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ARTICLES

GETTING TO THE BOTTOM OF THE NINTH: CONTINUITY, DISCONTINUITY, AND THE RIGHTS RETAINED BY THE PEOPLE

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Ninth Amendment rights . . . are still a mystery to me.
JUSTICE ROBERT JACKSON¹

Do not smile when I speak of the Ninth Amendment.
SENATOR CHUCK GRASSLEY,
TO JUSTICE WILLIAM REHNQUIST²

INTRODUCTION

Most of us consider the Ninth Amendment,³ on the rare days we consider it at all, as an unsolved cipher of sorts, a constitutional Cheshire Cat.⁴ It is more a historical riddle than a working provision of our fundamental law.⁵ No other part

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1. ROBERT H. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 74-75 (1955).

2. Grassley made the comment during the hearings on Rehnquist's nomination for Chief Justice. See *Nomination of Justice William Hubbs Rehnquist to Be Chief Justice of the United States: Hearings Before the S. Comm. on the Judiciary*, 99th Cong. 182 (1986) (See video at <http://www.c-span.org/video/?150256-2/chief-justice-confirmation-hearing-2>) [<https://perma.cc/B686-CN22>] (comment at 1:46) (last visited Dec. 30, 2016).

3. U.S. CONST. amend. IX.

4. See LEWIS CARROLL, *ALICE IN WONDERLAND* (1865), ch. 6.

5. Mark C. Niles, *Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights*, 48 *UCLA L. REV.* 85, 87-99 (2000); Duane L. Ostler, *Rights Under the Ninth Amendment: Not Hard to Identify After All*, 7 *FED. CTS. L. REV.* 35,

of the Constitution is so often called a puzzle, a paradox, an enigma,⁶ “almost unfathomable.”⁷ The Ninth Amendment is an “irresistible mystery,”⁸ made more captivating by its elusiveness: the Greta Garbo of the Bill of Rights.⁹ It bewitches the academy, bothers the bench, and bewilders the bar.

The first eight amendments, in remarkably few words, set forth many of our dearest liberties. The First Amendment protects freedom of speech, press, free exercise of religion, rights to assemble and rights to petition the government.¹⁰ Other amendments protect the right to keep and bear arms,¹¹ the right to just compensation for the taking of private property,¹² the right to due process,¹³ as well as numerous rights of criminal defendants.¹⁴ Our freedom from unreasonable searches and seizures,¹⁵ double jeopardy,¹⁶ self-incrimination,¹⁷ excessive bail,¹⁸ and cruel and unusual punishment¹⁹ are expressly set forth in the text of amendments one through eight.

The amendment that comes next is just twenty-one words—compact as a

36-38 (2013); Derrick Alexander Pope, *A Constitutional Window to Interpretive Reason: Or in Other Words . . . the Ninth Amendment*, 37 HOW. L.J. 441, 441 (1994).

6. Jeffrey D. Jackson, *The Modalities of the Ninth Amendment: Ways of Thinking About Unenumerated Rights Inspired by Philip Bobbitt’s Constitutional Fate*, 75 MISS. L.J. 495, 496 (2006); 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, 425 (1992).

7. Robert G. Dixon Jr., *The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?*, 64 MICH. L. REV. 197, 207 (1965).

8. Kurt T. Lash, *Originalism as Jujitsu*, 25 CONST. COMMENT. 521, 521 (2009) (book review of DANIEL A. FARBER, *RETAINED BY THE PEOPLE: THE “SILENT” NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON’T KNOW THEY HAVE* (2007)).

9. Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 223 (1983). On Garbo, see Peter Flint, *Greta Garbo, 84, Screen Icon Who Fled Her Stardom, Dies*, N.Y. TIMES (Apr. 6, 1990), <http://www.nytimes.com/specials/magazine4/articles/garbo1.html> [<https://perma.cc/VP5H-5XFC>].

10. U.S. CONST. amend. I. The First Amendment also prohibits Congress from making any “law respecting an establishment of religion.” *Id.*

11. U.S. CONST. amend. II.

12. U.S. CONST. amend. V.

13. *Id.*

14. U.S. CONST. amend. VI. These include the right to a speedy and public trial, the right to a trial by an impartial jury, the right to be informed of criminal charges, the right to confront witnesses, the right to compel witnesses to appear in court, and the right to assistance of counsel. *Id.* The Sixth Amendment also requires grand jury screening of criminal indictments. *Id.*

15. U.S. CONST. amend. IV. The Fourth Amendment also requires that warrants be judicially sanctioned and supported by probable cause. *Id.*

16. U.S. CONST. amend. V.

17. *Id.*

18. U.S. CONST. amend. VIII.

19. *Id.*

fortune cookie, and just as cryptic: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”²⁰ This, too, is an amendment about rights. Not the rights enumerated in the Constitution, but “others retained by the people.”²¹

There is one difficulty with the rights retained by the people: Nobody knows what they are, and twenty-one words is not a lot to work with.²² All we can confidently say is that some other rights (might) exist that do not appear in the Constitution but that the people (might) “retain”²³—whatever *that* means—and that we are not supposed to “deny or disparage” those rights—whatever *that* means—on the ground that they do not appear in the Constitution.²⁴ The Constitution provides no further guidance about how to identify retained rights, how to think about them, or how to enforce them. The rest is silence.²⁵

Small wonder the Ninth Amendment, like Garbo, has largely been left alone.²⁶ Few courts have ever used it as the basis of a decision; the U.S. Supreme Court has never done so.²⁷ The amendment was scarcely mentioned before 1965;

20. U.S. CONST. amend. IX.

21. *Id.*

22. Of the amendments in the Bill of Rights, only the Eighth Amendment (sixteen words) is shorter. *See* U.S. CONST. amend. VIII. Those sixteen words had a much longer history of elaboration in English law, however. The phrases in the Eighth Amendment were at least a century old; they originated in the English Bill of Rights (1689). By contrast, the phrases in the Ninth Amendment were entirely new; nothing like it had even been suggested prior to the Virginia Ratifying Convention, less than a year earlier (which had also used very different language). *See Ratification of the Constitution by the State of Virginia*, (June 26, 1788), AVALON PROJECT: YALE L. SCH., http://avalon.law.yale.edu/18th_century/ratva.asp [<https://perma.cc/P5HJ-7P66>] (last visited Dec. 30, 2016) (seventeenth proposed amendment to the body of the Constitution).

The Eighth and Ninth Amendments are the only two amendments in the Bill of Rights that are short enough to be a tweet.

23. *See* CHARLES L. BLACK JR., *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED* 14 (1997).

24. Lash, *supra* note 8, at 521.

25. Jackson, *supra* note 6, at 498-99, 517; Lash, *supra* note 8, at 521; Niles, *supra* note 5, at 87-99; Ostler, *supra* note 5, at 36-38; Chase J. Sanders, *Ninth Life: An Interpretive Theory of the Ninth Amendment*, 69 IND. L.J. 759, 761 (1994); Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935, 1960 (2013). *Cf.* Laurence H. Tribe, *Contrasting Constitutional Visions: Of Real and Unreal Differences*, 22 HARV. C.R.-C.L. L. REV. 95, 107 (1987).

26. *See* Remarks by Chairman Alan Greenspan at the Conference on Privacy in the Information Age, Salt Lake City, Utah, 1997 WL 103810, at *1 (F.R.B. Mar. 7, 1997).

27. Elizabeth Price Foley, *Judicial Engagement, Written Constitutions, and the Value of Preservation: The Case of Individual Rights*, 19 GEO. MASON L. REV. 909, 924-27 (2012); Jackson, *supra* note 6, at 496; Niles, *supra* note 5, at 89. The chief outlier among U.S. Supreme Court cases is *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), a decision based in part on the Ninth Amendment. *See id.* at 579 n.15. *Richmond Newspapers* was a plurality opinion; however, it did not command a majority of the Court. *See id.* at 555.

since then it has been cited only as secondary support for decisions reached on other grounds.²⁸ The Court has declined even to discuss the amendment in any substantial way, much less reflect on its importance to any particular decision.²⁹ Indeed, the Supreme Court has never issued a majority opinion explaining what the Ninth Amendment means.³⁰

The Court does protect some unenumerated rights, but in a way that an ordinary reader would be highly unlikely to infer from the text of the Constitution. The direct way would be simply to observe that the asserted right is not among those “certain rights”³¹ “enumerate[d] in the Constitution,”³² before proceeding to consider whether it is among the “others retained by the people.”³³ That would be the direct way, but that is not what the Court does. Instead, the Court takes the roundabout route we have come to call *substantive due process*.³⁴ That is, the Court recognizes unenumerated rights not by finding that they fall under the Constitution’s sole reference to such rights, but by finding that they *do* fall under something in the text (the Due Process Clause), so that a link is announced between the asserted right and the text. Now armed with a textual peg on which the right may hang, the Court need never consider whether the right might also be among the “others retained by the people.”³⁵

Thus, the most common approach to the Ninth Amendment today is to avoid

28. Niles, *supra* note 5, at 89 n.13; Ostler, *supra* note 5, at 36-38.

29. Randy E. Barnett, *The People or the State? Chisholm v. Georgia and Popular Sovereignty*, 93 VA. L. REV. 1729, 1758 (2007); Randy E. Barnett, *The Presumption of Liberty and the Public Interest: Medical Marijuana and Fundamental Rights*, 22 WASH. U. J.L. & POL’Y 29, 31 (2006); Foley, *supra* note 27, at 926-27; Jackson, *supra* note 6, at 496; Lash, *supra* note 8, at 522.

30. David M. Burke, *The “Presumption of Constitutionality” Doctrine and the Rehnquist Court: A Lethal Combination for Individual Liberty*, 18 HARV. J.L. & PUB. POL’Y 73, 122 (1994); Foley, *supra* note 27, at 924-27; Jackson, *supra* note 6, at 496.

31. U.S. CONST. amend. IX.

32. *Id.*

33. *Id.*

34. The term *substantive due process* was first used in casebooks in the 1930s; by 1950 it had been mentioned twice in Supreme Court opinions. See G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 259 (2000). Objections to the expanded scope of the Fourteenth Amendment are nothing new; see, e.g., *Baldwin v. Missouri*, 281 U.S. 586, 595-96 (1930) (Holmes, J., dissenting). More recently, the Court has acknowledged (in a unanimous opinion) that the substantive content of the Due Process Clause “is suggested neither by its language nor by preconstitutional history” and in fact “is nothing more than the accumulated product of judicial interpretation of the Fifth and Fourteenth Amendments.” *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225-26 (1985) (citation and internal quotation marks omitted).

35. U.S. CONST. amend. IX; see, e.g., *Bd. of Regents v. Roth*, 408 U.S. 564, 572 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965); *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923); *Lochner v. New York*, 198 U.S. 45, 53, 64 (1905); *Allgeyer v. Louisiana*, 165 U.S. 578, 591 (1897).

approaching it at all.³⁶ A lawyer seeking to base an argument on retained rights will swiftly learn that arguments based on retained rights are simply not made.³⁷ A leading Ninth Amendment scholar, Randy Barnett, has called the amendment's role in deciding constitutional cases "all but imaginary."³⁸ Some commentators acknowledge that the amendment exists(!), but politely decline to apply it.³⁹ Others, less polite, treat it frankly as more of a joke. The Ninth Amendment is today "little more than a constitutional oddity" with "little prospect of ever winning from the Court the respect it deserves."⁴⁰ "In sophisticated legal circles," wrote John Hart Ely, "mentioning the Ninth Amendment is a surefire way to get a laugh."⁴¹

Laughing off liberties rarely ends well. It is dispiriting to see part of the Bill of Rights shipwrecked at the bottom of the sophisticates' punch bowl. Whatever interpretive challenges it poses, the Ninth Amendment is part of our fundamental law and the Constitution contains no known exception under which we may ignore provisions on the ground that they are tough to understand. The aw-shucks shrug, the faux-knowing chuckle, therefore will not do. We do not get to call the Ninth Amendment unfathomable and call it a day. We must do all we can to fathom it. Plainly we can do better and the Constitution obliges us to try.

This essay is part of my own effort to understand the Ninth Amendment's proper place in constitutional law and history. My longer-term project seeks better ways to think about unwritten law in general and about unenumerated rights in particular. Naturally, this includes those liberties the Ninth Amendment calls the rights retained by the people.

Part I below observes that a constitution's specific features can ordinarily be classified as either a continuation or a discontinuation of the old order. The Ninth Amendment, however, is weirdly difficult to classify as either *continuity* or *discontinuity*. Part I also briefly reviews how the Ninth Amendment came to be; to allay fears that a partial enumeration of rights could endanger other rights that were not listed, James Madison proposed an amendment simply to clarify what enumeration did and did not do.⁴² Congress ultimately adopted Madison's

36. Roland H. Beason, *Printz Punts on the Palladium of Rights: It Is Time to Protect the Right of the Individual to Keep and Bear Arms*, 50 ALA. L. REV. 561, 575 (1999); Niles, *supra* note 5, at 95.

37. The earliest serious commentary on the Ninth Amendment is probably BENNETT B. PATTERSON, *THE FORGOTTEN NINTH AMENDMENT* (1955). For contemporary discussions, see, e.g., *Troxel v. Granville*, 530 U.S. 57, 91-92 (2000) (Scalia, J., dissenting); RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 254, 260, 261 (2004); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 184 (1990).

38. Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 42 (1988) [hereinafter Barnett, *Reconceiving the Ninth Amendment*].

39. Ostler, *supra* note 5, at 36-38.

40. Burke, *supra* note 30, at 122.

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

42. *See infra* Part I.

proposal, but only after eliminating much of his suggested language, thereby obscuring not only the purpose of the amendment but the legal effect of enumeration and the relation between enumerated and unenumerated rights.⁴³

Part II delineates several schools of thought about the Ninth Amendment, defining them by *their* answers to the question Madison had intended the amendment to answer. These include: those who think enumeration makes no difference at all (*non-differentialists*); those at the opposite end, who think unenumerated rights are or should be unenforceable (*strict differentialists*); and those who think enumeration does matter but that whether a right is enforceable should not be determined by enumeration per se (*moderate differentialists*).⁴⁴ Part III discusses a fourth group, the *exoconstructionists*, who interpret the Ninth Amendment not as an invitation to inquire into the rights retained by the people, but as an instruction about how to construe other parts of the Constitution.

Part IV examines Michael McConnell's argument that the Ninth Amendment is best understood in light of Lockean political theory, and that "retained rights" are simply the individual natural rights that the people did not relinquish as part of the original social compact. In McConnell's view, the amendment seeks to clarify that the enumeration of some of these rights in the written Constitution did not abrogate those not enumerated; they remain in force unless contradicted by sufficiently explicit positive law.⁴⁵

Part V observes that interpretation gets more complicated as we get further from the "poles" of non-differentialism and strict differentialism. In moderate differentialism, the courts enjoy maximum discretion both to decide which unenumerated rights are enforceable and to evaluate which interpretations comport with what we know about the historical context.⁴⁶ This Article suggests that a simple tool like the continuity/discontinuity distinction might help nonhistorians make effective commonsense arguments about whether the choices we ascribe to our forebears are plausible as a matter of history.

I. WHAT DID THE NINTH AMENDMENT AMEND?

ON THIS SITE IN 1897
NOTHING HAPPENED.
*Parody "historical plaque,"
a novelty item*⁴⁷

Constitutional history can either emphasize *continuity*, the endurance over time of certain practices, customs, traditions, and institutions as fundamental law;

43. *See id.*

44. *See infra* Part II.

45. *See infra* Part IV.

46. *See infra* Part V.

47. *See* Maureen Monahan, *11 Offbeat Commemorative Plaques*, MENTAL FLOSS (July 11, 2013), <http://mentalfloss.com/article/51605/11-offbeat-commemorative-plaques> [<https://perma.cc/YX9H-9BED>].

or it can emphasize *discontinuity*, the moments when such practices, customs, traditions, and institutions substantially change. As Michael Hoffheimer has written, both views “claim[] a privileged position in constitutional interpretation,” but they “adopt radically different theories of textual authority, employ conflicting strategies of constitutional interpretation, and are committed to incompatible views of history.”⁴⁸ Practically speaking, most constitutions continue some features of the old order and discontinue others. Our own Constitution, for instance, continues the bicameral legislative structure we inherited from Britain, with an “upper” and “lower” house. It discontinues the practice of selecting upper-house members from a hereditary peerage. Our Eighth Amendment is a restatement of rights long claimed by Englishmen (continuity). The rights listed in the Sixth Amendment, on the other hand, are largely an American innovation (discontinuity). As our framers surely understood, in establishing a new constitutional order, they were maintaining some preexisting practices and institutions while dispensing with others.

Is the Ninth Amendment itself an example of continuity, or discontinuity?

In some ways, the Ninth Amendment seems like a continuity. It announces no new law, establishes no new institution, and abolishes no otherwise-existing practice. It seems more like a statement about the way things already are. Yet calling it a continuation of the old order does not seem quite right. Nothing like the Ninth Amendment had existed before, either in the English Constitution or at common law, and unlike the eight preceding amendments, it lacked any counterpart in either the Articles of Confederation or the laws of the newly independent states. The Ninth Amendment is the first place in the Bill of Rights that a reasonably well-informed reader in 1791 would have encountered something entirely unfamiliar.⁴⁹

And how confident are we that the Ninth Amendment involves *no* change? Amendments *amend* things, after all. Even if this one is more preventive than innovative, it does seem to be doing some work: Something is different because this was added to the Constitution. If that were *not* the case, then why adopt it at all? (What would the interpretive implications have been had the Ninth Amendment failed to win approval? Only if the answer is “none whatsoever” can we call the amendment purely declaratory.) Yet what exactly did the Ninth Amendment *change*, other than the Constitution’s total word count?

