "disparage" rights not indicated in such enumeration). See *infra* notes 41-52 and accompanying text for a discussion of the Federalist arguments.

41. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 388 (Merrill Jensen ed., 1976) [hereinafter RATIFICATION OF THE CONSTITUTION].

42. Massey, *supra* note 30, at 309-10; Sherry, *supra* note 28, at 1162. The arguments for this interpretation are not addressed in the text because they have never been made. Commentators have generally assumed that the meaning of Wilson's words was plain, and that Wilson feared that omitted affirmative limitations on government power would be lost.

43. 2 RATIFICATION OF THE CONSTITUTION, *supra* note 41, at 388.

44. *Id.*

45. *Id.* In the same speech, Wilson initially confessed that he did not know why a Bill of Rights was not proposed, but then insisted that a proposal to adopt a measure "that would have supposed that we were throwing into the general government every power not expressly reserved by the people would have been spurned at . . . with the greatest indignation." *Id.* at 387-88.

Second, notice that Wilson's ultimate concern about the trade-off he perceived in adding a bill of rights was that "the rights of the people would be rendered incomplete"—a declaration suggesting that he viewed the people's rights as complete in the absence of the proposed Bill of Rights. Elsewhere, Wilson clarified that this conclusion about the unamended Constitution, as well as his opposition to a bill of rights, related directly to the unique function played by enumerated powers in the federal scheme:

When the people established the powers of legislation under their separate governments, they invested their representatives with every right and authority which they did not in explicit terms reserve; and therefore upon every question, respecting the jurisdiction of the house of assembly, if the frame of government is silent, the jurisdiction is efficient and complete. But in delegating federal powers, another criterion was necessarily introduced, and the congressional authority is to be collected, not from tacit implication, but from the positive grant expressed in the instrument of union. Hence it is evident, that in the former case [of the states] every thing which is not reserved is given, but in the latter [case of the federal Constitution] the reverse of the proposition prevails, and every thing which is not given, is reserved.⁴⁶

We recognize that Wilson saw the Federal Constitution as creating a complete system of rights precisely because it limited government by the device of enumerated powers. Therefore, we should also recognize that Wilson's fear was that a Bill of Rights would suggest a return to the state constitutions' contrasting approach of stating specific limitations on general, and in theory unlimited, government powers.⁴⁷ Wilson could not have been expressing concern that a bill of rights might exclude unwritten limitations on government because, outside the context of a government of enumerated powers, he specifically stated there would not be any unwritten limitations on government. Later in the same speech, Wilson himself confirmed that his fear of a bill of rights was that it would reverse the framers' design:

In short, . . . I have said that a bill of rights would have been improperly annexed to the federal plan, and for this plain reason, that it would imply that whatever is not expressed was given [as in the

46. 13 RATIFICATION OF THE CONSTITUTION, *supra* note 41, at 337, 339 (Speech at a Public Meeting in Philadelphia, Oct. 6, 1787).

47. It should be observed, moreover, that Wilson accurately described the assumptions about legislative power underlying the state constitutions. Thus, the leading work on the revolutionary-era state constitutions concludes that the drafters of those constitutions "assumed that government had all power except for specific prohibitions contained in a bill of rights." DONALD S. LUTZ, POPULAR CONSENT AND POPULAR CONTROL 60 (1980). For further documentation of this conclusion at the time of ratification of the Constitution, and an explanation of how this view of state power fits together with the concept of limited government and natural and inalienable rights, see Thomas B. McAfee, *The Bill of Rights, Social Contract Theory, and the Rights "Retained" by the People*, 16 S. ILL. U. L.J. 267, 281 & n.40, 286-88 (1992).

state constitutions], which is not the principle of the proposed Constitution.⁴⁸

Implicit in Wilson's argument against adding a bill of rights to the Federal Constitution was a recognition that state constitutions presented an entirely different question. The reason for this is apparent: Because state constitutions lacked the protections provided by the limited powers scheme, those constitutions needed bills of rights to clarify the limits which the people would impose on their state governments. James Iredell, an important defender of the Constitution, and later an Associate Justice on the Supreme Court, made these points even more clearly before the North Carolina Ratifying Convention:

If we had formed a general legislature, with undefined powers, a bill of rights would not only have been proper, but necessary; and it would have then operated as an exception to the legislative authority in such particulars. It has this effect in respect to some of the American constitutions, where the powers of legislation are general. But where they are powers of a particular nature, and expressly defined, as in the case of the [federal] Constitution before us, I think . . . a bill of rights is not only unnecessary, but would be absurd and dangerous.⁴⁹

In their statements quoted above, both Wilson and Iredell made clear that without the enumerated powers scheme, which was unique to the proposed Federal Constitution, there would have been no security for the natural rights believed in by the founding generation unless these rights were explicitly protected by a bill of rights. The natural rights did not of themselves create implied constitutional limitations on government power. Wilson further clarified that he maintained these views by raising the specific example of freedom of the press, which critics had contended would be lost if the Constitution were to be ratified without a bill of rights. Wilson contended that if "a power similar to that which has been granted for the regulation of commerce, had been granted to regulate literary publications, it would have been . . . necessary to stipulate that the liberty of the press should be preserved inviolate."⁵⁰ Moreover, Wilson observed, the "salutary precaution" of a free press guarantee *would* be necessary in the then-proposed District of Columbia, inasmuch as Congress' legislative powers there would be general; but he proposed that such a guarantee should be included in a "compact" within the district itself.⁵¹ Finally, he concluded that a free press guarantee in the federal constitution would be "merely nugatory," considering that no such regulatory power had been granted, and that such a provision

48. 13 RATIFICATION OF THE CONSTITUTION, *supra* note 41, at 391 (Pennsylvania Ratifying Convention, Nov. 28, 1787).

49. 4 ELLIOT'S DEBATES, *supra* note 31, at 149 (North Carolina Ratifying Convention, July 29, 1788).

50. 13 RATIFICATION OF THE CONSTITUTION, *supra* note 41, at 337, 340 (Speech at a Public Meeting in Philadelphia, Oct. 6, 1787).

51. *Id.* at 340.

might even be dangerous in that it could be construed "to imply that some degree of power was given, since we undertook to define its extent."⁵²

The Federalist objection to a bill of rights, then, flowed directly from the Federalists' contention that the enumerated powers scheme to define and limit federal legislative power served as a substitute for a declaration of specific rights limitations on government power. The objection amounted to a claim that an attempt to adopt the device of limiting provisions would undermine the system already in place. The "mischief," then, that the Constitution's proponents feared from inclusion of a bill of rights was the inference that a bill of rights' statement of specific limitations on government powers might be taken as exclusive, to the detriment of the security of rights provided for by the federal scheme of limited powers.

IV. THE REMEDY ADOPTED

To understand how the Ninth Amendment functions as a remedy to the mischief which some feared from the adoption of a bill of rights, it is necessary to review the history of the drafting and consideration of the amendment. An important starting point is to recognize that the drafting history of the amendment began at the Virginia Ratifying Convention in July of 1788. Following a pattern established elsewhere, the Virginia Convention reached a compromise where it both ratified the Constitution and adopted proposed amendments designed to confront various objections that had been raised. With this decision in mind, the Convention appointed a committee to draft the recommended amendments. This committee included such important Federalists as John Marshall, George Wythe, and James Madison, as well as leading Antifederalists Patrick Henry and George Mason.⁵³

Since during the Convention's proceedings both sides of the contest had addressed the issue of the potential danger presented by a bill of rights, the drafting committee, as expected, recommended an amendment designed to resolve these oft-expressed fears.⁵⁴ The Convention later adopted this amendment.⁵⁵ From this recommended amendment, Madison, the principal draftsman of the Bill of Rights, drafted what became the Ninth Amendment, which he included in the proposed amendments that he presented to Congress in June of 1789.⁵⁶ It thus makes sense to begin our treatment of the "legislative history" of the Ninth Amendment with Virginia's recommended amendment. After this review, we can trace the balance of the drafting and ratification history to determine if the amendment's purpose remained constant.

52. *Id.*

53. 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 764-65 (1971).

54. *Id.* at 840-45.

55. *Id.* at 845.

56. McAfee, *supra* note 16, at 1236 & n.84 (collecting authorities who concur that Ninth Amendment was drafted from Virginia's recommended amendment).

