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THE ANTI-FEDERALIST NINTH AMENDMENT
AND ITS IMPLICATIONS FOR
STATE CONSTITUTIONAL LAW

CALVIN R. MASSEY*

The ninth amendment has, of late, been the focus of much academic reflection. In this Article, Professor Massey provides a provocative thesis regarding the intended purposes and uses of the ninth amendment. Professor Massey contends that the amendment is one of substance, guaranteeing the existence of citizens' rights, both created and preserved in state constitutions.

Although in recent years the ninth amendment has become the topic of considerable academic commentary, for the most part courts have ignored the amendment as a source of substantive constitutional rights. This general lack of attention, however, has been distinguished

* Associate Professor of Law, University of California, Hastings. I express my appreciation to the National Association of Attorneys General, at whose annual seminar on state constitutional law I delivered a preliminary version of these thoughts. I am also grateful to my perceptive colleague, Bill Wang. Of course, the errors and omissions are all mine.

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


by notable exceptions. Perhaps the most famous judicial invocation of
the ninth amendment was Justice Goldberg's concurrence in Griswold
v. Connecticut, where he advanced the ninth amendment as a possible
textual home for the otherwise constitutionally unexpressed right to
privacy. Even Warren Burger, a notably cautious justice, relied on the
ninth amendment in upholding a right of press access to criminal trials
in Richmond Newspapers, Inc. v. Virginia.

It would thus be imprudent to dismiss the amendment as devoid
of practical constitutional significance. Moreover, from an academic
perspective, it would be rash indeed to pass over such a rich and rel-
atively unmined vein of constitutional ore. Accordingly, in this Article
I present a provocative thesis designed to stretch the legal imagination
concerning the intended purposes and contemporary uses of the ninth
amendment.

Two fundamental propositions may be made about the ninth
amendment. First, it embodies a deep belief held by the founders that
individuals composing a political society cede to government only a
limited, enumerated portion of their freedoms; all other individual
rights are inviolate. This proposition demands our allegiance to the
principle—plain in the text of the ninth amendment—that unenumer-
ated constitutional rights are entitled to the same constitutional pro-
tection as enumerated rights. This is so because if the reserved rights
are not to be denied or disparaged by the enumeration of other rights,
but only the enumerated rights are susceptible to meaningful protection,
the reserved rights must necessarily wither away. This understanding,
in turn, commits us to locate those rights outside the constitution itself.
Yet, because this principle rests on the premise that governments pos-
sess legitimate power to invade only those individual freedoms ceded
by the act of political union, a corollary belief attends that there is a
domain of private choice with which government may not legitimately
interfere. If this is so, it follows that the unenumerated rights intended
as sacrosanct are of necessity "negative" ones: rights that inhere in
individuals to negate government actions that seek to invade the in-
dividual sphere. While it is true that no single theory of political union

60 U.S. (19 How.) 393, 511 (1857) (Campbell, J., concurring); Lessee of Livingston v. Moore,
32 U.S. (7 Pet.) 469, 551 (1833) (in which the reference to the "ninth article of amendment"
may refer to the ninth proposed amendment, which was eventually the seventh amendment
adopted).

4. 381 U.S. 479 (1965).
6. For an earlier and even more tentative version of this thesis, see Massey,
Antifederalism and the Ninth Amendment, 64 CHI.-KENT L. REV. 987 (1988). See also
Bonventre, Beyond the Reemergence—'Inverse Incorporation' and Other Prospects for State
was universally accepted in late eighteenth-century America,\(^7\) it is also true that Americans were virtually united in their desire to free individuals from oppressive state control. The Hobbesian ideal of an omnipotent state was decisively rejected; if Americans were not orthodox Lockians, they were at least, in today's parlance, highly libertarian. The ninth amendment is the fruit of that attitude.

A second and more controversial proposition is that the ninth amendment is part of an "Anti-Federalist constitution," one concerned with preserving the states as autonomous units of government and as structural bulwarks of human liberty. According to this view, the ninth amendment is both historically and structurally part of a constitutional antidote to the potential excesses of national power so feared by the Anti-Federalists.\(^8\) Although the Federalists opposed a bill of rights on the ground that an imperfect, or incomplete, enumeration of rights would effectively presume that all other rights had been abandoned to government,\(^9\) and James Madison (in his Federalist phase) was the principal architect of the amendment,\(^10\) it is too facile to regard the ninth amendment as a Federalist monument. The amendment, like the rest of the Bill of Rights, was in essence a device to ensure that the national government would be disabled from intruding upon the fundamental rights of its citizenry.\(^11\) It accomplishes this by endeavoring

\(^7\) See, e.g., F. McDonald, Novus Ordo Seclorum: The Intellectual Origins of the Constitution (1985) (contending that the founding generation subscribed to both multiple and contradictory political philosophies).