That question—whether the Ninth Amendment was more of a continuation or discontinuation of the history that preceded it—seems as though it should be simple enough to answer. But it is not. There is something disorienting, something confusing about the distinction between continuity and discontinuity when applied to the Ninth Amendment, and I have been trying to identify just what that is. I think the source of our confusion lies outside the text of the amendment itself. The difficulty is older than the text. It is what the text was meant to address, a problem as old as the advent of written constitutionalism.

48. Michael Hoffheimer, *Copying Constitutional Text: Natural Law, Constitutionalism, Authority*, 4 S. CAL. INTERDISC. L.J. 653, 660 (1995).

49. See BERNARD SCHWARTZ, *THE GREAT RIGHTS OF MANKIND* 198-99 (1977).

A leading objection to the proposed Constitution during the ratification debates of 1787-1788 was the document's lack of a bill of rights.⁵⁰ The Federal Convention had deferred most discussion of rights, focusing instead almost entirely on how the new government should be structured—that is, on selecting the specific institutional components of a redesigned government and debating how each component should relate to the others and to the whole. Only once did anyone propose adding a bill of rights to the new Constitution; the proposal was summarily voted down with virtually no discussion.⁵¹ If the Constitution was to contain a catalogue of discrete liberties, it would have to wait. In the meantime, the continuing concerns about the lack of a bill of rights led those who opposed ratification to call for a second constitutional convention, where that omission and other defects could be remedied with one or more amendments.⁵²

Supporters of ratification overcame these demands, temporarily at least, by arguing that a bill of rights was both needless and potentially unsafe. Alexander Hamilton argued in the Federalist Papers that a bill of rights would be “not only unnecessary [but also] dangerous,” inasmuch as it might pose a positive obstacle to the exercise of any liberty not expressly mentioned.⁵³ In a similar vein, James Iredell warned the North Carolina ratifying convention: “[I]t would be not only useless, but dangerous, to enumerate a number of rights which are not intended to be given up.”⁵⁴ Such a list could too easily be misunderstood to mean that any right not listed was no longer (or never was) a right.⁵⁵ The only way to avoid the problem was to enumerate each and every possible right we might seek to protect from the government—a task that Iredell thought impossible: “Let any one make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it.”⁵⁶

This fear that a bill of rights might actually endanger rights was thus premised on the concern that a written list of rights might be misinterpreted to mean that only the listed rights were to enjoy constitutional protection. The familiar interpretive principle *expressio unius est exclusio alterius*—“to express one thing is to exclude the other”—meant that any right not expressly included

50. See *infra* note 51 and accompanying text.

51. It was George Mason of Virginia, on September 12, who suggested adding a bill of rights modeled on previous state declarations; Elbridge Gerry of Massachusetts made it a formal motion, which was discussed only briefly before being defeated unanimously by a vote of the state delegations. See RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 341 (2009).

52. See, e.g., Brutus, *Essay of Brutus II* (Nov. 1, 1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 372-77 (Herbert J. Storing ed., 1981); *Letter from The Federal Farmer* (Jan. 20, 1788), reprinted in *id.* (Letter XVI).

53. THE FEDERALIST NO. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

54. North Carolina Ratification Debates (July 29, 1788), in 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 167 (Jonathan Elliot ed., 1836).

55. See THE FEDERALIST NO. 84, *supra* note 53, at 513-14 (Alexander Hamilton).

56. N.C. Ratification Debates (July 29, 1788), *supra* note 54.

would be presumptively excluded. This, in turn, could authorize the government to violate that right with impunity. Better to avoid the problem entirely, by making no list at all, than to invite disaster with a partial enumeration.

Thus, the Constitution of 1787 included no bill of rights, in part for fear of the dangers a partial enumeration of rights might bring.⁵⁷ Two summers later, on the day Madison rose as a member of the First Congress to offer a series of proposed amendments that would become the Bill of Rights, he knew he needed to address such fears directly.

Madison began by conceding that the argument was “one of the most plausible arguments [he] ha[d] ever heard urged against the admission of a bill of rights into this system.”⁵⁸ He believed, however, that the dangers could be addressed, and he proposed doing so with an additional amendment:⁵⁹

The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.⁶⁰

At fifty-seven words, this is longer than the amendment that has come down to us, but it also does a much better job of illuminating what Madison intended. Madison’s strategy for protecting unenumerated rights was to clarify precisely what enumeration did and did not do⁶¹: Do not construe the exceptions (rights)

57. See *The U.S. Constitution*, HIST., <http://www.history.com/topics/constitution> [<https://perma.cc/WP73-C2YP>] (last visited Dec. 29, 2016).

58. 1 ANNALS OF CONG. 439 (1789) (Joseph Gales ed., 1834).

59. Madison’s language most resembled that of the Virginia ratifying convention, which provided

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

Amendments Proposed by the Virginia Convention (June 27, 1788), in *THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES AND ORIGINS* 675 (Neil H. Cogan ed., 1997). Madison, who had served on the committee that had drafted Virginia’s proposal, later acknowledged the influence of that proposal on the language he would ultimately present to Congress as part of the proposed Bill of Rights. *Letter from James Madison to George Washington (Nov. 20, 1789)*, in 2 *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 1185 (Bernard Schwartz ed., 1971). See also *Amendments Proposed by the North Carolina Convention (Aug. 1, 1788)*, in *THE COMPLETE BILL OF RIGHTS*, *supra*, at 674-75.

60. 1 ANNALS OF CONG., *supra* note 58, at 435.

61. This is not the only place in the Constitution where the framers tried to address the *expressio unius* canon by clarifying the implications of a list. See U.S. CONST. amend. X. Both the Ninth and Tenth Amendments tell us how to read lists that appear in the Constitution, but they point in opposite directions depending on whether their subject is rights or powers. The Ninth instructs that a list of rights should not be presumed exhaustive; the Tenth instructs the opposite for a list of

to diminish the just importance of other rights retained by the people; do not construe them to enlarge delegated (enumerated) powers; do construe them as actual limitations of delegated (enumerated) powers; or, do construe them as “inserted merely for greater caution.”⁶² Madison reasoned that this provision, which he presented in Congress on June 8, 1789, and which was then referred to the Select Committee of the House for revision, would help safeguard unenumerated rights simply by clarifying the intent and effect of enumeration.⁶³

Madison’s language fared poorly, however, at the hands of the Select Committee, which revised it to its present version, “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”⁶⁴ Unfortunately, these changes obscured not only the point of the proposed amendment, but the point of enumeration itself. The revised version preserved only the guidance that retained rights were not to be “diminished”⁶⁵ (changed to “den[ied] or disparage[d]”⁶⁶) by enumeration. The rest of Madison’s explanation was entirely removed.⁶⁷ The revised version omitted the guidance that enumeration was not to enlarge delegated powers.⁶⁸ It omitted the guidance that enumerated rights were actual limitations of delegated powers.⁶⁹ It threw Madison’s “greater caution”⁷⁰ to the winds.

What to make of these changes depends partly on one’s view of legislative history, particularly whether one thinks that deleted words can help us construe the words that remain. But it is undeniable that the Select Committee’s changes made the amendment more obscure. Madison’s original aim—to protect retained rights by clarifying the purpose and effect of enumeration—is completely frustrated, since we can no longer say what, if anything, enumeration actually does. Measured by Madison’s purpose, it is difficult to see the Select Committee’s alterations as any sort of improvement—difficult, indeed, to see those alterations as anything other than a choice to privilege brevity at the cost of clarity, concision sowing confusion.⁷¹

federal powers.

62. 1 ANNALS OF CONG., *supra* note 58, at 435.

63. Madison himself did not use “enumeration” but referred more broadly to “[t]he exceptions here or elsewhere in the Constitution,” encompassing rights included in the original Constitution as well as those enumerated in the Bill of Rights. *See id.* It is unclear whether the Select Committee intended “enumeration” to refer solely to the particular list in the Bill of Rights; to my knowledge it has never been so interpreted.

64. U.S. CONST. amend. IX.

65. 1 ANNALS OF CONG., *supra* note 58, at 435.

66. U.S. CONST. amend. IX.

67. *Compare* 1 ANNALS OF CONG., *supra* note 58, at 435, *with* U.S. CONST. amend. IX.

68. *Compare* 1 ANNALS OF CONG., *supra* note 58, at 435, *with* U.S. CONST. amend. IX.

69. *Compare* 1 ANNALS OF CONG., *supra* note 58, at 435, *with* U.S. CONST. amend. IX.

70. *Compare* 1 ANNALS OF CONG., *supra* note 58, at 435, *with* U.S. CONST. amend. IX.

71. “Everything should be made as simple as possible, but not simpler”: Usually attributed to Einstein (though more properly termed a paraphrase of the original). *See* ALBERT EINSTEIN, IDEAS AND OPINIONS 272 (1954).

Confusion about the effect of enumeration, and about the relative standing of enumerated and retained rights, was front and center in the case that opened the modern era of Ninth Amendment studies, *Griswold v. Connecticut*.⁷² In his influential concurrence in that case, Justice Goldberg noted that the Court had, up to that point, “little occasion to interpret the Ninth Amendment”⁷³ (an understatement), and he therefore looked instead to Madison’s House speech introducing the Bill of Rights, to Story’s *Commentaries*, and several other scholarly works.⁷⁴ Based on these sources, Justice Goldberg concluded the Ninth Amendment simply means that “the framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people.”⁷⁵ That is a straightforward enough conclusion, which presumably has contributed to the lasting influence of Justice Goldberg’s opinion, but it was, of course, a concurring opinion only; it did not command a majority of the Court.

The task of writing for the Court's majority fell to Justice Douglas, who used the Ninth Amendment in the customary (i.e., auxiliary) way, mentioning it only in passing as one of the guarantees of the Bill of Rights that “ha[s] penumbras, formed by emanations from [such] guarantees.”⁷⁶ Unlike Justice Goldberg, Justice Douglas was unwilling to rest the decision or the right to privacy on the Ninth Amendment.⁷⁷ The fundamental right of marital privacy asserted in *Griswold* is not specifically enumerated in the Bill of Rights;⁷⁸ the *Griswold* majority agreed that marital privacy could be protected, not because the Ninth Amendment afforded a sufficient basis for recognizing it as a fundamental right, but because it was within the “liberty”⁷⁹ protected by the Due Process Clause—that is, within a textual guarantee.⁸⁰ Fifty years later, it is still this general liberty category that the Court uses as a textual basis for rights not explicitly described by the text.⁸¹

72. 381 U.S. 479 (1965).

73. *Id.* at 490 (Goldberg, J., concurring).

74. *Id.* at 489-91 n.6 (citing 1 ANNALS OF CONG., *supra* note 58; II JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 626-27 (5th ed. 1891); PATTERSON, *supra* note 37; Knowlton H. Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L.J. 309 (1936); Norman Redlich, *Are There ‘Certain Rights . . . Retained by the People?’*, 37 N.Y.U. L. REV. 787 (1962)). Except for references in treatises on the Constitution, until *Griswold* these three were virtually the only treatments exclusively devoted to the Ninth Amendment.

75. *Griswold*, 381 U.S. at 490.

76. *Id.* at 484 (majority opinion).

77. *See id.* at 480-86.

78. *See* U.S. CONST. amend. I-X.

79. U.S. CONST. amend. IV, XIV.

80. *Griswold*, 381 U.S. at 480-86.

81. In *Obergefell v. Hodges*, the Court reiterated its view that the Due Process Clause protects fundamental liberties and that the category includes not only most enumerated rights but also “certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.” 135 S. Ct. 2584, 2597-98 (2015) (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Duncan v. Louisiana*, 391 U.S. 145, 147-49 (1968); *Griswold*, 381

The justices will sooner infer the existence of an unenumerated right from the language of enumerated ones, before undertaking the more dicey project of deciding whether the right asserted is among those retained by the people.

“To a large extent,” Jeffrey Jackson has written, “our views on what unenumerated rights the Ninth Amendment might yield will be governed by our views on constitutional interpretation in general.”⁸² I believe our responses to the Ninth Amendment, and ultimately the positions we take on how best to interpret it, are shaped by how *we* answer the question that the Ninth Amendment was intended to answer.

One reason it is not immediately obvious whether the Ninth Amendment is continuing or discontinuing the old order is that we are asking the wrong question, or rather we are asking the right question about the wrong thing. The Ninth Amendment is unlike other constitutional provisions, not because it is vague, open-ended, etc. (for that is hardly unique), but because it is metaconstitutional: It is an instruction about how to read the text we are already reading. That in itself does not mean it has no substantive effect—but it is very, very distracting. We get so caught up in deciding what the Ninth Amendment *is* that we are diverted from considering what it *does*. We might, upon review, issue our conclusion that the amendment is “merely declaratory.” True enough; but does it declare continuity or change? Or perhaps we conclude that it is a rule of construction, a simple instruction for those undertaking to read the Constitution. But this, too, will not do. If it is an instruction about how to construe the Constitution, it is an instruction about how to construe the Constitution *in light of something*. The key to the Ninth Amendment is not the instruction itself; it is what *occasioned* the instruction. That is the amendment’s true subject.

And in fact, the text of the amendment tells us what that subject is. It is the grammatical subject of the verb “construed.”⁸³ That “something else” is the enumeration of rights. It is the partial enumeration of rights that gives rise to the amendment. The Ninth Amendment, by its own terms, addresses the fact that some rights are enumerated in the Constitution and other rights are not. Our real question is about the effect of that enumeration. The Ninth Amendment “problem,” in other words, is not the real problem. Enumeration is the problem; written constitutionalism is the problem. Those are the questions that truly divide us, and the Ninth Amendment is merely a hostage to our divisions.

The Ninth Amendment, in other words, is not so much a continuity or discontinuity, as it is an attempt to answer that question for something else. Asking the continuity-vs.-discontinuity question about the Ninth Amendment is confusing because *the amendment itself is an answer* to that very question—*about something else* in the Constitution. It clarifies, or tries to clarify,

U.S. at 484-86). *See also Griswold*, 381 U.S. at 500 (Harlan, J., concurring) (“While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands . . . on its own bottom.”).

82. Jackson, *supra* note 6, at 499.

83. U.S. CONST. amend. IX.

the category to which *enumeration* belongs. Clarifying what enumeration did and did not change was the Ninth Amendment's original *raison d'être*, which is why the Select Committee's alterations were so damaging. Our quizzical responses to it reflect our ambivalence about that deeper question, the question the Ninth Amendment was meant to answer but that remains disputed today: *Does enumeration make a difference?*

That question—whether *enumeration* is continuity or discontinuity—*can* be answered. We just have not yet done so, and by avoiding the amendment we also avoid the deeper enumeration question it was written to address. Nor has the Court ever addressed the Ninth Amendment in a way that made clear the precise effect of enumeration *per se*.⁸⁴ Indeed, we have never quite put our finger on what enumeration actually does.

But this question—does enumeration *per se* make any practical difference?—is not unanswerable. Madison's original draft, had it been adopted, would have communicated a great deal about enumeration's purpose and practical implications. Another (very different) answer was provided by Leslie Dunbar, writing in 1956: Judicial enforcement is the “practical effect of enumeration”⁸⁵ and Ninth Amendment rights are defensible “only through political action.”⁸⁶ This, too, is an entirely legitimate view, although we know it is one the Court itself does not share, as it has repeatedly held.⁸⁷ Beyond Dunbar's view, though,

84. Until *Griswold*, only seven Supreme Court cases really dealt with the Ninth Amendment. See *Roth v. United States*, 354 U.S. 476, 492-93 (1957); *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948); *United Pub. Workers v. Mitchell*, 330 U.S. 75, 94-96 (1947); *Tennessee Elec. Power Co. v. Tennessee Valley Auth.*, 306 U.S. 118, 143-44 (1939); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 330-31 (1936); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 511 (1857) (Campbell, J., concurring); *Lessee of Livingston v. Moore*, 32 U.S. (7 Pet.) 469, 551 (1833) (in which the Court's reference to the “ninth article of amendment” may refer to the ninth proposed amendment, i.e., the seventh amendment enacted). *But see* Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L. REV. 597, 598-600 (2005) (disputing the widespread assumption that the Ninth Amendment received little judicial construction before 1965).

85. Leslie W. Dunbar, *James Madison and the Ninth Amendment*, 42 VA. L. REV. 627, 643 (1956).

86. *Id.*

87. On multiple occasions the Court has recognized or enforced liberties not specifically enumerated in the Bill of Rights. Such liberties include the right to relocate or travel interstate, *see* *Dunn v. Blumstein*, 405 U.S. 330, 338-42 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 629-30 (1969); the right to vote, *see* *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 625-29 (1969); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665-70 (1966); *Reynolds v. Sims*, 377 U.S. 533, 554-58 (1964); and the right to equal protection of federal laws, *see* *Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954). Other unenumerated rights the Court has recognized include the right to bodily integrity, *see* *Washington v. Harper*, 494 U.S. 210, 221-22 (1990); *Rochin v. California*, 342 U.S. 165, 172-73 (1952); the right to marry or not marry, *see* *Turner v. Safley*, 482 U.S. 78, 95-96 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 383-87 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); the right to make one's own decisions about having children, including the decision to use contraceptives or terminate a pregnancy, *see* *Carey v. Population Servs. Int'l*, 431 U.S. 678, 694

are vast unexplored territories of our constitutional law. After two hundred years, we remain unsettled on the practical effect of enumeration per se.