A. Virginia's Recommended Amendment

The amendment proposed by Virginia was a response to the ratification arguments articulating the potential dangers of adding a bill of rights, and provided an effective remedy to the fears expressed. The recommended amendment read as follows:

That those clauses which declare that Congress shall not exercise certain powers, be not interpreted, in any manner whatsoever, to extend the powers of Congress; but that they be construed either as making exceptions to the specified powers where this shall be the case, or otherwise, as inserted merely for greater caution.⁵⁷

Notice first that the Virginia proposal is focused directly on avoiding an extension of Congressional powers, in derogation of the contemplated scheme of enumerated, limited powers, inferred from the rights provisions of a bill of rights.⁵⁸ This proposal reflects that the risk presented by a bill of rights was its threat to the rights-protective enumerated powers scheme. The amendment could be stated as prohibiting an inference of extended powers precisely because the rights which might be jeopardized by an enumeration of rights were those secured by the Constitution's enumerated powers. With the inference of extended powers foreclosed, the rights retained by the federal structure would be secure.

The specifics of the text confirm this general impression. The first clause of the proposed amendment, which prohibits an inference of extended powers from specified prohibitions, attempts to foreclose exactly what Wilson had feared—namely, to use an example, that a superfluous free press provision might suggest that some regulatory power, which was to be limited, had been granted by implication.⁵⁹ The second clause of Virginia's proposal also confirms that the feared mischief was an inference that the provisions of the Bill of Rights had been substituted for the prior-existing scheme of enumerated powers. This clause initially provides that some of the limitations in the Bill of Rights might constitute "exceptions to the specified powers,"⁶⁰ a construction that does not pose a threat to the concept of enumerated powers because it merely recognizes that some of the specifically granted powers might be broad enough to be abused. It then further clarifies that other stated prohibitions, those which might well be redundant of the security offered by the enumerated powers scheme, should be viewed "as inserted merely for greater caution" rather than as suggestive of extended, or general, national powers that require limitations.⁶¹

57. 2 SCHWARTZ, *supra* note 53, at 844.

58. Some might think it odd that the drafters of the proposed amendment would refer to rights provisions as those declaring that "Congress shall not exercise certain powers." *Id.* But notice that this is the form in which the First Amendment is written: "Congress shall make no law . . ." U.S. CONST. amend. I.

59. See *supra* notes 41-48 and accompanying text for a discussion of Wilson's objections to adopting a bill of rights.

60. 2 SCHWARTZ, *supra* note 53, at 844.

61. *Id.*



The amendment recommended by Virginia, then, provides as a "remedy" to the perceived mischief, the potential inference against the scheme of limited powers in Article I, a provision that expressly foreclosed the feared inference. The purpose of Virginia's proposed amendment was to clarify that the Constitution would secure rights both through the enumeration of limitations on government power and by the general reservation of rights through the scheme of enumerated powers. The specified rights limitations were supposed to supplement, rather than undercut, the "enumerated powers" strategy adopted by the Philadelphia Convention. The question which remains is whether this purpose remained constant during the process of drafting and adopting the Ninth Amendment.

B. The Ninth Amendment in Congress

There are reasons to think that James Madison, the principal draftsman of the Bill of Rights, would have both understood and attempted to carry forward the project of foreclosing the feared inference against the Constitution's general reservation of rights of the people. Madison himself was a key participant in the debate over the omission of a bill of rights from the proposed Constitution, and before the Virginia Ratifying Convention he offered the argument that the inclusion of a bill of rights would be dangerous as well as unnecessary.⁶² Finally, Madison was a member of the committee appointed by the Virginia Ratifying Convention which drafted the Virginia proposal to meet the oft-expressed fears concerning a bill of rights.⁶³

Moreover, when Madison presented his draft proposals for amendments to the first Congress, he confirmed that the mischief feared from a bill of rights was the threat to the enumerated powers scheme of reserved rights as had been described during the ratification debates. Madison first restated the contention that a bill of rights was unnecessary under the federal Constitution "because the powers are enumerated, and it follows, that all that are not granted by the constitution are retained; that the constitution is a bill of powers, the great residuum being the rights of the people."⁶⁴ Therefore, according to Madison's summary, "a bill of rights cannot be so necessary as if the residuum was thrown into the hands of the Government"⁶⁵—a statement confirming the correlation between the Federalist's "necessity" and "danger" arguments,⁶⁶ as well as echoing James Wilson's suggestion that the attempt to

62. 3 ELLIOT'S DEBATES, *supra* note 31, at 620 (June 24, 1788) (arguing that Constitution provides that all powers not granted are reserved; enumeration of rights would imply that all rights omitted from enumeration were retained by government); accord Letter from Madison to Jefferson (Oct. 17, 1788), in 1 SCHWARTZ, *supra* note 53, at 614-15 (stating that he could support bill of rights "provided that it be so framed as not to imply powers not meant to be included in the enumeration").

63. See *supra* note 53 and accompanying text for a list of important Federalists on the committee that drafted the Virginia proposal.

64. 1 ANNALS OF CONG., *supra* note 40, at col. 455.

65. *Id.*

66. See *supra* notes 40-41 and accompanying text for a discussion of the Federalist argument against adopting a bill of rights.

specify limitations on powers implies an initial grant of general powers, contrary to the federal scheme as drafted by the framers, from which it was necessary to carve limitations.⁶⁷

Subsequently, Madison observed that during the ratification debates some of the participants had objected that:

[B]y 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 consequentially insecure.⁶⁸

Read in the context of the ratification debates, to which Madison alluded, and his own prior summary of the argument against the need for a bill of rights, Madison's statement rather clearly expresses the feared loss of the system of rights secured by enumerated powers.⁶⁹ Indeed, Madison's summary recalled his own argument that the Constitution provides that "every thing not granted is reserved," and that if "an enumeration be made of our rights" it will be "implied that every thing omitted is given to the general government."⁷⁰ Together with Wilson and the other Federalist defenders of the Constitution, Madison feared that a bill of rights would reverse the premise of the Constitution's limited powers scheme.

Madison assured the Congress, however, that the feared danger "may be guarded against," and that he had drafted a proposal to that end.⁷¹ The draft proposal that would become the Ninth Amendment read as follows:

The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be 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.⁷²

Madison's proposal rather clearly tracks the Virginia proposal aimed at addressing the Federalists' fears of adding a bill of rights to the Constitution.

67. See *supra* notes 41-48 and accompanying text for a discussion of James Wilson's argument against adopting a bill of rights.

68. 1 ANNALS OF CONG., *supra* note 40, at col. 456.

69. Some commentators have taken Madison's description of the danger feared by opponents of a bill of rights as referring to the potential loss of implied limitations on powers granted to government. *E.g.*, LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 774-75 (2d ed. 1988) (describing Madison's concern that a bill of rights might "dangerously suggest" that rights not singled out were intended to be retained by government); Laycock, *supra* note 26, at 353 (discussing Madison's desire to protect unenumerated rights). In each of their works, however, just as with the final text of the Ninth Amendment and the statements from the ratification debates opposing a bill of rights, the commentators advance no real argument for their views, apparently basing their conclusions on the assumption that the statement is plain and unambiguous. By contrast, this article has attempted to show that these statements can only be understood in context.

70. 3 ELLIOT'S DEBATES, *supra* note 31, at 620 (June 24, 1788) (Virginia Ratifying Convention).

71. 1 ANNALS OF CONG., *supra* note 40, at col. 456.

72. *Id.* at col. 452.

Thus, the proposal prohibits an inference of enlarged powers from "exceptions" to granted powers, and it identifies the same permissible inferences—that the exceptions are either "actual limitations" on the granted powers or merely cautionary provisions.⁷³ The obvious continuity in language between the Virginia-recommended amendment and Madison's proposal confirms both that Madison worked from the Virginia amendment and that his goal was to address the concerns raised during the ratification debates. Read together with Madison's explanation of the mischief to which the provision was to respond, moreover, the proposal seems to provide the contemplated "remedy" of a provision expressly prohibiting the feared inference of essentially unlimited powers subject only to specifically enumerated limitations—to the end of securing the rights retained by the scheme of enumerated powers.

Some commentators have emphasized, however, that Madison's proposed amendment included language not found in its Virginia precursor.⁷⁴ The proposed amendment's language not only prohibited an inference of enlarged federal powers, but also an inference that would "diminish the just importance of other rights retained by the people."⁷⁵ Accordingly, a number of commentators have suggested that Madison's language "stamped the Bill of Rights with his own creativity,"⁷⁶ and that his proposal, in contrast to the Virginia-proposed amendment, addressed for the first time the question of unenumerated rights.⁷⁷ As we have seen, however, in his speech to Congress, Madison linked the proposed amendment to the ratification-period debate over a bill of rights and did not intimate that he had made a creative contribution.⁷⁸ The suggestion that Madison's proposal was the first to address the question of unenumerated rights ignores that the Virginia proposal was drafted to ensure the security of the rights omitted from the enumeration

73. *Id.* Compare Madison's proposal that the exceptions should be limitations on the granted powers, or else cautionary provisions, with the Virginia proposal to secure rights through the enumeration of limitations on the government's powers. See *supra* notes 53-61 and the accompanying text for an analysis of the Virginia proposal.