\(^8\) See infra text accompanying notes 17-67.

\(^9\) See infra text accompanying notes 36-41.

\(^10\) See infra text accompanying notes 48-49.

\(^11\) I endorse the view that the ninth amendment acts as an independent constraint on governmental power. This view has been labeled by Randy Barnett as the "power-constraint" conception. Barnett, supra note 2, at 11, 26-42; see also Massey, supra note 2, at 329-44. The opposing view is that if the ninth amendment has any substance at all, it merely replicates the function of the tenth amendment by stating, in essence, that individual constitutional rights and powers delegated to the central government are complementary: as powers are exercised, rights decrease; as powers shrink, rights inflate. Barnett labels this view the "rights-powers" conception. Barnett, supra note 2, at 4-9. Thomas McAffee has recently argued that the ninth amendment was originally intended only to constrain the powers of the federal government by preventing the inference that an enumeration of rights implied a general augmented federal power to invade unenumerated ones, while the tenth amendment was intended to ensure that the states continued to possess powers not surrendered in the plan of the 1787 Constitution. See McAffee, The Original Meaning of the Ninth Amendment, 90 COLUM. L. REV. 1215 (1990). McAffee's historical argument is open to debate, but his more fundamental error is in supposing that, even assuming he has read history accurately, the original intentions now control. McAffee contends that the ninth amendment's function was only to cabin federal powers and not to establish "legally enforceable, affirmatively defined limitations on governmental power on behalf of individual claimants." Id. at 1222. However, like Pandora's Box, federal powers have since been virtually released from whatever restraining check was supplied by enumeration in the Constitution. Thus, for the ninth amendment to perform the original structural function claimed by McAffee, it is essential that the amendment act as an affirmative limit on governmental powers now virtually freed from the
to preserve both natural rights (those transcendent of political union) and rights located in state law (created or preserved by the people in the act of state political union).  

I will not pursue in this Article the argument that the ninth amendment is a source of judicially enforceable natural rights. It is enormously difficult to define natural rights in a sufficiently precise, bounded or even temporal fashion to permit principled judicial enforcement. Instead, I contend, in the company of even those most skeptical that the ninth amendment has substance, that the amendment was intended to guarantee the existence of rights created or preserved in state constitutions.

The ninth amendment explicitly commands that unenumerated rights are not to be denied or disparaged by virtue of their lack of textual location in the federal Constitution. The very term "disparage" carries with it a strong implication that enumerated and unenumerated constitutional rights are to be accorded equal status. "Disparate" has its origins in the Old French term déparer, meaning "to marry unequally." Its more modern, English meaning is "actions or words" that "depreciate, undervalue" or "degrade" that which is disparaged. Thus, whether by reference to its etymological roots or its contemporary meaning, the concept of disparagement has at its heart the denial of equal treatment, or parity, between the items compared. If both enumerated and unenumerated rights are entitled to the full panoply of constitutional protections accorded individual liberties, and if the ninth amendment was intended to preserve individual liberties secured by state constitutions, the necessary conclusion is that individual liberties secured by state constitutions against governmental invasion were federalized by the ninth amendment. Just as the fifth amendment prevents Congress from using its delegated powers to compel a criminal defendant to testify against herself, the ninth amendment prevents Congress from using its delegated powers to contravene an unenumerated

original limits to those powers envisioned by the framers. See also infra text accompanying notes 59-86, and Massey, supra note 2, at 312-23.

12. For elaboration on these points, see Massey, supra note 2, at 312-23.

13. It is certainly not impossible, however. For a promising methodology for locating such natural rights, see Barnett, supra note 2, at 30-38.

14. A caveat is now in order. Henceforth, when I refer to ninth amendment rights, unless specifically made clear to the contrary, I am referring only to that strand of ninth amendment rights I have identified as "positive" or "civil" rights. My conclusions here would not necessarily be identical with respect to the natural law strand of ninth amendment rights. In a future article I hope to provide further refinements pertaining to the natural law aspects of the ninth amendment. Currently, the best developed effort to construct a usable and principled method of locating natural law rights protected by the ninth amendment may be found in Barnett, supra note 2, at 26-42. See also Massey, supra note 2, at 329-44.

15. WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 750 (2d ed. 1944).

16. Id.
federal right contained within a state constitution. Thus, state citizens have the power, through their state constitutions, to preserve areas of individual life from invasion by the federal Congress in the exercise of its delegated powers.

This is radical stuff, for it amounts to a form of reverse preemption. Lest it be dismissed too quickly, this Article first examines the historical pedigree of the argument, considering the Anti-Federalists’ demands for a bill of rights, the Federalists’ response to those demands and other readings of historical sources. In section II, this Article examines some contemporary applications of the theory and discusses problems it poses. This discussion leads to the conclusion that, for the theory to be workable, the judiciary will need to devise a test enabling it to recognize only those ninth amendment positive rights that preserve fundamental liberties without impeding the legitimate exercise of national power to accomplish national policy. Section III proposes and defends such a test.