The problem is not that the question is unanswerable; if anything, as we shall see, the problem is that there are too many competing answers out there. But the question the Ninth Amendment originally aimed to answer—*does enumeration make a difference, and, if so, what is it?*—also suggests a useful way to classify present-day views of the amendment itself.

So let us try to classify Ninth Amendment interpretations according to how they answer that question: *Does enumeration make a difference?* If it was discontinuity, what actually changed? The Bill of Rights did not, after all, create anything new. Adopting those ten amendments in 1791 added no new states to the Union, established no new branch of government, conferred no new authority on existing institutions. On its face, and certainly through the first Eight Amendments, it merely announces that we possess certain liberties, which we also possessed before the Constitution announced them, and which we presumably would have continued to possess whether the Constitution had announced them or not. On the other hand, if enumeration was an act of continuity, why was it the subject of such controversy at the time? Why was it even needed? What is the purpose of the list? Does enumeration even matter? Or is enumeration a distinction without a difference? Is the Ninth Amendment like a plaque that reads, “On this site—in 1791—nothing happened”?

II. DOES ENUMERATION MAKE A DIFFERENCE?

A. “Enumeration Makes No Difference”: The Non-Differentialists

The simplest way to read the Ninth Amendment is this: Whether a right is

(1977); *Roe v. Wade*, 410 U.S. 113, 153 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942); the right to live with one’s own family, *see Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977) (plurality opinion); and the right to direct the education and upbringing of one’s children, *see Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925); *see also Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

In the criminal context, unenumerated rights include the right to attend and report on criminal trials, *see Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 563-81 (1980) (plurality opinion); the presumption of innocence and the right to demand proof beyond a reasonable doubt before being convicted of a crime, *see Jackson v. Virginia*, 443 U.S. 307, 313-24 (1979); *Sandstrom v. Montana*, 442 U.S. 510, 523-24 (1979); *Estelle v. Williams*, 425 U.S. 501, 503-05 (1976); and the right to retain U.S. citizenship, notwithstanding the commission of criminal acts, until one voluntarily renounces it, *see Afroyim v. Rusk*, 387 U.S. 253, 267-69 (1967).

For other examples, *see Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (right to receive information and ideas); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (same); *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984) (freedom of association, both expressive and intimate); and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) (liberty of conscience; freedom of thought; right to hold one’s own beliefs).

enumerated makes no difference at all. Some rights are expressly listed in the Constitution, others are not, but we must take no notice of whether a right happens to be listed, because the Ninth Amendment expressly bars us from denying or disparaging any right on that basis. The distinction between enumerated rights and retained rights is a suspect classification, a line that the Ninth Amendment tells us not to draw.

Despite the simplicity of this view, or perhaps because of it, relatively few commentators read the Ninth Amendment this way. I will call them *non-differentialists* to indicate their position that whether a right is enumerated really makes no difference (or is not supposed to, at least). The listing of some rights in the text has no bearing on the existence or enforceability of rights not listed. I am no more prevented from exercising an unlisted right than I am from dialing an unlisted phone number.

Non-differentialists rely, first and foremost, on the text of the Ninth Amendment.⁸⁸ They start with intrinsic evidence, chiefly the plain meaning (or what they assert is the plain meaning) of the amendment's words on their face. Such arguments fall into five groups, more or less: (1) the amendment "means what it says";⁸⁹ (2) its language is clear;⁹⁰ (3) its language is simple;⁹¹ (4) historical evidence supports this construction;⁹² and (5) the only way to avoid what the amendment actually says is by contriving elaborate arguments that it means something else—and nothing on its face suggests that it does.⁹³ These five

88. These are the points non-differentialists would make if for some reason the text were all we had to work with—if all other pertinent records of the founding were lost, for example, or if we sought to interpret identical language contained in the constitution of another nation with a history utterly unlike our own.

89. See Jed Rubenfeld, *Concurring in the Judgment Except as to Doe, in WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION* 109, 119 (Jack M. Balkin ed., 2005); see also Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 80 (2006) [hereinafter Barnett, *The Ninth Amendment*]; Susan H. Bitensky, *Theoretical Foundations for A Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 623 (1992).

90. See ELY, *supra* note 41, at 34-38; Barnett, *The Ninth Amendment*, *supra* note 89; Barnett, *Reconceiving the Ninth Amendment*, *supra* note 38, at 9-23; Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 CHI.-KENT L. REV. 131, 141 (1988); see also Murphy, *supra* note 6, at 425.

91. Bruce A. Antkowiak, *The Rights Question*, 58 U. KAN. L. REV. 615, 630 (2010); Barnett, *The Ninth Amendment*, *supra* note 89; Terrence J. Moore, *The Ninth Amendment—Its Origins and Meaning*, 7 NEW ENG. L. REV. 215, 217 (1972); Timothy Sandefur, *Liberal Originalism: A Past for the Future*, 27 HARV. J.L. & PUB. POL'Y 489, 526 (2004); Sanders, *supra* note 25, at 761; Christopher J. Schmidt, *Revitalizing the Quiet Ninth Amendment: Determining Unenumerated Rights and Eliminating Substantive Due Process*, 32 U. BALT. L. REV. 169, 193 (2003).

92. ELY, *supra* note 41, at 34-38; Barnett, *Reconceiving the Ninth Amendment*, *supra* note 38, at 9-23; Barnett, *The Ninth Amendment*, *supra* note 89.

93. BLACK, *supra* note 23, at 10 (characterizing academic writing on the Ninth Amendment

lines of argument, which intersect and overlap, cover the plain-meaning points that non-differentialists typically make, and they all carry overtones of an appeal to common sense.

Intrinsic evidence includes not only the plain meaning of the words on their face but also the inferences a competent reader will sensibly draw from those words. I count around ten such inferences that non-differentialists frequently draw:⁹⁴

- (1) the enumeration of some rights does not foreclose the possibility that other, unenumerated rights exist;⁹⁵
- (2) some unenumerated rights do, in fact, exist; i.e., the Bill of Rights is not intended to be exhaustive, but only illustrative;⁹⁶
- (3) at least some of these unenumerated rights that do exist are “rights retained by the people”;⁹⁷
- (4) retained rights are not to be “denied or disparaged”;⁹⁸
- (5) at least some retained rights enjoy some measure of constitutional protection;⁹⁹
- (6) the Constitution authorizes judges to identify and enforce retained rights, just as it authorizes judges to identify and enforce enumerated rights;¹⁰⁰
- (7) nothing prevents retained rights from enjoying, in fact, the same constitutional protection that enumerated rights do;¹⁰¹
- (8) at least some retained rights therefore enjoy the same constitutional status as those made explicit in the text, and in this sense, such

as “in great part a multidirectional fluttering flight from the Amendment’s rather plain meaning”); ELY, *supra* note 41, at 34; LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION 275 (1988).

94. This catalog is my own.

95. See *Griswold v. Connecticut*, 381 U.S. 479, 492-93 (1965) (Goldberg, J., concurring); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579 n.15 (1980); *Charles v. Brown*, 495 F. Supp. 862, 863-64 (N.D. Ala. 1980).

96. *Griswold*, 381 U.S. at 488, 492 (Goldberg, J., concurring); see also *Hockenberry v. Village of Carrollton*, 110 F. Supp. 2d 597, 604 (N.D. Ohio 2000); *McGee v. Attorney Gen.*, [1974] I.R. 284, 319 (Sup. Ct.) (Ireland), reprinted in J. O’REILLY & M. REDMOND, CASES AND MATERIALS ON THE IRISH CONSTITUTION 157 (1980).

97. Daniel A. Farber, *Constitutional Cadenzas*, 56 DRAKE L. REV. 833, 836-37 (2008); Murphy, *supra* note 6, at 425, 447; Solum, *supra* note 25, at 1960.

98. Burke, *supra* note 30, at 128-29.

99. LEVY, *supra* note 93, at 269, 275.

100. Phoebe A. Haddon, *An Essay on the Ninth Amendment: Interpretation for the New World Order*, 2 TEMP. POL. & CIV. RTS. L. REV. 93, 93 (1992).

101. As a corollary, it is improper to require unenumerated rights to satisfy criteria (e.g., a broad social consensus) that enumerated rights need not satisfy. This is improper under the Ninth Amendment because it relegates unenumerated rights to a lower and more suspect status, and thereby denies or disparages them. See Tribe, *supra* note 25, at 106.

- retained rights are fully protected;¹⁰²
- (9) if enumerated rights and retained rights are treated differently, with only enumerated rights enjoying meaningful protection, then retained rights “must necessarily wither away”;¹⁰³
 - (10) any interpretation that falls short of the above-stated parameters will indeed “deny or disparage”¹⁰⁴ retained rights precisely because they are unenumerated, thereby violating the Ninth Amendment in both letter and spirit; and
 - (11) the amendment’s specific purpose is to keep us from misinterpreting what enumeration does—i.e., that without a provision like the Ninth Amendment, the decision to enumerate some rights and not others could be misconstrued in any number of ways.¹⁰⁵

Some non-differentialists also infer, in part from the placement of the Ninth Amendment in the Bill of Rights, (12) that the Ninth Amendment is more than a simple rule of construction, and that it serves more substantive needs in the framework of the Constitution as a whole.¹⁰⁶

Non-differentialists also base arguments on extrinsic evidence, especially the historical context in which the Ninth Amendment was written and adopted. We

102. *Hearings Before the Committee on the Judiciary, United States Senate, on the Nomination of Robert H. Bork to Be an Associate Justice of the Supreme Court of the United States*, S. 100-1011, 100th Cong., 1st Sess. 3055 (1987) (statement of David A.J. Richards) [hereinafter *Bork Hearings*]; see also Jackson, *supra* note 6, at 517; Calvin R. Massey, *The Anti-Federalist Ninth Amendment and Its Implications for State Constitutional Law*, 1990 WIS. L. REV. 1229, 1230 [hereinafter Massey, *The Anti-Federalist Ninth Amendment*]; 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, 242 (1988). That is, the distinction between enumerated and unenumerated rights is to have no constitutional implications.

103. Massey, *The Anti-Federalist Ninth Amendment*, *supra* note 102, at 1230.

104. Burke, *supra* note 30, at 128-29.

105. The simplest explanation, however, is that the amendment probably means what it says: The fact that some rights are listed here is not meant to deny or disparage other rights that are not. See Bitensky, *supra* note 89, at 623; Haddon, *supra* note 100; Stephen D. Hampton, *Sleeping Giant: The Ninth Amendment and Criminal Law*, 20 SW. U. L. REV. 349, 349 (1991); Douglas Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review*, 59 TEX. L. REV. 343, 368 (1981); Levinson, *supra* note 90; Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 HASTINGS L.J. 305, 343 (1987) [hereinafter Massey, *Federalism and Fundamental Rights*]; Lawrence E. Mitchell, *The Ninth Amendment and the ‘Jurisprudence of Original Intention,’* 74 GEO. L.J. 1719, 1727, 1742 (1986); Murphy, *supra* note 6, at 447; Jordan J. Paust, *Human Rights and the Ninth Amendment: A New Form of Guarantee*, 60 CORNELL L. REV. 231, 237 (1975); Pope, *supra* note 5, at 450; Sager, *supra* note 102; Sanders, *supra* note 25, at 761; Sol Wachtler, *Judging the Ninth Amendment*, 59 FORDHAM L. REV. 597, 617 (1991).

106. For example, we can think of it as a sort of elastic clause for individual rights, comparable to the Necessary and Proper Clause’s function for congressional powers. See Stephen Macedo, *Reasons, Rhetoric, and the Ninth Amendment: A Comment on Sanford Levinson*, 64 CHI.-KENT L. REV. 163, 168 (1988).

can divide contextual arguments into two groups: the specific account of how the amendment came to be, and the more general historical context. The first of these I have already described above. We know that some founders worried that a partial enumeration might endanger any right not specifically mentioned,¹⁰⁷ and we know that the Ninth Amendment was conceived as a way of avoiding such dangers.¹⁰⁸ In effect, these are arguments about the Ninth Amendment's legislative history.

The second group of contextual arguments, broader than the specific account of how the Ninth Amendment came to be, involves how founding-era thinkers understood constitutions and constitutionalism, natural and positive law, and bills of rights in general. We know, for instance, that the founders "were, for the most part, men whose thinking had been influenced by natural law theory."¹⁰⁹ Revolutionary declarations of rights,¹¹⁰ including the Declaration of Independence,¹¹¹ reflect that generation's deep conviction that people possess some rights inherently as individuals, independently of positive law.¹¹² It was this broad context that Justice Goldberg cited nearly two centuries later to support his conclusion that the framers understood the Constitution to guarantee fundamental rights beyond those stated in the first eight amendments.¹¹³

The leading non-differentialist today, Randy Barnett, has described four distinct approaches a court might take when reviewing legislation alleged to violate constitutional rights. The first approach is to show extreme judicial deference, applying a presumption of constitutionality to all legislation affecting

107. 1 ANNALS OF CONG., *supra* note 58, at 435-39.

108. *Id.*

109. Richard F. Hahn, *Constitutional Limits on the Power to Exclude Aliens*, 82 COLUM. L. REV. 957, 971 (1982) (citing Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247 (1914); Edward S. Corwin, *The 'Higher Law' Background of American Constitutional Law*, 42 HARV. L. REV. 149 (1928); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978); Louis Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405 (1979)). *But see* ELY, *supra* note 41, at 48-49 (arguing that the framers were not as influenced by natural law theory as is usually contended).

110. *See, e.g., The Rights of the Colonists and a List of Infringements and Violations of Rights*, reprinted in 1 THE BILL OF RIGHTS, *supra* note 59, at 200; *Declaration and Resolves of the First Continental Congress*, reprinted in 1 THE BILL OF RIGHTS, *supra* note 59, at 215-16; *The Virginia Declaration of Rights*, reprinted in 1 THE BILL OF RIGHTS, *supra* note 59, at 234.

111. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

112. PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 111-13, 1131 (4th ed. 2000); KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 452-53 (14th ed. 2001).

113. *Griswold v. Connecticut*, 381 U.S. 479, 490 (1965) (Goldberg, J., concurring). Naturally, contextual arguments "from the particular" and contextual arguments "from the broad" will often be mutually reinforcing. But the former asks what motivated a particular instance or series of official acts; the latter asks about the broader ideas "in the air" at that time.

rights.¹¹⁴ The second approach begins with the same presumption—that governmental action is constitutional—but would reverse the presumption when the rights infringed upon are enumerated.¹¹⁵ This appears to be the approach the Supreme Court took in Footnote Four of *Carolene Products*¹¹⁶—an approach that certainly seems at odds with the Ninth Amendment.¹¹⁷

The third approach, which Barnett also calls “Footnote Four-Plus,” appears to be the one now favored by the courts.¹¹⁸ Under the third approach, courts protect all enumerated rights but also protect some additional specific unenumerated rights (through substantive due process).¹¹⁹ This is the approach the Supreme Court took in *Griswold* and which the Court has continued to take in the five decades since, enforcing some unenumerated rights by identifying them as within the “liberty”¹²⁰ protected by the Due Process Clause.¹²¹

Barnett himself favors the fourth approach, which he terms the “presumption of liberty.”¹²² For Barnett, the first and second approaches are non-starters, since he proceeds from the premise that the Ninth Amendment “means what it says.”¹²³ The third approach is much better, but does not avoid the central problem of how to specify what the retained rights are; moreover, Barnett also concurs with those founders who argued that “it is impossible to specify in advance all the rights we have.”¹²⁴ Barnett argues that the answer is not to redouble our efforts to construct the perfect list, but to adopt a “presumption of liberty”¹²⁵ approach under which the government has the burden “to establish the necessity and propriety of any infringement on individual freedom.”¹²⁶

The presumption-of-liberty approach is Barnett’s most important contribution to Ninth Amendment theory. Its purpose, in Barnett’s own words, is “to protect all the rights retained by the people equally whether enumerated or unenumerated.”¹²⁷ This perfectly encapsulates the non-differentialist view: The Ninth Amendment means that enumeration does not matter.

114. BARNETT, *supra* note 37, at 253.

115. *Id.* at 253-54.

116. *Id.*; see *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

117. This approach also conflicts with the Privileges or Immunities Clause of the Fourteenth Amendment. See BARNETT, *supra* note 37, at 253-54.

118. *Id.* at 254.

119. *Id.*

120. U.S. CONST. amend. V, XIV.

121. “[T]he Court has acknowledged that certain unarticulated rights are implicit in enumerated guaranties.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579 (1980).

122. BARNETT, *supra* note 37, at 254.

123. See generally Barnett, *The Ninth Amendment*, *supra* note 89.

124. BARNETT, *supra* note 37, at 259.

125. *Id.*

126. *Id.* at 260.

127. *Id.* at 254 (emphasis omitted).

