RECONCEIVING THE NINTH AMENDMENT

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> It cannot be presumed that any clause in the constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it.[1]
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> I do not think you can use the Ninth Amendment unless you know something of what it means. For example, if you had an amendment that says "Congress shall make no" and then there is an inkblot, and you cannot read the rest of it, and that is the only copy you have, I do not think the court can make up what might be under the inkblot.[2]

I

CLEARING A PATH FOR THE NINTH AMENDMENT

The courts long have protected constitutional rights that are not listed explicitly in the Constitution,[3] but are they warranted in doing so? As scholars and commentators vigorously debate this and other questions about the appropriate role of judges in interpreting the Constitution, the Ninth Amendment has assumed increasing importance. Its declaration that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"[4] has suggested to many that the set of rights protected by the Constitution is not closed and that judges may be authorized to protect these "unenumerated" rights on occasion.

While much is controversial about the Ninth Amendment, the events that led to its adoption generally are agreed upon.[5] The

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

2 *Testimony of Robert Bork*, WALL ST. J., Oct. 5, 1987, at 22, col. 1.

3 For a list of judicially protected unenumerated rights see *infra* note 106.

4 U.S. CONST. amend. IX.

5 For discussions of the legislative history of the Ninth Amendment, see M. GOOD-

Ninth Amendment was originally conceived by James Madison. A committee of the House of Representatives, on which Madison served, revised it. The House and the Senate debated and approved it and, along with the rest of the Bill of Rights, the several states ratified it. Any provision that survives this process must be presumed by interpreters of the Constitution to have some legitimate constitutional function, whether actual or only potential. Despite this long respected presumption, the Supreme Court has generally interpreted the Ninth Amendment in a manner that denies it any role in the constitutional structure.[6] The Ninth Amendment's most important appearance in a Supreme Court case to date has been in a supporting role.[7] In his now-famous concurring opinion in *Griswold v. Connecticut*,[8] Justice Goldberg stated: "In interpreting the Constitution, 'real effect should be given to all the words it uses,'. . . . The Ninth Amendment to the Constitution may be regarded by some as a recent discovery, . . . but since 1791 it has been a basic part of the Constitution which we are sworn to uphold."[9]

In this article, I hope to clear a path for a more fruitful and faithful interpretation of the Ninth Amendment by removing certain doctrinal and theoretical impediments to such an interpretation. This requires a critical appraisal of what I call the "rights-powers" conception of constitutional rights—a conception that the Court has applied exclusively to the Ninth Amendment, rendering it functionless. I shall then contrast this view with the very different "power-constraint" conception that the Court has used to interpret most other constitutional rights. If I accomplish nothing else in this arti-

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MAN, THE NINTH AMENDMENT 4-8 (1981); B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT 6-18 (1955); Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1, 3-9 (1980); Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 228-59 (1983); Dunbar, *James Madison and the Ninth Amendment*, 42 VA. L. REV. 627, 629-40 (1956); Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 HASTINGS L.J. 305, 307-11 (1987); Rogge, *Unenumerated Rights*, 47 CALIF. L. REV. 787, 787-93 (1959); Van Loan, *Natural Rights and the Ninth Amendment*, 48 B.U.L. REV. 1, 4-17 (1968); Note, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. CHI. L. REV. 814, 815-20 (1966) (authored by James F. Kelly).

6 The singular exception to this is Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980). There, the plurality based its opinion, in part, on the Ninth Amendment. *Id.* at 579 n.15.

7 The judicial use of the Ninth Amendment is summarized in Redlich, *The Ninth Amendment*, in 3 THE ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1316-20 (L. Levy ed. 1982).

8 381 U.S. 479 (1965).

9 *Id.* at 491 (Goldberg, J. concurring) (citation omitted). Justice Goldberg relied on three scholarly works on the Ninth Amendment: B. PATTERSON, *supra* note 5; Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L.J. 309 (1936); 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.

cle, I intend to show that the traditional rights-powers interpretation of the Ninth Amendment is untenable.

The rights-powers conception is, however, more a symptom than the real cause of the Ninth Amendment's past and current neglect. The principal obstacles in the path of a functional Ninth Amendment are certain views of constitutional structure and a deep-seated fear of letting judges base their decisions on unenumerated rights—a fear that stems in large part from a modern philosophical skepticism about rights. In this article, after laying the rights-powers conception to rest, I shall present the outlines of a power-constraint conception of the Ninth Amendment. In doing so, I shall discuss how the judicial protection of unenumerated rights is consistent with the structural features of the Constitution and why philosophical skepticism about the idea of "retained" rights should not operate as a bar to their recognition. Finally, I shall suggest a practical method of interpreting the rights retained by the people referred to in the Ninth Amendment.

My analysis will rely heavily on the explanation of constitutional rights provided by James Madison in his speech before the House of Representatives.[10] I do this for two reasons. First, such a focus responds to the concern of some that giving the Ninth Amendment a genuine role to play in constitutional adjudication somehow conflicts with the intent of the framers. As the Framer who first conceived of the Ninth Amendment, Madison's conception of constitutional rights is the most pertinent to an understanding of the Ninth Amendment's intended function. Whether or not the views Madison expressed to the House reflected a clear consensus of his contemporaries, if a robust theory of the unenumerated rights retained by the people is consistent with his vision, then it will be quite difficult to sustain an objection to such a theory on the ground that it violates original intent.

Second, I have great respect for Madison as a political theorist. For this reason, in deciding upon the best theory of the Ninth Amendment, I think it is useful to consult the opinion of the insightful person who conceived it and who also conceived a good deal of the Constitution's other important features. I view the Framers as teachers, not wardens, and consider their writings to be the best place to begin looking for a theoretical understanding of the text they wrote.

The theoretical issues raised by the Ninth Amendment are, in my view, extremely fundamental and this article is in no way in-

10 *See* 1 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 454 (J. Gales & W. Seaton eds. 1834) (Speech of Rep. J. Madison) [hereinafter "Madison"].

tended to be the last word on the subject.[11] A complete defense of allowing the Ninth Amendment a real constitutional function would require a much more extensive presentation than I shall attempt here. Indeed, a complete analysis of the rights "retained by the people" would require nothing short of a comprehensive theory of the Constitution.

II
Two Competing Conceptions of Constitutional Rights

A. The Rights-Powers Conception of Constitutional Rights

Although the longstanding neglect of the Ninth Amendment is a product of basic concerns about grounding judicial review on unenumerated rights, this neglect would not have been possible without an interpretation that purports to give the amendment a meaning while denying it any functional role in constitutional disputes. Such an interpretation employs a rights-powers conception of constitutional rights, a view that can be traced to a Federalist argument against the addition of any bill of rights. Federalists originally argued that a bill of rights was unnecessary because the Constitution granted the national government only enumerated powers. Any power that was not enumerated could not be exercised by the national government. A bill of rights, they argued, would be redundant and therefore unnecessary. Any rights enumerated in a bill of rights would be outside the powers of the national government and would need no further protection. As Alexander Hamilton wrote, "why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?"[12] James Wilson made the same argument:

> [E]very thing which is not given, is reserved. . . . [I]t would have been superfluous and absurd, to have stipulated with a federal body of our own creation, that we should enjoy those privileges, of which we are not divested either by the intention or the act that

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11 I discuss the relationship between the judicial protection of unenumerated rights and the ability of a constitution to impart legitimacy on enacted legislation in Barnett, *Foreword: The Ninth Amendment and Constitutional Legitimacy*, 64 CHI.-KENT L. REV. 37 (1988). For a representative collection of writings on the Ninth Amendment and a bibliography of additional Ninth Amendment scholarship, see THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT (R. Barnett ed. forthcoming). For a recent collection of Ninth Amendment scholarship that appeared while this article was in production, see *Symposium on Interpreting the Ninth Amendment*, 64 CHI.-KENT L. REV. 37 (1988).

12 THE FEDERALIST No. 84, at 559 (A. Hamilton) (Mod. Lib. ed. 1937).

has brought that body into existence.[13]

In *United Public Workers v. Mitchell*,[14] Justice Reed used this rights-powers conception of constitutional rights to interpret the Ninth Amendment. Writing for the Court, he stated:

> The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people. Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail.[15]

The rights-powers conception of the Ninth Amendment views delegated powers and constitutional rights as *logically* complementary. This approach has two important advantages. First, when rights are viewed as the logical obverse of powers, content can be given to unenumerated rights by exclusively focusing on the expressed provisions delegating powers. By avoiding the need to directly address the substance of unenumerated rights, the rights-powers conception appears to provide judges a practical way of interpreting the otherwise open-ended Ninth Amendment. Second, the view that rights and powers are logically complementary seems to avoid any internal conflict or logical contradiction between constitutional rights and powers. In this way, the rights-powers conception has the apparent virtue of treating the Constitution as internally coherent. For these reasons, the rights-powers conception continues to attract proponents.[16] Nonetheless, it is a dubious interpretation of the Ninth Amendment for at least three reasons.

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13 Address by James Wilson to a Meeting of the Citizens of Philadelphia (1787), *reprinted in* B. SCHWARTZ, 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 529 (1971). Both Hamilton and Wilson argued that an expressed protection of freedom of the press was unnecessary since the regulation of the press was beyond the powers of Congress. In the Federal Convention, Roger Sherman used the same example:

> Mr. Pinkney & Mr. Gerry, moved to insert a declaration "that the liberty of the Press should be inviolably observed—"
>
> Mr. Sherman—It is unnecessary—The power of Congress does not extend to the Press.

Federal Convention (Sept. 14, 1787), *reprinted in* B. SCHWARTZ, *supra*, at 437, 439.

14 330 U.S. 75 (1947).

15 *Id.* at 95-96. Calvin Massey reports that this case was one of only "seven Supreme Court cases prior to Griswold [that] dealt in any fashion with the ninth amendment. . . ." Massey, *supra* note 5, at 305 n.1.

16 *See, e.g.*, Berger, *supra* note 5, at 3 (Ninth Amendment rights and Tenth Amendment powers "are two sides of the same coin."); Cooper, *Limited Government and Individual Liberty: The Ninth Amendment's Forgotten Lessons*, 4 J. LAW & POL. 63, 78 (1987) ("A ninth amendment claim against *federal* action . . . is determined by the extent of the federal government's enumerated powers . . .").

First, this interpretation erroneously construes the Ninth Amendment to mean nothing more than what is stated in the Tenth. The Tenth Amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people."[17] The idea that animates the rights-powers conception—that powers not delegated are reserved—is expressed clearly here. There was absolutely no need for another amendment, confusingly written in terms of "rights" that are "retained by the people," to express exactly the same idea.[18] Justice Reed's reference to "*those rights*, reserved by the Ninth *and Tenth Amendments* . . ."[19] illustrates the confusion the rights-powers conception can cause. The Tenth Amendment does not speak of *rights*, of course, but of reserved "powers." By contrast, the Ninth Amendment speaks only of rights, not of powers. Yet Charles Cooper states that: "The ninth amendment does not specify what rights it protects other than by its reference to the enumerated *powers* of the federal government."[20]

The second objection to the rights-powers conception follows from the first: This conception renders the Ninth Amendment effectively inapplicable to any conceivable case or controversy. On the assumption that rights and powers are logically complementary, rights begin at precisely the point where powers end. Thus, in principle, at least, there can never be a conflict between a right and a power. But because the focus of the rights-powers approach is entirely on the powers side, any claim that the national government had exceeded its enumerated powers would rely entirely upon the provisions enumerating the powers of the national government (to show the absence of a power) and the language of the Tenth Amendment (to show that those powers not delegated are reserved). The Ninth Amendment has absolutely no role to play in the analysis.