I. HISTORICAL BACKGROUND AND THE NATURE OF NINTH AMENDMENT RIGHTS

A. The Ninth Amendment as a Font of Unenumerated Rights

It is familiar history that the 1789 convention took place amid a crisis of confidence in the new nation. 17 Most, but by no means all, of the leaders of the time thought that the difficulties of trade, public debt and funding of a national government for common purposes such as defense demanded a significantly stronger central government. 18 Participants of the Philadelphia convention were more commonly beset by fears of state encroachment upon national power than fears of federal displacement of state power. In part, this was due to the Confederation experience, marked by state jealousies, rival tariffs, artificial barriers to trade and the lack of a national currency or credit; 19 in part, it was due

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18. See H. Storing, What the Anti-Federalists Were For 24-32 (1981), for a most thoughtful survey of the Anti-Federalists’ view of the need for a stronger central government. Storing argues that the Anti-Federalists were divided on this point, but even those who accepted the need for a stronger central government did so only with respect to limited purposes, such as national defense.

19. “The financial condition was chaos,” claims historian Albert Beveridge. I A. Beveridge, The Life of John Marshall 295 (1916). Each state issued its own paper currency, which was virtually worthless and unacceptable outside the state of issuance. Interstate commerce was predictably stifled by the lack of a common currency. States commonly imposed tariffs on goods imported into the state regardless of their origin in some other American state. See generally id. at 295-311.
to sheer intellectual fascination with Madison’s pathbreaking conception of the “extended republic” as a device to check the ever-present dangers of majoritarianism. Madison contended that a large, diverse nation could control factionalism by bringing diverse factions under a common roof, making it harder for any particular group to dominate the majoritarian machinery.

While the framers relied heavily on Madison’s view, they also resorted to other devices to ensure the continuation of human liberty. In designing the structure of the central government, they took care both to disperse power among the branches of government and to insert the powers of each branch into the other branches in a fashion we call “checks and balances.” In defending the constitutional design, Madison argued that the “accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.” This principle “did not mean that these departments ought to have no partial agency in, or no control over, the acts of each other . . . [but rather] that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted.” Madison thought that simply marking “with precision, the boundaries of these departments” provided wholly insufficient “parchment barriers against the encroaching spirit of power.” Instead, “the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachment of the others.”

20. In The Federalist No. 10, Madison explored the problems associated with controlling self-interested factions which, when constituting a majority of the polity, threaten “to sacrifice to its ruling passion or interest both the public good and the rights of other citizens.” The Federalist No. 10, at 80 (J. Madison) (W. Kendall & G. Cary ed. 1966). Madison argued that in small communities, the dangers of factionalization were heightened because “[a] common passion or interest will . . . be felt by a majority of the whole . . . [leaving] nothing to check the inducements to invade the [minority].” Id. at 81. But, in a large, diverse community—the “extended republic”—the dangers of faction will be diminished by reason of the “greater variety of parties and interests . . . [which] make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens.” Id. at 83.

21. See generally id. Madison’s view was in stark contrast to that of Baron de Montesquieu, who believed that republics could only survive in small, homogeneous societies. See Montesquieu, 8 The Spirit of the Laws 124 (A. Cohler, B. Miller & H. Stone trans. & eds. 1989).

23. Id. at 302-03 (emphasis in original).
25. Id.
Of equal importance was the preservation of states' independent status. Madison contended that an advantage of the new Constitution was that "the federal and State governments . . . [would possess] the disposition and the faculty . . . to resist and frustrate the measures of each other."27 This was thought necessary in order to curb "ambitious encroachments of the federal government on the authority of the State governments."28 Moreover, the framers acknowledged that the federal government would depend upon the states for its very existence, through such devices as state control over the qualifications of voters, the election of senators by state legislatures and the use of the electoral college or voting by states within the House of Representatives to elect the president.29 To facilitate the independence of the states, the framers vested the central government with "few and defined" powers, reserving to the states "all the objects, which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people."30

Thus, the expectation of the framers was "that the protection of citizen rights was a matter to be governed by state constitutional law";31 in other words, sovereignty rested ultimately with the people of each state. A "federal republic . . . of both national and state governments was possible because the people, as the sovereign body, were superior to each government and could determine the precise amount of power allocated to each."32 Therefore, in Federalist No. 46, Madison could declare with confidence that the federal and state governments were "different agents and trustees of the people, constituted with different powers, and designed for different purposes."33 Accordingly, to Madison and the Federalists there was no need for an enumerated bill of rights, because the sovereign people had made an explicit, and quite narrow, delegation of power to the central government in the new Constitution.