B. “Enumeration Makes All the Difference”: The Strict Differentialists

Before I describe what I call strict differentialism, a word about what I mean by differentialism in general. A differentialist view of enumeration is one that posits any meaningful difference, of constitutional import, between rights that are expressly listed in the written Constitution and rights that are not.¹²⁸ A differentialist is someone who thinks it makes a difference—any difference—whether a right is enumerated. A familiar example is *Carolene Products*’ Footnote Four: “There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments[.]”¹²⁹

Where exactly retained rights fit in is unclear, but there is an obvious tension between the Ninth Amendment, which seems to tell us not to make too much of enumeration, and Footnote Four, which suggests that enumeration may matter a great deal indeed. Can the two be squared? Perhaps, perhaps not. But it does sum up the one thing all differential readings say: *Enumeration matters*. As to whether the distinction between enumerated and retained rights makes any constitutional difference, the non-differentialist says it does not, the differentialist says it does.

Differentialism is a big tent. (After all, in its broadest sense it includes everyone except the non-differentialists, and there are not many of those.) While differentialism’s strictest adherents deny that retained rights exist at all, others say not only that such rights exist but that the judiciary has both the power and the duty to enforce them. The question is not whether unenumerated rights exist; the question is whether enumeration itself makes any meaningful difference. If you think it does, you are a differentialist. Most commentary on the Ninth Amendment thus falls somewhere in the differentialist camp. What all differentialists share is not the belief that retained rights signify nothing; it is the belief that enumeration signifies anything.

Only a small band of differentialists, the subset I call *strict differentialists*, takes the position that is differentialism at its utmost: that the rights retained by the people lack any judicially enforceable meaning. Strict differentialists take differentialist logic as far as it will go: Unenumerated rights are unenforceable rights, at least as far as the judiciary is concerned, and whatever “other” rights the Ninth Amendment is talking about—rights claimed to be “retained by the people”—are unknowable, if not unreal, and absolutely beyond the power of judges to enforce.¹³⁰ To the extent that the amendment suggests otherwise, to the

128. It includes any reading that posits a distinction of constitutional import between the rights that are expressly listed in the Constitution and those that are not. *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 91-93 (2000) (Scalia, J., dissenting); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 790 (1986) (White, J., dissenting). *See also* DAVID A.J. RICHARDS, *FOUNDATIONS OF AMERICAN CONSTITUTIONALISM* 222-23 (1989).

129. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

130. That is, whatever the “other” rights may be, they cannot be enforced in court. *See, e.g.*, *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 980-84, 999-1001 (1992) (Scalia, J.,

extent that it purports to have any judicially enforceable meaning, it is effectively a dead letter.¹³¹ For the strict differentialist, therefore, the gulf between enumerated and retained rights is as wide as that between fact and fiction. Whether a right is enumerated does not just make *a* difference, it makes *all* the difference. “We are not guardians of the rights of the people of the State, unless they are secured by some constitutional provision which comes within our judicial cognizance.”¹³² For strict differentialists, enumeration is genuinely the whole ball game.

Probably the most notorious articulation of strict differentialism took place nearly thirty years ago, during the Senate Judiciary Committee’s hearings on the Supreme Court nomination of Judge Robert Bork.¹³³ Asked about unenumerated rights, Bork replied, “I do not think you can use the ninth amendment unless you know something of what it means.”¹³⁴ He continued:

[I]f you had an amendment that says “Congress shall make no” and then there is an ink blot and you cannot read the rest of it and that is the only copy you have, I do not think the court can make up what might be under the ink blot if you cannot read it.¹³⁵

Bork’s position on unenumerated rights became, in Thomas McAfee’s words, “the linchpin in the argument that [Bork] was a constitutional extremist.”¹³⁶ Those who sought to block Bork’s appointment argued that his “steadfast opposition to the legitimacy of judicial elaboration of unenumerated constitutional rights was

dissenting); *Johnson v. Louisiana*, 406 U.S. 356, 388 (1972) (Douglas, J., dissenting); *Griswold v. Connecticut*, 381 U.S. 479, 520-27 (1965) (Black, J., dissenting); *Fong Yue Ting v. United States*, 149 U.S. 698, 737 (1893) (Brewer, J., dissenting); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 398-99 (1798) (Iredell, J., Dissenting); *Dronenburg v. Zech*, 741 F.2d 1388, 1396-97, 1396 n.5 (D.C. Cir. 1984) (Bork, J.).

Note that even a strict differentialist need not completely deny that unenumerated rights *exist*; the strict differentialist holds only that any such rights are entirely without constitutional (or at least judicial) consequence, or that their role in constitutional interpretation is no more consequential than, say, the words of the Declaration of Independence.

131. Stephen Kanter, *The Griswold Diagrams: Toward a Unified Theory of Constitutional Rights*, 28 *CARDOZO L. REV.* 623, 684 (2006); Kurt T. Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 *STAN. L. REV.* 895, 898 (2008).

132. *Billings v. Hall*, 7 Cal. 1, 21 (1857) (Terry, J., dissenting) (quoting *Bennett v. Boggs*, 3 F. Cas. 221, 227 (C.C.D.N.J. 1830)).

133. See generally *Bork Hearings*, *supra* note 102.

134. *Id.* (testimony of Judge Bork).

135. *Id.* In later years Judge Bork seemed to move away from using the inkblot analogy to describe the Ninth Amendment, but used it instead to explain another unenumerated-rights clause, the Privileges or Immunities Clause of the Fourteenth Amendment. See BORK, *supra* note 37, at 166.

136. Thomas B. McAfee, *The Role of Legal Scholars in the Confirmation Hearings for Supreme Court Nominees—Some Reflections*, 7 *ST. JOHN’S J. LEGAL COMMENT.* 211, 215 & n.13 (1991).

a sufficient ground to reject his nomination.”¹³⁷ While there was no single reason that the Bork nomination ultimately unraveled, it certainly did not benefit from the suggestion that the nominee considered the Ninth Amendment effectively unusable.¹³⁸

Judicial opinions candidly embracing strict differentialism are relatively rare in U.S. jurisprudence. They sometimes occur in cases involving the right to vote. For example, at various times in the decades after the Civil War, the Supreme Court upheld the disenfranchisement of women¹³⁹ and African-Americans;¹⁴⁰ held the Constitution confers no general right of suffrage (notwithstanding the Fifteenth Amendment);¹⁴¹ and upheld broad state authority to determine the qualifications of voters.¹⁴² In the twentieth century, the Court upheld literacy tests¹⁴³ and the continuing disenfranchisement of felons.¹⁴⁴ In each of these cases, the Court declined to extend general federal constitutional protection to the rights claimed, on the grounds that those rights appear nowhere in the text of the Constitution,¹⁴⁵ that is, by engaging in exactly the sort of *expressio unius* reasoning that the Ninth Amendment seems to prohibit.¹⁴⁶

For strict differentialists, in other words, the line dividing enforceable from unenforceable rights is enumeration per se. To those who would draw the line anywhere else they respond with two basic critiques: the critique from authority and the critique from accountability.

Justice Scalia summed up the *critique from authority* well in his dissenting opinion in *Troxel v. Granville*.¹⁴⁷ “I do not believe,” he wrote, “that the power which the Constitution confers upon me *as a judge* entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) [an] unenumerated right.”¹⁴⁸ Another part reads, “[T]he Constitution’s refusal to ‘deny or disparage’ other rights is far removed from affirming any one of them, and even further

137. *Id.*

138. *See generally id.*

139. *Minor v. Happersett*, 88 U.S. 162, 178 (1875).

140. *Giles v. Harris*, 189 U.S. 475, 486-88 (1903).

141. *United States v. Reese*, 92 U.S. 214, 217-18 (1875).

142. *See Williams v. Mississippi*, 170 U.S. 213, 223-25 (1898). The Court has also held that states are not barred from prescribing the qualifications of electors. *United States v. Cruikshank*, 92 U.S. 542, 554-57 (1875).

143. *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 53-54 (1960).

144. *Richardson v. Ramirez*, 418 U.S. 24, 54-56 (1974).

145. *See Wickard v. Filburn*, 317 U.S. 111, 124 (1942) (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942)). Of course, if we view the relationship between rights and powers as the framers did—rights being exceptions to, or limitations of, powers, then to say a power is subject only to the limitations expressed in the Constitution is another way of saying that the exceptions to that power (i.e., rights) are limited to the enumerated ones.

146. *Id.*

147. 530 U.S. 57, 91-92 (2000) (Scalia, J., dissenting).

148. *Id.* (emphasis in original).

removed from authorizing judges to identify what they might be”¹⁴⁹ Justice Scalia’s reference to “the power which the Constitution confers upon me *as a judge*,” and his reference to what the Constitution “authoriz[es] judges” to do are, of course, both critiques from authority.¹⁵⁰

Strict differentialists also offer the *critique from accountability*. Here is the full quotation from above: “[T]he Constitution’s refusal to ‘deny or disparage’ other rights is far removed from affirming any one of them, and even farther removed from authorizing judges to identify what they might be, *and to enforce the judges’ list against laws duly enacted by the people*.”¹⁵¹ This is the critique from accountability, the other part of the case against judicial enforcement of unenumerated constitutional rights. As Lawrence Sager put it, “The apparent impulse behind the judicial unenforceability thesis is the sense that somehow democratic theory is better served if electorally accountable officials are the exclusive guardians of the unenumerated constitutional rights of the people.”¹⁵² If critiques from authority are purportedly based on what judges *may* not do, then critiques from accountability are purportedly based on what judges *ought* not do.¹⁵³ Even if the Constitution permits it, striking down the “duly enacted” work of the majoritarian branches is poor form, a sort of democracy foul.¹⁵⁴

Both the critique from authority and the critique from accountability point to limitations—real, perceived, or normative—on the role of the judge. Both are also somewhat circular insofar as they imply that any judge who upends congressional will is, by definition, acting beyond the judiciary’s proper place. The reason this is not so is that the power of judicial review follows from the power to say what the law is.¹⁵⁵ Both the critique from authority and the critique from accountability ignore a central principle underlying judicial review: *An action by the legislature is not duly enacted if it is outside the legislature’s authority*.¹⁵⁶

Congressional power in the United States is not plenary.¹⁵⁷ It is specifically committed to Congress by the people, through a constitution, the same Constitution by which the people authorize the courts to decide particular cases

149. *Id.*; see also *The West Wing: The Short List* (NBC television broadcast Nov. 24, 1999) (“I do not deny there are natural laws. . . . I only deny that judges are empowered to enforce them.”).

150. The critique from authority comes in two forms: “holding” and “dicta.” When a judge disavows the power to deny legal effect to an unenumerated right, she disavows the authority to hold, to rule, to affect a legal change. But when she disavows the power even to indicate her own views on what those other rights might be, she disavows something else: the power to engage in *obiter dicta*, to issue asides. For our purposes, it suffices to say that both forms presuppose a constitution that limits, formally or informally, what a judge may say or do.

151. *Troxel*, 530 U.S. at 91-92 (Scalia, J., dissenting) (emphasis added).

152. Sager, *supra* note 102, at 251.

153. See *Troxel*, 530 U.S. at 91-92 (Scalia, J., dissenting).

154. See *id.*

155. See generally *Marbury v. Madison*, 5 U.S. 137 (1803).

156. See *Troxel*, 530 U.S. at 91-92 (Scalia, J., dissenting).

157. See generally *Marbury*, 5 U.S. 137.

or controversies, which entails the power to say what the law is.¹⁵⁸ Therefore, when in the course of a particular case or controversy the Court determines that what purports to be legislative action is beyond the legislature's authority, the Court must possess not only the power but also the duty to say so.¹⁵⁹

Both the non-differentialist and the strict differentialist adhere to "all-or-nothing" stances on enumeration: Either it means nothing or it means everything. This places their respective camps at irreconcilable odds, making them polar opposites of each other.

To the absolute non-differentialist, whether a right is enumerated makes no difference: The decision to enumerate some rights and not others should not be misconstrued as diminishing rights that the people retain but that happen to be unenumerated.¹⁶⁰ The distinction between enumerated and unenumerated rights makes no constitutional difference: We should address rights equally, without regard to their enumeration status, and whatever significance the distinction may have is not really a matter of judicial concern. This minimizes the constitutional effect of enumeration, since all unenumerated rights are fully enforceable by judges. As far as the courts are concerned, the Ninth Amendment is everything; enumeration is nothing.

The strict differentialist directly opposes each of these ideas. To the strict differentialist, whether a right is enumerated makes all the difference in the world: The determination of which rights will be enumerated is also the determination of which rights will be enforced. Pointing out that some rights have actually been ratified and made part of the text does not "deny or disparage" the rights that have not, and it would be absurd to pretend that we should treat these two classes of rights identically. Indeed, a strict differentialist will argue, even the Ninth Amendment acknowledges that unenumerated rights are "other" rights that are not "in the Constitution." Therefore, they must be beyond the power of federal judges to enforce. The difference between enumerated and unenumerated rights is therefore profound, and a matter of the utmost concern to judges. This maximizes the constitutional effect of enumeration, since only enumerated rights are enforceable by judges. As far as the courts are concerned, enumeration is everything; the Ninth Amendment is nothing.

Yet in another sense the non-differentialist and the strict differentialist are also each other's mirror image. Both take an all-or-nothing approach to answering our signal question: What weight should we accord to the fact of enumeration? The strict differentialist says "all"; the non-differentialist says "none." But in both cases the fact of enumeration is not actually weighed or assessed or balanced against anything.

158. *Id.* at 177.

159. *Id.* at 166-67.

160. Indeed, a non-differentialist would argue that the preceding statement is simply an excellent paraphrase of the Ninth Amendment itself.

C. “Enumeration Sometimes Matters, to Some Extent, Except on Some Other Occasions When It Might Not”: The Moderate Differentialists

Between the two poles of non-differentialism and strict differentialism lie the vast marshy midlands of moderate differentialism. Moderate differentialists do not go as far as strict differentialists—they do not say that rights are only cognizable when enumerated—but they do distinguish between rights that are written and rights that are not.

Moderate differentialists are a varied bunch, but they agree on certain things. First, they believe that whether a right is identified in the actual text of the Constitution cannot be entirely meaningless: Somehow, enumeration matters. Second, they believe that the enumeration of some rights does not preclude the judiciary from identifying and enforcing other rights that are unenumerated.¹⁶¹ Third, they believe this is the most sensible way to read the Ninth Amendment. The language of the amendment may be obscure, but it is neither meaningless nor beyond our comprehension. Fourth: That said, they also believe that the Ninth Amendment works best when used to reinforce other arguments more grounded in specific text, such as substantive due process. They will prefer to rely on text-based arguments rather than on the Ninth Amendment’s mysterious reference to retained rights. The cardinal belief of the moderate differentialist is this: Enumeration does matter, but whether a right is enforceable does not turn on enumeration per se.

Fittingly, the most influential moderate differentialist today is the person who was ultimately named to the Court in Judge Bork’s place, Justice Anthony Kennedy.¹⁶² During his own confirmation hearings, then-Judge Kennedy expressed his belief that retained rights do exist and are safeguarded in part by the Ninth Amendment.¹⁶³ Like Justice Goldberg, he read the amendment to mean “that the first eight amendments were not an exhaustive catalogue of all human rights.”¹⁶⁴ He also introduced a new idea: that the amendment could function as a sort of “reserve clause” when other constitutional provisions proved inadequate.¹⁶⁵ Unsurprisingly, these views were received more warmly on Capitol Hill, and his comments on the Ninth Amendment and retained rights help explain why it was Judge Kennedy and not Judge Bork who joined the Court in 1988.¹⁶⁶

161. The choice of which unenumerated rights to enforce may be based on any number of factors.

162. See, e.g., David S. Broder, *Decider on the High Court*, WASH. POST (July 6, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/07/04/AR2008070402090.html?utm_term=.99dfe49275f3 [https://perma.cc/WUN7-E7DY] (stating Justice Kennedy may be “the single most influential arbiter of domestic policy in the land”).

163. L.A. Powe Jr., *From Bork to Souter*, 27 WILLAMETTE L. REV. 781, 798 (1991).

164. *S. Comm. on the Judiciary, Nomination of Anthony M. Kennedy to be an Associate Justice of the United States Supreme Court*, S. Exec. Rep. No. 113, 100th Cong., 2d Sess. 20-21 (1988).

165. *Id.*

166. Powe, *supra* note 163, at 798, 800; 2 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 119-20, 478 (Randy E. Barnett ed., 1993). See

Today, most courts and commentators that have expressed a view of the Ninth Amendment (many have not) have adopted some variant of moderate differentialism. Justice Thomas, for example, while every bit the conservative originalist that Justice Scalia or Judge Bork ever were, does not flatly dismiss the possibility of enforceable unenumerated rights.¹⁶⁷ It is true that Justice Thomas has repudiated substantive due process,¹⁶⁸ and he evidently believes the proper vehicle for considering unenumerated rights is the Privileges or Immunities Clause of the Fourteenth Amendment.¹⁶⁹ But, unlike Justice Scalia or Judge Bork, Justice Thomas has never suggested that courts lack the authority or capacity to consider unenumerated rights at all.¹⁷⁰ In the years since the Bork nomination, no Supreme Court nominee has dared suggest either that the Ninth Amendment is entirely unusable or that retained rights are entirely unknowable.¹⁷¹

Moderate differentialists are still differentialists. They are not enumeration-blind; they treat enumerated rights and unenumerated rights differently. Moderate differentialists certainly do not accept the basic idea behind Barnett's "presumption of liberty," that any right against the government is enforceable unless proven otherwise.¹⁷² But moderate differentialists are not strict differentialists, as this Article uses that term. Moderate differentialists might find the Ninth Amendment baffling; they might avoid using it without the aid of other textual provisions; but they are not ready to write it out of the Constitution. Moderate differentialists are positivists: Rights that appear in the constitutional text clearly have a leg up on those that do not. But they are gentle positivists, who do not dismiss retained rights as the stuff of fairy tales. Enumeration does matter to them, but whether a given right is enforceable does not turn on enumeration per se.