The problem is not that there would never be occasion to use

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17 U.S. CONST. amend. X. The Tenth Amendment explicitly incorporates the enumerated powers theory of the national government. Although it is often thought of as a "states' rights" provision, the Tenth Amendment is entirely neutral as to which powers are "reserved to the states" and which "to the people," and, therefore, it does not explicitly endorse any particular vision of state governments.

18 *See, e.g.*, Kelsey, *supra* note 9, at 310 ("there was some distinction in the minds of the framers . . . between *declarations of right* and *limitations on* or *prohibitions of power* . . . [otherwise] the Ninth Amendment would have been unnecessary."); Note, *supra* note 5, at 832 ("Such a reading of the ninth amendment is clearly wrong; it is the tenth amendment that protects state powers against federal encroachment and that limits the federal government to the exercise of express and implied powers."). *Cf.* J. ELY, DEMOCRACY AND DISTRUST 34-35 (1980) ("The Tenth Amendment . . . completely fulfills the function that is here being proffered as all the Ninth Amendment was about.").

19 *United Pub. Workers*, at 96 (emphasis added).

20 Cooper, *supra* note 16, at 79-80 (emphasis added).

the Ninth Amendment. After all, there has been no occasion to enforce the rule requiring the President to be at least thirty-five years old either. Rather, the problem is that a rights-powers conception deprives the Ninth Amendment of any *potential* application. It does not allow for even a *hypothetical* case that would require an independent Ninth Amendment analysis. Moreover, the rights-powers conception does not simply render the Ninth Amendment unenforceable by the judiciary. The Ninth Amendment is rendered irrelevant to any conceivable constitutional decision, regardless of which branch of government is the decision maker.

Of course, it is possible that the Congress approved and the states ratified an amendment that was meant to be inapplicable to any conceivable circumstance. However, we cannot prefer such an interpretation of a constitutional enactment if one that contemplates a potential role is also available.[21] Such an alternative interpretation, based on a power-constraint conception of constitutional rights, will be suggested below.[22] In sum, absent compelling evidence, we cannot presume any provision of the Constitution to be as superfluous as the rights-powers conception would render the Ninth Amendment.

The third objection to the rights-powers conception is that it cannot be limited to the Ninth Amendment. If it is correct, it must apply to the rights enumerated in the Constitution in the same manner as it does to the unenumerated rights referred to in the Ninth Amendment. Assuming that the rights of the people are the logical converse of the powers delegated to the government, the very enumeration of a particular power in the Constitution automatically ceded to the general government any potentially conflicting rights that might have existed prior to the adoption of the Constitution. If this conception is correct, however, then even an enumerated right should never constrain an enumerated power. In the words of Raoul Berger: "Thus viewed, the Bill of Rights added nothing, but was merely declaratory."[23] Of course, as noted below, this is not at all how courts have interpreted enumerated constitutional rights.[24] Legislative acts that fall within an enumerated power *can* violate an enumerated right.[25]

It is not surprising that a rights-powers conception denying the

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21 *Cf.* Massey, *supra* note 5, at 316. ("Construing the ninth amendment as a mere declaration of a constitutional truism, devoid of enforceable content, renders its substance nugatory and assigns to its framers an intention to engage in a purely moot exercise."). *See supra* note 1 and accompanying text.

22 *See infra* notes 39-87 and accompanying text.

23 Berger, *supra* note 5, at 6 (footnote omitted).

24 *See infra* notes 39-45 and accompanying text.

25 *See, e.g.*, Lamont v. Postmaster General, 381 U.S. 301 (1965) (congressional act

effect of unenumerated rights denies effect to enumerated rights as well. For the Federalists originally launched the rights-powers conception against the enumeration of any constitutional rights to defuse Antifederalist opposition to the Constitution. James Madison would have had no reason to devise a means of protecting *un*enumerated rights placed in jeopardy by an enumeration that, at that time, he still opposed. The problem that the Ninth Amendment was devised to solve simply had yet to arise.

The rights-powers conception reflects a losing argument against enumerating any constitutional rights. Notwithstanding the ultimate victory of the Federalists at the Constitutional Convention, their attempt to defend the absence of a bill of rights on the grounds that it would be redundant was controversial when made[26] and ultimately was rejected during the ratification process. No one denies that ratification of the Constitution depended upon the promise of a forthcoming bill of rights. It is odd indeed to insist that the best interpretation of the Bill of Rights is based on the theory used by its most vociferous opponents.

The rights-powers conception of constitutional rights is attractive both because it promises a practical way of interpreting unenumerated rights and because it appears to interpret the rights and powers provisions of the text in a logically consistent manner. Unfortunately, it achieves these objectives at the price of rendering the Ninth Amendment completely functionless and superfluous. Still, any alternative account of constitutional rights that contemplates unenumerated rights doing any serious work in constitutional analysis must show both the practicality of its method and the internal coherence of such a constitutional scheme.

In the balance of this article, I shall describe and defend another way to conceive of constitutional rights, including those rights retained by the people: the power-constraint conception. In Part

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regulating the receipt of "communist political propaganda" is violative of the first amendment and is unconstitutional).

26 Thomas Jefferson, for example, rejected Wilson's argument that a bill of rights was unnecessary. In a letter to Madison, he wrote:

> To say, as Mr. Wilson does that a bill of rights was not necessary because all is reserved in the case of the general government which is not given, while in the particular ones all is given which is not reserved might do for the Audience to whom it was addressed, but is surely gratis dictum, opposed by strong inferences from the body of the instrument, as well as from the omission of the clause of our present confederation which had declared that in express terms.

Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *reprinted in* 1 B. SCHWARTZ, *supra* note 13, at 606-07. Even Madison, who at one point accepted Wilson's argument that a declaration of rights was unnecessary, did not do so "in the extent argued by Mr. Wilson. . . ." Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* 1 B. SCHWARTZ, *supra*, at 615.

IV, I shall examine the practicality of three methods of interpreting these power-constraining unenumerated rights. In the next two sections, I shall explain why conceiving constitutional rights as constraining the exercise of delegated powers is not a contradictory approach to rights and powers. Instead of viewing rights and powers as *logically* complementary, a power-constraint conception views rights and powers as *functionally* complementary. Moreover, this approach is truer than the rights-powers conception to the concerns expressed by some Federalists about the dangers of enumerating any rights.

B. Recasting The Original Debate Over Constitutional Rights

The idea that constitutional rights are simply what is left over after the people have delegated powers to the government flies in the face of the amendments themselves. For example, it is impossible to find a "right to a speedy and public trial, by an impartial jury,"[27] a right against double jeopardy or self-incrimination,[28] or a right to be free from "unreasonable searches and seizures"[29] by closely examining the limits of the enumerated powers of the national government. The pivotal mistake of Justice Reed and those commentators who would neuter the Ninth Amendment is their exclusive concentration on only one of two Federalist arguments. Consequently, they fail to discern the distinct functions played by the Ninth and Tenth Amendments.[30]

The Federalists' argument that the enumeration of powers rendered a declaration of rights unnecessary is best viewed as a response to the criticism made by opponents of ratification that the Constitution was dangerous because it lacked a bill of rights. This response employed the theory that the federal government is one of limited and enumerated powers, a theory that eventually was incorporated in the Tenth Amendment. However, the Federalists not only responded to this criticism of the proposed Constitution, they also advanced a criticism of their own against the idea of a bill of rights. They attempted to turn the tables on the Federalists by arguing that a declaration of rights would be *dangerous*. In Hamilton's words: "I . . . affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous."[31]

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27 U.S. CONST. amend. VI.

28 U.S. CONST. amend. V.

29 U.S. CONST. amend. IV.

30 I thank David Mayer for emphasizing to me the importance of this separate strain of the Federalist argument for distinguishing the rationales of the Ninth and Tenth Amendments.

31 THE FEDERALIST No. 84 (A. Hamilton), *supra* note 12, at 559.

Enumerating rights in the Constitution was seen as presenting two potential sources of danger. The first was that such an enumeration could be used to justify an unwarranted expansion of federal powers. As Hamilton explained: "They would contain various exceptions to powers which are not granted; and on this very account, would afford a colourable pretext to claim more than were granted."[32] The second source of danger was that any right excluded from an enumeration would be jeopardized. In his speech to the House explaining his proposed amendments, James Madison stressed this danger of enumerated rights:

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against.[33]

Madison's initial device for doing so was a provision that ran together both of these concerns:

> 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.[34]

Eventually the two ideas were unpacked. The danger of interpreting federal powers too expansively was handled by the Tenth Amendment, while the danger of jeopardizing unenumerated rights was addressed by the Ninth Amendment.

Thus, the Federalist position does not disparage as superfluous the rights retained by the people. Nor does it deny that retained rights operate as a genuine and enforceable constraint on government. On the contrary, the Federalists disparaged the idea of using a written declaration of rights in the Constitution precisely to protect the rights retained by the people. They expressed fear that an incomplete or inaccurate written declaration may well undermine the status of the unwritten retained rights. In sum, this Federalist objection to a bill of rights assumes the preeminent importance of

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32 *Id.*

33 Madison, *supra* note 10, at 456.

34 *Id.* at 452.

the unwritten rights retained by the people.[35]

There is no reason to suppose that these Federalists did not share the then-prevailing beliefs in rights antecedent to government.[36] For example, the same James Wilson who used a rights-powers argument in his vocal opposition to a bill of rights was an ardent adherent to natural rights. In his lectures on jurisprudence he explicitly rejects the views of both Edmund Burke and William Blackstone and contends that: "Government, in my humble opinion, should be formed to secure and to enlarge the exercise of the natural rights of its members; and every government, which has not this in view, as its principal object, is not a government of the legitimate kind."[37] Nor were these mere "theoretical" or "philosophical" rights with no real bite:

> I go farther; and now proceed to show, that in peculiar instances, in which those rights can receive neither protection nor reparation from civil government, they are, notwithstanding its institution, entitled still to that defence, and to those methods of recovery, which are justified and demanded in a state of nature.
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> The defence of one's self, justly called the primary law of nature, is not, nor can it be abrogated by any regulation of municipal law.[38]

C. The "Power-Constraint" Conception of Constitutional Rights

A rights-powers conception of constitutional rights is untenable if a better account of constitutional rights is available. In fact, courts do not use a rights-powers conception to interpret enumerated or written constitutional rights. Enumerated rights need not be the logical mirror image of enumerated powers. Rather, enumerated rights can potentially limit in some manner the exercise of powers

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35 Of course, some Federalists may have been motivated less by concerns about the efficacy and dangers of a bill of rights than by a concern that the absence of a bill of rights would jeopardize the ratification of the Constitution (which in fact it did until assurances of future amendments were made). Nonetheless, the analysis presented in the text assumes that the positions articulated by Hamilton, Wilson, and Madison were advanced in good faith. A contrary, more cynical, assumption can hardly be offered to bolster the case for a Federalist-style rights-powers conception.