The Anti-Federalists, however, had good reason to think otherwise. At the Philadelphia Convention, George Mason made the irrefutable observation that the supremacy clause would render all federal laws "paramount to State Bills of Rights."34 Although Mason and El-

28. Id. at 298.
30. Id. at 292-93.
32. Id. at 1273.
33. The Federalist No. 46, supra note 27, at 294.
34. 2 The Records of the Federal Convention of 1787 at 588 (M. Farrand ed. 1966) (George Mason speech of Sept. 12, 1787).
bridge Gerry were unsuccessful in their attempt to persuade the Philadelphia Convention to attach a bill of rights to the proposed Constitution, the lack of a bill of rights became "the chief rallying point for the opponents to the Constitution during the ratification debates."35

The Anti-Federalists' central objection to the new Constitution was that it "would create an oppressive national government and destroy the political authority of the states."36 Evidence of this was found in the consolidated nature of the new central government, a government with sweeping legislative and judicial powers and the authority to make its legislation supreme—displacing any contrary state statutory or constitutional law. Because the practical necessity of a stronger central government was apparent, the Anti-Federalist opposition shifted "to a reluctant acceptance of the instrument provided that appropriate constitutional restraints were placed upon the powers of the federal government."37 To Mason, appropriate restraints would be those that would "point out what powers were reserved to the state governments, and clearly discriminate between [such powers] and those which are given to the general government."38 Accordingly, every one of the eight states whose ratification conventions proposed amendments to the Constitution included an amendment reserving to the states all unenumerated rights and powers.39

Federalists reacted to these demands by asserting that "any enumeration of rights would necessarily be imperfect and would create the inference that no rights existed except those itemized."40 Thus, it was preferable to enumerate imperfectly "the powers of the federal government with the implication that powers not enumerated were reserved to the people, than to attempt an imperfect enumeration of rights reserved to the people, with the implication that rights not so reserved were impliedly delegated to the federal government."41

35. Wilmarth, supra note 31, at 1276; see also H. Storing, supra note 18, at 15-23 (discussing the Anti-Federalist "belief that there was an inherent connection between the states and the preservation of individual liberty . . . [since] states . . . are the natural homes of individual liberty," id. at 15).

36. Wilmarth, supra note 31 at 1276; see also H. Storing, supra note 18, at 64-70 ("the legacy of the Anti-Federalists was the Bill of Rights," id. at 65).

37. Wilmarth, supra note 31 at 1276; see also H. Storing, supra note 18, at 24-37 (discussing the qualified acceptance by the Anti-Federalists of a stronger central government).

38. 3 the Debates in the Several State Conventions on the Adoption of the Federal Constitution 271 (J. Elliot ed. 1836) (George Mason speech of June 11, 1788 at the Virginia convention) [hereinafter Debates]; 2 the Bill of Rights: A Documentary History 793 (B. Schwartz ed. 1971) [hereinafter 2 the Bill of Rights].

39. See 2 the Bill of Rights, supra note 38, at 665-66 (Pennsylvania), 712 (Massachusetts), 732 (Maryland), 757 (South Carolina), 760 (New Hampshire), 842 (Virginia), 911-12 (New York), 968 (North Carolina).

40. Massey, supra note 2, at 309.

41. Id. See also Wilmarth, supra note 31, at 1285.
The Anti-Federalists' response was that the enumeration of federal government powers was unbounded. For support, they pointed to numerous factors: the existence of the "general welfare" and "necessary and proper" clauses in the Constitution; the fact that the Federalists had already enumerated certain rights such as the right to jury trial in criminal cases, the right to habeas corpus and the prohibition of bills of attainder and ex post facto laws; and their reservations over whether an incomplete enumeration of rights could be overcome by a declaration that "all rights are reserved... which are not expressly surrendered." The ninth amendment finds its textual origins in this last point. Once Madison began the task of shepherding a bill of rights through the first Congress, he proposed that the enumeration of specific rights in the Constitution "shall not be construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution." In explaining this proposal on the floor of the House of Representatives, Madison declared that the "amendment [would] prevent the implied surrender of unenumerated rights 'into the hands of the General Government,' or any implied 'enlarge[ment of] the powers delegated by the