74. See, e.g., Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 10 (1988) (noting that Madison's draft focused both on the problem of extended powers and the loss of unenumerated rights).

75. 1 ANNALS OF CONG., *supra* note 40, at col. 456.

76. LEONARD LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* 272 (1988).

77. *Id.* at 280; see also Massey, *supra* note 30, at 310 (concluding that new proposal shifted focus from powers granted to government to rights retained by people); Yoo, *supra*, note 11, at 990-91 (suggesting that Madison's language introduced concept of people's rights); Jeff Rosen, Note, *Was the Flag Burning Amendment Unconstitutional*, 100 YALE L.J. 1073, 1075 (1991) (arguing that "retained" rights refers to natural rights retained as society transitioned from "natural" to "civil" state). To date, however, no modern commentator has proffered any explanation for why the committee appointed by the Virginia Ratifying Convention failed to recommend an amendment that addressed the oft-cited problem of the fate of the rights left out of an enumeration of rights.

78. See *supra* notes 62-73 and accompanying text for a discussion of how Madison exercised his role in the debates over a bill of rights.

of rights in a bill of rights—the rights already secured by the system of enumerated powers.⁷⁹ ★

If the Virginia proposal already ensured the security of the rights retained by the limited powers scheme, one might question why Madison added the language specifically focusing on rights. While the contemporaneous records do not provide any help in determining the rationale for any language changes,⁸⁰ there is a reasonable probability that Madison was not attempting to alter the thrust of the amendment, but was inserting additional language to underscore the rights-protective function of the proposed amendment. In turn, he may have retained the language prohibiting an inference of enlarged powers because preventing this inference would have had an independent significance as well, inasmuch as the limited powers scheme also served to secure the prerogatives of state and local government in our federal scheme. If Madison's draft nevertheless strikes the reader as containing some redundancy, that is because it does. Indeed, the draft's redundancy probably explains why the committee, on which Madison himself served, in its considerations of the amendments ultimately eliminated the language prohibiting an inference of enlarged powers in favor of the final text—which, of course, places the emphasis on securing rights "retained by the people" against any adverse inference from rights enumerated in the Constitution.⁸¹ 18

The evolution of the language of the Ninth Amendment is even more difficult to explain for those who assert that Madison added the language concerning rights "retained by the people" to secure unwritten limitations on government powers. The ratification-era debate, to which Madison referred in presenting the Amendment, reflected deep concern about the impact of a bill of rights on the Constitution's enumerated powers scheme. As we have seen, this concern was the fear that Madison and other proponents of the unamended Constitution had articulated during the ratification debate.⁸² If the proposed amendment's alternative formulations, prohibiting an inference of enlarged powers and the disparagement of retained rights, are not two ways of addressing this same concern, the apparent implication is that the Amendment as actually adopted failed to address even the central fear, that the enumerated powers scheme for securing rights would be lost.

Proponents of such a reading of the "rights" language inserted by Madison have not to date provided a plausible accounting for why Madison would set out to supplement the purpose of the Virginia proposal and wind

79. See, e.g., Barnett, *supra* note 74, at 22 (leading critic of traditional reading acknowledging that "first line of defense of individual rights and liberties" was "the governmental structure and procedures established by the Constitution"); *id.* at 10 (acknowledging fears that a bill of rights would raise inference of enlarged powers).

80. See McAfee, *supra* note 16, at 1237 (noting sparse legislative history pertaining to Congress' adoption of Ninth Amendment).

81. *Id.* at 1239.

82. See, e.g., Letter from Madison to Jefferson (Oct. 17, 1788), in 1 SCHWARTZ, *supra* note 53, at 615 (stating that he could support bill of rights only if it did not grant unenumerated powers to government).

up agreeing to an amendment that failed even to address the perceived threat to the enumerated powers scheme that the Virginia proposal so clearly addressed.⁸³ By contrast, the explanation offered above has the virtue of perceiving all of the relevant texts—the Virginia proposal, Madison's draft, and the final text of the Amendment—as efficient remedies for the feared mischief, as articulated during the ratification debates. On the other hand, there is a dearth of evidence outside of these three texts to suggest that Madison or others intended to substitute a different purpose, or to essentially abandon the amendment proposed by Virginia.

C. The Ratification Debate in Virginia

The continuity between the Virginia proposal, with its emphasis on preserving the rights-protective scheme of limited powers, and the final draft of the Ninth Amendment, was strongly confirmed by Madison during the process of ratifying the Bill of Rights. Late in the fall of 1789, the amendments proposed by Congress came up for ratification by the Virginia Assembly. In this setting, at least one important Virginian, Edmund Randolph, objected to the final form of the proposed Ninth Amendment and, in particular, to the changes Congress had introduced.⁸⁴ Describing the proposed amendment as a "reservation against constructive power," Randolph argued that it should operate "as a provision against extending the powers of Congress" rather than "as a protection to rights reducable [sic] to no definitive certainty."⁸⁵ ✓

83. One suggestion is that Madison or others believed that the language of the Tenth Amendment would accomplish the power-limiting purpose of the Virginia proposal. See, e.g., Mayer, *supra* note 11, at 317-18 (theorizing that Madison used Tenth Amendment to deal with danger of implied powers). However, this suggestion is not plausible. The Virginia convention adopted recommended amendments that anticipated both the Ninth and Tenth Amendments, and Madison's initial draft of the Ninth Amendment, as submitted to Congress, which prohibited an inference of enlarged powers, was offered in addition to his proposal which became the Tenth Amendment. There is a reason for the existence of two separate amendments, as we will see when we address the issue of the relationship between the Ninth and Tenth Amendments, see *infra* Part V. While the Tenth Amendment was designed to add security to the limited powers scheme, it was not written to address, and accordingly its text says nothing about, the peculiar concern that the enumeration of rights might be taken as a source of implied powers. See *infra* notes 105-08 and accompanying text for a contrast of the reasons for adopting the Ninth and Tenth Amendments. 9
10
11

Another suggestion is that the revised text served both to incorporate a body of unwritten limitations in favor of natural rights, as well as to prevent an inference of extended national powers in derogation of the enumerated powers scheme—to secure the people's rights by alternative strategies. Massey, *supra* note 27, at 87. However, if the prohibition of an inference against rights "retained by the people" is properly read as preventing an enlarged powers construction, so as to preserve the rights retained by the enumerated powers scheme, as this argument concedes, one may question whether there is any reason to even look for an additional purpose to be filled by the "rights" language. In fact, as we have seen, the historical evidence from the ratification debates suggests that the fears about rights dealt with the set of rights defined as a residuum from the enumerated powers.

84. The Virginia debate is discussed at some length in McAfee, *supra* note 16, at 1287-93.

85. Letter from Hardin Burnley to James Madison (Nov. 28, 1789), in 2 SCHWARTZ, *supra* note 53, at 1188.

In a letter to Madison summarizing the assembly debate, assemblyman Hardin Burnley suggested that he and others did not "see the force of the distinction" presumed by Randolph's argument.⁸⁶ Burnley contended that if the Constitution's grant of "powers [is] not too extensive already," the Amendment as drafted would protect "the rights of the people & of the States" and prevent "an improper extension of power."⁸⁷ In effect, Burnley expressed difficulty in understanding why Randolph could not perceive that the other rights "retained by the people" referred to the residual rights defined by reference to enumerated powers. Thus, Burnley was confident that the people's rights would be adequately protected by the proposed amendment, provided the Convention had adequately defined federal powers in the first place.

In relaying Burnley's report of the assembly debate to President Washington, Madison adopted Burnley's argument, rejecting the idea that there was a significant distinction between the Virginia proposal and the amendment proposed by Congress. Madison also found the proposed "distinction" to be "fanciful."⁸⁸ According to Madison, so long as federal powers were adequately defined so that one could draw a line "between the powers granted and the rights retained," it hardly mattered whether the rights were secured by stating that they may not be abridged, or that the powers should not be extended.⁸⁹ Both Burnley and Madison, then, rejected criticism of the final form of the Ninth Amendment by contending that the Amendment stated the substance of the original Virginia proposal in different language. Moreover, each agreed, that the Ninth Amendment's purpose was to preserve whatever amount of security for rights was supplied by the federal system of enumerated powers.