If enumeration per se does not determine whether a right is enforceable, what does? We can define the variations of moderate differentialism by how they answer that question, so let us examine those variants in more depth.

We wish to know whether our judge (a moderate differentialist) will

also Nomination of Stephen G. Breyer to Be an Associate Justice of the Supreme Court of the United States, 1994: Hearings Before the S. Comm. on the Judiciary, 103d Cong. 167 (1994) (statement of Judge Breyer).

167. John F. Basiak Jr., *The Roberts Court and the Future of Substantive Due Process: The Demise of "Split-the-Difference" Jurisprudence?*, 28 WHITTIER L. REV. 861, 890 (2007).

168. *Id.*

169. *Id.* at 890-91.

170. *Id.* at 890. Indeed, the Senate Judiciary Committee was satisfied to conclude that he recognized an unenumerated right to privacy. See Senator Dennis DeConcini, *Examining the Judicial Nomination Process: The Politics of Advice and Consent*, 34 ARIZ. L. REV. 1, 15 n.47 (1992).

171. I will refrain from speculating whether this is because no President since then has dared nominate someone who held such views, or because no nominee since then has dared express them. Either way, the point is the same: A potential Justice who expressed such views would not survive the process of nomination and confirmation.

172. See generally Randy E. Barnett, *The Ninth Amendment*, *supra* note 89.

recognize and enforce a particular right. All agree that such a right is described nowhere in the text of the Constitution, but our judge is a moderate differentialist, so knowing whether the right is enumerated does not tell us everything we need to know. We need to ask other questions. Here are two questions that can help us get unstuck: First, how does our moderate differentialist define the rights retained by the people?¹⁷³ Second, how does our moderate differentialist specifically describe either the purpose of the Ninth Amendment or how it was meant to work?¹⁷⁴ The answers to both questions can tell us a great deal. In fact, unless we can articulate answers to both, it is hard to see how we can claim to understand a moderate differentialist's view of the Ninth Amendment.

Thus, Russell Caplan, for instance, defines the rights retained by the people as *the rights that are unlisted in the Constitution but guaranteed elsewhere by the laws of the states*.¹⁷⁵ Notice that this makes “rights retained by the people” a discrete and closed set, the contents of which we can readily identify if we know enough about the constitution and statutes of each state.¹⁷⁶ This leaves open whether retained rights are limited to those that were protected by state law in 1791, or whether the content of retained rights might evolve as state laws are enacted and repealed and so on—though either model of retained rights can correctly be called a discrete set at any particular moment.¹⁷⁷ For his part, Caplan contends that the “rights retained by the people” meant the positive law of the states when the Constitution was adopted, but that this was also subject to change in the future, as states varied their own positive law.¹⁷⁸ Caplan calls the Ninth

173. For instance, there is a world of difference between the conventional view, which holds that retained rights are exclusively individual rights, and the view of Kurt Lash and Akhil Reed Amar, who define retained rights to include not only the rights of individuals but also rights that the people possess as a collective political body, including the right to revolution. Lash and Amar have argued that the retained rights include not only the rights of individuals but also the rights that the people possess as a collective political body (including, perhaps, the right to revolution). See Kurt Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331, 342 (2004).

174. I group these last two together because they are sometimes referred to interchangeably and can be expressed in that way. A third question might be the meaning of “deny or disparage,” but I have omitted it here because so few commentators have said what they think it means. Justice Scalia at least denied the contrary in *Troxel*, but even he did not really define what “deny or disparage” means. At any rate, the lack of commentary on the question leads me to think it would be less helpful in getting us unstuck.

175. See Caplan, *supra* note 9, at 227.

176. Presumably it would also include those that existed at English common law in 1791, although Caplan does not always make that clear.

177. See Laurence Claus, *Protecting Rights from Rights: Enumeration, Disparagement, and the Ninth Amendment*, 79 NOTRE DAME L. REV. 585, 595, 620-21 (2004).

178. Caplan, *supra* note 9, at 227-28, 248. These are the “constitutional” rights that already existed when the written Constitution was adopted. Under this theory, retained rights are those already guaranteed by the positive law of the states, not only in state constitutions but also in state statutes and common law. Compare Michael Conant, *Antimonopoly Tradition Under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-Examined*, 31 EMORY L.J. 785, 803-04

Amendment “a rule of nonrepeal-by-implication” of retained rights, which he defines as “whatever state law rights individuals might possess against their states’ governments by virtue of state constitutional law, statutory law, or common law.”¹⁷⁹

Others might define retained rights more expansively than Caplan. Calvin Massey, for example, would include not only the liberties guaranteed by the states through positive law,¹⁸⁰ but also those guaranteed by natural law.¹⁸¹ According to Massey’s view of the Ninth Amendment, it seeks to preserve both “rights located in state law (created or preserved by the people in the act of state political union)” and “natural rights (those transcendent of political union).”¹⁸²

Another position, which I would place somewhere between Massey and Caplan, is that of my colleague Michael Stokes Paulsen. Paulsen defines retained rights primarily, though perhaps not exclusively, in positivist terms, concurring with Caplan that retained rights include those guaranteed by the positive law of the states.¹⁸³ At the same time, Paulsen is at least open to the idea that retained rights might also include rights guaranteed by natural law.¹⁸⁴

Paulsen’s position is especially interesting because he seems genuinely ambivalent about whether to include natural law in his definition of the rights retained by the people.¹⁸⁵ At first, this ambivalence is not obvious, as Paulsen avoids speculating about the content of retained rights and focuses more on describing the Ninth Amendment in terms of its specific function.¹⁸⁶ “At most,” he writes, the amendment “could be read as stating the truism that nothing in the Constitution legitimately could take away the natural rights of all human beings.”¹⁸⁷ It further implies, perhaps, “a general political principle that the adoption in positive constitutional law of particular rights should not be understood to supersede the natural law rights of man.”¹⁸⁸ The closer Paulsen

(1982).

179. Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 885 (2009).

180. It is not always clear whether “the positive law of the states” refers to the positive law contained in state constitutions, or rather to all state law.

181. Massey, *The Anti-Federalist Ninth Amendment*, *supra* note 102, at 1231-32.

182. *Id.*

183. See Michael Stokes Paulsen, *How to Interpret the Constitution (and How Not to)*, 115 YALE L.J. 2037 (2006).

184. *Id.* at 2048.

185. *Id.* at 2048-49.

186. *Id.*

187. *Id.*

188. *Id.* Of course, even if the rights retained by the people are those rights that were “frozen” in 1791, we can argue about what those rights are. Moreover, even if we take 1791 as our baseline, the nature of some rights, or the language used to describe them, may allow or even require a certain degree of evolution in their enforcement: The freedom from searches that are “unreasonable,” or from punishments that are “cruel and unusual,” may remain constant over time in the sense of being continuously unimpaired, but that does not mean that the measure of what is

draws to the topic of natural law and the question whether such natural law rights are within the rights retained by the people, the more uncertain his language grows: “More abstractly (and more speculatively), the Ninth Amendment might also have been thought a rule of nonrepeal of the ‘natural rights’ of the people, whatever those might be.”¹⁸⁹

Paulsen, in my view, never wholly commits to a particular definition of retained rights. As to natural rights, he seems genuinely torn; as to positive rights, he is on terra firma; but of course, the Ninth Amendment itself strongly suggests that positive rights are one thing that retained rights are not.¹⁹⁰ The reader can judge whether this sort of “positive-law-and-maybe-natural-rights” description of retained rights is really a distinct stance; whether it helps us articulate exactly what retained rights are; or whether, as a definition of retained rights, it lacks definition.

Which of these authors is most “correct” is beside the (present) point. Here, my point is simply that we get wildly different pictures of the Ninth Amendment depending on how we define *retained rights*. In fact, because the term itself is not self-defining, and we lack an agreed-upon definition, we will *always* have to do some additional defining at the outset, simply to make the Ninth Amendment usable.¹⁹¹ Consequently, there are at least as many distinct variants of moderate differentialism as there are distinct ways to define retained rights.¹⁹²

Other than how these theories define retained rights, what about our second question? How would these authors specifically describe either the purpose of the Ninth Amendment or how it was meant to work?

Caplan, for example, argues that the amendment was intended as a hold-harmless provision to protect rights otherwise guaranteed by the laws of the states.¹⁹³ Most immediately, in proposing the amendment, Madison hoped to communicate to Anti-Federalists that all rights under state laws then “on the books” would be protected from harm, as would any additional rights that the

unreasonable or unusual today is what was unreasonable or unusual in 1791.

189. Paulsen, *supra* note 179, at 885.

190. At least, the Ninth Amendment certainly seems to say that retained rights are not part of the positive law of the Constitution. If, however, we concur with those who define “retained rights” to mean simply those rights protected by the positive law of the states, then retained rights could certainly be considered “positive law,” perhaps exclusively so. Even then, retained rights would not be a part of the positive law of the Constitution itself.

191. That is, unless we take the strict differentialist view that the term lacks any meaningful content so far as constitutional adjudication is concerned. But that is not “using” the Ninth Amendment in the sense that I mean; it merely avoids using the amendment at all.

192. Without some clear definition of retained rights, the Ninth Amendment does have some trouble getting off the ground. But that suggests that the difficulty runs far deeper than the Ninth Amendment itself, that we would face essentially the same problem whether or not the Ninth Amendment existed. The distinction between *enumerated* and *unenumerated* rights was not introduced by the Ninth Amendment; it merely follows from the original decision to enumerate anything in the first place.

193. Caplan, *supra* note 9, at 227, 259.

states might later enact.¹⁹⁴ The specific function of the Ninth Amendment was to prevent any suggestion that these preexisting rights had been supplanted.

The continuity/discontinuity distinction can help us understand how particular models of the Ninth Amendment view the effect of enumeration. If we take Caplan as our example, which of those alternatives—continuity or discontinuity—better describes the Ninth Amendment? It seems odd to use discontinuity to describe an amendment that neither creates new rights nor alters the status of pre-existing rights. Yet, continuity does not quite work, either: If the Ninth Amendment’s message to us is simply that the pre-existing English constitutional order has survived and will continue, then what was the point of adopting a bill of rights at all?¹⁹⁵ If the point of the Revolution was that we already had these rights, why accept the imperial premise that anything more was required for their security?

On the other hand, Caplan seems to say that the pre-existing English constitutional system *is* continued, in a sense, by the positive law of the states.¹⁹⁶ It becomes a question of perspective. From the perspective of the states—the perspective of positive law—the new order is continuous with the old. The Constitution merely picks up where the Empire has (involuntarily) abandoned the stage. Yet, from the perspective of unwritten law—the perspective of the English constitutional tradition—nothing could be more jarringly *discontinuous* than for the people to formally adopt a written instrument that declares a national interest in securing specific liberties and then proceeds to spell out what they are. Thus, as far as continuity and discontinuity are concerned, moderate differentialism can turn out to be rather a mixed bag. Whether we see a continuation or a discontinuation of the previous order depends ultimately on the angle from which we look. Whether a particular reading appeals to us will depend on which perspective we see as essential.

Varying the definition of retained rights may also influence our view of the Ninth Amendment’s purpose and function. Calvin Massey, who defines retained rights more broadly than Caplan does, also takes a larger view of the amendment’s purpose and function. Massey contends that the Ninth Amendment

194. *Id.* at 263. This included all existing individual rights contained in state constitutions, statutes, and (probably) common law. *Id.*

195. Of course, asking whether we needed a written bill of rights is not the same as asking whether we needed a written *constitution*. Given the exigencies of 1787 and the need to redesign the government, the adoption of a written constitution was probably unavoidable. That said, not every state felt it necessary even to adopt a new constitution: Connecticut and Rhode Island were content to rely on their royal charters until 1818 and 1842, respectively. CONN. CONST. of 1818; R.I. CONST. of 1842.

196. Presumably, this also includes the contents of English common law in 1791, although Caplan does not always make that clear. Of course, this is only as to positive law, not natural law, and the pre-existing “system” of English common law is not formally adopted at the federal level at all. The violation of a federal statute—whether—we mean those that existed in 1791 or those adopted later—simply did not give rise to a constitutional claim; the only federal constitutional rights are those that are specifically enumerated in the U.S. Constitution.

“was specifically intended as a catch-all to preserve for the people their great and fundamental rights that were not enumerated in the first eight amendments or elsewhere in the Constitution.”¹⁹⁷ This certainly seems to go further than Caplan’s view that the amendment simply holds harmless all rights under state laws on the books at the time.

For Paulsen, who in my view is less precise in defining retained rights, the Ninth Amendment potentially has more than one purpose. Paulsen’s definition of retained rights certainly includes rights protected by the positive law of the states (statutory as well as constitutional); he contends that those rights continue to be enforceable against state governments. Retained rights *may* also, in Paulsen’s view, include rights premised on natural law; but how exactly the Ninth Amendment operates to protect such rights is fuzzy. Perhaps as a result, when it comes to natural law rights, Paulsen appears (to me, anyway) to see the Ninth Amendment as more declaratory in its function.¹⁹⁸ Thus, although Paulsen is more open to a broad definition of retained rights, he is less sanguine about whether the Ninth Amendment actually operates to protect all of them (i.e., not just the positive ones).

For example, do the state law rights, protected by the states, include natural law? That is important because if Paulsen does not think they can be vindicated at the state level, he surely does not think they can be vindicated at the federal level. It is thus “state law” or nothing, but it is unclear whether this is restricted to positive law. He suggests that natural law can be saved or safeguarded through the truisms, but it is not clear whether he believes those truisms to be true (or at least judicially enforceable). The upshot of Paulsen’s position is that the amendment aims to maintain state law rights by ensuring that they are not placed in doubt by the fact of a partial enumeration. But he deemphasizes the specific content of retained rights, leaving us with a sense of *how* the Ninth Amendment operates to protect rights that surpasses our sense of *what* those rights might be.

Before we conclude our discussion of moderate differentialism and the rights-based interpretations of the Ninth Amendment, a final point. Although it is an understandable impulse to pigeonhole the Ninth Amendment as simply a “rule of construction”—its grammatical heart, after all, is “shall not be construed”—that approach also risks sidestepping vital questions. In general, those who focus on the specific *means* of the Ninth Amendment—describing it as a mere directive as to interpretation, or a rule of constitutional construction, or a rule of nonrepeal, savings clause, etc.—tend to deemphasize the specific *ends* the amendment aims to protect or advance.

The number of genuinely distinct moderate differential interpretations is large, but it is finite, and we should not mistake mere deviations in style and tone

197. Massey, *Federalism and Fundamental Rights*, *supra* note 105, at 343; Massey, *The Anti-Federalist Ninth Amendment*, *supra* note 102, at 1230.

198. Of course, even a purely declaratory Ninth can be a form of continuity. Certainly Paulsen nowhere suggests that passing the Bill of Rights made it *harder* to prevail in a case involving retained rights. Yet, it is also unclear whether Paulsen thought such claims were judicially enforceable before.

for truly substantive differences. The interpreter who speaks mainly of “means” may sound very different from the one who speaks mainly of “ends,” and they may appeal to different values or priorities in their audiences. But, if their definitions of retained rights are effectively the same, and their views of the amendment’s specific purpose and means are effectively the same, then they will ultimately arrive at the same conclusion. One person’s truism is another person’s truth.

III. “IT’S NOT REALLY *ABOUT* RIGHTS”: THE EXOCONSTRUCTIONISTS

Some of the most imaginative interpretations of the Ninth Amendment devote remarkably little attention to the subject of retained rights. For these interpreters—withstanding the Ninth Amendment’s reference to the rights retained by the people—the amendment’s true subject is not really rights at all. For that reason, I have chosen to discuss these interpreters in a separate section. I call them the *exoconstructionists*.¹⁹⁹

Exoconstructionists interpret the Ninth Amendment’s reference to retained rights not as an invitation to inquire into those rights, but primarily as a direction about how to construe other parts of the Constitution. Under the exoconstructionist approach, retained rights are a sort of constitutional dark matter: their exact content is unknown, perhaps unknowable. But our role as readers does not require that we know anything about them; what matters is that they exist, exercising their influence from far away, as the gravity of the Moon quietly guides the tides.

An excellent example of an exoconstructionist interpretation is the “federalism” reading, associated primarily with the work of Kurt Lash. In Lash’s account of the founding, those who opposed the new Constitution sought above all to limit the reach of federal power and to keep that power from expanding.²⁰⁰ The Federalists had promised that such an expansion would be prevented both by a careful enumeration of powers and by the common understanding that the federal government would not exercise powers not enumerated in the constitutional text.²⁰¹ Lash, however, contends that this enumeration-of-powers principle, reflected in the Tenth Amendment, was insufficient on its own to prevent federal power from expanding.²⁰² This was because the Tenth Amendment ultimately only prevents the federal government from exercising powers that are wholly unenumerated; it does nothing to prevent the powers that *are* enumerated from being interpreted more and more expansively over time.²⁰³ This difficulty was aggravated by other provisions of the Constitution,

199. I chose the *exo-* prefix in part to indicate that the interest of these interpreters lies largely outside the Bill of Rights itself. The unwieldiness of *exoconstructionist* reflects both my view that such readings are overly elaborate and my sincere hope that the term itself will never catch on.