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42. U.S. CONST. art. I, § 8, cl. 1.
43. U.S. CONST. art. I, § 8, cl. 18.
44. U.S. CONST. art. III, § 2.
46. Id.
48. 1 ANNALS OF CONG. 435 (J. Gales & W. Seaton ed. 1834) (remarks of James Madison on June 8, 1789); 2 THE BILL OF RIGHTS, supra note 38, at 1027. To Professor McAffee, Madison's "draft proposal provides strong additional confirmation that the Federalists were concerned that a bill of rights would undercut the scheme of limited powers and be read to imply constructive powers not intended by the constitutional design." McAffee, supra note 11, at 1284. McAffee is correct, but only partially so, for he rejects the possibility that Madison intended the ninth amendment to perform two different functions simultaneously: prevention of implied constructive governmental powers and recognition of judicially enforceable individual unenumerated rights. Id. at 1293-1303. McAffee argues that arguments supportive of the latter function are "inconsistent with what we know of Madison's role in the Bill of Rights debate." Id. at 1300. In fact, the arguments are inconsistent only if one makes an initial assumption that Madison could not have intended the ninth amendment to perform two different functions simultaneously. But Madison left clear evidence that he recognized that human liberty could be better secured both by limitations on governmental powers and by recognition of judicially enforceable affirmative rights. In proposing to Congress that the Bill of Rights be adopted, Madison asserted that the 1787 Constitution was defective in that "it did not contain effectual provisions against the encroachment on particular rights." 1 ANNALS OF CONG., supra at 433. The Bill of Rights—judicially enforceable affirmative rights—was Madison's proposed remedy to this defect. It is thus most plausible that Madison intended the ninth amendment to serve both functions, regardless of whatever theoretical awkwardness might be produced by such a dual role.
constitution’” to the national government. 49 To Arthur Wilmarth this sufficiently proves “that the ninth amendment was originally intended to allow the people of each state to define unenumerated rights under their own constitution and laws, free from federal interference.”

This view is bolstered by the evident connection between the ninth and tenth amendments. 51 Anti-Federalist objections to the Constitution centered on the lack of restraints upon federal power, specifically, the need for a textual directive that all powers and rights not surrendered to the national government remained with the states and their people. Accordingly, the first proposed amendments were worded in a fashion encompassing the thoughts later contained in the ninth and tenth amendments. During the Bill of Rights ratification debates, Virginia delegate Hardin Burnley informed Madison by letter that Edmund Randolph had professed displeasure with the ninth amendment because “there was no criterion by which it could be determined whether any particular [unenumerated] right was retained or not.” 52 Thus, to Randolph, it was preferable “that this reservation against constructive power, should operate rather as a provision against extending the powers of Congress by their own authority, than as a reservation of rights reducible to no definitive certainty.”

To many contemporary observers, including Madison, Randolph’s

49. Wilmarth, supra note 31, at 1297.
50. Id. at 1297-98. Even those who contend that the ninth amendment lacks any ascertainable substantive content admit that its original purpose was to preserve state constitutional, statutory and common law rights from elimination, simply by virtue of the implied consequence of the adoption of the Constitution. For example, Russell Caplan concluded that “the ninth amendment embraces those individual liberties protected by state laws.” Caplan, supra note 2, at 265. Raoul Berger contends that the ninth amendment “was designed to limit federal powers . . . [by preventing] any exercise of power which may endanger the states . . . .” Berger, The Ninth Amendment: The Beckoning Mirage, 42 RUTGERS L. REV. 951, 956 (1990). Berger concludes that with the ninth amendment, “the people looked to the states, not the federal newcomer, to protect their rights . . . . [T]he ninth amendment was to limit, not to enlarge, federal power.” Id. at 980-81. Even Judge Robert Bork, certainly no friend of unenumerated constitutional rights, opined at his confirmation hearings that “I think the ninth amendment says that, like powers, the enumeration of rights shall not be construed to deny or disparage rights retained by the people in their State Constitutions. That is the best I can do with it” (emphasis added). The Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States, Hearings before the Comm. on the Judiciary, United States Senate, 100th Cong., 1st Sess. 249 (1988) [hereinafter Bork Hearings]. At another point, Judge Bork reiterated this point when he observed “it is a little hard to know what category of rights, if any, were supposed to be preserved by the ninth amendment unless it is the State constitutional rights.” Id. at 290.
51. U.S. CONST. amend. X: “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.”
52. 2 THE BILL OF RIGHTS, supra note 38, at 1188 (letter from Hardin Burnley to James Madison, dated Nov. 28, 1789, in which Burnley attributes these sentiments to Randolph).
53. Id.
conception that the retention of unenumerated rights was equivalent only to a denial of implied congressional power made no sense. Madison termed it "fanciful" and argued that for either tack to be effective, both must have real teeth. In writing to George Washington, Madison observed: "[i]f a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing, whether the latter be secured by declaring that they shall not be abridged, or that the former shall not be extended. If no line can be drawn, a declaration in either form would amount to nothing." Madison evidently meant that in order for individual rights to be secure from governmental invasion, it would be necessary for both the ninth and tenth amendments to constrain the powers of the newly established central government. The failure of either to do so would be inimical to the preservation of a zone of individual autonomy where governments could not intrude.

