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ANTIFEDERALISM AND THE NINTH AMENDMENT

CALVIN R. MASSEY*

I. INTRODUCTION

In this Essay I intend to advance two general propositions about the ninth amendment¹ and several specific ideas that follow from those propositions. First, the amendment embodies a deep belief that the individuals composing a political society cede to government only a limited, enumerated portion of their freedoms; all other individual rights, of whatever source, are inviolate. Second, and somewhat more controversially, the amendment is part of an "Antifederalist Constitution," the promise of which has been largely ignored due to the political victories of the Federalist judiciary in the formative years of American constitutional jurisprudence.² The "Antifederalist Constitution" is concerned with preservation of the states as autonomous units of government and as bulwarks of individual liberty. The ninth amendment's peculiar and powerful contribution is that it is a vehicle for recognizing that state guarantees of individual rights, through state constitutions, are of co-equal status, as a matter of federal constitutional law, with any right specifically enumerated in the federal Constitution. The significance, of course, is that the citizens of a state have the power, through their constitutions, to preserve areas of individual life inviolate from invasion by the federal Congress in the exercise of its delegated powers. Just as Congress is unable to use its delegated powers to compel a criminal defendant to testify against herself, Congress is unable to use its delegated powers to contravene an unenumerated federal right contained within a state constitution.

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1. "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

2. I use the term "Antifederalist Constitution" to include the ninth, tenth, and eleventh amendments. An argument can be made that the term should include the first eleven amendments since the impetus for the Bill of Rights largely came from Antifederalists in the state ratifying conventions. See *infra* notes 5-14 and accompanying text. I limit the term because the ninth, tenth and eleventh amendments all speak to the structure of the Constitution itself, and do so in a fashion that unabashedly addresses Antifederalist concerns. For more of my evolving views on this complex subject, see Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 HASTINGS L.J. 305 (1987) [hereinafter Massey, *Federalism*]; Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61 (1989).

Standing in isolation, the first general proposition is unremarkable and uncontroversial. It is only when it is considered in the context of a scheme of constitutional law that it begins to assume shape, and carry implications which some may find exciting and others disturbing. Allegiance to the principle that unenumerated individual rights are entitled to the same constitutional protection as any enumerated right has necessary implications for constitutional theory—both foundational and substantive, to borrow Professor Sager's coinage.³ On a foundational level, it commits us to an unwritten constitution supplemental to the venerated written document,⁴ one which embraces as constitutionally enforceable rights which have never been explicated by the democratic, representative organs of government. On a substantive level, it commits us to location of specific rights which mesh with and further this foundational account. Since the role played by the ninth amendment in foundational constitutional theory is to remind us sharply that there is a domain of private choice with which the state may not legitimately interfere, its substantive import will almost always be as a source of "negative" rights—rights which inhere in individuals to negate the actions of government seeking to invade that individual sphere.

The second proposition seeks to locate the ninth amendment, historically and structurally, as part of a constitutional antidote to the excessive potentiality of national power feared by the Antifederalists. It may seem a misnomer to append the label "Antifederalist" to the ninth amendment, since one of its principal congressional sponsors was James Madison and it was Federalists who opposed adoption of the Bill of Rights on the ground that an imperfect, or incomplete, enumeration would give rise to a presumption that all individual rights beyond those enumerated had been conveyed to the national government.⁵ Yet, it is simply too facile to conclude that the ninth amendment was just another piece of a constitutional mosaic created exclusively by Federalist artisans.

In our current worship of the Constitution, we overlook all too

3. 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, 240 & n.4 (1988).

4. See, e.g., Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984); Grey, *The Uses of an Unwritten Constitution*, 64 CHI.-KENT L. REV. 211 (1988).

5. See 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 436-37 (J. Elliot 2d ed. 1863) (Remarks of James Wilson in the Pennsylvania Convention, Oct. 28, 1787) [hereinafter ELLIOT'S DEBATES]; 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 387-90 (M. Jensen ed. 1976) (Speech of James Wilson, Nov. 28, 1787).