36 These prevailing beliefs are discussed in Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 369 (1928-1929); Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978); Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

37 Wilson, *Of the Natural Rights of Individuals*, in 2 THE WORKS OF JAMES WILSON 307 (J.D. Andrews ed. 1896).

38 *Id.* at 335. Wilson's lectures, given between 1790 and 1792, also undermine the claim that by the time of the Constitution, Americans had lost their Lockean and revolutionary ardor for natural rights in favor of a more conservative Blackstonian positivism that favored legislative supremacy.

delegated by other provisions of the Constitution. A principal reason for this was voiced by Eldridge Gerry during the House debate concerning the proposed amendments: "This declaration of rights, I take it, is intended to secure the people against the maladministration of the Government; if we could suppose that, in all cases, the rights of the people would be attended to, the occasion for guards of this kind would be removed."[39]

Constitutional rights can be conceived as "power-constraints" that regulate the exercise of power by Congress and the executive branch by constraining either their choice of means or their choice of ends. First, constitutional rights are means constraints.[40] Although the enumeration of powers restricts Congress to pursuing only certain ends, constitutional rights further restrict the means by which these ends may be pursued. In this way, in contrast with the rights-powers conception, the power-constraint conception contemplates a potential conflict between constitutional rights and enumerated powers.

Under this conception, it is possible that means chosen to pursue a constitutionally permissible end might infringe a constitutional right.[41] Suppose, for example, that in pursuit of its enumerated power to "lay and collect Taxes" or to "raise and support Armies," Congress infringed on the enumerated rights of free speech and assembly. If so, Congress would not have violated the Tenth Amendment for it was acting within its delegated powers, but may have violated the First Amendment because it exercised its power in a rights-violating manner.

The Supreme Court appears to have adopted a means-constraints approach when enumerated rights are at issue. As the Court stated in *Dennis v. United States*:[42] "The question with which we are concerned here is not whether Congress has such a *power*, but whether the *means* which it has employed conflict with the First and

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39 1 DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 778 (J. Gales & W. Seaton eds. 1834) (Remarks of Rep. E. Gerry).

40 *See, e.g.*, S. BARBER, ON WHAT THE CONSTITUTION MEANS 113 (1984) ("Constitutional rights . . . remove certain means from those means available to the government for pursuing its authorized ends.").

41 One might try to salvage the rights-powers theory by claiming that there can be no clash between powers and rights because Congress has no power to violate a constitutional right. Although this response maintains a formal distinction, it suggests an entirely different methodology for determining the content of constitutional rights than that described by Justice Reed in United Public Workers v. Mitchell, 330 U.S. 75 (1947). This formulation of the rights-powers distinction would require an inquiry into the substance of constitutional rights to determine the extent of Congressional power. Moreover, this distinction does not provide an objection to including unenumerated rights in such an inquiry.

42 341 U.S. 494 (1951).

Fifth Amendments to the Constitution."[43] On the floor of Congress, Madison made a very similar argument: "[T]he great object in view is to limit and qualify the powers of Government, by excepting out of the grant of power those cases in which the Government ought not to act, *or to act only in a particular mode*."[44] He then offered a similar example:

> The General Government has a right to pass all laws which shall be necessary to collect its revenue; the means for enforcing the collection are within the direction of the Legislature: may not general warrants be considered necessary for the purpose . . . ? If there was reason for restraining the State Governments from exercising this power, there is like reason for restraining the Federal Government.[45]

Perhaps, then, John Ely judged Madison a bit too harshly when he attributed to him and others "a failure to recognize that rights and powers are not simply the absence of one another but that rights can cut across or 'trump' powers."[46] By the same token, Raoul Berger's response to Ely that "whether the Founders were mistaken in logic is of no moment if they acted on that mistaken view"[47] was premature, for at least one of the Framers was not mistaken in this regard.

Moreover, as Madison's example suggests, the Necessary and Proper clause exacerbates the means-end problem within a scheme of delegated powers. After enumerating specific powers of Congress, the Constitution authorizes the Congress, "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[48] This open-ended language heightens the prospect that Congress or some department or officer of the general government may pursue a delegated end by means that infringe upon the rights of the people. Therefore, some regulation of the means employed to achieve enumerated governmental ends must supplement the device of enumerating powers. This is one way that constitutional rights may functionally complement a scheme of delegated powers.

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43 *Id.* at 501 (emphasis added). *See also* Barenblatt v. United States, 360 U.S. 109, 112 (1959) ("Congress . . . must exercise its powers subject to the . . . relevant limitations of the Bill of Rights.").

44 Madison, *supra* note 10, at 454 (emphasis added).

45 *Id.* at 456.

46 J. ELY, *supra* note 18, at 36. The metaphor of "trump" suggests a power-constraint conception.

47 Berger, *supra* note 5, at 21-22 (citation omitted).

48 U.S. CONST. art. I, § 8, cl. 18.

Even Madison, a strong proponent of the Necessary and Proper clause, acknowledged that it was susceptible to abuse and consequently that there was a need for constitutional rights to constrain the means chosen by the general government:

> It is true, the powers of the General Government are circumscribed, they are directed to particular objects; but even if Government keeps within those limits, it has certain discretionary powers with respect to the means, which may admit of abuse to a certain extent, . . . because in the constitution of the United States, there is a clause granting to Congress the power to make all laws which shall be necessary and proper for carrying into execution the powers vested in the Government of the United States, or in any department or officer thereof . . . .[49]

The second power-constraining function of constitutional rights is to limit the permissible ends of governmental activity. Constitutional rights were adopted, in Madison's words, "as actual limitations of such powers, or . . . merely for *greater caution*."[50] This last phrase suggests that, in addition to placing actual or additional limits on the means by which government can accomplish its legitimate ends, constitutional rights provide a "redundant" or cautionary safeguard in the event that the acts of government exceed its proper ends. This function is also reflected in Madison's earlier quoted remark that "the great object in view is to limit and qualify the powers of Government, by excepting out of the grant of power *those cases in which Government ought not to act*, or to act only in a particular mode."[51] In other words, the Bill of Rights was meant to constrain the powers of government in two ways: by reinforcing the limitations on the delegated powers or ends of government and by placing additional restrictions on the means by which government may pursue its delegated ends.

The combination of two different strategies for limiting the powers of government—constitutional rights and expressed limitations on powers—creates an interesting dynamic. When government acts within a narrow construction of its powers, constitutional rights play only a minor role in constraining its activity. As the enumerated powers are given an increasingly expanded interpretation, however, constitutional rights assume a greater importance within the constitutional scheme. Even if no logical conflict initially existed between delegated powers and constitutional rights (whether enumerated or not) previously nonexistent conflicts between rights and powers might well emerge as the scope of governmental powers ex-

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49 Madison, *supra* note 10, at 455.

50 *Id.* at 452 (emphasis added).

51 *Id.* at 454 (emphasis added).

pands. As Justice Brennan has observed, "the possibilities for collision between government activity and individual rights will increase as the power and authority of government itself expands."[52]

If one concedes that the rights enumerated in the constitution were intended as "actual limitations of such [delegated] powers,"[53] then the rights-powers conception becomes a dubious interpretation of the Ninth Amendment. For such an interpretation implies that a fundamentally different conception of constitutional rights applies to the "retained" rights of the Ninth Amendment than applies to the enumerated rights. This implication appears to conflict with Madison's claim that the *enumerated* rights also included "retained" rights:

> In some instances they [the enumerated rights] assert those rights which are exercised by the people in forming and establishing a plan of Government. In other instances, they *specify those rights which are retained when particular powers are given up to be exercised by the Legislature*. In other instances they specify positive rights, which may seem to result from the nature of the compact.[54]

The wording of the Ninth Amendment itself argues against such differential treatment. For the Ninth Amendment declares that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny *or disparage* others retained by the people."[55]

Supporters of a rights-powers interpretation of the Ninth Amendment rely heavily on a passage of a letter written by Madison to George Washington in 1879[56] in which Madison employs a rights-powers distinction as part of a defense of the Ninth Amendment:

> If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing, whether the latter to be secured by declaring that they shall not be abridged, or that the

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52 Brennan, *Construing the Constitution*, 19 U.C. DAVIS L. REV. 1, 9 (1985).

53 Madison, *supra* note 10, at 452. The quotation is excerpted from the precursor to the Ninth Amendment which appears in full in the text accompanying note 34.

54 *Id.* at 454 (emphasis added). Madison's characterization of the enumerated rights as including, among others, rights that were retained by the people also undermines Raoul Berger's claim that a judicial "power" to protect retained rights would undermine the framer's intent to limit federal power. Berger, *supra* note 5, at 7. Madison made clear that the retained rights were not "assigned" to the federal government: to the contrary, he emphasized that they constitute an area in which the "Government ought not to act." *Id.* This means, in my judgment, that the courts have not been empowered to enforce the retained rights against either the federal government or the states. In fact, Madison speaks here of "particular powers . . . given up to be exercised *by the Legislature*." He was most fearful of abuses in the legislative branch. *See infra* note 60 and accompanying text.

55 U.S. CONST. amend. IX (emphasis added).

56 Letter from James Madison to George Washington (Dec. 5, 1789), *reprinted in*, 2 B. SCHWARTZ, *supra* note 13, at 1190.

> former shall not be extended. If no line can be drawn, a declaration in either form would amount to nothing.[57]

Madison's use of a rights-powers distinction to explain the Ninth Amendment, however, is not logically inconsistent with a robust power-constraining view of the Ninth Amendment. Indeed, it supports such a view.

Madison was distinguishing two conceptual strategies for accomplishing a single objective. An expressed declaration of "rights retained . . . that . . . shall not be abridged" has the same object in view as an expression that "powers granted . . . shall not be extended." The object of both strategies is that "the rights retained . . . be secure." Given this object, if one provision has teeth, so must the other. In stark contrast, the rights-powers conception specifies that the rights retained by the people automatically diminish as the powers of government expand—a construction that contradicts the stated purpose for declaring the existence of individual rights[58] and the very point Madison was making in his letter. Far from supporting a rights-powers conception of the Ninth Amendment, then, this quotation reveals a fundamental flaw in any interpretation that acknowledges the power-constraining function of enumerated powers while denying this same function to unenumerated rights.

The rights-powers conception gains its plausibility, in part, from the claim that the powers delegated by the Constitution provide sufficiently clear limitations on the scope of governmental activity. This claim was controversial when made and did not assuage proponents of a bill of rights. The ever expanding scope of governmental power over the past two hundred years has confirmed their suspicions that more than delegated powers provisions were needed to constrain the powers of government. We must now consider whether the safeguard provided by judicial review on the basis of enumerated constitutional rights alone is sufficient to this power-constraining task or whether unenumerated rights may also provide a basis for judicial review.