D. The Ninth Amendment "Remedy" and Natural Rights

Despite the evidence reviewed above, some commentators insist that the Ninth Amendment was written to affirm that the Constitution generally incorporates the idea of natural rights limits on government powers, apart from the limits provided by enumerated powers or the Bill of Rights. To some extent, this view rests on a misconstruction of the ratification-period arguments against a bill of rights, expressing the fear that any positive enumeration of rights is unnecessary and dangerous. For example, commentators often cite a speech by James Iredell in which he predicted that adoption of a bill of rights would lead to a construction of the Constitution including only the rights named in that bill of rights.⁹⁰ Yet, in the same speech, Iredell clari-

86. *Id.*

87. *Id.*

88. Letter from Madison to Washington (Dec. 5, 1789), in 2 SCHWARTZ, *supra* note 53, at 1189, 1190.

89. *Id.*

90. The speech was given at the North Carolina Ratifying Convention on July 28, 1788. 4 ELLIOT'S DEBATES, *supra* note 31, at 148-49. Among those relying on this language, see DAVID A.J. RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 221 (1989) (asserting that

fied the "danger" argument uniquely related to the idea of adding a bill of rights to the proposed federal Constitution with its enumerated powers scheme. Indeed, as we have seen, Iredell stated quite clearly that a bill of rights would be both "necessary" and "proper" in a constitution with "a general legislature," like those in the states, because otherwise the rights would not be secured.⁹¹ Iredell, like others critical of adding a bill of rights, was anxious to avoid a threat to the security of rights already built into the text of the proposed written Constitution. He was not focused on avoiding any such threat to preexisting natural rights, which he viewed as insecure in the absence of either a bill of rights or a scheme of enumerated powers.⁹²

Recently, however, some have argued that a pure natural rights reading is confirmed by the particular language embodied in the Ninth Amendment. History, one contends, reveals a "specific understanding of the phrase 'retained by the people.'" ⁹³ We are told that "under social contract theory," this phrase refers to "natural rights 'retained' during the transition from the state of nature to civil society."⁹⁴ For this reason, Madison would have realized that the choice of this language would convey the idea of preexisting rights.⁹⁵

Social contract theory did hold that some rights are, or ought to be, "retained" as individuals enter civil society, but the Ninth Amendment is not plausibly read as simply restating this familiar doctrine. For one thing, the Ninth Amendment's text refers to "other" rights retained by the people, implying that the enumerated rights are also rights retained. Yet, as Madison explained in his speech in Congress, bills of rights often "specify positive rights" which, though they are not granted by nature, are "essential to secure the liberty of the people."⁹⁶ More importantly, this view interprets the Ninth Amendment without regard to the ratification debate context in which it was adopted.

One who reviews the ratification debate discovers that the word "retained" permeated the discussion of enumerated powers and reserved rights

Iredell's speech foreshadows positivist constitutional philosophy of Judge Robert Bork, and that Bork is Iredell's "nightmare"); Massey, *supra* note 27, at 86-87 (asserting Iredell's speech meant that unenumerated rights would be in danger because government could usurp these rights by arguing that absent their enumeration they were no rights at all); Mayer, *supra* note 11, at 317 n.16 (arguing that Iredell saw two reasons why adopting bill of rights would be dangerous: it would lead to (1) loss of system of enumerated powers with reserved rights, and (2) loss of any unenumerated rights).

91. See *supra* notes 41-48 and accompanying text for James Wilson's description of the function of bills of rights in state constitutions.

92. Iredell did address the question of whether natural rights were secure under the proposed Constitution. However, he argued from the enumerated powers scheme, contending that important rights were secured because "any person by inspecting [the Constitution] may see if the power claimed be enumerated." 4 ELLIOT'S DEBATES, *supra* note 31, at 172.

93. Rosen, *supra* note 77, at 1075.

94. *Id.*

95. This leads Rosen to conclude that it is erroneous to suppose that Madison's draft "added nothing to a precursor of the Ninth Amendment proposed by Virginia." *Id.* at 1075 & n.11.

96. 1 ANNALS OF CONG., *supra* note 40, at col. 454.

that were central to the bill of rights debate. Recall, for example, Madison's summary of the view that "because the powers are enumerated," it followed that "all that are not granted by the constitution are *retained*."⁹⁷ Similarly, recall that James Burnley and Madison responded to Edmund Randolph's objection to Congress' proposed "retained rights" version of the Ninth Amendment by stating that it would secure the rights retained by the powers scheme of the Constitution.⁹⁸ Madison could have explained a shift from a "powers" focus to a contractarian "rights" focus had such a shift occurred. Instead, he denied that the form of the amendment proposed by Congress changed the amendment's meaning in any way.⁹⁹

V. THE NINTH AND TENTH AMENDMENTS

Perhaps the single biggest source of confusion about the Ninth Amendment concerns its relationship to the Tenth Amendment.¹⁰⁰ Surprisingly enough, those who espouse the traditional reading of the Ninth Amendment have been accused of failing to see that the two amendments perform radically distinct functions, *as well as* failing to perceive that both amendments reinforce the idea of substantive limitations on the powers granted to the national government. Both sorts of objections are described and assessed below.

97. *Id.* at col. 455 (emphasis added).

98. See *supra* notes 86-89 and accompanying text for a discussion of Burnley's response to Randolph's objection.

99. A related suggestion is that the Ninth Amendment draws upon a proposed amendment presented to the committee in Congress charged with considering the Bill of Rights, which guaranteed the natural rights which are "retained by [the people] when they enter into Society." Randy E. Barnett, *Introduction: James Madison's Ninth Amendment*, in *THE RIGHTS RETAINED BY THE PEOPLE* 1, 7 n.16 (Randy E. Barnett ed., 1989) (quoting James Madison, in *1 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES* 452 (Joseph Gales & William Seaton eds., 1834)). However, this is extremely unlikely. First, there is nothing to suggest that this proposal influenced the committee, and we know that the committee was already considering Madison's proposed language, which included the language of retained rights. Second, the author of the proposed natural rights amendment, Roger Sherman, simultaneously proposed an amendment that correlates perfectly with the Ninth and Tenth Amendments. See Roger Sherman's Proposed Committee Report (July 21-28, 1789), reprinted in *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS* 267-68 (Helen E. Veit et al. eds., 1991) (stating that powers "not delegated" are "retained by the States," and that "[limitations on] the exercise of power by the government of the united States [in] the particular instances here in enumerated by way of caution" may not "be construed to imply the contrary"). Most importantly, the Ninth Amendment responds compellingly to the ratification debate that led to its adoption, and that debate does not point toward the sort of provision proposed by Sherman. For a more complete treatment of the relevance of Sherman's proposed language, see McAfee, *supra* note 47, at 299-305.

100. 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." U.S. CONST. amend. X. For the text of the Ninth Amendment, see *supra* note 2.

A. The Redundancy Argument

The most oft-stated objection to the traditional view of the Ninth Amendment is that, since it defines retained rights as being the residuum of enumerated powers, the Tenth Amendment accomplishes all that is thus ascribed to the Ninth Amendment. Therefore, some contend, this interpretation violates the traditional canon of construction that presumes all clauses of the Constitution are to have some effect.¹⁰¹ If this argument has any merit, it did not move the committee that drafted Virginia's proposed amendments. That committee, which included such luminaries as James Madison, Patrick Henry, and George Mason (author of the Virginia Declaration of Rights),¹⁰² proposed amendments providing that all powers not granted are reserved (our Tenth Amendment),¹⁰³ and that the enumeration of limits on government do not imply extended powers (our Ninth Amendment).¹⁰⁴ Why would these distinguished gentlemen have thought both provisions were necessary?

The main reason is that both provisions are cautionary guarantees to assure that the limited powers design of the Constitution was understood and implemented. Nevertheless, the two amendments have separate histories and serve complementary functions. The Tenth Amendment grew out of expressed fears that the omission of such an explicit guarantee of reserved powers, such as had been included in the Articles of Confederation, might raise the inference that general powers were intended.¹⁰⁵ As we have seen, the Ninth Amendment addresses an altogether different threat to the rights-protective enumerated powers scheme, a threat which might arise from the enumeration of specific limitations on government powers.¹⁰⁶ In contrast, the Tenth Amendment does not by its terms address any inferences which arguably flow from the enumeration of rights in the Constitution.