Madison's view is supported by his correspondent, Hardin Burnley. Burnley believed that "the supporters of the Bill of Rights in the Virginia legislature deemed both the ninth and tenth amendments to be essential in order to assure the efficacy of the previous amendments." Thus, as Wilmarth has concluded, "[t]he Burnley-Madison letters confirm that the ninth and tenth amendments were intended to operate in tandem to protect the unenumerated rights of the people and the unenumerated powers of the states against federal encroachment." Wilmarth is not alone in this conclusion, for Raoul Berger, Russell Caplan, Randy Barnett and Robert Bork all agree on this point, though they disagree as to its meaning regarding the ninth amendment.

54. Id. at 1190; 5 THE WRITINGS OF JAMES MADISON 432 (G. Hunt ed. 1904) (letter from Madison to George Washington, dated Dec. 5, 1789, discussing Randolph's objections). To Professor McAffee, this statement is simply further proof that Madison intended the ninth amendment to perform the single function of preventing implied constructive governmental powers. McAffee, supra note 11, at 1287-93. McAffee fails to consider the possibility that Madison thought the ninth amendment would perform this function while at the same time perform an utterly separate function: preserve unenumerated rights as judicially enforceable affirmative rights. The distinction drawn by Randolph—between the retention of unenumerated rights as only a limitation on governmental power, on the one hand, and a mutually exclusive alternative reading of unenumerated rights as a source of enforceable affirmative rights, on the other hand—was "fanciful" to Madison because the ninth amendment was intended to serve both functions. McAffee has fallen into the trap of supposing that Madison was unable to conceive of but one role for the ninth amendment. However theoretically messy such a dual role might be, it was politically adept to conceive of the ninth amendment in such a fashion. Madison was a statesman, but he was also a politician. See also supra note 48.

55. See Barnett, supra note 2, at 15-16.
56. Wilmarth, supra note 31, at 1302 (emphasis in original).
57. Id.
58. See Berger, supra note 2, at 2-3 (ninth and tenth amendments are "two sides
Further historical evidence of this parallel intent is found in the congressional modification of the tenth amendment, to which the phrase "or to the people" was added.59 This phrase provides a linguistic parallel between ninth amendment rights and tenth amendment powers. Without the change, the ninth amendment would have operated to secure the unenumerated rights "retained by the people," while the tenth amendment would have simply preserved the residual powers to the states alone. By adding the phrase "or to the people" the tenth amendment makes plain that the people, as ultimate sovereigns, retain both unenumerated individual rights and the residual powers of government, which may or may not be vested by them in their state governmental agents. Moreover, early constitutional commentators such as Justice Joseph Story interpreted the phrase "or to the people" to mean that "what is not conferred [to the national government], is withheld, and belongs to the state authorities, if invested by their constitutions of government respectively in them; and if not so invested, it is retained by the people, as a part of their residuary sovereignty."60 In sum, both amendments were conceived as devices by which the sovereign people manifested their residual sovereignty. By the ninth amendment, they retained unenumerated rights; by the tenth amendment, they retained the nondelegated and unprohibited powers.

But because the tenth amendment failed to limit federal powers to those "expressly" delegated, it has borne out Randolph's prediction that it would "not appear... to have any real effect."61 Madison argued that the federal government would not usurp state autonomy because it would possess powers which were "few and defined" while the states would retain powers that were "numerous and indefinite."62 Thus, the tenth amendment could easily have been read as stating a presumption of the same coin"); Caplan, supra note 2, at 262-64 (ninth amendment preserves individual rights as determined by state law, while the tenth amendment preserves state power to act in areas not delegated to the national government or prohibited to the states); Barnett, supra note 2, at 4-16 (ninth amendment, as well as tenth amendment, bars extension of federal powers through unwarranted implication and limits the means of exercising such powers); Bork Hearings, supra note 50, at 249 ("ninth amendment may be a direct counterpart to the tenth amendment").

59. See 1 ANNALS OF CONG., supra note 48, at 790; 2 THE BILL OF RIGHTS, supra note 38, at 1118 (House of Representatives debates of Aug. 18, 1789). Though the debates provide no certain reason for the change, the phrase was probably added to underscore the theme that "ultimate authority... resides in the people alone..." and that "[t]he federal and state governments are in fact but different agents and trustees of the people." THE FEDERALIST No. 46, supra note 27, at 294.

60. 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 752 (1833) (emphasis added).


62. THE FEDERALIST No. 45, supra note 29, at 292.
in favor of state power, requiring the national government to sustain the burden of proving that a contested power it seeks to exercise is within the "enumerated objects" of its jurisdiction. But this interpretation was rendered stillborn by *McCulloch v. Maryland*, in which Chief Justice John Marshall found in the necessary and proper clause broad authority for implied federal powers. In so doing, he dismissed the tenth amendment as furnishing no independent limit on the powers of the central government because, unlike the Articles of Confederation, the tenth amendment omitted the word "expressly" before the phrase "delegated to the United States." The result, of course, is the modern understanding that the tenth amendment "states but a truism that all is retained which has not been surrendered." The unspoken message of the modern understanding is that the presumption of state power has been inverted into a presumption of federal power. In that sense, the "truism" of the tenth amendment serves purposes utterly the opposite of those for which it was adopted. Its intended function has been eviscerated. Perhaps because of its linkage with the tenth amendment, the ninth has suffered a similar desuetude.