III
JUDICIAL REVIEW OF UNENUMERATED RIGHTS

Should a power-constraint conception of unenumerated rights be enforced by judges or must the protection of unenumerated rights be left to the political realm? To answer this question I shall examine the principal dangers that Madison hoped a bill of rights would help avoid and one way he thought such a device would ac-

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57 *Id.*

58 *See supra* notes 39, 44-51, and accompanying text.

complish this objective. Considering both the contemplated end and the means envisioned for accomplishing this end, I shall suggest that it is highly unlikely that the unenumerated rights were to be left entirely to the political process.

Before doing so, it is useful to note that there is no logical contradiction between the Federalist criticisms of a bill of rights and judicial review on the basis of unenumerated rights. True, one could argue that, although the Framers attached great importance to protecting the rights retained by the people, they also believed judicial review to be an inefficacious means of accomplishing this end. There is nothing in the Federalist argument, however, to suggest that judicial review could be based only on enumerated rights. On the contrary, insofar as they believed in the judicial protection of rights, the Federalists' fear that enumerating rights would diminish other, unenumerated rights suggests only that they wanted these unenumerated rights protected every bit as much as the enumerated rights. In other words, in the absence of a bill of rights, a Federalist who believed in the judicial protection of rights would have had to envision enforcing only the unenumerated rights retained by the people.[59]

A. The Equal Protection of Enumerated and Unenumerated Rights

The theory that the unenumerated rights retained by the people were to be protected exclusively by recourse to the political process or, perhaps, by recourse to popular insurrection seems unlikely in light of the reasons given by Madison for needing a bill of rights. Madison, for one, believed that, of the three branches of the national government, the greatest threat to liberty and to rights came from the legislature. In his speech to the House, he states that "the legislative [branch] . . . is the most powerful, and most likely to be abused, because it is under the least control. Hence, so far as a declaration of rights can tend to prevent the exercise of undue power, it cannot be doubted but such declaration is proper."[60]

Although he viewed the legislature as the most dangerous branch of government, Madison saw the political power possessed by "the majority" of the people to be the ultimate source of the governmental threat to the rights and liberties of the people. In his speech explaining the need for a bill of rights he said:

> [I]n a Government modified like this of the United States, the

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59 I thank Sheldon Richman for this point. *See* Sherry, *supra* note 36, at 1134-46 (discussing the practice of judicial review prevailing at the time of the framing).

60 Madison, *supra* note 10, at 454.

> great danger lies rather in the abuse of the community than in the legislative body. The prescriptions in favor of liberty ought to be levelled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power. But this is not found in either the executive or legislative departments of Government, but in the body of the people, operating by the majority against the minority.[61]

This was hardly an argument made in passing. Madison had repeatedly expressed this view elsewhere in ways that amplify his conception of rights. In *The Federalist* No. 10,[62] he wrote:

> By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.[63]

Later, in a letter to Thomas Jefferson he wrote:

> Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents.[64]

These passages not only reiterate the danger Madison saw in the political power of factious majorities, they also show that Madison did not view rights as a product of majoritarian will. Nor did he equate majority will with the common good. In the passage above from *The Federalist*, he allowed the possibility that the interest of a majority can be averse both to the "rights of other citizens" and to the "permanent and aggregate interests of the community."[65] In Madison's letter to Jefferson, he said that the impetus for "invasion of private rights" is most likely to come from the "major number of

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61 *Id.* at 454-55. His omission of any reference to the judiciary here suggests that Madison saw the judicial department as no threat at all.

62 THE FEDERALIST No. 10 (J. Madison), *supra* note 12.

63 *Id.* at 54.

64 Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* 1 B. SCHWARTZ, *supra* note 13, at 616.

65 THE FEDERALIST No. 10 (J. Madison), *supra* note 12, at 54. In his letter to Jefferson, Madison may also be seen as implicitly distinguishing between the "rights of citizens" and the "permanent and aggregate interests of the community." Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* B. SCHWARTZ, *supra* note 13, at 616. The existence of such a distinction, however, does not entail an irreconcilable conflict between the two concepts. For example, one could view the protection of the rights of citizens as the best, or even the exclusive, means of advancing the permanent and aggregate interests of the community. In sum, protecting individual rights could be viewed as the best means of securing and even discovering the common good.

the Constituents."[66]

Given that the most dangerous branch of the national government was the legislature, it is unlikely that Madison would have envisioned the protection of the rights retained by the people being consigned exclusively to the legislature. Given that the governmental threat to the rights and liberties of the people was likely to be promoted by the majority seeking to operate against the minority, it is equally unlikely that Madison would have envisioned the protection of the rights retained by the people being consigned exclusively to the device of popular insurrection. How then was a bill of rights to help ameliorate this danger?

In his letter to Jefferson, Madison suggested several ways that a bill of rights might prove useful, but he also expressed skepticism about the effectiveness of written bills of rights in addressing the bane of majoritarian abuses. "Repeated violations of these parchment barriers," he wrote, "have been committed by overbearing majorities in every State."[67] Jefferson replied that:

> In the arguments in favor of a declaration of rights, you omit one which has great weight with me, the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent, and kept strictly to their own department merits great confidence for their learning and integrity.[68]

After this correspondence, Madison used essentially the same argument on the floor of the House.[69] Immediately after stressing to the House the danger posed by "the abuse of the community," Madison stressed that "paper barriers" will favorably influence "public opinion in their favor, and rouse the attention of the whole community . . . ."[70] This was not, however, the only way a bill of rights could protect the rights and liberties of the people. Moments later he added, in an often quoted passage:

> If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive;

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66 Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* B. SCHWARTZ, *supra* note 13, at 616.

67 *Id.*

68 Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), *reprinted in* 1 B. SCHWARTZ, *supra* note 13, at 620.

69 Bernard Schwartz suggests that it was Jefferson's letter that led Madison to this argument. *See* B. SCHWARTZ, THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS 118 (1977).

70 Madison, *supra* note 10, at 455. It is important to note that Madison is here speaking of the effectiveness of the entire bill of rights including the enumerated rights provisions. This passage in no way suggests that unenumerated rights were limited to this manner of protection.

> they will naturally be led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.[71]

In sum, Madison viewed a bill of rights as a means of constraining legislative and executive abuses, whether intended to benefit the officials or the majority of the community. The Bill of Rights accomplished this end, in part, by putting enforcement of these rights in the hands of independent tribunals of justice. In light of this purpose, it seems unlikely that Madison anticipated that the uneunumerated rights retained by the people were to be left entirely to the will of the legislature or a majority of the community and that only enumerated rights would receive judicial protection.

The principal support for such a claim is Madison's use of the phrase "rights expressly stipulated" in the passage of his speech just quoted.[72] Seizing upon this phrase, Raoul Berger argued that judicial review was originally intended to be confined to the enumerated rights.[73] Although this passage is consistent with such an interpretation, it hardly compels it. The proposal under consideration at the time included an enumeration of expressly stipulated rights, so it is natural that Madison would dwell on the advantages of such a strategy. This in no way requires, however, that expressly stipulated rights were to be the only rights receiving judicial protection.

Moreover, such an interpretation is implausible insofar as the quoted passage immediately follows Madison's explanation of the need for an express provision to deny any implication "that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure."[74] Without judicial review of government interference with the unenumerated rights retained by the people, the legislature would be the judge in its own case—something that is not permitted when enumerated rights are violated.[75] Madison saw the problem of legislative partiality quite clearly:

> No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citi-

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71 *Id.* at 457.

72 *See supra* text accompanying note 71.

73 *See* Berger, *supra* note 5, at 9.

74 Madison, *supra* note 10, at 456.

75 *See supra* notes 25 & 43 and accompanying text.

> zens? And what are the different classes of legislators but advocates and parties to the causes which they determine?[76]

In sum, Madison viewed a written bill of rights as a means of constraining abuses by the legislature attempting to agrandize their own interest or that of the majority. Crucial to the success of such a strategy was the fact that such rights would be enforced by independent tribunals of justice. In light of this purpose and this strategy, it seems highly unlikely that Madison anticipated that only the enumerated rights would receive protection from independent tribunals of justice and that any right retained by the people that was otherwise omitted from the declaration would be protected from legislative and majoritarian abuse solely by means of legislative or majoritarian will.

An analysis that supports judicial review of legislative interference with enumerated rights while denying equal judicial protection to unenumerated rights is inherently suspect.[77] The words of the Ninth Amendment argue strongly against such a construction. As Charles Black has noted:

> [A]ffirmative settlement of the question (if, as I doubt, it was a real question in 1790) of the rightness of judicial review, on the basis of *any* right "enumerated" in the Constitution, would settle the rightness of judicial review on the basis of those rights not enumerated, though "retained by the people," because anything else would "deny or disparage" these latter, in a quite efficacious way.[78]

To concede that enumerated rights are judicially enforceable power-constraints, but unenumerated rights are not, is to "diminish" their "just importance" and surely to "disparage" them, if not to "deny" them altogether. Denying judicial protection to the unenumerated rights effectively surrenders them up to the general government. As Calvin Massey concludes: "By assuming that the ninth amendment can be invaded by congressional action and that the first eight amendments cannot, Justice Reed made a distinction fatally disparaging to ninth amendment rights. Unless its text be

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76 THE FEDERALIST No. 10 (J. Madison), *supra* note 12, at 57. True, when he wrote this passage, Madison did not expect judicial review based on "parchment barriers" to be an important check on legislation. But by the time he proposed his amendments he had been brought around to this view. *See supra* notes 67-71 and accompanying text.

77 My use of "equal protection" here and elsewhere is not a reference to the Equal Protection clause of the Fourteenth Amendment. While that clause refers to the equal protection of the laws to be afforded all persons within the jurisdiction of any state, I am referring to the equal protection of all rights protected by the Constitution.

78 Black, *On Reading and Using the Ninth Amendment*, in POWER AND POLICY IN QUEST OF LAW: ESSAYS IN HONOR OF EUGENE VICTOR ROSTOW 188 (M. McDougal & W.N. Reisman eds. 1985).

ignored, the ninth amendment forbids the distinction."[79]

B. The Rights-Preserving Function of Unenumerated Rights

There is an understandable reluctance to open the pandora's box of judicial review of such an open-ended provision as the Ninth Amendment. Some fear that giving any real effect to the Ninth Amendment would provide "a bottomless well in which the judiciary can dip for the formation of undreamed of 'rights' in their limitless discretion";[80] that it would permit judges to impose their purely subjective preferences on the people; that judicial review would quickly become judicial supremacy and tyranny. How, then, does a power-constraining conception of the Ninth Amendment square with the separation of powers and the enforcement of enumerated rights?

The first line of the constitutional defense of individual rights and liberties was not the judicial protection of constitutional rights—rights that needed to be added by amendment.[81] Rather, the governmental structure and procedures established by the Constitution were the first line of defense. The preservation of state governments, popular elections of representatives, election of senators by states, the electoral college, local control of suffrage, the presidential veto, the power of the purse, and the impeachment powers are just a sample of structural and procedural, rather than substantive, restraints on government powers. Moreover, the unamended Constitution, at least implicitly, limited the government of the United States to its delegated powers.