Despite these points, it has recently been suggested that the Tenth Amendment should have been sufficient to foreclose a construction undercutting enumerated powers, even if the logical grounding of such a proposed construction was the enumeration of rights rather than the mere omission of an explicit statement of reserved powers.¹⁰⁷ The suggestion is that the Ninth Amendment remains superfluous if we accept the traditional understanding

101. Justice Marshall asserted in *Marbury v. Madison* that it "cannot be presumed that any clause in the constitution is intended to be without effect." 5 U.S. (1 Cranch) 137, 174 (1803).

102. See, e.g., LANCE BANNING, *THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC* 85 (1995) (noting George Mason's draft of Virginia's Declaration of Rights contained "generous" but "conventional" protections of individual rights).

103. See *infra* notes 107-11 and accompanying text for a discussion of the mischief that the Tenth Amendment was intended to relieve.

104. See *supra* notes 35-73 and accompanying text for a discussion of the "mischief" that the Ninth Amendment was intended to relieve.

105. McAfee, *supra* note 16, at 1307.

106. Thus, Professor Richard Kay has observed that "redundancy in legal documents is not particularly odd. And, in this case, the drafting history of the Bill of Rights explains the presence of both provisions." Kay, *supra* note 16, at 271.

107. See MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS* 65 (1993) (arguing that "residual rights" reading of Ninth Amendment makes it duplicative of Tenth Amendment).

of its terms. One should remember, however, that proposals for a general reserved powers provision, virtually identical to our Tenth Amendment, were on the table during the entire period of time when the Federalists were contending that an enumeration of rights would pose a danger to the enumerated powers scheme.¹⁰⁸ Their obvious conviction as to the need for an additional safeguard, as reflected by Virginia's recommended amendment, thus seems more relevant to determining the intended meaning of the Ninth Amendment than the contrasting view of modern commentators.

About eighty years after the adoption of the Bill of Rights, the Supreme Court in the *Legal Tender Cases*¹⁰⁹ actually asserted that the provisions in the Bill of Rights showed:

[T]hat, in the judgment of those who adopted the Constitution, there were powers created by it, neither expressly specified nor deducible from any one specified power, or ancillary to it alone, but which grew out of the aggregate of powers conferred upon the government, or out of the sovereignty instituted.¹¹⁰

This is almost precisely the sort of argument that James Wilson and others suggested might be made based upon the inclusion of a bill of rights.¹¹¹ Apart from illustrating the role the Ninth Amendment could have played, had the Court in this instance perceived its relevance to the rationale it offered, this decision suggests two points of interest. First, it is difficult to see how the language of the Tenth Amendment, which speaks only of the reservation of what is not granted, forecloses this sort of argument about how to derive "granted" powers. Second, inasmuch as the Court's argument would unequivocally violate the terms of the provision originally proposed by Virginia, the fact that the argument was made seems to vindicate Edmund Randolph's concern that the altered amendment did not express the remedy for the perceived mischief as effectively as the Virginia proposal had.

B. *The Federal Structure as a Source of Affirmative Limitations on Government*

The standard complaint against the traditional view of the Ninth Amendment, that it merely duplicates our federal system and provides no special protection to rights, rests securely on the modern assumption that the Constitution's granted powers are to be read straightforwardly and without any strong background assumption of a limited construction favoring individ-

108. The significance of the omission of such a provision from the unamended Constitution had itself been an important and widely discussed topic during the ratification debates. See McAfee, *supra* note 16, at 1242-45. Considering that every state that ratified the Constitution and recommended amendments included a Tenth Amendment provision, 1 SCHWARTZ, *supra* note 53, at 157-58, it is reasonable to assume that the participants in this bill of rights debate would have anticipated the inclusion of such a reserved powers provision.

109. 79 U.S. (12 Wall.) 457 (1870).

110. *Id.* at 535.

111. See *supra* notes 41-48 and accompanying text for a discussion of Wilson's arguments against adopting a bill of rights.

ual rights.¹¹² Recently, however, the traditional reading of the Ninth Amendment has been subjected to what is practically the opposite criticism, namely, that it is basically indistinguishable from the natural rights reading which it purports to reject.¹¹³ The basic argument is that, even if the other rights secured by the Ninth Amendment are to be defined by reference to the powers enumerated in the Constitution, the founders would have contemplated that the powers were to be construed to preserve natural and traditional rights that were not enumerated in the Constitution or its amendments.¹¹⁴ Thus, we are told, it hardly matters whether the retained rights are described as reservations from granted powers or as unenumerated limitations on government power; both formulations have the same practical effect.¹¹⁵

A variation on this sort of argument is the claim that the word "proper" in the Necessary and Proper Clause was intended to provide a basis for limiting the reach of granted powers so that there would be no intrusion on fundamental, unwritten rights.¹¹⁶ If we all concurred that federal powers are properly to be construed strictly, so as to avoid any potential encroachment on unspecified rights, it would hardly seem to matter which description of the Ninth Amendment was adopted, inasmuch as the federal powers scheme would be viewed as itself incorporating unwritten limitations on powers in favor of inherent rights.

That such arguments are being made reflects a kind of progress, in that modern scholars acknowledge that an interpretation of the Ninth Amendment which sees the Amendment as protecting the system of federal powers actually does have a "rights" focus.¹¹⁷ Unfortunately, such arguments still display the modern inability to conceive that the drafters might have attempted to secure rights by a straightforward granting of only limited powers. A short answer to these sorts of arguments about the nature of federal powers might be that none of them has actually carried the day historically, inasmuch as the Supreme Court generally has not given independent content to the word "proper," nor employed a different standard for construing federal

112. See PERRY, *supra* note 107, at 65.

113. See *infra* notes 115-17 and accompanying text for a discussion of this criticism of the traditional reading of the Ninth Amendment.

114. See, e.g., DANIEL FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 380-81 (1990) (contending that Framers' confidence in enumerated powers scheme rested on assumption that powers would be construed as limited by traditional and natural rights).

115. See, e.g., Sherry, *supra* note 11, at 180 (describing difference between reserved rights and limits on governmental power as "irrelevant").

116. See, e.g., Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 271-72 (1993) (arguing that word "proper" serves an important Constitutional purpose).

117. See McAfee, *supra* note 16, at 1239-40 describing the claim that the text of the Ninth Amendment precludes the possibility that it was designed to preserve a scheme of limited government powers.

powers when their exercise has encroached on unwritten claims of rights.¹¹⁸ If these arguments were valid, the Court should have adopted such constructions. After all, neither the Ninth Amendment nor the Bill of Rights purport to alter the way in which the enumerated powers scheme and the Necessary and Proper Clause are to be construed.

The more fundamental point, however, is that such arguments are inventions designed to combine what are actually very different strategies for securing liberty—on the one hand, stating limits on the exercise of government power in favor of individual rights and, on the other hand, defining powers delegated to government in such a way as to limit the potential for government wrongdoing. Notice, for example, what both Assemblyman Hardin Burnley and James Madison observed in discussing the merits of the alternative formulations of the Ninth Amendment. Either way it was worded, the success of the project would depend on whether the written Constitution had adequately defined, and hence limited, the power granted the national government.¹¹⁹ While some historians have contended that the federal system did succeed in securing individual and local autonomy from federal intrusion for more than a century,¹²⁰ in the long run the limited powers scheme has failed to restrict federal power significantly. In this regard, the Antifederalist proponents of a bill of rights proved to be more prophetic than their Federalist opponents.¹²¹

Moreover, all the participants in the debate over a bill of rights understood that the success of the enumerated powers approach to securing rights would rest on only the grants of powers, and not on an independently-grounded rights theory. Indeed, the Federalist arguments against the need for a bill of rights make no sense if one understands them to refer to rights-based limiting constructions of enumerated powers. The defenders of the proposed Constitution always clarified that the soundness of their argument against the necessity for a Bill of Rights rested on whether the Constitution's drafters had adequately defined and limited federal powers.¹²² Still, rights-

118. See, e.g., McAfee, *supra* note 16, at 1310 & n.355 (noting expansion of federal power in modern era and largely critical reaction to Supreme Court's narrow construction of Necessary and Proper Clause in small number of cases involving federal laws impinging on individual liberty).

119. See *supra* notes 86-89 and accompanying text for a discussion of Hardin Burnley's letter to James Madison regarding the Ninth Amendment. If the efficacy of the enumerated powers scheme as a rights-protective device is to turn on the adequacy of the drafting of the Constitution, as these arguments suppose, it must be because the grants of powers were to be read as stated and not as subject to implied limitations.