quickly the controversial nature of the original document. The work of the 1787 Convention was not received with anything like acclamation by the early citizens of the nation. In Pennsylvania, for example, the ratification convention was selected by less than ten percent of the eligible voters; this condition came about because the pro-ratification forces called the elections in such a way and on such short notice that, as a practical matter, the citizens of Pennsylvania were disenfranchised in selecting their representatives for the ratification convention.⁶ Similarly, in Massachusetts, public opinion was so overwhelmingly against the Constitution that some forty-six towns refused to send a delegate to the state ratification convention. Had those forty-six communities been represented, it is a virtual certainty that Massachusetts would have refused to ratify the new Constitution.⁷ In Virginia, perhaps the most pivotal state of all, it was acknowledged that, south of the James River, public opinion was at least ninety percent opposed to adoption of the new Constitution.⁸ In New York, public opinion was overwhelmingly against adoption of the new Constitution.⁹ In all probability, apart from Delaware, Rhode Island and New Jersey, which regarded the new Constitution as a way of achieving enhanced economic and political leverage,¹⁰ public opinion throughout the original states was substantially opposed to adoption of the new document.¹¹ Opposition to the Constitution's adoption was rooted in deep fear of national power.¹² This sentiment, pervasive throughout the early American states, ultimately compelled proposal and adoption of the first ten amendments to the Constitution.¹³ Indeed, ratification was obtained in part by the promise that a bill of rights would be

6. 1 A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 327-28 (1916).

7. *Id.* at 340 n.4. Massachusetts ratified the Constitution by a vote of 187 to 168. *Id.* at 348; 2 ELLIOT'S DEBATES, *supra* note 5, at 178-81.

8. 5 THE WRITINGS OF JAMES MADISON 120-22, 302 (Hunt ed. 1904); 3 ELLIOT'S DEBATES, *supra* note 5, at 587-96; 1 A. BEVERIDGE, *supra* note 6, at 367, 468-70.

9. 1 A. BEVERIDGE, *supra* note 6, at 379.

10. *Id.* at 325.

11. *Id.* at 307-09, 324-25; J. MARSHALL, *THE LIFE OF GEORGE WASHINGTON* 132-33 (1st ed. 1807).

12. 1 A. BEVERIDGE, *supra* note 6, at 345-47 ("National Government would destroy . . . liberties . . . [and was thought to be] a kind of foreign rule.") Too much cannot be made of the public opposition to the Constitution's adoption. It was this opposition, which viewed the central government as "foreign," that compelled the first Congress to propose the Bill of Rights. See, e.g., Elbridge Gerry's assertion in Congress that

a great body of our constituents [is] opposed to the constitution as it now stands . . . [and is] apprehensive of the enormous powers of [the federal] Government The ratification of the constitution in several States would never have taken place, had they not been assured that the objections would have been duly attended to by Congress.

1 ANNALS OF CONG. 463-64 (J. Gales ed. 1789).

13. See generally Patrick Henry's two remarkable speeches on the penultimate day of the Virginia convention, June 24, 1788. 3 ELLIOT'S DEBATES, *supra* note 5, at 587-96, 649-57.

promptly appended to the newly adopted Constitution.¹⁴

Both the Federalist and Antifederalist factions agreed that the focal point of any bill of rights was to provide certainty that the newly created national government would be disabled from intruding upon the elementary and fundamental rights of the citizenry.¹⁵ Of course, Federalists contended that there was a danger in any enumeration of rights. Nevertheless, the Federalist majority acquiesced to the implicit price of ratification and such Federalist leaders as James Madison assumed responsibility for introducing into the First Congress constitutional amendments responsive to Antifederalist demands for an articulated bill of rights.¹⁶ In an attempt to deal with the concern that an enumeration of rights would imply that the enumeration was exhaustive, Madison introduced his fourth resolution which, after considerable revision, eventually became the ninth amendment.¹⁷

II. A FOUNDATIONAL ACCOUNT OF THE NINTH AMENDMENT

While it is uncontroversial that the ninth amendment was intended to guard against the possibility that individual rights would be limited to those enumerated, controversy attaches to the meaning of that statement. My first general proposition seeks to locate meaning in two dimensions: the political theory which actuated the framers, and the peculiar intersection of a British tradition of an unwritten constitution with the American colonial experience of written declarations of rights.

A. Political Theory

No single theory of political union captured the mind of every American who drafted, debated, voted upon, pondered, or even heard

14. 1 ANNALS OF CONG., *supra* note 12, at 464 (remarks of Elbridge Gerry).

15. For the Federalist position, see THE FEDERALIST NO. 84, at 436-45 (A. Hamilton) (M. Beloff ed. 1948); 2 ELLIOT'S DEBATES, *supra* note 5, at 436-37. For the Antifederalist position, see 3 ELLIOT'S DEBATES, *supra* note 5, at 445-49 (Patrick Henry's remarks in the Virginia convention).