Some, however, were not satisfied with these elaborate structural protections alone. They wanted and demanded more. In urging a reluctant House to take up the question of a bill of rights, Madison observed:

> It cannot be a secret to the gentlemen of this House, that, notwithstanding the ratification of this system of Government by eleven of the thirteen United States, . . . yet still there is a great number of our constituents who are dissatisfied with it . . . . We ought not to disregard their inclination, but, on principles of amity and moderation, conform to their wishes, and expressly declare the great rights of mankind secured under this

79 Massey, *supra* note 5, at 323 n.97.

80 Berger, *supra* note 5, at 2.

81 This does not mean that constitutional rights would have been unprotected in the absence of enumeration. For, as noted above, if the Federalists' argument that a bill of rights was unnecessary is accepted as sincere, then, in the absence of any enumerated rights, judicial protection of the rights of the people would have been exclusively on the basis of unenumerated rights. *See supra* note 59 and accompanying text.

constitution.[82]

The critics wanted a safeguard. "I believe," Madison said, "that the great mass of the people who opposed . . . [the Constitution], disliked it because it did not contain effectual provisions against encroachments on particular rights . . . ."[83]

The Constitution as amended, therefore, was a product of conflicting, but ultimately reconcilable, intents. On the one hand, if the constitutional structure worked as its Framers hoped and intended, there would be little, if any, need to protect constitutional rights by judicial review. On the other hand, if government exceeded its proper boundaries and threatened the liberty and rights of the people as its critics feared, then a declaration of constitutional rights might provide an invaluable second line of defense.

Accordingly, even if the designers of the original constitutional structure did not contemplate aggressive judicial protection of individual rights from legislative acts—even if they "would have rejected [it] out of hand"[84]—it does not follow that such judicial review is not a legitimate constitutional device from the perspective of the original scheme. For these Framers also did not contemplate that the structure they designed would fail to constrain the power of government as they hoped it would. If time has proved them wrong and their critics right on this count, then we must thank the critics for insisting on a fall-back scheme of constitutional rights and James Madison for insisting that a reluctant House take up the issue.

Consider the following analogy. A group of ship designers devise a structure intended to ensure that the ship will stay afloat forever. Suppose they still add lifeboats and life-preservers to the ship. As far as they are concerned, this is an entirely redundant exercise. They have absolutely no intention that passengers should ever use the lifeboats or life-preservers. In fact, they fervently hope and believe that these devices will never be used. Years after the designers have died, as passengers board the ship, they too do not intend to use the lifeboats or life-preservers. Without instruction by a knowledgeable crew, future generations may not even know that these devices are on board or how to use them. After a long enough period, however, even the crew may become complacent and forgetful.

Suppose now that the unintended event occurs and the ship be-

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82 Madison, *supra* note 10, at 449. This quotation also undermines the claim that the rights "retained by the people" are peculiarly English.

83 *Id.* at 450. Once again, the fact that Madison refers to the perceived threat to "particular rights" does not mean that the other rights retained by people were to be left unprotected from encroachment. The Ninth Amendment was intended to negate this inference.

84 Berger, *supra* note 5, at 2.

gins to sink. Would it make any sense to argue that passengers should refuse the lifeboats or life preservers because it was "never intended" that they use them? Would the "evidence" of this "lack of intent" provided by the designers' vigorous pre-voyage statements that the ship is seaworthy or even "unsinkable" support such an argument? Would such an argument be supported by the fact that the designers had spent virtually all of their time trying to perfect the ship's structure and hardly any time worrying about the lifeboats? Would it be supported by the fact that many or all of the ship's designers actually opposed having lifeboats and life-preservers on board?

No, such an argument would be a non sequitur. Although the designers spent little time fussing with the life preservers and never intended that passengers ever use them, although they were provided "merely for greater caution," although the designers continually insisted they were entirely unnecessary, and although the life preservers might even have been an afterthought imposed upon the designers by an overly cautious shipowner to assuage the "unreasonable" fears of prospective passengers and induce their patronage, those who insisted they be on board certainly intended that the passengers use them if, God forbid, it should become necessary.

In addition to the light it casts on arguments purporting to rest on the intent of the Framers, this analogy teaches a number of other lessons about the relationship of constitutional rights and the Ninth Amendment to the rest of the constitutional structure. First, it casts judicial review of legislation in the role of a "rights preserver." The fact that the Framers of the Constitution unquestionably preferred structural constraints to "paper barriers"[85] enforced by judges does not mean that they would have us ignore judicial review of these paper barriers if their structural constraints were found wanting in practice. Second, this analogy puts into proper perspective the early disuse of the Ninth Amendment (and the other amendments as well).[86] Just as life preservers are not the preferred means of keeping passengers afloat, judicial review was not the preferred means of protecting the liberties of the people. Both are fallback devices.

Third, just as lifeboats are preferred to life preservers, many have thought that it is safer to protect liberty by abstract interpretations of enumerated rights than by speculating about unenumerated rights. This technique, however, has its limits. Enumerated rights cannot always be interpreted to protect some very fundamental lib-

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85 Madison, *supra* note 10, at 455. It is worth noting that the strategy of holding government to its enumerated powers also rests on paper barriers.

86 It was, after all, 1965 before the Supreme Court first used the First Amendment to invalidate an act of Congress in Lamont v. Postmaster General, 381 U.S. 301 (1965).

erties without straining them beyond their reasonable capacity. But straining the text by pushing enumerated rights too far can undermine the perceived legitimacy of any judicial review based on textual analysis.

Fourth, after a long period in which the Ninth Amendment and other rights-preserving passages of the text were neither needed nor used, it is understandable why they would be almost forgotten. Yet this does not mean that the impetus for the Ninth Amendment was a momentary and passing sentiment. Seventy years after the adoption of the Ninth Amendment, the framers of another American constitution included virtually identical language: "The enumeration, in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people of the several States."[87]

C. What Justifies Judicial Negation of Legislation?

The power-constraint conception described above suggests two developments that would justify reliance on judicial negation of legislation or executive acts on the basis of either enumerated or unenumerated rights: first, when the legislative or executive branch abuses its delegated powers by using improper means that violate the rights of the people; and second, when the legislative or executive branch exceeds its rightful powers to pursue unconstitutional ends that violate the rights of the people.

These developments are likely to result from a gradual but persistent erosion of both structural constraints and the paper barriers of delegated powers. Over the past fifty years, for example, we have witnessed an enormous expansion in the scope of federal powers—especially the implied powers found in the Necessary and Proper Clause—and a corresponding inattention to structural constraints. This development, coupled with the failure to acknowledge an expanded scope to the implied rights referred to in the Ninth Amend-

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87 CONST. OF THE CONFEDERATE STATES OF AMERICA art. VI, § 5 (1861). Section 6 of Article VI reads: "The powers not delegated to the Confederate States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people thereof." CONST. OF THE CONFEDERATE STATES OF AMERICA art. VI, § 6 (1861); *reprinted in* 1 J. DAVIS, THE RISE AND FALL OF THE CONFEDERATE GOVERNMENT 672 (1958). Moreover, the Ninth Amendment came also to be widely copied in state constitutions drafted after its adoption. *See, e.g.*, ALA. CONST. art. I, § 33; ARIZ. CONST. art. II, § 33; ARK. CONST. art. II, § 29; COLO. CONST. art. II, § 28; FLA. CONST. art I, § 1, par. XXVIII; ILL. CONST. art. I, § 24; IOWA CONST. art. I, § 25; KAN. CONST. bill of rights, § 20; LA. CONST. art. I, § 24; MD. CONST. declaration of rights, art. 45; MICH. CONST. art I, § 23; MISS. CONST. art. 3, § 32; NEB. CONST. art. I, § 26; NEV. CONST. art I, § 20; N.J. CONST. art. I, par. 21; N.M. CONST. art. I, § 23; OHIO CONST. art. I, § 20; OKLA. CONST. art. II, § 33; OR. CONST. art. I, § 33; R.I. CONST. art. I, § 23; UTAH CONST. art. I, § 25; WYO. CONST. art. I, § 36.

ment, has resulted in a constitutional structure that is ever more lopsided in the direction of increased government power.

Two different strategies may be used alone or together to restore some semblance of balance. Courts could cleave more rigorously than they have in recent decades to the original structural constraints of the Constitution—for example, the courts could more strictly enforce principles of separation of powers, federalism, and enumerated powers. This would reestablish a regime of limited government and greatly reduce (though not entirely eliminate) the need for judicial review based on constitutional rights—especially unenumerated rights.

On the other hand, if the expanded scope of governmental powers is maintained, courts must correspondingly expand the protection of both enumerated and unenumerated constitutional rights. This would entail, for example, a vigorous interpretation of the First Amendment, the Takings Clause, and the procedural rights established by the Fourth and Fifth Amendments. In the comparatively few remaining cases in which an honest interpretation of these provisions does not authorize serious scrutiny of governmental intrusion on individual liberties, the Ninth Amendment stands ready as a supplement.

Presumably, those who wrote the Constitution would consider the latter approach to be a second-best departure from the original structure. The structure they devised, however, has been permanently altered by such later developments as the Civil War Amendments, universal suffrage, the direct election of senators, and the creation of a national income tax. Even if those original structural restraints that have survived on paper were given new life, we cannot—and, in some significant respects, we would not want to—return to the original scheme. Moreover, the Constitution would not have been ratified without this second-best means of coping with expanded governmental powers because of those who withheld their consent until promised that rights-preserving amendments were forthcoming. And it was James Madison, the man who was converted to their cause, who kept that promise.

IV
Interpreting Unenumerated Rights

Assuming that we wish to apply a power-constraint conception to the rights retained by the people, is there a practical way to do so? In this Part, I shall describe three possible methods of identifying unenumerated rights: the originalist method, the constructive method, and the presumptive method. These interpretive methods are not mutually exclusive. Although they may be used alone, they

may also be used to complement each other. Before describing these methods, however, let me first turn to a philosophical concern that some may think impedes any effort to identify unenumerated rights.

A. What if the Ninth Amendment was a Philosophical Mistake?

The Ninth Amendment refers to unspecified rights "*retained* by the people"; rights that the people had before forming a government.[88] One of the sources of intellectual resistance to a justiciable interpretation of the Ninth Amendment today is not constitutional, but philosophical. Until quite recently, many, if not most, modern philosophers insisted that there were no such things as natural rights; that in fact, government is the ultimate source of all rights.

Given a philosophical skepticism about rights, the reference in the Ninth Amendment to unspecified retained rights is no different from a constitutional prohibition of discrimination against ghosts. "Suppose," argues John Ely, "there were in the Constitution one or more provisions providing for the protection of ghosts. Can there be any doubt, now that we no longer believe there is any such thing, that we would be behaving properly in ignoring the provisions?"[89] For one who denies the existence of rights antecedent to government, a reference to unspecified retained rights is no different from "an amendment that says 'Congress shall make no' and then there is an inkblot, and you cannot read the rest of it, and that is the only copy you have. . . ."[90] This philosophical objection lurks behind many of the objections to judicial review of the rights retained by the people.[91]

According to this view, the Ninth Amendment is simply a mis-

88 In the balance of this Article, I assume that the phrase "rights retained by the people" refers to rights that are antecedent to the formation of government and I will not consider the difficulties raised by such an interpretation. Although, in my view, this is the most plausible interpretation of this phrase it is not the only possible one. Russell Caplan has argued that this phrase refers to rights created by state governments prior to the formation of the government of the United States. *See* Caplan, *supra* note 5.