120. See, e.g., Walter Berns, *The Constitution as Bill of Rights*, in *HOW DOES THE CONSTITUTION SECURE RIGHTS* 50, 52 (Robert A. Goldwin & William A. Schambra eds., 1985) (stating that "history has vindicated the Federalists, who insisted that, so far as the federal government was the object of concern, a bill of rights was unnecessary").

121. See *supra* notes 36-39 and accompanying text for a discussion of the Antifederalists' push to adopt a bill of rights.

122. See, e.g., Massey, *supra* note 30, at 308-09 (noting that demand for Bill of Rights served to provide certainty that federal government would not intrude upon fundamental rights of citizens).

based limiting constructions would not depend at all on the contents of the text of the power-granting provision. James Wilson, for example, stated that a free press provision would have been required had there been a grant of power to regulate the press.¹²³ But if federal powers were thought to be subject to a rights-based limiting construction, a power to regulate the press logically would not be construed to permit invasion of the legitimate scope of freedom of the press. Alternatively, a court would presumably find freedom-suppressing regulations to be an "improper" means of implementing the granted regulatory power.

Similarly, in presenting his proposed amendments to Congress, Madison defended the necessity of including a bill of rights, despite the scheme of limited powers, on the ground that the Necessary and Proper Clause itself had granted to Congress "certain discretionary powers with respect to means, which may admit of abuse to a certain extent."¹²⁴ To illustrate his point, Madison offered validly enacted federal laws which imposed criminal sanctions, and then suggested that, without the prohibition contained in what became the Fourth Amendment, the federal government would have the authority to rely on general search warrants.¹²⁵ Since prohibitions on general warrants were included in state constitutions, however, Madison's argument specifying the need for such a prohibition would have had no force had he understood that the word "proper" in the Necessary and Proper Clause provided a general limitation on all the powers granted to Congress.¹²⁶

In fact, these modern rights-based limiting constructions make what are really implicit rights claims do all the work that the Federalists had said the wording of the grants of power would do.¹²⁷ If the Federalists' theory had

123. For Wilson's statement regarding the press, see 13 RATIFICATION OF THE CONSTITUTION, *supra* note 41, at 340; see also *supra* notes 42-48 and accompanying text for a discussion of Wilson's polemics in opposition to the Bill of Rights.

124. 1 ANNALS OF CONG., *supra* note 40, at col. 455.

125. *Id.* at col. 456.

126. Some have argued that Madison was contending only that constitutional limitations were needed to avoid a possible misconstruction of the Necessary and Proper Clause. See Lawson & Granger, *supra* note 116, at 281 (quoting Madison on remedies available should Congress "misconstrue" or "enlarge" its enumerated powers); *id.* at 322-23 (quoting Madison extolling utility of bill of rights to circumscribe federal government's power, so that extent of its power is not misconstrued by Congress). Professor Barnett, however, correctly links Madison's defense of the need for a Bill of Rights with the language of Madison's own proposed Ninth Amendment, which suggested that some rights provisions would constitute "actual limitations of such [granted] powers." Barnett, *supra* note 99, at 17 (quoting JAMES MADISON, in 1 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 452 (Joseph Gales & William Seaton eds., 1834)). If the Necessary and Proper Clause was in fact a limiting provision, all of the provisions in the Bill of Rights would be cautionary provisions at best, rather than actual limitations on the powers granted. Accordingly, despite being a proponent of the natural rights reading of the Ninth Amendment, Barnett nevertheless acknowledges that Madison's argument to Congress reflected his understanding that, to adequately secure basic rights, "some regulation of the means employed to achieve enumerated government ends must supplement the device of enumerating powers." *Id.* at 16.

127. E.g., 4 ELLIOT'S DEBATES, *supra* note 31, at 171-72 (statement of James Iredell, 1788). Iredell responded to the charge that the Constitution lacked clear "fences" or "boundaries" for

been that government powers cannot in theory be construed to invade rights, their challenges to opponents to show where the Constitution empowered the invasion of fundamental rights would have to be characterized as disingenuous and incoherent.¹²⁸ Correspondingly, the Antifederalist proponents of a bill of rights continually answered such challenges by attempting to show that powers enumerated in the Constitution could easily lend themselves to abuse—arguments that reflect a straightforward understanding of the Federalist claims about enumerated powers.¹²⁹ Indeed, the people were persuaded of the need for a bill of rights by arguments that the powers granted were in fact broad enough to enable the national government to threaten basic rights, unless those powers were explicitly limited by provisions added to the Constitution.¹³⁰

VI. WHAT DIFFERENCE DOES IT MAKE?

Some of the most immediate implications of the Ninth Amendment debate for constitutional decision-makers seem obvious enough. If Justices Black and Stewart were correct in their conclusions, the argument for nontextual fundamental rights must be grounded somewhere else. The

securing natural rights by arguing that the Constitution's powers scheme included so clear "a definition of authority . . . that any person by inspecting [the Constitution] may see if the power claimed be enumerated." *Id.* This sort of appeal to the text would be quixotic if it amounted, in fact, to the argument that limiting principles would prevent the text from being read to invade basic rights.

128. *E.g.*, 2 ELLIOT'S DEBATES, *supra* note 31, at 455 (statement of James Wilson, 1787) (challenging Constitution's opponents to show "what part of this system puts it in the power of Congress to attack [the rights of conscience]").

129. See McAfee, *supra* note 16, at 1269 n.215 (quoting statements made by Antifederalists responding to Federalist challenge to show where in Constitution powers to threaten basic rights could be found). The success of the Antifederalists in this very debate has prompted modern commentators to conclude that the adoption of the Bill of Rights "implied a rejection of the Federalist position that rights were adequately secured by the structure of enumerated powers." Steven J. Heyman, *Natural Rights, Positivism and the Ninth Amendment: A Response to McAfee*, 16 So. ILL. U. L.J. 327, 331 (1992); *accord*, Barnett, note 99, at 16 (stating that means to achieve enumerated ends must be regulated).

130. In presenting his proposed amendments to Congress, Madison justified additional limiting provisions by recognizing that Congress "has certain discretionary powers with respect to the means, which may admit of abuse to a certain extent, in the same manner as the powers of the State Governments under their constitutions may to an indefinite extent." 1 ANNALS OF CONG., *supra* note 40, at col. 455. Madison further acknowledged that the Constitution itself had, in general, given to Congress power to "judge of the necessity and propriety to accomplish those special purposes which they may have in contemplation," which could lead to abusive laws, just as "improper laws could be enacted by the State Legislatures, for fulfilling the more extended objects of those Governments." *Id.* at cols. 455-56. Madison's statements directly link the need for limits on federal power with the consensus, as shown in the ratification debates, that a bill of rights had been necessary under the state constitutions in order to specify the limits the people expected their governments to abide by. See Lawson & Granger, *supra* note 116, at 280-81 (noting contemporaneous similarities between several state constitutions and language from Constitution delimiting powers of governments). This consensus, in turn, cuts sharply against the notion of inherent, implied constitutional limits that modern commentators presume is the focus of the Ninth Amendment.

"rights" referred to in the Ninth Amendment are defined by reference to the enumerated powers granted to Congress in Article I, and the Ninth Amendment does not warrant a search beyond the text for additional limitations on those granted powers, let alone the powers of the states. It is precisely this implication of the Black-Stewart reading that prompted the complaint that the reading rendered the amendment meaningless.

On the other hand, if the Goldberg reading of the Ninth Amendment were accepted, it would lend clear support to the project of discovering additional limitations on the powers granted to the national government, in addition to those found in the Bill of Rights. Some have accurately observed, however, that the implications of the Ninth Amendment on state power are less obvious, even if Justice Goldberg's construction is correct.¹³¹ Most scholars have agreed that the Ninth Amendment, as well as the balance of the Bill of Rights, did not originally serve to limit state power.¹³² The Ninth Amendment could, of course, be "absorbed" into the Fourteenth Amendment through the process of selective incorporation based on the theory that the unenumerated rights to which it refers might include rights as "fundamental" as the specific Bill of Rights provisions already incorporated.¹³³ But to the extent that selective incorporation historically served as a device for domesticating a frighteningly open-ended "substantive due process" doctrine,¹³⁴ incorporation of the Ninth Amendment seems to defeat the project at hand. Even more telling, many thoughtful commentators are skeptical as

131. See Earl M. Maltz, *Unenumerated Rights and Originalist Methodology: A Comment on the Ninth Amendment Symposium*, 64 CHI.-KENT L. REV. 981, 982 (1988) (discussing applicability of Ninth Amendment to separate states).