16. 1 ANNALS OF CONG., *supra* note 12, at 431-42.

17. 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.

1 ANNALS OF CONG., *supra* note 12, at 435. I have noted elsewhere that a comparison of the differences between Madison's resolution and its ancestors with the final draft of the ninth amendment reveals a subtle shift of focus. Madison's original resolution contained within it a clause that enjoins interpreters of the Constitution from enlarging the powers delegated by the Constitution to the federal government. This focus on powers is missing in the final version which deals only with the rights retained by the people. The tenth amendment provides the focus missing in the ninth amendment on limitation of powers of the federal government. See Massey, *Federalism*, *supra* note 2, at 310-11 & nn.26-29.

about the 1787 Constitution and the Bill of Rights.¹⁸ But in the richly textured political philosophy of the time, some themes do predominate. It was the zenith of the liberal Enlightenment—maximum individual freedom from governmental control was the polestar of such powerfully influential thinkers as John Locke or Montesquieu. Americans could, and did, quarrel about the most effective means to accomplish that end, but they were largely united in their desire to free the individual from the yoke of state control. Americans plainly rejected the Hobbesian idea that political union required the cession of all individual liberties to an omnipotent state.¹⁹ It is thus a reasonable inference that Americans of the age embraced the ideas of Hobbes' principal ideological competitor, John Locke. Unlike Hobbes, the defender of absolute sovereign power, who regarded humans as uniformly selfish in a world without external authority to restrain their passions, Locke sought to devise a set of institutional arrangements which would allow individuals to escape the perils of social disorder without having to surrender their entire stock of individual rights. Locke's goal was to vest all of the benefits created by political union with the individuals composing the society. Unlike Hobbes, Locke posited that the government merely succeeded to the private rights given up to it by the contracting individual members of society. Thus, the state itself has no claim to new and independent rights as against the persons under its control. As a modern commentator has put it: "The state can acquire nothing by simple declaration of its will but must justify its claims in terms of the rights of the individuals whom it protects."²⁰ Of course, since "[t]he central purpose of government is to maintain peace and order within the territory,"²¹ the Lockean sovereign succeeds to private rights of self-defense in order to curb illegitimate, power-based intrusions upon the rights of others.²² This police power attribute of sovereignty insures that the state can effectively provide peace and order

18. See, e.g., F. McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* (1985) (contending that the framers subscribed to multiple, and contradictory, political philosophies).

19. See T. HOBBS, *LEVIATHAN* (1651).

20. R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 12 (1985).

21. *Id.* at 16.

22. An apt illustration of this principle is to be seen in the interplay of the law relative to possession of, and trespass upon, real property. At early common law, the essence of possession was the legal concept of "seisin," a term connoting "peace and quiet." 2 F. POLLOCK & F.W. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, at 29 (2d. ed. 1903). He who had possession could enjoy his property in "peace and quiet." To vindicate this right, the law of trespass was created. Since allowing "men to make forcible entries on land . . . is to incite violence," the trespass laws' protection of possession "is a prohibition of self-help in the interest of public order." *Id.* at 41.

to the individual members of the society but, critically, its theoretical outer limits are the limits of self-defense in private hands. The state cannot prohibit what could not legitimately be resisted or prohibited by private action prior to the Lockean compact.

However disparate the political theories of the framers, these fundamental conceptions dominated the scheme formulated by the 1787 convention. Constitutional limitations upon the national government's power and express diffusion of its exercise were intended to guarantee the liberties of the individuals forming the society by dividing the potential power of the state to seize for itself those liberties.²³ The Constitution specifies precise measures to divide and check the exercise of power but is generally silent about protection of individual substantive rights. The elaborate procedural devices created to limit power were, of course, intended to serve the substantive end of protection against encroachment upon individual liberties. Although Hamilton and Wilson contended these procedural safeguards were adequate, it is ultimately the Bill of Rights that "identifies the ends of government, the rights that the system of limited jurisdiction, indirect voting, and separation of power is designed to protect."²⁴ Included among the Bill of Rights, of course, is the ninth amendment.