One difficulty (among others) with a state-law rights interpretation of the rights retained by the people is that, as Caplan acknowledges, these rights would fail to constrain the powers of either the federal or state governments. *See id.* at 261-62. According to this interpretation, Madison drafted, Congress approved, and the states ratified an essentially moot provision; consequently, this interpretation is subject to much of the same infirmities as a rights-powers conception of the Ninth Amendment. For other difficulties with this interpretation, see 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, 243-51 (1988).

89 J. ELY, *supra* note 18, at 39.

90 Bork, *supra* note 2.

91 *See* S. MACEDO, THE NEW RIGHT V. THE CONSTITUTION 39-48 (rev. ed. 1987) (contrasting the philosophical skepticism of some modern constitutional theorists with the philosophical views of the Framers).

take[92] and the nature of this mistake prevents any nonarbitrary interpretation of the rights retained by the people. If rights antecedent to government are mere illusions or ghosts, then judicial enforcement of these alleged "rights" can only be wholly subjective and arbitrary. Courts would be, in effect, "mak[ing] up what might be under the inkblot."[93] Decisions that are unavoidably based on subjective preferences, the argument continues, ought to be made by the representative branch of government so as to reflect the preferences of the majority.

I reject the premises of this argument, but let us assume that the skeptics are correct and that rights independent of government are mere phantoms. Even so, because the Framers believed in the existence of "other" rights "retained by the people,"[94] the structure they created would take on an entirely different and unintended cast if the reality and acceptance of Ninth Amendment rights were not assumed. This fact should matter to those who allow a role for Framers' intent and to those who view the Constitution as a kind of contract entered into at the time of ratification, two views of the Constitution that are often hard to separate. Of course, many constitutional theorists take neither approach, but I would wager that those theorists who are also moral skeptics are disproportionately in one or both of these camps. Because they deny the possibility of discerning genuine rights independent of government, they require some other more palpable touchstone for finding constitutional values, be it original intent or some notion of consent or both.

The relevance of the Framers' beliefs in natural rights to interpretations based on original intent is obvious. If the Framers intended that unenumerated rights be protected by the judiciary, then to honor that intent requires that we make some effort to discern and protect at least the kinds of rights the Framers had in mind when they ratified the Ninth Amendment. The obviousness of this position may explain the lengths to which some adherents to origi-

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92 Ronald Dworkin distinguishes two kinds of mistakes: "[E]mbedded mistakes are those whose specific authority is fixed so that it survives their loss of gravitational force; corrigible mistakes are those whose specific authority depends on gravitational force in such a way that it cannot survive this loss."
R. DWORKIN, TAKING RIGHTS SERIOUSLY 121 (1977). Dworkin goes on to claim that according to a theory of legislative supremacy, statutory mistakes "will lose their gravitational force but not their specific authority." *Id.* Presumably, the doctrine of constitutional supremacy would lead to the same conclusion with regard to the Ninth Amendment. Thus, even if the Ninth Amendment is a mistake, it would not lose all of its authority. Perhaps the interpretations that deprive the Ninth Amendment of any effect while purporting to respect it can be viewed in Dworkin's theory as an effort to deprive this mistake of any gravitation force.

93 Bork, *supra* note 2.

94 *See, e.g.*, Corwin, *supra* note 36; Grey, *supra* note 36; Sherry, *supra* note 36; Van Loan, *supra* note 5.

nal intent have gone to defend the rights-powers theory.[95]

A similar analysis applies if one interprets the text of the Constitution as one would a contract. Determining the consensual terms or original meaning of any agreement requires that one take into account the background assumptions of the parties. Given the widespread belief in individual rights that prevailed at the time of the drafting of the Constitution, it is reasonable to assume that, if those who vehemently insisted on a bill of rights to protect the liberties of the people had shared the philosophical skepticism of modern philosophy (or anticipated its coming), they would not have rested content with the abbreviated list of rights they received. They surely would have insisted on a greatly expanded list of enumerated rights. Only a handful of the many rights proposed by state ratification conventions were eventually incorporated in the Bill of Rights.[96] The Ninth Amendment was offered precisely to "compensate" these critics for the absence of an extended list of rights. Putting this in contract terms, the Ninth Amendment "clause" served as the "consideration" for not insisting on a more elaborate statement of rights.[97]

The adoption of the Ninth Amendment forces those who reject the reality of such rights, but who seek to interpret the Constitution according to either original intent or original meaning, to hypothesize on the content of this expanded list. Without such an attempt, the scheme of delegated powers and reserved rights becomes fundamentally different from the one that the Framers promised and the people involved in the ratification process agreed on. Modern philosophical skepticism about rights is simply beside the point. Just as contract law seeks to enforce the "benefit of the bargain" as agreed to, enforcing the Constitution as enacted would seem to require protection of the retained rights and liberties of the people assumed by the Ninth Amendment in the same manner as we would if we believed these rights and liberties to be "real." From the perspective of either original intent or original meaning, ignoring the Ninth Amendment because it does not comport with modern moral philosophy is, to shift the metaphor, constitutional bait and switch.

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95 *See, e.g.*, Berger, *supra* note 5; Cooper, *supra* note 16. *See also* OFFICE OF LEGAL POLICY, DEPARTMENT OF JUSTICE, WRONG TURNS ON THE ROAD TO JUDICIAL ACTIVISM: THE NINTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES CLAUSE 8-27 (1987).

96 In fact, the list of amendments proposed by the state ratifying conventions was quite lengthy. *See infra* notes 99-100 and accompanying text.

97 *Cf.* Grey, *The Uses of an Unwritten Constitution*, 64 CHI.-KENT L. REV. 211, 223-30 (1988) (analogizing differing approaches to the parol evidence rule to differing approaches to contractual interpretation).

B. Three Methods of Interpreting Unenumerated Rights

Few will abandon the safe harbor of the rights-powers conception of the Ninth Amendment unless they are convinced that some practical method exists for determining the unenumerated rights retained by the people. In this section, I shall consider three methods for discerning the content of the unenumerated rights. One method suggested by the previous section we may call the originalist method of interpreting unenumerated rights. A second method, which begins where the originalist method leaves off, is the constructive method. The third and, perhaps, most practical approach is the presumptive method. Although none of these methods is entirely without difficulty, any problems they pose are not unique to interpreting unenumerated rights. As Charles Black has observed:

> Maybe we ought to give up, and let the Ninth Amendment—and the priceless rights it refers to—keep gathering dust for a third century.
>
> But there is one thing to note about the very real troubles that face us when we turn to the search that the Ninth Amendment seems to command. *These are the troubles not of the Ninth Amendment itself, but of law.*[98]

1. *The Originalist Method*

If moral skeptics are correct and unenumerated rights are nonexistent, then it would seem that determining the content of such rights would be truly impossible. However, according to the methodology of those seeking either the original intent or the original meaning of the Ninth Amendment, they no more need to discern the content of actual or real rights, than they need to discern searches that are "really" unreasonable or activity that is "really" commerce. Instead, they seek the Framers' understanding of the text. However difficult it may be, the task of interpreting the Ninth Amendment in this way is no different from the task of interpreting many other provisions of the Constitution.

Just as those concerned with original intent consult such materials as Madison's notes on the Federal Constitutional Convention, we may also consult the lengthy lists of proposed amendments sent to Congress by several state ratification conventions.[99] Virginia, for example, proposed twenty provisions for "a declaration or bill of rights asserting, and securing from encroachment, the essential and

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98 Black, *supra* note 78, at 189.

99 *See* 2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 549 (J. Elliot ed. 2d ed. 1836) [hereinafter J. Elliot] (amendments proposed by Maryland convention); 3 J. Elliot at 657 (amendments proposed by Virginia convention); 4 J. Elliot at 242 (amendments proposed by North Carolina convention).

unalienable rights of the people."[100] Only a handful of the many proposed rights were incorporated into the Bill of Rights. In addition, the rights expressly stipulated by state constitutions at the time of the Constitution's ratification are potentially significant.[101] Some of these rights were conceived of as retained by the people against state government. Certainly rights retained against state governments were not surrendered to the general government.[102]

These various lists are not, of course, definitive. After all, most of these rights were left out of the Bill of Rights and it is nearly impossible to know why a deicison was made to exclude a particular right. Nonetheless, the Ninth Amendment was intended to remove the need to enumerate every right retained by the people.[103] Thus, the mere fact that a right was excluded from the enumeration does not support a strong negative implication.

Moreover, just as those concerned with original intent consult such theoretical writings as *The Federalist* to interpret passages of the text, we may also consult the Framers' theoretical writings on natural rights that were contemporaneous with the Ninth Amendment, such as those by James Wilson quoted earlier.[104] Some of these writings are quite comprehensive and specific. Wilson, for example, summarized his analysis as follows:

> In his unrelated state, man has a natural right to his property, to his character, to liberty, and to safety. From his peculiar relations, as a husband, as a father, as a son, he is entitled to the enjoyment of peculiar rights, and obliged to the performance of peculiar duties. These will be specified in their due course. From his general relations, he is entitled to other rights, simple in their principle, but, in their operation, fruitful and extensive. . . . In these general relations, his rights are, to be free from injury, and to receive the fulfilment [sic] of the engagements, which are made to him; his duties are, to do no injury, and to fulfil [sic] the engagements, which he has made. On these two pillars principally and respectively rest the criminal and the civil codes of the municipal law. These are the pillars of justice.[105]

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100 3 J. Elliot, *supra* note 99, at 657.

101 *See, e.g.*, THE CONSTITUTIONS OF THE SEVERAL INDEPENDENT STATES OF AMERICA; THE DECLARATION OF INDEPENDENCE; THE ARTICLES OF CONFEDERATION BETWEEN THE SAID STATES; THE TREATISE BETWEEN HIS MOST CHRISTIAN MAJESTY AND THE UNITED STATES OF AMERICA (1781).

102 Russell Caplan and Calvin Massey agree on the relevance of state constitutional and common law rights to Ninth Amendment analysis but draw opposite conclusions on the implication of these rights for constitutional adjudication. *See* Caplan, *supra* note 5, at 254-56; Massey, *supra* note 5, at 322.

103 *See supra* notes 27-38 and accompanying text.

104 *See supra* text accompanying notes 37-38.

105 Wilson, *supra* note 37, at 308.

Of course, some may argue that any discussion of rights based on this sort of historical inquiry would simply be too open-ended to provide judges with adequate guidance in interpreting the Ninth Amendment. However, adherents to original intent are hard-pressed to make such an argument. Their position requires that we engage in just such an enterprise to interpret the rest of the Constitution—including the open-ended Necessary and Proper Clause.

There is, then, no shortage of textual materials contemporaneous with ratification of the Ninth Amendment that would permit an elaboration of the rights retained by the people. These materials are comparable in every respect to those traditionally used to interpret the original intent of other provisions and there is no inkblot preventing us from reading them. Abandoning the originalist method only when considering the Ninth Amendment may reach the desired result of greatly limiting the scope of constitutional rights but only at the price of a consistent originalist methodology.