132. *E.g.*, ELY, *supra* note 13, at 37 (observing that original Framers and ratifying conventions clearly intended Bill of Rights to control only federal government actions); MASSEY, *supra* note 11, at 138 (contending that Bill of Rights was clearly intended to bind only federal actions); observing that most commentators agree Ninth Amendment operates only against federal action); Norman G. Redlich, *Are There "Certain Rights . . . Retained by the People"?* 37 N.Y.U. L. REV. 787, 805-06 (1962) (stating that legislative history of Ninth Amendment demonstrates it was intended to apply only to federal government); Eugene M. Van Loan III, *Natural Rights and the Ninth Amendment*, 48 B.U. L. REV. 1, 22-23 (1968) (describing history of Ninth Amendment as clearly indicating Amendment could only be used to constrain federal government).

133. See Van Loan, *supra* note 132, at 23-24 (advocating selective incorporation). After all, the text of the Amendment prohibits interpreters from "disparag[ing]" the unenumerated rights. U.S. CONST. amend. IX. If we first assume that the fundamental rights reading is correct, then precluding incorporation because a right was not enumerated would seem to run afoul of this prohibition.

134. In his ground-breaking article, Professor Redlich suggested that the basic point of relying on the Ninth Amendment was to justify moving beyond the tendency to limit the application of substantive due process to rights "absorbed" into the Fourteenth Amendment to the specific limitations found in the Bill of Rights. Redlich, *supra* note 132, at 787-90, 794-95. His point seemed to be that the strategy of looking to the Bill of Rights to avoid open-endedness is useless if in fact the Bill of Rights, properly understood in light of the Ninth Amendment, is itself open-ended in nature. See *id.* at 795 (noting concern over interpretations of Bill of Rights provisions, not on their flexibility); see also MASSEY, *supra* note 11, at 15 (observing that it is more difficult to justify existence of substantive component of due process than to justify existence of constitutional unenumerated rights protected by Ninth Amendment). If substantive due process is difficult to justify, regardless of whether the fundamental right under consideration is found in a

to whether there is adequate justification, textually and historically, for the doctrine of substantive due process doctrine, root and branch, and this skepticism was itself a source of the interest that has been shown in the Ninth Amendment.¹³⁵

If the historical debate over the incorporation of the Bill of Rights through the Fourteenth Amendment was resolved in favor of the incorporation theory,¹³⁶ it could perhaps be more plausibly argued that the Ninth Amendment should be applied to the states. However, even acceptance of the incorporation doctrine does not necessarily entail the application of the Ninth Amendment's unenumerated rights concept against the states. Thus, there is some evidence suggesting that the framers of the Fourteenth Amendment were thinking about incorporating the first eight amendments to the Constitution.¹³⁷ It is possible that they were thinking in terms of the familiar civil rights provided for in the specific provisions of the Bill of Rights rather than in terms of any overarching theory, such as the one reflected in the reading of the Ninth Amendment offered by Justice Goldberg.

The more difficult question is whether the materials relating to the Ninth Amendment affect the modern arguments for the "unwritten Constitution"—the notion that, even apart from any text such as the Ninth Amendment, there are limitations on government in addition to those found in constitutional text. One historical thesis is that the founding generation believed in higher law, and saw the principles limiting government power as inherent in the social contract, which the written Constitution only partially embodies.¹³⁸ It has become a familiar claim that the Ninth Amendment is the

constitutional text or alluded to by the Ninth Amendment, arguably it contributes little to add the Ninth Amendment to the equation.

135. See, e.g., ELY, *supra* note 13, at 14-21 (contending that doctrine of substantive due process lacks any merit for justifying modern fundamental rights doctrine); *id.* at 34-41 (relying on Ninth Amendment as grounding for constitutional doctrine not rooted in specific constitutional texts).

136. The incorporation theory debate is one of the never-ending contests in the fields of constitutional history and interpretation. For two important contributions to the incorporation debate, see RAOUL BERGER, *GOVERNMENT BY THE JUDICIARY* 134-56 (1977); MICHAEL K. CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986).

137. See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. App. 84 (1872) (Congressman John A. Bingham); *id.*, 39th Cong., 1st Sess. 2765-67 (1866) (Senator Jacob M. Howard); Maltz, *supra* note 131, at 982 (noting that two congressmen alluded to incorporating first eight amendments). Strikingly, the tendency of Reconstruction Era legislators to think of the Bill of Rights as the first eight amendments to the Constitution is further evidence that the Ninth Amendment was linked in thoughtful people's minds with the Tenth Amendment, rather than with the other eight. The likely reason for this is that these legislators perceived the Ninth Amendment as a structural guarantee, as suggested in the treatment offered above.

138. Modern scholars have contended that the founding generation believed in a Constitution that consisted of the written document identified by that name, as well as unwritten rights limiting government power. E.g., Thomas C. Grey, *Do We Have an Unwritten Constitution?* 27 *STAN. L. REV.* 703, 716 (1975) (stating that framing generation recognized that written constitution could not codify unwritten higher law); Sherry, *supra* note 28, at 1176-77 (concluding that founding generation intended to protect natural rights, whether written or unwritten).

textual embodiment of this view, and, indeed, that it actually grounds the idea of an unwritten Constitution in the written Constitution itself.¹³⁹

As reviewed above, however, the arguments advanced during the debate over ratification of the Constitution lend support to the conventional view that constitutional interpreters are limited to enforcing the terms of the written Constitution.¹⁴⁰ Still, commentators have recited both federal and state cases from early American history which purport to rely on unwritten fundamental law,¹⁴¹ and the famous exchange between Justices Chase and Iredell in *Calder v. Bull*,¹⁴² reflects that there were two views about the exclusivity of the written Constitution in 1798.¹⁴³ It seems a fair assessment, then, to conclude that the debate over the idea of an unwritten Constitution probably cannot be fully resolved simply by discovering the original meaning of the Ninth Amendment.

The "unwritten Constitution" debate demonstrates, however, that there is ultimately much more at stake in the Ninth Amendment debate than the possibility of justifying rights-limitations in addition to those in the written Constitution and its amendments. What is ultimately at stake is the appropriate foundational account of our constitutional order. Proponents of the more expansive reading of the amendment ultimately ground their reading in the view that, for the founding generation at least, the inalienable rights held an inherent constitutional status because they were rooted in a natural law that was binding over all positive law. The most fundamental rights were withheld from the government, not because the people made that decision, but because God or nature had decreed it, and because such rights were the very

139. E.g., MASSEY, *supra* note 11, at 21-52, 175 (discussing political context of founding generation); Grey, *supra* note 138, at 709 (describing Ninth Amendment as protecting rights not enumerated in first eight amendments); Sherry, *supra* note 28, at 1163, 1166 (calling Ninth Amendment "license" permitting decisionmakers to look beyond text of Constitution to protect fundamental rights).

140. See, e.g., McAfee, *supra* note 47, at 276-89 (discussing Antifederalists' arguments against inherent fundamental rights); McAfee, *supra* note 16, at 1229 & n.52, 1230-31, 1266-77 (describing ratification debates' natural rights arguments). For further support of this conventional understanding, from materials in addition to the ratification debates, see Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 *YALE L.J.* 907, 909 (1993) (conventional view during founding era was that natural rights, including fundamental ones, "were retained under civil government only to the extent permitted by the Constitution and other civil laws").

141. E.g., Thomas C. Grey, *The Original Understanding and the Unwritten Constitution*, in *TOWARD A MORE PERFECT UNION: SIX ESSAYS ON THE CONSTITUTION* 145, 157-59 (Neil L. York ed., 1988) (discussing cases of judicial review); Sherry, *supra* note 28, at 1134-36 (examining early instances of judicial review).

142. 3 U.S. (3 Dall.) 386 (1798).

143. See *id.* at 387 (Chase, J.) (concluding that full extent of federal legislative powers are defined in Constitution; whereas state legislatures retain powers that are "indefinite" to extent not expressly taken away by Constitution); *id.* at 398-99 (Iredell, J., concurring) (concluding that Constitution "defined with precision" full extent of "all" legislative powers, and restrained those powers "within marked and settled boundaries").

basis of the social contract. Because of this, the foundation of American constitutionalism is the very idea of natural rights.¹⁴⁴

This sort of rights-foundationalist account of the Constitution has potentially profound implications for our legal order, as well as for the practice of judicial review. The traditional understanding of our constitutional system, articulated by Chief Justice Marshall in *Marbury v. Madison*,¹⁴⁵ is that the Constitution constitutes the supreme positive law adopted by the sovereign people—law that controls, and prevails over, the lower-level decisions of their agents.¹⁴⁶ This account provided the grounds for the standard historical defenses of the doctrine of judicial review, both in *The Federalist* No. 78 and in the *Marbury* decision itself.¹⁴⁷ Courts were empowered to override decisions of the legislature precisely because they owed a greater fidelity to the decisions made by the true sovereign than to the people's representatives.