200. Lash, *supra* note 173, at 355.

201. *Id.* at 355, 399.

202. *See generally id.*

203. *See generally id.*

particularly the Necessary and Proper Clause.²⁰⁴ State ratification conventions had expressed concerns that such sweeping provisions were so ambiguous that they could easily allow for unduly broad interpretations of enumerated powers.²⁰⁵ The Ninth Amendment was needed because the Tenth Amendment alone could not get the job done.

Under the federalism reading, the Ninth Amendment should be read as prohibiting even the enumerated powers from being read too expansively, especially through such open-ended provisions as the Necessary and Proper Clause.²⁰⁶ The Ninth Amendment thus works in close conjunction with the Tenth, albeit in different ways, to limit the expansion of federal authority.²⁰⁷ The original understanding of the Ninth Amendment, Lash maintains, was much like that of the Tenth: In different ways, both were meant to limit the federal government's authority to interfere with the states.²⁰⁸ The purpose of the Tenth Amendment, however, was to make sure that the federal government could only act pursuant to specific enumerations of power, while the purpose of the Ninth Amendment was to make sure that even those specific enumerations of power would be construed narrowly.²⁰⁹

The chief difficulty with this interpretation is, of course, the language of the Ninth Amendment. On its face, the amendment says nothing about limiting powers; it concerns rights, not powers.²¹⁰ Lash, however, maintains that “[n]either the text nor the purpose of the Ninth Amendment was limited to protecting a subcategory of retained rights.”²¹¹ Instead, “The point was to protect the right of the people to manage *all* those affairs not intended to be handed over to the federal government.”²¹²

Making sense of the Ninth, under this view, is not really about getting to the bottom of what individual retained rights are; it is not really about individual rights at all. In Lash's telling, the reference to retained rights actually distracts from the amendment's true purpose, which is to prevent overexpansion of the scope of federal power into the state law realm.²¹³

In the continuity/discontinuity terms we were using earlier, there is a sense in which the federalism reading and other exoconstructionist interpretations are no different than the rights-oriented readings discussed in the previous section.²¹⁴

204. *Id.* at 355.

205. *Id.*

206. *Id.* at 399.

207. *Id.*

208. *Id.*

209. *Id.* at 355, 399.

210. *Id.*

211. *Id.* at 399.

212. *Id.* (emphasis in original).

213. *Id.* at 350.

214. *Id.* Note that non-differentialists need not agree on the reasons that rights are not specified (e.g., they are too innumerable, etc.). Nor need they agree on the characteristics of those rights (e.g., natural, customary, etc.). Generally, however, the rights retained by the people are thought to be

Each of these interpretations sees the purpose of the Ninth Amendment as clarifying what is to *continue*, notwithstanding the *discontinuity* introduced by the enumeration of (some) rights. What separates exoconstructionists from the more rights-based interpreters is simply how they define *what* is meant to continue.

For exoconstructionists, the amendment is attempting to preserve something other than individual liberties per se. The challenge for these interpreters is making that case notwithstanding the amendment's clear reference to retained rights.

Lash gets there by defining individual rights as a mere "subcategory of retained rights,"²¹⁵ far narrower than the overarching broader liberty of the people to manage their own affairs, except where specifically assigned to the federal government.²¹⁶ By tacitly redefining retained rights to include a more general right of the people not to be interfered with, Lash is able to reframe the Ninth Amendment's true purpose as something other than protecting individual liberties per se.²¹⁷

That sound you hear is the call of the exoconstructionist. The Ninth Amendment may *seem* to be concerned with unenumerated individual rights, but in fact this is a misdirection and the amendment is not really about individual rights at all. Instead, the reference to retained rights is incidental to the amendment's true purpose, which is to limit the powers granted in some other part of the Constitution. This is the essence of the exoconstructionist view.

Another good example of exoconstructionism is the "residual rights" reading, advanced primarily by Thomas McAfee.²¹⁸ The label "residual rights" suggests, at first, that this school of thought is primarily concerned with rights; indeed, a casual reader might initially think that McAfee is using the terms *residual rights* and *retained rights* interchangeably. That would be a mistake, as McAfee's real emphasis is on powers: "Residual" describes the rights that are left over once the powers granted to the national government have been correctly defined.²¹⁹ But McAfee is not so concerned with the specific question of what this residue is; his purpose is to make sure that the powers provisions are construed narrowly.

According to McAfee, the Ninth Amendment's purpose was to ensure that the enumeration of some rights was not taken to imply a government of general powers.²²⁰ The concern was that the government might cite, for example, the existence of the First Amendment as evidence of a general power to regulate the

individual rights, in part because of the historical facts of the colonists' revolution.

215. *Id.*

216. *Id.*

217. Whether that reconceived purpose is properly called "federalist," or whether this interpretation would in fact advance the general aims of federalism, is a separate question that need not concern us here. For our purposes, the point is that it is not purely libertarian.

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

219. *Id.* at 1221.

220. *Id.* at 1253-54.

press.²²¹ The Ninth Amendment, McAfee says, was intended to contradict such arguments.²²² More broadly, he maintains that it was intended to prevent the government from taking the Bill of Rights in its entirety as evidence of a general police power.²²³

This is textbook exoconstructionism: it deemphasizes the issue of what the retained rights themselves are, and it emphasizes instead the inferences that the framers sought to foreclose concerning other parts of the Constitution.²²⁴ The harm that the Ninth Amendment aims to prevent is not the abridgment of specific retained rights, but the government's claim of expanded general powers. In other words, McAfee is using the Ninth Amendment to fortify the work of the Tenth. His premise is that what is being protected is not individual rights per se, but (with the help of the Tenth) the concept of enumerated power.²²⁵

This illustrates, I think, the difference between exoconstructionist interpretations of the Ninth Amendment and the more rights-based interpretations we considered in the previous section. The rights-based group is concerned with retained rights—their nature, identifying them, and the size of the enforceable set (if any). The exoconstructionists are interested in other things,²²⁶ and in fact, it is an exoconstructionist hallmark of sorts to be relatively agnostic as to what other rights might be “out there” that we have yet to discover. For the exoconstructionist, the Ninth Amendment's reference to the rights retained by the people is not really about rights at all; it is really about the strength and scope of government power.

IV. RETAINED RIGHTS AND THE SOCIAL CONTRACT: MCCONNELL'S NINTH

Judge Michael McConnell²²⁷ links the framers' view of retained rights to the

221. *Id.* at 1307.

222. *Id.*

223. *Id.*

224. Note that although McAfee and Caplan might differ in their articulations of the Ninth Amendment's ultimate purpose, they would probably agree that such purposes are best advanced by preventing the federal government from intruding upon rights already protected by state law. *Cf.* Caplan, *supra* note 9, at 227-28.

225. Lash, *supra* note 173, at 346.

226. Ultimately whether a school is exoconstructionist or rights-focused is a matter of emphasis. Still, it can be useful to think of them as distinct realms.

This focus on other things—the “exo-” of the exoconstructionist—also makes these interpretations vulnerable to a grammatical attack. The verb “construed” has a direct object, and that object is “[t]he enumeration.” The Ninth Amendment is an instruction about how to construe, or rather how not to construe, the specific enumeration that is the Bill of Rights. Strictly speaking, it says nothing about how to construe anything outside that list.

227. Judge McConnell served (2002-2009) on the U.S. Court of Appeals for the Tenth Circuit and is presently the Richard and Frances Mallery Professor and Director of the Constitutional Law Center at Stanford Law School, as well as Senior Fellow at the Hoover Institution. He has coauthored two casebooks, *THE CONSTITUTION OF THE UNITED STATES* and *RELIGION AND THE*

political theory of John Locke.²²⁸ McConnell ultimately proposes that courts resolve retained-rights claims through equitable interpretation (in accord with the principles of natural law), rather than continuing to “constitutionalize” unenumerated rights.²²⁹ In McConnell’s account, Lockean social compact theory helps explain the original concept and text of the Ninth Amendment, and suggests a way forward.

Of the many Ninth Amendment interpretations we might have examined more closely, I chose Judge McConnell’s interpretation for four reasons. First is McConnell’s own sterling reputation as a jurist and scholar of high integrity, and as one particularly sensitive to the interactions between history and law. Second, McConnell’s approach is not overly semantic: He addresses the problem not by parsing words but by using the ideas contemporary to the era in which the Ninth Amendment was written and adopted. Third, the originality of his solution makes it more of a challenge, both to classify and to evaluate. That affords us multiple opportunities to learn from the attempts. Finally, because McConnell’s proposal hinges on a moment of maximum discontinuity (man’s emergence from the state of nature to form a new social compact), it is an ideal vehicle for examining continuities and discontinuities in constitutional history, and for stressing the importance of recognizing which is which.

McConnell’s proposal will be easier to understand if we start with how he (following Locke) defines retained rights. Locke theorized that humans begin in the state of nature, but leave that state to form political society.²³⁰ When they do, they agree to a sort of omnibus settlement of rights: In return for relinquishing certain natural rights, they can better secure the natural rights they retain, and can also enjoy positive rights, i.e., other rights that are not natural rights, but the creation of political society.²³¹ This agreement is the basis of the Lockean social compact. McConnell associates it with constitution making, when the people collectively decide which rights to relinquish, which rights to retain, and which powers to delegate to the state.²³² McConnell contends that the rights retained by the people are the natural rights that remain once others have been relinquished under the social compact.²³³ They are real—but they are not constitutional.

CONSTITUTION, and since 1996 has been a fellow of the American Academy of Arts and Sciences.

228. Michael W. McConnell, *Natural Rights and the Ninth Amendment: How Does Lockean Legal Theory Assist in Interpretation?*, 5 N.Y.U. J.L. & LIBERTY 1, 1 (2010) [hereinafter McConnell, *Natural Rights and the Ninth Amendment*].

229. Michael W. McConnell, *The Ninth Amendment in Light of Text and History*, CATO SUP. CT. REV. 13, 28 (2009-2010) [hereinafter McConnell, *Text and History*].

230. See generally JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT, in TWO TREATISES OF GOVERNMENT §§ 95-140 (1690).

231. *Id.* at 13, 15; McConnell, *Natural Rights and the Ninth Amendment*, *supra* note 228, at 1-3, 11, 13, 15, 19 (citing JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 156-57 (Ian Shapiro ed., 2003) (1689)). For Locke’s social compact theory of government, see generally LOCKE, *supra* note 230.

232. McConnell, *Natural Rights and the Ninth Amendment*, *supra* note 228, at 14.

233. *Id.*

According to McConnell's historical account of English law in the seventeenth and eighteenth centuries, even after political society had formed, natural rights were widely recognized, and continued to have some force in court; but natural rights were never "constitutional" rights in today's sense, because they could never override contrary positive law.²³⁴ Parliament was expected and presumed to follow English constitutional customs, but, even if Parliament deviated from or breached those customs, English judges lacked authority to declare such action unconstitutional or otherwise render it void.²³⁵

Thus, although natural law enjoyed considerable authority on matters that positive enactments had left unaddressed, this authority ultimately was moral authority only; in the event of a confrontation between natural and positive law, positive law always won.²³⁶ At the same time, natural rights were not just declaratory bromides. They could decide cases. This happened through the practice of equitable interpretation, which counsels that statutes be construed narrowly to avoid violating natural law.²³⁷ Few doubted Parliament's power to contravene natural rights when it chose, but in cases where Parliament's intent was unclear, courts ordinarily construed statutes narrowly to avoid such results.

As I have stated, McConnell associates the Lockean social compact with constitution making, since the era in which constitutions are formed are when the people definitively and collectively determine which rights to relinquish, which rights to retain, and which powers to delegate to the state.²³⁸ Retained rights, for McConnell, simply mean those natural rights that were not relinquished in the formation of political society.²³⁹ (It does not include positive rights, which are the product of the social compact itself.) Under this interpretation, the Ninth Amendment's reference to "other" rights "retained by the people" simply means those natural rights that are not given up under the terms of the social compact.²⁴⁰ That is a good working definition of retained rights; what then are the specific purpose and operation of the Ninth Amendment?

The purpose of McConnell's Ninth Amendment is to clarify the status of retained rights following the adoption of the written Constitution. The concern was that if the written Constitution mentioned some rights but not others, people might mistakenly think that the unmentioned rights had been surrendered to the national government.²⁴¹ The point of the new provision was to clarify that all

234. *Id.* at 21, 24; McConnell, *Text and History*, *supra* note 229, at 18.

235. See PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* 252-54 (2008).

236. McConnell, *Natural Rights and the Ninth Amendment*, *supra* note 228, at 21; McConnell, *Text and History*, *supra* note 229, at 20.

237. *Id.* at 21-24; McConnell, *Text and History*, *supra* note 229, at 18, 21.

238. McConnell, *Natural Rights and the Ninth Amendment*, *supra* note 228, at 14.

239. *Id.*

240. McConnell, *Text and History*, *supra* note 229, at 17. In a way, McConnell is combining Lockean social-compact theory with McAfee's residual-rights idea writ large, though to my knowledge neither McConnell nor McAfee has thus described it. The liberties that concern us here are those that remain once government has been established and minimally provided for.

241. McConnell, *Natural Rights and the Ninth Amendment*, *supra* note 228, at 11.

individual natural rights remained in force, notwithstanding that some, but not all, had been specifically listed in the constitutional text.²⁴² The Ninth Amendment did not make such rights “constitutional,” in the sense of being superior to positive law; its purpose was to ensure that such rights would perpetually enjoy the same protections that had been in place before the Constitution was adopted.²⁴³ These were the “other” rights that were not to be “denied or disparaged.”²⁴⁴

Once we have clarified as far as possible what the retained rights are, what is the specific mechanism that protects them?²⁴⁵ The mechanism McConnell describes is a clear statement requirement that must be met before retained rights may be abrogated.²⁴⁶ That is, natural rights—retained rights—will control unless there is sufficiently explicit positive law to the contrary.²⁴⁷

For example, at common law, one of the traditional justifications and defenses to the crime of murder was self-defense. Under McConnell’s proposed reading, the Ninth Amendment could therefore come into play if Congress enacted a law that defined the crime of murder but said nothing about self-defense. A defendant accused of murder, wishing to plead self-defense, could invoke the Ninth Amendment by showing that the right of self-defense is a natural right and that the relevant statute was silent on the subject. In such circumstances, the natural right to self-defense would prevail because there was no specific indication that Congress intended to abrogate the right.²⁴⁸

Let us try to place McConnell’s proposed reading in relation to some of the other interpretations we have discussed. Does it belong in one of the rights-based groupings I have described (non-differentialist, strict differentialist, moderate differentialist), or is McConnell more of an exoconstructionist?

At times, McConnell’s description of retained rights does have an air of indirection that is reminiscent of the exoconstructionists. McConnell’s reading has an exoconstructionist flavor because it contemplates that our interpretation of the text will be shaped by things not in the text, natural rights. In McConnell’s account, even as positive law gained influence in England, natural rights continued to have some legal force in court, at least on matters where Parliament’s intent was unclear. In such cases, courts ordinarily engaged in equitable interpretation, i.e., construing statutes narrowly to avoid violating natural law. From this, McConnell derives an arrangement under which

242. *Id.* at 20; *see also* Barnett, *supra* note 89, at 2.

243. McConnell, *Natural Rights and the Ninth Amendment*, *supra* note 228, at 21.

244. *Id.* at 20.

245. McConnell in fact mentions three mechanisms that would work to protect retained rights; the other two are “self-control on the part of the political branches” and “the separation of powers.” McConnell, *Text and History*, *supra* note 229, at 19. Sadly, he does not elaborate on these two others, so it is hard to know how he thinks they would work in conjunction with the clear statement requirement.

246. *Id.* at 19, 18.

247. McConnell, *Natural Rights and the Ninth Amendment*, *supra* note 228, at 21.

248. McConnell, *Text and History*, *supra* note 229, at 41, 24.

unenumerated rights quietly shape how broadly or narrowly we construe positive law. It *feels* indirect, and in this sense is reminiscent of the exoconstructionist outlook.

A closer look, however, makes clear that McConnell's proposed reading is in fact not exoconstructionist at all, but decidedly rights-based. As interested as he is in things outside the text of the Bill of Rights and indeed the whole Constitution, he never really takes his eye off his main interest, which is the meaning and meaningful application of retained rights. He seems more concerned than most with identifying what retained rights are, and he takes care to define them precisely: Retained rights are those natural rights that have not been given up under the terms of the social compact—i.e., have not been relinquished in the formation of political society.

Indeed, McConnell's account of the Ninth Amendment would be incomprehensible absent his precise definition of retained rights and his discussion of how the framers would have understood them. He is concerned with the relationship between natural and positive law, and with whether retained rights have been "elevated" to become constitutional positive law, superior to ordinary legislation. McConnell's emphasis on rights is also reflected in his interest in Lockean theory and the social compact: The moment when the people decide which rights to relinquish, which rights to retain, and which powers to delegate to the state is the moment when the Constitution is made.

Finally, McConnell is very rights-oriented in articulating the Ninth Amendment's purpose (to clarify the status of retained rights, i.e., unenumerated natural rights, following the adoption of the written Constitution). McConnell argues that such rights continue to enjoy the limited protection accorded to retained natural rights before the Constitution: They are not abrogated on account of the *expressio unius* effect of a partial enumeration, but neither are they elevated to the status of constitutional positive law, superior to ordinary legislation. For exoconstructionists, the main purpose of the Ninth Amendment is something other than rights protection per se; McConnell, by contrast, wants to get to the bottom of what retained rights are, and how best to protect them.