B. *The English Tradition in America: A Transformation*

The English tradition is of an unwritten constitution, one which embodies a constellation of fundamental individual liberties rooted in an historical understanding of such rights.²⁵ Colonial Americans, who liked to assert that they possessed all the "rights of Englishmen,"²⁶ came to North America with that tradition. After arrival, however, they fashioned a new and uniquely American gloss upon the English conception of unwritten guarantees of individual liberties, for they assiduously adopted written declarations of individual rights inviolate from governmental intrusion.²⁷ These declarations were, of course, part of the English tradi-

23. Locke desired a separation of executive and legislative functions. J. LOCKE, OF CIVIL GOVERNMENT 143-44 (1698). Montesquieu, of course, is generally credited with the doctrine of separation of powers. MONTESQUIEU, THE SPIRIT OF LAWS 196-219 (D. Carrithers ed. 1977).

24. R. EPSTEIN, *supra* note 20, at 18.

25. See, e.g., J.G.A. POCOCCO, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW (reissued 1987).

26. See, e.g., George Mason's 1766 claim that American colonials "claim Nothing but the Liberty & Privileges of Englishmen, in the same Degree, as if we had still continued among our Brethren in Great Britain." 1 THE PAPERS OF GEORGE MASON 1725-1792, at 65, 71 (R. Rutland ed. 1970) (reprinting letter of June 6, 1766 to "the Committee of Merchants in London").

27. See, e.g., the various colonial charters and declarations collected in 1 THE ROOTS OF THE BILL OF RIGHTS 49-175 (B. Schwartz ed. 1980) [hereinafter ROOTS].

tion of restating, during times of political crisis, the "unwritten" fundamental liberties of the citizenry.²⁸

Americans, however, departed from the English habit of restatement in two crucial respects. First, they included in their itemizations of fundamental liberties rights which were not recognized in England.²⁹ Second, Americans drafted their restatements as matters of first principle,³⁰ not as reactions to a particular political crisis, as the barons had done at Runnymede or the 1689 Convention had done in the wake of James II's flight from the throne. The effect of these American innovations was to begin a tradition of looking both to an unwritten constitution (containing the "rights of Englishmen") and to written constitutions (containing, in the various colonial charters and declarations, the rights of American Englishmen).³¹ It should, therefore, come as little surprise that in the confluence of these traditions the ninth amendment, a blend of the written and unwritten, should be produced.³²

C. *The Transition from Foundation to Substance*

This foundational account of the ninth amendment demands that its substance have real bite, in order to protect individuals from governmental intrusion not warranted by some independent cession of individual liberties to government made as part of the constitutional bargain. For

28. See, e.g., Magna Carta (1215); Petition of Right, 1628, 3 Car.; Habeas Corpus Act, 1679, 30 Car. 2; Declaration of Rights, 1689, 1 W. & M.; Toleration Act, 1689, 1 W. & M.; Mutiny Act, 1689, 1 W. & M.; Settlement Act, 1701, 12 W. & M. See generally F. McDONALD, *supra* note 18, at 9-55; H. TAYLOR, *THE ORIGIN AND GROWTH OF THE AMERICAN CONSTITUTION* 230-43 (1911). See also 1 W. BLACKSTONE, *COMMENTARIES* *63-64, *104-05, *123-24.

29. See, e.g., the 1677 Concessions and Agreements of West New Jersey, 1 ROOTS, *supra* note 27, at 126-29. This proprietary charter, heavily influenced by William Penn, "offered the inhabitants more political and legal rights than most people enjoyed anywhere in the world then or now." E. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 130 (1988).

30. See, e.g., the New York Charter of Liberties and Privileges, adopted in 1683, which at the first opportunity granted New Yorkers the right to convene a colonial representative assembly. See 1 ROOTS, *supra* note 27, at 162-63.

31. For a fuller elaboration upon this theme, see Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

32. A similar phenomenon may be observed in the Canadian experience. Until 1982, Canada operated under the unwritten constitutional tradition of Britain. Its governmental structure was defined by the British North America Act, 1867, 30-31 Vict. Ch. 3 (1867) (now titled "Constitution Act, 1867"), amendable only by the U.K. parliament. Since the Statute of Westminster, 1931, 22-23 Geo. 5 Ch. 22 (1931), Canada has possessed the power to control all of its statutes save the B.N.A. Act. Under that authority, Canada enacted the Canadian Bill of Rights in 1960, S.C. 1960 C.44, but that act was an ordinary statute, not a constitutional document. In 1982, with the enactment of the Canada Act, Canada acquired a written constitution, amendable only by extraordinary action of the Canadian polity. Part One of the 1982 Constitution consists of the Canadian Charter of Rights and Freedoms. It is not likely accidental that section 26 of the Charter provides that "[t]he guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada." CAN. CONST. pt. 1, § 26.

that condition to obtain it is vital that ninth amendment rights, like rights enumerated in the other portions of the Bill of Rights, be judicially enforceable.