A rights-foundationalist theory of the Constitution, by contrast, carries the potential to privilege judicial views of "natural law," or political morality, over the views of the people who are the source of their office.¹⁴⁸ The Ninth Amendment, in accord with this reading, symbolizes the view that the Constitution is fundamentally "a sustained project to define and maintain the

144. The sort of rights-foundational accounts summarized here are elaborated and defended in various works. See, e.g., DAVID RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 220 (1989) (observing that founding documents of constitutionalism protected unenumerated rights); Barber, *supra* note 33, at 68-71 (discussing Ninth Amendment and inalienable rights); Terry Brennan, *Natural Rights and the Constitution: The Original "Original Intent,"* 15 HARV. J.L. & PUB. POL'Y 965, 969, 993-94 (1992) (stating that Founders believed natural rights were superior to positive law); Stephen Macedo, *Morality and the Constitution: Toward a Synthesis for "Earthbound" Interpreters,* 61 U. CIN. L. REV. 29, 29 (1992) (suggesting that reliance on natural law is difficult to avoid); 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, 254-55, 258-59 (1988) (describing Constitution as both "significant but incomplete" and "self-contained and exhaustive"); Edwin Vieira, Jr., *Rights and the United States Constitution: The Declension From Natural Law To Legal Positivism,* 13 GA. L. REV. 1447, 1459 (1979) (stating that purpose of Constitutional limitations on governmental authority was to guarantee natural freedoms for all members of society).

145. 5 U.S. (1 Cranch) 137 (1803).

146. *Id.* at 177-78.

147. *Id.* For Alexander Hamilton's classic defense of judicial review, see *THE FEDERALIST* No. 78, at 492-96 (Benjamin F. Wright ed., 1961). See also Grey, *supra* note 138, at 705, in which Professor Grey, perhaps the most forceful and original proponent of the "unwritten Constitution" idea, freely acknowledges that the "unwritten" interpretation stands in contrast to the rationale provided for judicial review in *Marbury v. Madison*. *Id.* (citing *Marbury v. Madison*, 5 U.S. 137 (1803), for proposition that Constitution supports judicial review standards that adhere to written text for interpretations of law).

148. Among other things, if this account of our constitutional order is fully embraced, it suggests a powerful argument for the view that the incorporation debate is largely irrelevant to the issue of applying fundamental rights to the states, inasmuch as natural and inalienable rights should be viewed as inherently national in nature given the nation's initial commitment to such rights, as stated in the Declaration of Independence. This sort of view is suggested by at least one important commentator. See Black, *supra* note 11, at 27-30 (discussing correlation between Declaration of Independence and other rights retained by people).

proper relationship between government and its citizens,¹⁴⁹ rather than a binding text adopted by a sovereign people.¹⁵⁰

VII. SELECT BIBLIOGRAPHY

A. Works on the Meaning of the Ninth Amendment:

1. In General

- 1 THE RIGHTS RETAINED BY THE PEOPLE (Randy E. Barnett ed., 1989).
- 2 THE RIGHTS RETAINED BY THE PEOPLE (Randy E. Barnett ed., 1993).

These volumes are a collection of various authors' renderings of the history and meaning of the Ninth Amendment. The works included in these volumes are not cited below.

2. Works Supporting the Traditional Account

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

James H. Huston, *The Bill of Rights and the American Revolutionary Experience, in A CULTURE OF RIGHTS: THE BILL OF RIGHTS IN PHILOSOPHY, POLITICS, AND LAW—1791 AND 1991*, at 91 (Michael J. Lackey & Ned Haakonssen eds., 1991).

Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 269-73 (1988).

Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215 (1990).

Arthur Wilmarth, *The Original Purpose of the Bill of Rights: James Madison and the Founders' Search for a Workable Balance Between Federal and State Power*, 26 AM. CRIM. L. REV. 1261, 1287-89, 1297-98 (1989).

3. Works Supporting the Natural Rights Account

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

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

LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 367-83 (1988).

Calvin R. Massey, *The Natural Law Component of the Ninth Amendment*, 61 U. CIN. L. REV. 49 (1992).

149. Sager, *supra* note 144, at 263.

150. For an overall critique of this sort of vision of our constitutional order, see Thomas B. McAfee, *Substance Above All: The Utopian Vision of Modern Natural Law Constitutionalists*, 4 S. CAL. INTERDISC. L.J. (forthcoming).

DAVID A. J. RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 220-26 (1989).

B. Works on the Idea of an Unwritten Constitution:

1. Supporting Thesis that Founders Intended an Unwritten Constitution

Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978).

Thomas C. Grey, *The Original Understanding and the Unwritten Constitution*, in TOWARD A MORE PERFECT UNION: SIX ESSAYS ON THE CONSTITUTION 145 (Neil L. York ed., 1988).

Stephen Macedo, *Morality and the Constitution: Toward a Synthesis for "Earthbound" Interpreters*, 61 U. CIN. L. REV. 29 (1992).

David N. Mayer, *The Natural Rights Basis of the Ninth Amendment: A Reply to Professor McAfee*, 16 S. ILL. U. L.J. 313 (1992).

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

2. Critical (at Various Levels) of Thesis That Founders Intended an Unwritten Constitution

LESLIE F. GOLDSTEIN, IN DEFENSE OF THE TEXT: DEMOCRACY AND CONSTITUTIONAL THEORY (1991).

Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907 (1993).

Thomas B. McAfee, *Prolegomena to A Meaningful Debate of the "Unwritten Constitution" Thesis*, 61 U. CIN. L. REV. 1201-63 (1992).

Thomas B. McAfee, *The Bill of Rights, Social Contract Theory and the Rights 'Retained' by the People*, 16 S. ILL. U. L.J. 267-305 (1992).

Helen K. Michael, *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of "Unwritten" Individual Rights*, 69 N.C. L. REV. 421 (1991).

EQUAL PROTECTION PRINCIPLES AND THE ESTABLISHMENT CLAUSE: EQUAL PARTICIPATION IN THE COMMUNITY AS THE CENTRAL LINK

Michael J. Mannheimer*

The United States Supreme Court's modern Establishment Clause¹ jurisprudence began with *Everson v. Board of Education*² in 1947. It was also in this case that the Court held the Establishment Clause to be incorporated against the states via the Fourteenth Amendment.³ The Court came to that conclusion without much analysis of the purposes of either the Establishment Clause or the Fourteenth Amendment. Rather, the Court concluded that since the Free Exercise Clause of the First Amendment⁴ had already been incorporated,⁵ the incorporation of its counterpart, the Establishment Clause, must logically follow.⁶ Since that time, much of the Court's Establishment Clause jurisprudence has involved state, as opposed to federal, action but the Court has never justified its decision to incorporate the clause.

Some recent scholarship has sharply criticized the Court's original conclusion that the Establishment Clause is properly incorporated against the states.⁷ This school of thought asserts that the Establishment Clause was in-

* Law clerk to Hon. Sidney H. Stein, United States District Judge, Southern District of New York. J.D. 1994, Columbia Law School. I would like to thank Akhil Amar, Laura Brill, James Burns, and Kent Greenawalt for their helpful comments.

This Article is dedicated to the memory of my grandmother: "She carried the old world on her back across the ocean . . ." TONY KUSHNER, ANGELS IN AMERICA—PART ONE: MILLENNIUM APPROACHES, ACT 1, SC. 1 (1993).

1. "Congress shall make no law respecting an establishment of religion . . ." U.S. CONST. amend. I.

2. 330 U.S. 1 (1947).

3. *Id.* at 8.

4. "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. CONST. amend. I.

5. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (stating that fundamental concept of liberty embodied in Fourteenth Amendment embraces First Amendment liberties).

6. See Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700, 1702 (1992) (noting that *Everson* Court reasoned that since Free Exercise Clause was incorporated previously it was appropriate to give "same application and broad interpretation" to Establishment Clause).

7. Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1157-58 (1991) (criticizing Justice Black's opinion in *Everson v. Board of Education* for invoking views of Madison and Jefferson on religious freedom while failing to address interconnected issue of federalism); William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191, 1206-07 (1990) (stating that Court's decision to import nonestablishment as fundamental right is nonsensical); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 317 (1986) (criticizing Supreme Court for putting