Nevertheless, the inescapable conclusion remains that both amendments were intended to preserve to the people of the states the sovereign's prerogative to confer powers upon their state governmental agents (recognized in the tenth amendment) and to create personal liberties inviolate from governmental invasion (recognized in the ninth amendment). The intended medium for doing so, in both cases, was the state constitution. However, key differences do exist between the two amendments. The ninth recognizes that federally unenumerated personal liberties may not be treated any differently from federally enumerated liberties. The tenth simply recognizes that the people of the states and their state governmental agents retain residual authority to act in the shade of federal powers. Thus, the ninth amendment creates federal rights that are independent barriers to federal action, while the tenth amendment recognizes the existence of concurrent state powers beyond the frontier of federal power. This conclusion is disputed by some commentators, who contend that the ninth amendment is merely a truism and devoid of enforceable content. This view comes in three variations; I believe each one is flawed.

63. *The Federalist* No. 39, at 245 (J. Madison) (W. Kendall & G. Cary eds. 1966) (the central government's "jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects").
64. See, e.g., Wilmarth, *supra* note 31, at 1311-12, for another variation of this idea.
66. *Id.* at 406-07.
B. Flawed Visions of the Ninth Amendment

A common error among many ninth amendment commentators is to conflate the distinct yet interrelated purposes of the ninth and tenth amendments. An example of such conflation was provided by Justice Stanley Reed who, writing for the Court in United Public Workers v. Mitchell, asserted:68

“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.69

In essence, Justice Reed argued that the rights and powers associated with the amendments logically are complementary sides of the same coin. As Randy Barnett has demonstrated, such a view is wrong because it “construes the Ninth Amendment to mean nothing more than what is stated in the Tenth.”70 Further, it renders the ninth amendment superfluous,71 and, if correct, must also apply to constitutionally enumerated rights, a position wildly at odds with how courts have interpreted the constitutionally enumerated rights.72 In short, “[c]onstruing 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.”73

Raoul Berger provides a second example of the flawed reasoning attending interpretation of the ninth amendment. He contends that the ninth amendment is merely declarative of an area in which government has “no power.”74 According to Berger, the government may not act to invade unenumerated rights, but if it does so the judiciary has no power to intervene.75 Berger reaches this conclusion because he conceives ninth amendment rights as arising outside the Constitution, and

68. 330 U.S. 75 (1947).
69. Id. at 95-96.
70. Barnett, supra note 2, at 6.
71. Id. at 6-7.
72. Id. at 7.
73. Massey, supra note 2, at 316.
74. Berger, supra note 2, at 9. See also Dunbar, supra note 2, at 641.
75. Berger, supra note 2, at 9. See also Berger, supra note 50, at 966-73.
he assigns to the framers an intent to make only the enumerated rights judicially enforceable.\textsuperscript{76}

Berger's view is wrong for several reasons. First, his evidence of the framers' intentions is not persuasive. Berger relies on Madison's statement on the floor of the House, during the first Congress, that if the Bill of Rights were "incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights... they will naturally be led to resist every encroachment upon rights \textit{expressly stipulated} for in the constitution by the declaration of rights."\textsuperscript{77} From this Berger infers that Madison meant to vest the judiciary with only a limited power to enforce "effectual provisions against encroachment on \textit{particular rights}."\textsuperscript{78}

While it is undeniable that Madison's remark indicates his belief that the judiciary would enforce the enumerated rights, it does not necessarily follow that Madison thought the judiciary disabled from protecting the unenumerated rights. Indeed, there are two sound reasons to conclude that Madison meant to impose no such limitation on the judiciary. First, there is nothing definitive in Madison's remarks or in the urgings of the Anti-Federalist proponents of the Bill of Rights to suggest that the ninth amendment was anything other than a full-fledged member of the Bill of Rights. Given its critical function of preventing the possibility that judicial enforcers of the enumerated rights might err by supposing that the enumerated rights were all of the rights retained by the people, it is improbable that the framers meant to assign to the ninth amendment a lesser importance than other parts of the Bill of Rights. Second, the judicial failure to protect ninth amendment rights would permit Congress to invade those rights freely, a conclusion that mocks the textual command of the amendment that unenumerated rights may not be denied or disparaged by the enumeration of other rights. If only the enumerated rights are eligible for judicial protection, the unenumerated rights must necessarily atrophy. "If this is not disparagement... the concept has been drained of all meaning."\textsuperscript{79}

Moreover, Berger's view relies on an unarticulated assumption that ninth amendment rights are identical to tenth amendment powers. Justice Reed at least identified this as the assumption upon which he relied; Berger simply asks us to swallow this assumption in a flimsy capsule misleadingly labeled "original intent."\textsuperscript{80} Finally, since Berger

\textsuperscript{76} Berger, \textit{supra} note 2, at 9; Berger, \textit{supra} note 50, at 970-71.