There is no sound objection to judicial enforceability of these rights, for if they exist and judges are denied the opportunity to determine their nature, some other governmental actor will have to do the job. As Professor Sager has observed, the "problem . . . does not go away, but simply travels" from the judiciary to the executive or legislative branches.³³ Only those who contend that democracy is better served by vesting elected officials, rather than judges, with custody of unenumerated rights, can seriously make this claim.

Even then, objectors to judicial enforceability of unenumerated rights must explain away two considerable difficulties with their position. First, why are elected governmental officials likely to be optimal guardians of *individual* rights, for it is precisely these rights which are intended to be secure from control by the majoritarian will expressed through governmental power? Second, what is it about unenumerated rights, whose existence is textually recognized, that causes them to be exempt from the "virtually unflagging obligation"³⁴ imposed since *Marbury v. Madison*³⁵ upon the federal courts to exercise their jurisdiction? If the foundational account of the ninth amendment is correct, and it is a textual reminder that majoritarian impulses, transmitted through governments, may not erode fundamental (albeit unarticulated) norms, it seems almost obligatory to consign to the least majoritarian branch of government the task of determining those normative limits.

III. AN ANTIFEDERALIST SUBSTANTIVE ACCOUNT OF THE NINTH AMENDMENT

It is one thing to insist that the ninth amendment have substantive bite; it is another to define, in some principled way, the apparatus that controls that bite. I have argued in an earlier article that the ninth amendment captures both positive or civil rights (created by people as ancillary to and arising from political union) and natural rights (those beyond human creation and transcendent of political union).³⁶ The problem of describing natural rights in a sufficiently temporal fashion to permit principled judicial enforcement is enormous but not necessarily

33. Sager, *supra* note 3, at 252.

34. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

35. 5 U.S. (1 Cranch) 137 (1803).

36. See Massey, *Federalism*, *supra* note 2.

insoluble. In some other forum I will embark further upon that difficult task; in this Essay I wish to pursue the positive, or civil, rights dimension of the ninth amendment.

Even scholars who are otherwise skeptical that the ninth amendment contains much substance acknowledge that it has a role in circumscribing national power with respect to the states. One view is that it merely declares an area in which the national government has "no power."³⁷ Or, as another commentator asserts, "it simply provides that the individual rights contained in state law are to continue in force under the Constitution until modified or eliminated by state enactment, by federal preemption, or by a judicial determination of unconstitutionality."³⁸ The first variant is accurate as far it goes, for it recognizes the strongly Antifederalist nature of the entire formulation of a Bill of Rights. The second variant, while correctly recognizing the importance of individual liberties claimed as part of the political union inherent in state constitution-making, inexplicably delivers these rights to Congress for evisceration at its pleasure. But even these skeptics acknowledge the vitality of a core premise: the ninth amendment was intended to hem in the national government, to some degree and in some fashion, from intruding upon rights secured by state law.³⁹ Since the ninth amendment was created at a time when state constitutional declarations of rights were commonly regarded as the principal bulwark of human liberty against state inundation,⁴⁰ this is an unsurprising conclusion.

But the ninth amendment did more than this. Its textual guarantee is that unenumerated rights are not to be "denied or disparaged" by vir-

37. Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1, 9 (1980); Dunbar, *James Madison and the Ninth Amendment*, 42 VA. L. REV. 627, 641 (1956).

38. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 228 (1983).

39. The draftsmen of the ninth amendment knew what they were about: limiting the delegated powers of the federal government.

This declaration of rights, I take it, is intended to secure the people against the maladministration of the [new central] Government.

1 ANNALS OF CONG., *supra* note 12, at 749 (remarks of Elbridge Gerry). Even the nationalist Madison admitted that

the abuse of the powers of the General Government may be guarded against in a more secure manner than is now done [by the unamended Constitution.]

Id. at 432.