Within the rights-based group, is McConnell's proposal differentialist or non-differentialist? Clearly, the proposal falls on the differentialist side of the line, and is specifically what I have called moderate differentialist. Clearly, enumeration, although not the whole ball game, matters to some extent,²⁴⁹ although not enough to close the question for rights that are unenumerated. Even when rights are enumerated, McConnell assumes certain continuities. He assumes, for example, that the natural rights will continue to be available for equitable interpretation.²⁵⁰ He also assumes that natural rights will continue to be inferior to positive law—they are not "changed" by being "elevated" to constitutional rights.

Remember, what separates differentialist readings from non-differentialist

249. In this sense a clear statement is a substitute or proxy for the clarity of purpose that enumeration would otherwise provide.

250. "This mode of analysis differs from finding that there is a 'constitutional right of self-defense,' because such a right would be judicially defined and impervious to legislation." *Id.* at 42.

readings is that differentialist readings draw a line of constitutional import between rights that are enumerated and those that are not. That is why McConnell's interpretation is differentialist rather than non-differentialist. But within the range of differentialist readings, what separates strict differentialists from moderate differentialists is whether that line is enumeration per se. That is why McConnell's interpretation is moderate differentialist rather than strict differentialist.

McConnell's proposal manages, simultaneously, to be unique and to epitomize what all moderate differentialist interpretations share. It posits a necessary distinction between enumerated rights and retained rights beyond the fact of enumeration per se. It steers between the "enumeration changes everything" position (which seems at odds with the Ninth Amendment) and the "enumeration changes nothing" position (which seems at odds with enumeration itself). McConnell's proposal is moderate differentialist because it presumes both that enumeration does matter to some degree and that unenumerated rights are not per se unenforceable—that is to say, the degree to which a retained right is enforceable is not self-evident from the text.

A few closing thoughts on McConnell's proposed reading. First, note that, by incorporating a variant of the clear statement rule, McConnell seeks to address one of the chief concerns about judicial engagement with unenumerated rights: the lack of democratic accountability. Second, one of the strengths of McConnell's proposal is its painstaking attention to historical continuities and discontinuities, its meticulous survey of what was intended to change and what was not, and the balance that McConnell seeks to strike between continuity and discontinuity. He contends, for example, that the status and protections of retained rights are identical to those they were afforded before the Bill of Rights was added to the Constitution.²⁵¹ He contends that they continue today to enjoy the same legal protection they enjoyed before the written Constitution was adopted.²⁵² He also contends that they are not relinquished or abrogated (denied or disparaged) on account of the principle of *expressio unius*,²⁵³ but they are not "constitutionalized": They are not elevated to "the status of constitutional positive law, superior to ordinary legislation."²⁵⁴ "They are simply what all retained rights were before the enactment of the Bill of Rights: a guide to equitable interpretation and a rationale for narrow construction [of statutes that might be thought to infringe them],²⁵⁵ but not superior to explicit positive law."²⁵⁶

251. McConnell, *Natural Rights and the Ninth Amendment*, *supra* note 228, at 29.

252. *Id.* at 20, 21.

253. *Id.* at 20, 25, 29; McConnell, *Text and History*, *supra* note 229, at 23.

254. McConnell, *Natural Rights and the Ninth Amendment*, *supra* note 228, at 20, 21, 25; McConnell, *Text and History*, *supra* note 229, at 18, 22-23 (citing Barnett, *The Ninth Amendment*, *supra* note 89, at 2).

255. McConnell, *Natural Rights and the Ninth Amendment*, *supra* note 228, at 20, 21, 29 (citing Barnett, *The Ninth Amendment*, *supra* note 89, at 2); McConnell, *Text and History*, *supra* note 229, at 18, 23.

256. McConnell, *Natural Rights and the Ninth Amendment*, *supra* note 228, at 20, 21, 29;

Finally, McConnell also wends his way between premises that are unobjectionable and others that are more open to question. In his account, the event that changed the way rights were enforced was the adoption of a written Constitution.²⁵⁷ Let us accept McConnell's presumptions that there was such a change and that it was attributable to a single event. This still does not tell us everything we need to know about *how* the enforcement of rights was understood to have changed.

For example: While it is true that by declaring the document part of the "supreme Law of the Land,"²⁵⁸ the sovereign people made the Constitution positive law, superior to any act of the legislature, it does not necessarily follow that they made the positive law of the Constitution superior to all retained rights.

While it is true that by authorizing the federal courts to hear cases "arising under" the Constitution,²⁵⁹ the people made clear that the positive law of the Constitution would be judicially cognizable; it does not necessarily follow that retained rights no longer are (or never were).

While it is true that by enumerating certain rights through the Bill of Rights, the people made those rights as much a part of the positive law of the land as any power of Congress,²⁶⁰ it does not necessarily follow that the positive law of the land would henceforth always outweigh the force of retained rights. Before the Revolution, the American people must have thought they retained some rights that were unenumerated but nevertheless beyond Parliament's power to invade; indeed, that is one way to summarize what the Revolution itself was about. Why, then, should we assume that committing some of these rights to parchment was understood to abrogate all those not so committed or enumerated? We can accept McConnell's point that the enumeration of some rights made those rights part of the positive law of the land; it does not compel the conclusion that those which were not written down are no longer (or never were) enforceable. Such a conclusion seems at odds with both the letter and the anti-*expressio unius* spirit of the Ninth Amendment.

V. JUDICIAL DISCRETION AND HISTORICAL PLAUSIBILITY

The strict differentialist and the non-differentialist stand at opposite poles. Both constrain the court's discretion, but in opposite directions. For the strict differentialist, enumeration is determinative; for the non-differentialist, it is a suspect classification.

McConnell, *Text and History*, *supra* note 229, at 18, 23 (citing Barnett, *The Ninth Amendment*, *supra* note 89, at 2).

257. U.S. CONST. art. VI, cl. 2; McConnell, *Natural Rights and the Ninth Amendment*, *supra* note 228, at 24; McConnell, *Text and History*, *supra* note 229, at 22.

258. McConnell, *Natural Rights and the Ninth Amendment*, *supra* note 228, at 24; McConnell, *Text and History*, *supra* note 229, at 22.

259. U.S. CONST. art. III, § 2, cl. 1; McConnell, *Natural Rights and the Ninth Amendment*, *supra* note 228, at 24; McConnell, *Text and History*, *supra* note 229, at 22.

260. McConnell, *Text and History*, *supra* note 229, at 22.

The opening question is of course whether the asserted right is enumerated.²⁶¹ For the strict differentialist, the answer to that question answers everything: If the right is enumerated, it is enforceable; if not, it is unenforceable, at least as far as the judiciary is concerned.

For the non-differentialist, on the other hand, whether the right at issue is an enumerated right or a retained right is immaterial in itself—the non-differentialist will fully enforce both—but once it is accepted that the right at issue is *either* enumerated or retained, judicial discretion is at an end. There will be no additional inquiry to determine whether a retained right falls within some enforceable subset, or the extent to which it may be enforced: Under the non-differentialist model, all retained rights are fully enforceable, just as if they were enumerated.²⁶²

The further we get from those poles, the more discretion the judge has to decide just how much weight to accord the fact of enumeration. For the strict differentialist, retained rights are never enforceable; for the non-differentialist, all retained rights are always fully enforceable, but for the moderate differentialist, the inquiry as to any retained right is necessarily far more complex. The Supreme Court, for instance, has over time settled on a moderate differentialist approach: Enumerated rights are fully enforced; retained rights may be enforced—if they qualify as “fundamental.”

Practically speaking, we complicate things any time we designate, within the larger set of all unenumerated rights, some subset that is enforceable, whether we label that subset “Fundamental Rights” or something else. The very suggestion of an enforceable subset of unenumerated rights—of an island of enforceable Fundamental Rights surrounded by a sea of unenforceable ones—is heresy to the strict differentialist and the non-differentialist alike, albeit for opposite reasons. To the strict differentialist, Fundamental Rights Island is an affront to enumeration: What is the point of enumerating rights, if there are additional unenumerated rights out there that are just as enforceable? To the non-differentialist, Fundamental Rights Island is an affront to the Ninth Amendment, since (under this view) the privileging of some unenumerated rights necessarily denies or disparages all of the other unenumerated rights that lack the elite “fundamental” designation.²⁶³

261. Let us presume this can be answered yes or no, i.e., that whether a right is enumerated can be determined simply by looking at the text. Whether a right is retained, on the other hand, will ordinarily be a matter of historical fact (though there will sometimes be room for argument about the level of specificity with which a right is defined).

262. A non-differentialist would argue that there can be no additional analysis, if retained rights and enumerated rights are to be treated on an equal footing, as (under this view) the Ninth Amendment requires.

263. Moreover, a non-differentialist might argue that it is impermissible even to inquire whether an unenumerated right is fundamental. We do not ask that question about enumerated rights, after all, and the Ninth Amendment makes clear that enumerated and unenumerated rights are to be treated equally. A counterargument might be that we *do*, in fact, “ask” whether enumerated rights are fundamental—but the fact of their enumeration is such strong evidence that

To designate as enforceable only a subset of retained rights thus introduces an abundance of variables, and a degree of judicial discretion, that both the strict differentialist and the non-differentialist seek to avoid. If it is true, as moderate differentialists claim, that some unenumerated rights are enforceable and others are not, it is equally true that the Ninth Amendment provides no criteria for determining which are which; it does not mention any enforceable subset (or unenforceable subset) at all. That does not mean the borders of those subsets will be eternally undefined; it means they will be defined by judges. Moderate differentialism maximizes the scope of judicial choice, including the opportunity to make the wrong choice. Neither the strict differentialist nor the non-differentialist would claim that fundamental rights are not a matter of judicial concern; but both would resist making it a matter of judicial discretion.²⁶⁴

Any moderate differentialist approach to the Ninth Amendment, whether it be the fundamental-rights approach that the Supreme Court has actually adopted, or some other approach, introduces a level of judicial discretion that raises two distinct objections. First, anyone who objects to judicial discretion in general, will object to this model because it gives courts so much discretion. It thereby opens the door to the charge of judicial imperialism. Second, we may specifically object to particular exercises of that discretion by the Court. Anytime judicial discretion comes into play, we have something to examine, something to question; the more discretionary choices there are, the more forking paths in the garden, the more complicated the problem.

Besides opening a playgroundful of discretionary decisions that we can evaluate, moderate differentialism introduces another question: Is the proposed reading historically plausible? One need not call oneself an originalist to acknowledge that historical fit has a place in constitutional interpretation. McConnell's Ninth Amendment solution, for example, is an ingenious proposal that might deliver any number of practical advantages; whether it is plausible as a matter of history is a more open question.²⁶⁵ In any event, to the extent that an interpretation's premises and conclusion purport to rest on historical fact, we can

it makes the question perfunctory. At some point the distinction becomes metaphysical.

264. For more on judicial discretion, see *Spann v. People*, 561 P.2d 1268, 1269 (Colo. 1977); AHARON BARAK, JUDICIAL DISCRETION 5, 12, 24-27, 261, 266 (Yadin Kaufmann trans., Yale Univ. 1989) (1987); FELIX FRANKFURTER, OF LAW AND MEN 43 (1956); see also *Rex v. Wilkes*, 98 Eng. Rep. 327, 334 (K.B. 1770) (Mansfield, L.J.); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 739, 866 (1824) (Marshall, C.J.); THE FEDERALIST NO. 78, *supra* note 53, at 439 (Alexander Hamilton); *Brown v. Van Braam*, 3 U.S. (3 Dall.) 344, 350 (1797) (argument of counsel).

265. Cf. *Seattle Sch. Dist. No. 1 of King Cnty. v. State*, 585 P.2d 71, 96 (Wash. 1978) ("The suggestion is ingenious, but it is not supported by history . . .").

evaluate them on that basis.²⁶⁶

Inevitably, much of the historical evidence in such cases will be circumstantial. At least some of it will fall well short of what professional historians accept as evidence. “[H]istory is essential to constitutional theory because our understandings, our values, and the actual structure of our government are constantly, inevitably, changing,”²⁶⁷ but historical knowledge is rarely complete. Accordingly, legal reasoning from the circumstantial evidence of history is nothing new.²⁶⁸ Barring authentic and unequivocal proof of the intentions or understandings of this or that framer, we cannot avoid a certain amount of reasoning from historical circumstance.

Here we could use some heuristic tools to keep us focused on the big picture of history and to help us avoid getting bogged down in detail. We want to be able to draw on history to make educated guesses, we cannot (and, luckily, need not) amass all of the information necessary to produce a definitive historical proof. We are in the realm of the plausible now, broad-brush strokes suffice. As it happens, in our simple continuity/discontinuity distinction, we have a useful tool already at hand. Thinking about continuities and discontinuities can suggest whether the choices we ascribe to the framers, for example, are historically plausible.

There are two ways to get this wrong. *Constitutional continuity errors* can occur either as implausible discontinuity or as implausible continuity. An *implausible discontinuity* is the questionable claim that historical actors chose to discontinue some preexisting practice or institution—withstanding historical evidence that indicates, to the contrary, that they more probably intended to maintain it. An *implausible continuity* is just the opposite: It is the questionable claim that historical actors chose to maintain some preexisting practice or institution—withstanding historical evidence that indicates, to the contrary, that they more probably intended to discontinue it.

A detailed examination of these two types of constitutional continuity error is beyond the scope of this essay, but I can at least sketch out an example or two. A good example of an *implausible discontinuity*, in my view, is the claim that

266. Ultimately, it is the amendment’s text, not its history, that poses the dilemma; even if its history was unavailable to us and the text was all we had, the problem would still exist. The text refers to two sets of rights, enumerated and retained, but does not explain the connection (if any) between enumeration and enforceability. Perhaps only enumerated rights are judicially enforceable (though that seems at odds with the Ninth Amendment); perhaps all rights are at least potentially enforceable whether or not they are enumerated (though that raises the question: What was the point of enumerating rights at all?) My point is that the underlying problem is conceptually unavoidable even if we ignore history entirely and confine our inquiry to the amendment’s text.

267. See Larry D. Kramer, *Fidelity to History—and Through It*, 65 *FORDHAM L. REV.* 1627, 1627 (1997).

268. *E.g.*, *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 202 (1819) (Marshall, C.J.) (“[W]e know from the history of the times, that the mind of the convention was directed to other laws which were fraudulent in their character . . .”); *Fishgold v. Sullivan Drydock & Repair Corp.*, 154 F.2d 785, 788-89 (2d Cir. 1946) (L. Hand, J.). *Cf.* *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 23 (2d Cir. 1984).

most or all preexisting fundamental law (natural law, custom, common law, etc.) ceased to be judicially enforceable once the written Constitution was ratified. That claim certainly seems to be contradicted by the text of the Ninth Amendment,²⁶⁹ but it is also hard to reconcile with what we know about the historical context.²⁷⁰

The dispute that led to revolution concerned the colonists' rights as Englishmen under the English Constitution, which was unwritten.²⁷¹ Written bills of rights existed, but their purpose was to provide additional security rather than to create or enact rights.²⁷² Americans, both before and after the Revolution, looked to ordinary courts to help secure constitutional rights, whether those rights were written or not.²⁷³ It therefore strains historical plausibility to suggest that the framers intended the written Constitution to be the exclusive source of the nation's fundamental law,²⁷⁴ i.e., that they understood their adoption of a written constitution to repeal (discontinue) all fundamental law that was not explicitly

269. See *Bork Hearings*, *supra* note 102, at 2833 (statement of Philip B. Kurland), 1279 (statement of Laurence H. Tribe).

270. See THE DECLARATION OF INDEPENDENCE, para. 1 (U.S. 1776); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 387-88 (1798) (Chase, J.); PATTERSON, *supra* note 37, reprinted in THE RIGHTS RETAINED BY THE PEOPLE 107-09 (Randy Barnett ed., 1989); Suzanna Sherry, *The Ninth Amendment: Righting an Unwritten Constitution*, in 2 THE RIGHTS RETAINED BY THE PEOPLE 283-84 (citing other scholarship).

271. The Revolution itself "was justified and fought on constitutional grounds—on a claim that Parliament had violated the imperial constitution—even though there was no text at all." Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 240 n.105 (2000) (citing JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION (4 vols. 1986-1993)).

272. See BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 187-98 (1967); THE FEDERALIST No. 44, *supra* note 53, at 280, 282 (James Madison); Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), in 14 THE PAPERS OF THOMAS JEFFERSON 659, 660 (Julian Boyd ed., 1955); 1 ANNALS OF CONG., *supra* note 58, at 441; Letter from James Madison to Thomas Jefferson (Dec. 9, 1787), in 12 THE PAPERS OF THOMAS JEFFERSON 408, 410 (Julian Boyd ed., 1955).

273. See Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1146, 1156 (1987) [hereinafter Sherry, *The Founders' Unwritten Constitution*]; see also DANIEL J. BOORSTIN, THE AMERICANS: THE COLONIAL EXPERIENCE 20 (1958); Julius Goebel Jr., *Antecedents and Beginnings to 1801*, in HISTORY OF THE SUPREME COURT OF THE UNITED STATES 89-95 (Paul A. Freund ed., 1974); 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); LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 7 (1999); CALVIN R. MASSEY, SILENT RIGHTS: THE NINTH AMENDMENT AND THE CONSTITUTION'S UNENUMERATED RIGHTS 21-94 (1995); JAMES THAYER, CASES ON CONSTITUTIONAL LAW 48-53 (1895).