2. *The Constructive Method*

With the constructive method, we try to construct a coherent conception of rights from historical and hypothetical examples as well as theoretical materials, and then apply this conception to the facts of an individual case to reach a legal result. For example, we may begin with the historical materials described in the previous section and from these materials begin to construct a theory of the kinds of rights retained by the people. We may also take into account the examples of unenumerated rights that have been acknowledged by the courts over the past 200 years.[106] Many of these—

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106 One authority provides the following list of unenumerated rights that have already been recognized by the courts:

1. The right to retain American citizenship, despite even criminal activities, until explicitly and voluntarily renouncing it;
2. The right to receive equal protection not only from the states but also from the federal government;
3. The right to vote, subject only to reasonable restrictions to prevent fraud, and to cast a ballot equal in weight to those of other citizens;
4. The right to a presumption of innocence and to demand proof beyond a reasonable doubt before being convicted of a crime;
5. The right to use the federal courts and other governmental institutions and to urge others to use these processes to protect their interests;
6. The right to associate with others;
7. The right to enjoy a zone of privacy;
8. The right to travel within the United States;
9. The right to marry or not to marry;
10. The right to make one's own choice about having children;
11. The right to educate one's children as long as one meets certain minimum standards set by the state;
12. The right to choose and follow a profession;
13. The right to attend and report on criminal trials.

such as the right to travel within the United States and the right to the equal protection of the laws from the federal government—are now well accepted and provide paradigm examples or "easy cases" from which theories of unenumerated rights can be developed.[107] Whatever controversy still surrounds these acknowledged-but-unenumerated rights typically concerns not the rights themselves but either a particular application of these rights to new circumstances or, more generally, the legitimacy of judges protecting rights that are not written in the text.[108]

There are at least three reasons why our analysis of unenumerated rights may not be confined to historical examples but must also subject such examples to the theoretical scrutiny of the constructive method. First, the rule of law requires that the enforcement of legal rights be as internally consistent and coherent as possible. This means that we cannot escape the task of rationalizing as best we can these received historical examples of rights. Legal theory is the principal means by which this is accomplished.

Second, as I have discussed elsewhere,[109] we must be concerned with the actual, as opposed to the apparent, legitimacy that constitutional processes impart on legislation. The mere fact that the individual cannot successfully resist the coercion of government does not explain why a citizen or government official is "bound in conscience"[110] to obey legislation produced by constitutional processes. Might does not explain right; nor does the fact that a majority of some minority once cast a vote in favor of the Constitution.

If the Constitution imparts legitimacy on legislation such that legislation commands an ongoing moral obligation of obedience, it must be because the processes established by the Constitution produce results that are sufficiently consistent with a background set of individual rights that are both procedural and substantive in nature, corresponding to what Lon Fuller called the internal and external moralities of law.[111] If this view of constitutional legitimacy is correct, then the Ninth Amendment enhances the legitimacy of legislation by strengthening the link between enacted law that survives

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See W. MURPHY, J. FLEMING & W. HARRIS, AMERICAN CONSTITUTIONAL INTERPRETATION 1083-84 (1986) (listing and providing citations for these unenumerated rights).

107 *See* Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985) (describing and defending the use of easy cases in settling some constitutional issues).

108 I discuss the use of paradigm or easy cases and the existence of hard cases of unenumerated rights in Barnett, *supra* note 11, at 57-64.

109 Barnett, *supra* note 11, at 39-40.

110 The phrase is taken from Thomas Aquinas. *See* Aquinas, *Summa Theologica*, in 20 GREAT BOOKS OF THE WESTERN WORLD 233 (R. Hutchins ed. 1980).

111 *See* L. FULLER, THE MORALITY OF LAW 96-97 (rev. ed. 1969).

judicial review and the imperatives of justice based on individual rights. This objective can only be accomplished if received historical examples about unenumerated rights are subjected to rational analysis such as that provided by moral theory.

Finally, whether or not we are bound to enforce written, rule-like constitutional strictures that our best legal or moral analysis reveals to be mistaken, we are not bound to adhere to the errors of our forebears in the realm of unenumerated rights. Unwritten mistakes are not embedded.[112] James Wilson's views of natural rights,[113] for example, are both sophisticated and illuminating. We are not, however, compelled to embrace any sexism that we may find in his words. As with the common law process, an attempt to construct a theory of the retained rights from historical examples requires the use of critical reason to eliminate mistakes—particularly when starting the analysis of unenumerated rights in midstream.

3. *The Presumptive Method*

Although I think a constructive method of interpretation has its place,[114] many would question the competence of judges to engage in the interpretive enterprise that a constructive method would seem to require. Moreover, sharp theoretical disagreement seems inevitable. Although such disagreement does not undermine the actual legitimacy of unenumerated rights, it does serve to weaken the apparent legitimacy of their protection by judges.

There is good reason for doubting that one could specify in advance all of the rights retained by the people. In a classical liberal theory of rights, rights define a sphere of moral jurisdiction that persons have over certain resources in the world—including their bodies. This jurisdiction establishes boundaries within which persons are free to do what they wish. So long as persons are acting within their respective jurisdictional spheres, their acts are deemed to be "rightful" (as distinguished from "good") and others may not use force to interfere.[115] According to this approach, our specific rights are as numerous as the various acts we may perform within our re-

112 *See supra* note 92 for a discussion of different kinds of mistakes. I leave aside the issue of whether a precedent mistakenly granting protection to a purported right creates an embedded mistake that merits some degree of protection.

113 *See supra* notes 37, 38, 105 and accompanying text.

114 As I shall briefly discuss below, the constructive method is particularly appropriate for construing unenumerated procedural rights. *See infra* notes 126-32 and accompanying text.

115 There is, of course, much more to be said about this conception of rights. I have defended the reasonableness of this type of rights-based approach elsewhere. *See* Barnett, *Pursuing Justice in a Free Society: Part I—Power v. Liberty*, 4 CRIM. JUST. ETHICS, Summer/Fall 1985, at 50.

spective jurisdictions. Although our actions must remain within proper jurisdictional bounds, within those bounds our rights are as varied as our imaginations. Given this conception of rights—a conception in keeping with that held at the time of the framing of the Ninth Amendment—it is simply impossible to specify in advance all the rights we have. As natural rights theorist James Wilson put it:

> . . . there are very few who understand the whole of these rights. All the political writers, from *Grotious* and *Puffendorf* down to *Vattel*, have treated on this subject; but in no one of those books, nor in the aggregate of them all, can you find a complete enumeration of rights appertaining to the people as men and as citizens.
>
> . . .
>
> Enumerate all the rights of men! I am sure, sirs, that no gentleman in the late Convention would have attempted such a thing.[116]

According to this conception of rights, then, it may be impossible to enumerate all the rights we have and undesirable to try. It may also be unnecessary.

Instead of authorizing a search for particular rights, the Ninth Amendment can be viewed as establishing a general constitutional presumption in favor of individual liberty.[117] According to the presumptive approach, individuals are constitutionally privileged to engage in rightful behavior—acts that are within their sphere of moral jurisdiction—and such behavior is presumptively immune from governmental interference. Identifying rightful conduct by determining the proper contours of this moral jurisdiction is what distinguishes liberty from license. This kind of inquiry is exactly what common law courts have been doing for centuries with occasional assistance from legislatures. The freedom to act within the boundaries provided by one's common law rights may be viewed as a central background presumption of the Constitution—a presumption that is reflected in the Ninth Amendment.

This does not mean, however, that all legislative alterations of common law rights are constitutionally prohibited. Common law processes assumed that legislation can occasionally be used to correct doctrinal errors perpetuated by a strong doctrine of precedent, to establish needed conventions, and to achieve uniformity among diverse legal systems. But legislation must be scrutinized by in-

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116 2 J. Elliot, *supra* note 99, at 424 (remarks of J. Wilson).

117 Indeed, presumptions of this sort may be all that rules of law ever establish. *See* Epstein, *Pleadings and Presumptions*, 40 U. CHI. L. REV. 556 (1973) (describing the operation of staged pleadings in legal analysis). *See also* Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 309-19 (1986) (applying a presumptive methodology to contractual obligation). *Cf.* Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949 (1985) (distinguishing between "flat" and "structured" legal thinking).

dependent tribunals of justice to see whether, in the guise of performing these permissible functions, the legislature is seeking instead to invade individual rights. Legislation in pursuit of ends deemed by the Constitution to be appropriate—and defined at the federal level by the enumerated powers provisions—may rebut the presumption in favor of rightful activity when such legislation passes the sort of meaningful scrunity we associate with the infringement of other constitutional rights. As legislative activity becomes less extraordinary, however, increased skepticism of the purported justifications of legislation is warranted. Legislative inflation results in a general diminution of legislative value.

According to the presumptive method, then, the unenumerated rights of the Ninth Amendment that protect individual liberty operate identically to enumerated rights. For example, courts have not construed the First Amendment as literally barring *any* abridgment of "the freedom of speech." Such ancient common law principles as those governing fraud, copyright, and defamation provide boundaries (some of which are now codified in statutes) beyond which rightful exercises of free speech may not go. Nonetheless, the First Amendment establishes a constitutional presumption in favor of speech that is within these common law boundaries. When legislation operates to restrict speech, such legislation is subjected to meaningful judicial scrutiny. The executive branch of government must justify to the judiciary any legislative or executive interference with such free speech. The bare fact that such legislation reflects a majority preference is insufficient to overcome the presumption established by the First Amendment. Moreover, the bare assertion that legislation abridging freedom of speech serves a legitimate legislative end is also insufficient. When the First Amendment is implicated we maintain a healthy skepticism of legislative motivations.

In the same manner, the Ninth Amendment establishes a constitutional presumption in favor of other rightful activities. This presumption requires the executive branch of the government to justify to the judiciary any legislative or executive interference. The bare fact that such legislation reflects a majority preference is insufficient to overcome the presumption established by the Ninth Amendment. Moreover, the bare assertion that such legislation serves a legitimate legislative end would also be insufficient. As with restrictions on speech, skepticism of legislative motivations is warranted when unenumerated rights are abridged.

In sum, the presumptive approach to the Ninth Amendment does not require an elaborate philosophical inquiry into the rights of mankind. It is critical rather than constructive. It simply requires that governmental abridgment of personal or associational liberty

be justified to a neutral third party. With such a constitutional presumption, freedom from unjustified governmental interference is not limited to speech or to the free exercise of religion but extends to all aspects of a citizen's life. As Steven Macedo has proposed, "judges would critically examine the reasons and the evidence offered to support restrictions on liberty; they would infuse a measure of real 'critical bite' into their review of *all* governmental restrictions on constitutional liberty."[118]

Charles Black has suggested a similar approach to the Ninth Amendment with his "proportionality principle":

> It seems to me that a serious *and thoroughly general* commitment to liberty is inconsistent with restrictions or deprivations grossly out of proportion, in their impact on persons, to the benefits that may reasonably be anticipated by the society that imposes them. . . . [T]here is likely to be no difficulty in identifying at least some instances in which most people would agree that the gross disproportion is visible—sometimes even grotesque.[119]

The main difference between Professor Black's approach and mine is that the presumptive approach clearly places the burden of justification on the government. In any event, Black's concluding remarks apply equally to both proposals. "If we are committed to anything," he insists, "it is to the idea of 'liberty.' If that commitment doesn't really refer to anything except a good inner feeling, then we ought to shut up about it."[120]

As a practical matter, we must choose between two fundamentally different constructions of the Constitution, each resting on a different presumption. We either accept the presumption that in pursuing happiness persons may do whatever is not justly prohibited or we are left with a presumption that the government may do whatever is not expressly prohibited.[121] The presence of the Ninth Amendment in the Constitution strongly supports the first of these two presumptions. According to this interpretation of the Ninth Amendment, the Constitution established what Steven Macedo has called islands of governmental powers "surrounded by a sea of individual rights."[122] It did not establish "islands [of rights] surrounded by a sea of governmental powers."[123]

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118 S. MACEDO, *supra* note 91.