40. Oliver Ellsworth, for example, trusted "for the preservation of his rights to the State Govts. From these alone he could derive the greatest happiness he expects in this life." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 492 (M. Farrand ed. 1911). In recommending against inclusion of a Bill of Rights in the federal Constitution, Roger Sherman declared: "The State Declaration of Rights are not repealed by this Constitution; and being in force are sufficient." 2 *id.* at 588. James Wilson asserted in 1791 that "our [colonial] assemblies were chosen by ourselves: they were the guardians of our rights, the objects of our confidence, and the anchor of our political hopes." 1 THE WORKS OF JAMES WILSON 292 (R. McCloskey ed. 1967).

tue of their lack of enumeration in the federal Constitution. The term "disparage" carries with it the implication that enumerated and unenumerated rights are to be accorded equal status under the Constitution, for to deny unenumerated rights co-equal status on that account would violate the parity principle that infuses the concept of disparagement. If both types of rights are entitled to the full panoply of protections accorded individual liberties secured by the Constitution, and if the ninth amendment had as one of its aims the preservation of individual liberties secured by state constitutions, the necessary conclusion is that individual liberties secured by state constitutions against state invasion were federalized by the ninth amendment. Through the ninth amendment a citizen of North Carolina, for example, could assert her state constitution as a barrier to federal action invasive of her rights secured by the North Carolina constitution.

The claim that the ninth amendment preserves individual liberties secured by state constitutions is rooted in two sources: the foundational account of the amendment and the history of its proposal and adoption. As demonstrated above, the foundational account is one that seeks sharply to limit governmental power as against individuals. Locating the ninth amendment's unenumerated rights in state constitutional guarantees is not only consistent with but furthers that foundational account. Moreover, such a reading is structurally congruent with the ninth amendment's paired cousin, the tenth amendment.⁴¹ The tenth amendment confines the national government to its delegated powers and bars the states from exercising powers either prohibited to them by the Constitution or which have been exercised validly by Congress to preempt state authority. Everything else is "reserved to the States respectively, or to the people." "State constitutions act as the dividing line between rights reserved to the states and rights reserved to the people."⁴² State governments exercise authority to the extent that it has been conferred upon them by the people. If state constitutions mediate between the people and their state agents, they do so by defining anew, and on a different plane, the rights retained by the people. Thus, it makes special sense to regard state constitutions as informing the substance of the rights retained by the people under the ninth amendment.

41. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. The ninth amendment deals with reserved rights; the tenth amendment deals with reserved powers, although the ultimate clause in the tenth amendment implicates rights as well. *See supra* note 17.

42. *See* J. STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1900, at 752-53 (1833).

The historical argument proceeds from the premise that the ninth amendment, like the entire Bill of Rights, was responsive to Antifederalist demands for sharp limitations upon possible invasions of individual liberty by the new national government. Explicit support for this reading may be found in such declarations as this constitutional amendment, proposed by the Pennsylvania ratification convention:

[E]very reserve of the rights of individuals, made by the several constitutions of the states in the Union, to the citizens and inhabitants of each state respectively shall remain inviolate, except so far as they are expressly and manifestly yielded or narrowed by the national Constitution.⁴³

The fact that the ninth amendment fails to track this language precisely can be used to argue against the interpretation I have made here, but the contrary argument is unlikely to provide an adequate reconciliation with either the ninth amendment's foundational account or the strong Antifederalist sentiment presented in the state ratification convention precursors to the amendment itself.

If all this is so, why have the courts failed to construe the ninth amendment in this fashion? Is it solely because litigants have not seen the possibilities inherent in the amendment? Is it because too much attention has been focused on the not-easily-located-or-cabined natural law element of the amendment? Or is it because the Antifederalist predisposition to defer to states was swept away in the orgy of judicial nationalism that characterized the Marshall Court? There are no ready or definitive answers to these questions, only speculations. My belief is that all of these possibilities, and probably others as well, account for the dormancy of this dimension of the ninth amendment.

Today, two centuries later, academic and even judicial attention to the ninth amendment is burgeoning. Some of it is skeptical, some of it is focused primarily on the amendment's natural law dimension, but little focus is placed upon its effect of federally constitutionalizing state constitutional guarantees. If anything, this effect is even more important to recognize now than in 1791. Since then, thirty-seven states have entered the Union, Vermont as early as 1791, and Hawaii as late as 1959. No state constitution in existence at the time of the ratification of the ninth amendment is currently operative. In each case the citizens of the state have redefined the relationship between themselves and their state agents. In doing so, the people of the respective states have dealt with some of their rights not enumerated in the federal Constitution. By the textual

43. 2 ELLIOT'S DEBATES, *supra* note 5.

directive of the ninth amendment, the people's decisions respecting their rights are and ought to be clothed with federal constitutional protection against invasion by the federal Congress.