274. Sherry, *The Founders' Unwritten Constitution*, *supra* note 273, at 1164-65; Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171, 171-72 (1992); see also Andrew B. Coan, *The Irrelevance of Writtenness in Constitutional Interpretation*, 158 U. PA. L. REV. 1025 (2010).

spelled out in that instrument's text.²⁷⁵ That, in my opinion, is an example of an implausible discontinuity.

For a good example of *implausible continuity*, consider the framers' view of legislative supremacy. If the only rights that courts are authorized to enforce are those that are expressly mentioned in the Constitution, then in cases involving unenumerated rights, the last word belongs not to the courts, but to Congress.²⁷⁶ The men who wrote the Constitution had seen that sort of unlimited legislative power before—in the British Parliament. Americans specifically rejected the Blackstonian view that even fundamental law was subject to legislative change, and that Parliament was the final arbiter of what was or was not constitutional.²⁷⁷ Instead, they adhered to the older belief “that sovereign power was limited by the rule of law, specifically the fundamental rules of the common law embodied by long usage.”²⁷⁸ Their refusal to submit to a Parliament that recognized no true limits beyond its own will was a leading cause of the Revolution,²⁷⁹ and after the Revolution, their wariness of dominant legislatures was reinforced by the havoc such bodies had wrought in their own state governments.²⁸⁰ To make Congress effectively the final judge of the scope of its own authority, or the constitutionality of its own acts, would have violated some of the most basic principles of constitutionalism as the framers understood it.²⁸¹ If the nation were

275. See Grey, *supra* note 273, at 159-67; Sherry, *The Founders' Unwritten Constitution*, *supra* note 273, at 1157-67.

276. Under Michael McConnell's interpretation, discussed in Part IV, Congress gets the last word as long as it makes that intention clear. If the clear-statement requirement is met, Congress would enjoy total freedom to abrogate or abolish any right that is not specifically enumerated in the text of the Constitution.

277. Mary L. Clark, *Advice and Consent vs. Silence and Dissent? The Contrasting Roles of the Legislature in U.S. and U.K. Judicial Appointments*, 71 LA. L. REV. 451, 471 (2011).

278. John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1782 (2008).

279. See 4 JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 68-69 (1987). Historians of the American Revolution generally identify American rejection of parliamentary sovereignty as the central constitutional dimension of that conflict. See C. BRADLEY THOMPSON, JOHN ADAMS AND THE SPIRIT OF LIBERTY 79-87 (1998); JAMES R. STONER JR., COMMON-LAW LIBERTY 13 (2003); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787, at 260-62 (1969).

280. Edward H. Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 374-76 (1976); Martin H. Redish & Elizabeth J. Cisar, “If Angels Were to Govern”: *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 460 n.59 (1991) (quoting THE FEDERALIST NO. 48, at 147 (James Madison) (Roy P. Fairfield ed., 2d ed. 1966) (“The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.”)).

281. “Legislative bodies cannot be the judges of their own infraction of fundamental law.” *Rust v. Kitsap Cnty.*, 189 P. 994, 995 (Wash. 1920) (citation and internal quotation marks omitted); see also *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 567 (1985) (Powell, J., dissenting); *Oregon v. Mitchell*, 400 U.S. 112, 204-05 (1970) (Harlan, J., dissenting); Whittington

to continue under the English model, placing no practical constitutional limitations on congressional authority to violate retained rights,²⁸² it would put retained rights under constant threat by the political branches,²⁸³ rendering the rights worthless²⁸⁴ as Congress undermined the separation of powers²⁸⁵ and became omnipotent de facto, if not de jure.²⁸⁶

To prevent this, the Federal Convention chose not to grant Congress a general or plenary police power;²⁸⁷ instead, requiring that every law passed by Congress either fall within one of several discrete, enumerated powers or be “necessary and proper” to their execution,²⁸⁸ with the courts playing a critical role in keeping Congress within its designated limits.²⁸⁹ It is hard to imagine a clearer example of historical discontinuity, a break from the way things were done before.

If, as McConnell’s proposal would have it, retained rights are enforceable only at Congress’s option—if a clear statement of intent is all that is required to preclude judicial review²⁹⁰—it is fair to ask whether retained rights have any practical effect, just as we might wonder about the practical effect of the Necessary and Proper Clause if Congress were the ultimate judge of what was necessary or proper.²⁹¹ Given that it appears it was never the prevailing view that

v. Polk, 1 H. & J. 236, 242-46, 1802 WL 349, **4-6 (Md. Gen. 1802); *Burnham v. Morrissey*, 80 Mass. 226, 238, 1859 WL 7480, *9 (1859); *State ex rel. Schorr v. Kennedy*, 9 N.E.2d 278, 281-82 (Ohio 1937) (Day, J., dissenting); BARNETT, *supra* note 37, at 261; RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 142 (1978); THE FEDERALIST NO. 78, *supra* note 53, at 467 (Alexander Hamilton).

282. BARNETT, *supra* note 37, at 255; MARTIN H. REDISH, *THE FEDERAL COURTS IN THE POLITICAL ORDER: JUDICIAL JURISDICTION AND AMERICAN POLITICAL THEORY* 81 (1991).

283. Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45 (1975).

284. Martin H. Redish & Karin L. Drizin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1, 16-17 (1987); Redish & Woods, *supra* note 283.

285. See *Bartlett v. Bowen*, 816 F. 2d 695, 707 (D.C. Cir. 1987) (Edwards & Wright, JJ.) (citing *United States v. Klein*, 80 U.S. 128, 147 (1871) (Chase, C.J.)).

286. Karl S. Coplan, *Legal Realism, Innate Morality, and the Structural Role of the Supreme Court in the U.S. Constitutional Democracy*, 86 TUL. L. REV. 181, 184 (2011).

287. *United States v. Lopez*, 514 U.S. 549, 566 (1995); Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 185 (2003); Michael T. Morley, *The Law of Nations and the Offenses Clause of the Constitution*, 112 YALE L.J. 109, 109-10 (2002).

288. U.S. CONST. art. I, § 8, cl. 18; *Printz v. United States*, 521 U.S. 898, 919 (1997); *Lopez*, 514 U.S. at 566; *Hawaii v. Mankichi*, 190 U.S. 197, 240-41 (1903) (Harlan, J., dissenting); Barnett, *supra* note 287, at 185; Morley, *supra* note 287, at 109-10; 1 THE WORKS OF JAMES WILSON 764 (Robert G. McCloskey ed., 1967).

289. THE FEDERALIST NO. 77, *supra* note 53, at 462 (Alexander Hamilton).

290. See *Bartlett*, 816 F.2d at 707 (citing *Klein*, 80 U.S. at 147); *Ex parte Townsend*, 144 S.W. 628, 647 (Tex. Crim. App. 1911).

291. *United States v. Butler*, 297 U.S. 1, 78 (1936).

Congress should be the final arbiter of the constitutionality of its own actions,²⁹² and given the pains the framers took to constrain congressional power, it would have made little sense to give Congress the last word when “rights retained by the people” are at stake.²⁹³ This suggests it is an error to view congressional power as merely a continuation of the unbounded authority of Parliament. It is, in other words, an implausible continuity.

Something about the Ninth Amendment seems to attract labels that are not especially illuminating, that characterize the *kind* of rule it is without saying much about how the rule operates or the objects of its protection. For instance, both Caplan and McAfee describe the Ninth Amendment as a rule of construction, a hold harmless provision with the purpose of preventing a particular misconstruction. For Caplan, however, the threatened harm is the argument that the adoption of the federal Constitution supplants the rights that were already secured by the laws of the various states. McAfee’s concern, on the other hand, was that the listing of some rights would be misinterpreted to mean that the federal government enjoyed a more general authority to regulate in those areas, thereby having the overall effect of expanding federal power. That is, McAfee’s federalist approach “reads the Ninth as a mere declaration that enumerated rights do not imply otherwise unenumerated federal power.”²⁹⁴ Caplan and McAfee might agree that the amendment is a hold harmless provision, but they differ wildly on what it holds harmless, and on the specific harm that it holds harmless against. As Randy Barnett has observed, Caplan and McAfee have completely different ideas about the particular misconstruction the amendment aims to address.²⁹⁵ If we must use labels to categorize the possible interpretations, I favor the labels that put the enumeration question itself front and center. As a matter of historical fact, after all, that was the question the Ninth Amendment was written to answer.

A final thought on the use of history. Because the Court has cast its lot with what I have called moderate differentialism, for the foreseeable future the question of which rights to enforce will not hinge on enumeration per se. The Court will continue to enforce some unenumerated rights, provided those rights fall within the appropriate subset (e.g., fundamental rights). To make that determination, the Court will presumably look at any number of factors. If one of those factors is historical evidence, then the integrity of those determinations will depend in part on whether they are supported by plausible historical fact.

Evaluating whether something is historically plausible does not require the specialized training of the professional historian. It does not entail analyzing historical data in its entirety or to any great depth. All it entails is choosing the more plausible from competing narratives. In most cases, what will be called for

292. Sch. Districts’ Alliance for Adequate Funding of Special Educ. v. State, 244 P.3d 1, 12 (Wash. 2010).

293. Paul E. McGreal, *Ambition’s Playground*, 68 *FORDHAM L. REV.* 1107, 1171 (2000).

294. Lash, *supra* note 173, at 346.

295. See Barnett, *The Ninth Amendment*, *supra* note 89 (citing Caplan, *supra* note 9, at 227-28; McAfee, *supra* note 218, at 1226).

is a more pragmatic, almost thematic, historical sense. What will matter are not the details, but the grand sweeps, the epochal movements, the impulses of the age.

Large-scale continuities and discontinuities are one example of that. One need not know every last detail of the founding era, for instance, to know that the animating spirit of our Constitution since it began has been not the supremacy of our Congress but the sovereignty of our people; to know that this was a major discontinuity with the past; and to make a perfectly well-grounded inference about whether Congress was seen as succeeding to the unlimited authority previously held by Parliament.²⁹⁶ This is big-picture thinking that any nonspecialist should be able to do. We should no more expect judges to bring a professional historian's training to their work, than we expect jurors to bring legal training to theirs.

CONCLUSION

ROSE (to SOPHIA): Well, what did she say?

SOPHIA: It's not what she *said*. It's what she *didn't* say.

ROSE: What *didn't* she say?

SOPHIA: How the hell do I know? *She didn't say it!*

*The Golden Girls*²⁹⁷

The received view of the Ninth Amendment as paradoxical sphinx, as inscrutable inkblot, is more myth than mystery. Like other urban legends, it can be demystified, if not permanently debunked.

The Ninth Amendment is indeed about what the Constitution does not say. It tells us so, for one thing. The text explicitly refers to, and tells us not to diminish, something that, by definition, is not there. This is about as metalegal as you can get: words that point off the page. The Constitution seems to be alerting us that there is more constitution "out there." If there is such a thing as a constitutional fourth wall, it has been broken. It is not quite a contradiction in terms—"This statement is false"—but it is still funny to get one's mind around, like a Möbius strip. And it seems designed to madden those who prefer to think that the text is all there is. The text itself tells us it is not.

It is a clever little puzzle, to be sure, but something here seems out of proportion. The Ninth Amendment is not the only unenumerated rights clause that was ever written, after all; it is not even the only one in our Constitution. Yet it seems to draw a reaction like no other, a strange mix of marvel, disdain, and a

296. James W. Ely Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENTARY 315, 324 (1999); William J. Watkins Jr., *Popular Sovereignty, Judicial Supremacy, and the American Revolution: Why the Judiciary Cannot Be the Final Arbiter of Constitutions*, 1 DUKE J. CONST. L. & PUB. POL'Y 159, 174-93 (2006); see also 1 THE WORKS OF JAMES WILSON 168-93 (Robert G. McCloskey ed., 1967); 2 GRIFFITH JOHN MCREE, LIFE AND CORRESPONDENCE OF JAMES IREDELL 145-46 (1858).

297. *The Golden Girls: Flu Attack (a.k.a.) The Flu* (NBC-TV broadcast Mar. 1, 1986).

desire to change the subject. That it is self-referential does not make it unusable; why the collective judicial allergy to thinking and talking about it?

The conventional view is that our courts avoid the Ninth Amendment because the retained rights to which it refers are so uncertain, so undefined, so vague and obscure. Yet we could say the same thing about much of the Constitution, and the courts have been addressing vague and undefined provisions for a long time. What troubles us is not, I think, the amendment's failure to say more about the specific content of unenumerated rights, but its failure to tell us what enumeration is for. What makes the Ninth Amendment more inconvenient, particularly for judges, is the doubt it casts on the sufficiency of text as a guarantor of liberty.

With the hindsight of several eras we should hardly be surprised that the judiciary—the one branch most conditioned to look to text for its rules of decision—is also repelled by the one constitutional provision that points most forcefully away from the text. Maybe this was inevitable, especially once the Fourteenth Amendment provided further textual bases for unenumerated rights, making it unnecessary to develop the law of retained rights. Maybe substantive due process, if not the smoothest road, has taken us to the same destination. Maybe

Well, maybe. But I tend to think that the Ninth Amendment has never been superfluous, then or now. It has been an unfortunate casualty of the enumeration wars.

In the beginning, all rights were “unenumerated,” in our modern sense; this did not render them empty abstractions. It did not faze our forebears; their rights were real as rocks. Their independence won, the former colonists established a new, free nation. The historical record suggests that they valued the added security that a written bill of rights might afford, but did not see written enactments as having actually displaced the innumerable rights that remained unenacted. Madison's original proposal for what became the Ninth Amendment nicely sums up, I believe, the prevailing understanding of what enumeration did and did not do.

In this Article, I have tried to use the continuity/discontinuity distinction to reveal what really troubles us about the Ninth Amendment. Trying to pin down whether the amendment is continuous or discontinuous, as far as constitutional history is concerned, frankly can send the mind in circles. Perhaps it is discontinuous: If the most important thing about the American Constitution is its writtenness, then the Ninth Amendment, which explicitly undermines the ultimate authority of the text, is a most subversive provision, bordering on self-sabotage. (And what are “unenumerated” rights but an invitation to unending constitutional change and discontinuity?) Oh, but perhaps it is continuous: It is the written Constitution that is the real innovation here, one of the greatest discontinuities in an age of discontinuity, and here is the Ninth Amendment, tapping on the brakes a bit, a reminder that we have not let go of the old ways. That sounds like more of a continuity. (And, really, it *is* a rule of construction, simply a clarification of how other parts of the Constitution are to be read; it doesn't actually *change* anything, so how can it be discontinuous?) And on and on.

This, I maintain, is misdirection. To advance our understanding, I have suggested we should stop seeing the Ninth Amendment as a question, and start

seeing it as *enumeration's answer*.

To ask whether *enumeration* is continuity or discontinuity is far more illuminating. As a nation we lack consensus on this, and the Ninth Amendment, as adopted, does not appear to have helped.²⁹⁸ That said, the Ninth is even more opaque when we detach it from the question it was written to answer. Remembering that the issue is enumeration will at least help us better articulate what we are confused about. So I have argued that the Ninth Amendment “question” is really the enumeration question: Does enumeration make a difference?

In this Article, I have tried to show that one way to better understand the various interpretations of the Ninth Amendment is to group them according to how their adherents would answer that same question. I have sketched my own primitive map of what this might look like. At the highest level, I have distinguished those who read the Ninth Amendment as being about rights (Part II) from those who read it as being about something else (Part III). Within the rights category, I have drawn a primary distinction between those who think enumeration makes no difference (the nondifferentialists) and those who think it makes some difference (the very large category of differentialists). Within differentialists, I have distinguished the strict differentialists, who think enumeration *per se* determines whether a right is enforceable, from the moderate differentialists, who think it does not.

I recognize that I am distinguishing (a) the question of whether unenumerated rights have any enforceable content from (b) the logical next question of what those specific rights are. Enumeration is what necessitated²⁹⁹ the Ninth Amendment; without the partial enumeration of rights, such an amendment would have been entirely unnecessary (and in fact would have made no sense). For that reason, every proposed reading of the Ninth Amendment necessarily addresses (even if only implicitly) the possible and preferred effects of that partial enumeration. That is why, even before we examine specifically which unenumerated rights “make the list” of enforceable rights, we face the question of what enumeration itself does or does not do—the question the Ninth Amendment was originally meant to answer.

I do not mean to suggest that knowing which rights are fundamental is unimportant. Clearly one must get there to decide actual cases. I also recognize that such issues will often turn on how the argument is framed, especially the level of abstraction at which a right is defined. I mean only to suggest that a premature focus on which rights “make the list” can divert us from considering what each of the possible readings presupposes about the difference that enumeration makes—which, again, was after all the purpose of the amendment in the first place. What I have tried to do is to discern, in the array of proposed

298. I have hinted broadly that we might have been better off under Madison’s original version. I think that is true, although whether we would have arrived at a definite consensus about enumeration by now is anyone’s guess.

299. Or what occasioned it, if you are among those who believe the amendment was in fact unnecessary.

readings, some pattern that is more useful than our present querulous muddle.

None of this makes the Ninth Amendment a cinch to apply. It does not mean we will always agree on what rights should be protected, by whom, or how. It suggests only that the full answer is larger than could ever be wholly captured in words on a page. But in the Age of Revolution, that was not a revolutionary idea. That was simply the way it had been, seemingly always, since time immemorial, under the English Constitution that the colonists risked everything to restore.