119 Black, *supra* note 78, at 193.

120 *Id.* at 192.

121 *See, e.g.*, Graglia, *Judicial Review on the Basis of "Regime Principles": A Prescription for Government by Judges*, 26 S. TEX. L.J. 435, 436 (1985) ("Very few occasions for . . . [judicial review] would arise, because the Constitution contains few limitations on self-government, and those limitations are almost never violated.").

122 S. MACEDO, *supra* note 91, at 27.

123 *Id.*

The Ninth Amendment is sometimes dismissed as a mere rule of construction. However, by eliminating the second of these two possible constructions of the Constitution and by supporting a presumption in favor of personal and associational liberty, the rule of construction provided by the Ninth Amendment may be one of the most important provisions in the text.

4. *Choosing Between the Constructive and Presumptive Methods*

Given that there is more than one method available to interpret unenumerated rights, which one is the best? I have already given reasons why the originalist method is insufficient.[124] The choice between the constructive and presumptive methods of interpretation may reflect, at least in part, the dual function of constitutional rights. As was discussed above,[125] constitutional rights constrain the powers of government in two ways: by reinforcing the limitations on the delegated powers or ends of government and by placing additional restrictions on the means by which government may pursue its delegated ends.

The presumptive method is particularly effective at reinforcing and extending the limitations on delegated powers. By presuming the immunity of rightful conduct from governmental restriction, it forces the government to credibly articulate its purpose and defend any exercise of governmental power as both necessary and proper. However, because restrictions on the means by which government may pursue its delegated ends often cannot be cast in terms of presumptive immunities from governmental action, the presumptive method is less helpful in establishing the proper manner or mode of government activity. Supplementing the enumerated procedural protections afforded by the Constitution requires that a theory of appropriate institutional or procedural rights be constructed from textual, historical, or other materials.

The choice between the constructive and presumptive methods will also be influenced by the need to prevent abuses of the judicial power to protect unenumerated rights. To appreciate this we must consider the limits of the Ninth Amendment.

C. The Limits of the Ninth Amendment

Some may fear that openly protecting unenumerated rights will lead to abuses by the judiciary. Without minimizing the danger, I suggest that the worst way to address the problem of judicial abuse is to deny that courts may protect unenumerated rights. This would

124 *See supra* notes 99-105 and accompanying text.
125 *See supra* notes 40-51 and accompanying text.

amount to a preemptive surrender of these rights to the far greater threat of legislative or executive abuse. Instead, the problem of judicial abuse is best addressed at the level of general constitutional theory by strongly insisting on two formal constraints on judicial power and by using the structural constraints that are available to control judicial abuse. These traditionally recognized constraints concern the proper scope of all constitutional rights—whether enumerated or unenumerated.

1. *Formal Constraints and the Choice of Interpretive Method*

There are two formal constraints that concern the proper scope of both enumerated and unenumerated constitutional rights. Although I realize that these constraints are controversial, I shall not attempt a full elaboration or defense of them here. I shall indicate, however, how these formal constraints are bolstered in practice by the choice between the constructive and presumptive methods of interpreting unenumerated rights.

First, *substantive* constitutional rights are, in the current vernacular, negative, not positive.[126] They do not generate affirmative claims against the government but legally protect rightful domains of discretionary conduct with which government may not interfere. These rights specify areas within which government ought not to act. As was suggested above,[127] these kinds of constitutional rights reinforce and extend constitutional limits on governmental power. In contrast, *procedural* constitutional rights are both negative and positive, but they limit the manner by which government, not private citizens, may exercise its proper powers.[128] These rights specify areas within which government ought to act only in a particular mode.

Second, judges may exercise neither executive nor legislative powers—such as the power to tax or to appropriate funds—to enforce either enumerated or unenumerated rights. In Jefferson's words, judges must be "kept strictly to their own department."[129] This means that, by and large, judges only have the power to strike down legislation or executive actions. Judges may only say "no"—and judicial negation is not legislation.[130]

The formal distinction between procedural and substantive

126 *See* Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986). A more illuminating and neutral terminology would distinguish between liberty and welfare rights. *See* L. LOMASKY, PERSONS, RIGHTS, AND THE MORAL COMMUNITY 84 (1987).

127 *See supra* notes 39-51 and accompanying text.

128 This is the much-belittled "public-private" distinction. *See* Barnett, *Foreword: Four Senses of the "Public-Private" Distinction*, 9 HARV. J.L. & PUB. POL'Y 267 (1986).

129 Letter from Thomas Jefferson to James Madison, *supra* note 69.

130 I thank Leonard Liggio for suggesting to me this felicitous phrase.

constitutional rights is easier to maintain in practice if both methods are used to determine the unenumerated institutional or procedural rights that government must respect when exercising its powers, while only the presumptive method is used to protect the unenumerated background rights retained by the people from government infringement. By emphasizing the fact that judges are protecting immunities from governmental interference with rightful conduct, confining the enforcement of substantive rights to the presumptive method helps confine judges to exercising judicial negation.

To see how these constraints combine to effectively limit the scope of unenumerated rights, consider the tentative suggestion of Charles Black that the Ninth Amendment may authorize judges to protect the "*effective* 'pursuit of happiness' "[131]—for example, to combat "physical and intellectual malnutrition in childhood."[132] Interpreted as a right of children against their parents, this claim does not require the Ninth Amendment for its foundation; it can be readily assimilated into the common law of guardianship. Intepreted as a constitutional right against the government, such a claim runs afoul of the constraints just discussed. Such purported rights are substantive, not procedural, but they are positive in nature; they require the appropriation and expenditure of tax revenues; they cannot be implemented by judicial negation. Further, such a claim cannot plausibly be cast as either a presumptive immunity from governmental interference with rightful conduct or as a restriction on the means by which government pursues a permissible end.

These formal limits on the use of the Ninth Amendment, bolstered by the appropriate use of the constructive and presumptive methods of interpretation, confine the judiciary to enforcing only those unenumerated rights that are comparable to the substantive and procedural rights that were enumerated. However, when legislatures decide to dispense benefits or provide government "services" through administrative agencies, assuming such schemes are otherwise permitted under the constitution's enumerated powers, judges are not creating entitlements *de novo* when they insist that such schemes be administered in a manner consistent with such constitutional principles as due process of law and equal protection. Respect for such procedural constraints is the price of using public, as opposed to private, institutions to achieve social goals.

When necessary, the Ninth Amendment stands ready to supplement these and other expressed procedural rights. A good example of the importance of unenumerated procedural rights is provided by

131 Black, *supra* note 78, at 194.
132 *Id.*

Bolling v. Sharpe[133] in which the Court held that a person has a right to the equal protection of the laws against the federal as well as state governments, notwithstanding the fact that the Equal Protection Clause of the Fourteenth Amendment applies only to the states.[134] Another example is *Richmond Newspapers Inc. v. Virginia*[135] in which the Ninth Amendment was used by a plurality of the Court to justify the protection of the right to attend and report on criminal trials.[136]

2. *Structural Constraints*

We are not limited to formal constraints to control judicial abuse. Constitutional amendment, judicial nomination by an elected president and confirmation by an elected Senate, and impeachment by an elected House (followed by a trial in the Senate) are some of the structural constraints on the judiciary. The rarity with which these and other structural constraints are used to alter judicial decisions does not necessarily mean that these constraints are ineffective. It could well mean that, for better or worse, judicial decisions have largely reflected the sentiments of the majority.

One structural limitation on the Ninth Amendment may now be considered archaic for most purposes. Like the rest of the Bill of Rights, the Ninth Amendment was most likely intended to apply only to the national government.[137] This did not mean that the people retained no comparable rights against state governments. It meant only that the federal government, including the federal judiciary, lacked jurisdiction in the original scheme to protect at least some of the rights retained by the people from infringements by the states.[138] With the passage of the Fourteenth Amendment, however, this limitation on the protection of the rights of the people was substantially altered.[139]

If the Privileges and Immunities Clause of the Fourteenth Amendment is viewed as establishing the same constitutional presumption in favor of individual and associational liberty against the states as the Ninth Amendment established against the federal government, then whether the unenumerated rights retained by the people are seen as protected by one provision or the other may be

133 347 U.S. 497 (1954).
134 *See id.* at 499-500.
135 448 U.S. 555 (1980).
136 *Id.* at 579 n.15.
137 This view is not, however, without its dissent. Some, like Bennett Patterson, think the Ninth Amendment has always been directly applicable to the states. *See* B. PATTERSON, *supra* note 5, at 36-43.
138 Even the original scheme extended constitutional protection to some rights retained by the people against state governments as, for example, with the Contracts Clause.
139 *See* M. CURTIS, NO STATE SHALL ABRIDGE (1986).

immaterial.[140] Nonetheless, the reconception of the Ninth Amendment urged here would undermine the argument that the Fourteenth Amendment should be limited to a very selective incorporation of the Bill of Rights. Given that the Fourteenth Amendment extends the protection of constitutional rights to acts of state governments, the Ninth Amendment stands ready to respond to a crabbed construction that limits the scope of this protection to the enumerated rights (and even then to only certain of those rights).

Few would advocate preventing abuse of such expressed, but abstract constitutional provisions as the Equal Protection Clause or the Due Process Clauses by ignoring them. Rather, we prevent judicial abuse of open-ended provisions by formal and structural constraints. The proper way to control abuse of the Ninth Amendment is no different. If constrained in these ways, the judicial protection of unenumerated rights need not constitute the exercise of illegitimate "legislative" power.

CONCLUSION: RECONCEIVING THE NINTH AMENDMENT

The Ninth Amendment may be forgotten, but it is not gone. We can be grateful to James Madison for conceiving the Ninth Amendment. Without it any claim that the people retain rights other than those specified in the Constitution would be dismissed today as the product of a fevered imagination. As it is, the Ninth Amendment has been all but imaginary in constitutional adjudication because the Supreme Court and most constitutional analysts have seriously misconceived it. Although the task of interpreting the Ninth Amendment and protecting unenumerated rights can never be complete, it must be commenced in earnest if balance is to be restored to our constitutional scheme. The time has come to reconceive the Ninth Amendment.

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140 Sanford Levinson has suggested that the renewed interest in the Ninth Amendment has been spurred, in part, by the absence of Supreme Court precedent definitively inhibiting its use. In contrast, judicial scrutiny on the basis of the Privileges and Immunities Clause of the Fourteenth Amendment must confront the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872). *See* Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 CHI.-KENT L. REV. 131, 143-48 (1988).