Skeptics will assert many objections to this partial theory of the ninth amendment's substance. At risk of underestimating the ingenuity of my adversaries, I will hazard an attempt at raising and meeting some of these objections.

The theory violates the supremacy clause. It does not, because the ninth amendment incorporates into the federal Constitution state constitutional rights and secures them against federal invasion in the same manner as all other federal constitutional rights. Just as Congress may not validly mandate religious orthodoxy because of the first amendment, Congress is barred by the ninth amendment from trenching upon an Alaskan's or Californian's constitutionally secured right of privacy.

The theory will turn federal constitutional law into a crazy-quilt of fifty-one different variations. It will, and that is both one of its strengths and part of the legacy of a dual sovereignty system. The citizens of each state are entitled to define the nature of their relationship with their governmental agents, both immediately (with the state via the state constitution) and mediately (with the national government via the ninth amendment's incorporation of state constitutional guarantees). It has not proven so difficult for the federal courts to manage with fifty-one different legal regimes in diversity cases under the rule of *Erie Railroad Co. v. Tompkins*;⁴⁴ it is unlikely to be much more difficult for the courts to rely on state constitutional law to breathe life into this substantive dimension of the ninth amendment.

The theory will prevent the federal government from overturning obnoxious state guarantees. Suppose, the skeptics will say, that a state secured in its constitution the "right" of all whites to own blacks as slaves. The easy answer is that, in the absence of the Civil War amendments, Congress would be unable to overturn such an odious regime by statute but, in concert with three-quarters of the states, could easily do so by constitutional amendment. The thirteenth amendment is, of course, the living proof. This response, however, invites another skeptical objection.

The theory fails to account for inconsistencies between enumerated constitutional rights and unenumerated rights located in state constitutions. Suppose the people of a state attempted to secure their "right" to own slaves. On what principled basis ought the thirteenth amendment displace the ninth? Or suppose a state provides that its protection

44. 304 U.S. 64 (1938).

against cruel and unusual punishment does not forbid the public mutilation of convicted felons, and the United States Supreme Court has concluded that the eighth amendment forbids such practices. Which provision controls? The answer lies in the interplay between the foundational and substantive accounts of the ninth amendment. Since the foundational account seeks to maximize individual liberty from governmental intrusion, the substantive choice must conform to that account. Accordingly, in those instances of conflict the operative rule must be the one which pays most deference to the individual challenged by governmental authority, or which maximizes individual liberty generally.

Under the theory, some Americans will enjoy more individual liberty than others. They will, and to the extent the package of individual liberty provided by the federal Constitution and a state constitution is insufficient, state citizens will respond by alteration of their state constitutions or individual exit to other, more generous, jurisdictions. This objection is little different from the current situation where, for example, Alaskans possess the right to smoke marijuana in their homes⁴⁵ while the citizens of every other state face fines or imprisonment for the same conduct.

The theory will make it possible for wily state politicians to evade needed uniform and national policies. This objection assumes that state constitutions will assume meta-statutory proportions or that the ninth amendment right conceived here extends to issues having no plausible connection to individual liberty. I make no contention that state statutory rights are insulated by the ninth amendment from congressional preemption. To the extent that a state's citizens should seek to use their constitution as device to load statutory norms into the federal Constitution the gambit could probably be policed by reference to the foundational account of the ninth amendment: if the "constitutional" guarantee purports to preserve the Rule in Shelley's Case, for example, it is the sort of provision that speaks most softly, if at all, to the preservation of human liberty from governmental power. Some judicial good sense would be necessary to sort the liberty-bearing norms from the purely administrative ones. Of course, there will be friction at the margins; there always is.

No doubt there are other criticisms which can be levelled. This Essay is a tentative work designed to provoke thought and stimulate discussion. Perhaps in that interchange the ninth amendment will regain some of the vitality that was imagined for it by those earlier Americans who so profoundly mistrusted national power. The ninth amendment

45. *Ravin v. State*, 537 P.2d 494, 504, 511 (Alaska 1975).

has languished in disuse for its entire history. It is time to dust off this Antifederalist relic, put it to use and recognize that the Constitution truly created a Union—of Federalists as well as Antifederalists—that fostered diverse choices concerning the relationship between individuals and their governmental agents.