\textsuperscript{77} 1 \textit{ANNALS OF CONG.}, \textit{supra} note 48, at 440 (James Madison’s remarks of June 8, 1789) (emphasis added).

\textsuperscript{78} \textit{Id.} at 433 (James Madison’s remarks of May 25, 1789) (emphasis added).

\textsuperscript{79} Massey, \textit{supra} note 2, at 318.

\textsuperscript{80} For additional criticism of Berger on this point, see Massey, \textit{supra} note 2, at 317-19.
admits that these rights exist, denying the judiciary the power to enforce them does not make the problem go away. Rather, the task of locating and enforcing them merely travels to governmental actors in some other branch. To justify his claim, Berger is required at a minimum to do what he does not: defend the proposition that human liberty is better served by vesting elected politicians, rather than judges, with custody of unenumerated rights.

A third view of the ninth amendment is articulated by Russell Caplan. Caplan contends that the amendment “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.”

In essence, Caplan adds the following italicized text to the ninth amendment:

The mere fact of enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people, but such retained rights may be denied or disparaged by any other means or power given to the federal government under this Constitution.

Thus, in Caplan’s view, the supremacy clause allows Congress, whenever it chooses, to displace any unenumerated right with its substantive source in state law, just as Congress may act under the commerce clause, for example, to displace contrary state law. Caplan’s position is dubious for three reasons.

First, it assumes that the Anti-Federalists failed to realize that the ninth amendment would not do what they demanded of it: preserve individual rights rooted in state law against federal invasion. Given the evident and overriding concern of the Anti-Federalists on this point, it is highly unlikely that the Anti-Federalists would have acceded to an amendment so ill-suited to their purpose. In essence, Caplan asks us to conclude “that the best interpretation of the Bill of Rights [including the ninth amendment] is based on the theory used by its most vociferous [Federalist] opponents.”

82. Caplan, supra note 2, at 228.
83. U.S. CONST. art. VI, cl. 2: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”
84. Caplan, supra note 2, at 228 (individual rights preserved by the ninth amendment continue until “eliminated . . . by federal preemption”).
85. Barnett, supra note 2, at 8.
Second, Caplan's reading compels him to explain the amendment's purpose. His analysis suggests that its function was to prevent the argument that simply by expressing certain rights as inviolate against federal invasion, the Constitution had automatically extinguished all other human rights, whatever their origin. This is an astonishing proposition, one radically opposed to the structure of the Constitution and the historical evidence of its creation, both of which support the conclusion that the central government was intended to be one of limited and delegated powers. Moreover, this view ignores the contemporaneous, if imperfect, intent of the tenth amendment to limit federal powers. Apparently, Caplan would accept the idea that the tenth amendment was an empty reminder of the federal government's limited powers and that the ninth amendment was an even emptier statement that the federal government had not yet displaced individual rights under the state constitutions. To a limited extent, such a view of the tenth amendment may be accurate, but to view the ninth amendment in this fashion is to lose all sight of its Anti-Federalist origins. It is an explanation that fails to account even for the "rights-powers" conception of the ninth amendment from which it is born.\textsuperscript{86}

Third, Caplan's recasting of the ninth amendment reveals that, like Berger and Justice Reed, he conflates the ninth and tenth amendments. Caplan is unable to perceive that the ninth amendment, like the first eight amendments, acts as an independent barrier to governmental action since he assumes that its limits are merely definitional. Like the tenth, Caplan's ninth amendment merely traces the frontier of federal power otherwise drawn in the Philadelphia Convention. If that was its intended function, there was no reason to add it to the Constitution.

The ninth amendment's text, history and structural role in the Constitution compel the conclusion that it establishes judicially enforceable federal constitutional rights with their substantive source in state constitutions. Since the implications of this conclusion are so dramatically at odds with the accepted understanding, it is imperative that the constitutional landscape thus created be charted in some reasonably complete fashion.

**II. NINTH AMENDMENT RIGHTS SUBSTANTIVELY ROOTED IN STATE CONSTITUTIONS: CONTEMPORARY APPLICATIONS, CONSEQUENCES AND OBJECTIONS**

The most radical implication of the view that the ninth amendment contains within it judicially enforceable rights that are substan-
tively rooted in the state constitutions is that such rights are prophylactic of congressional action. This conclusion follows inexorably from the textual directive that ninth amendment rights are to be treated on a par with the other enumerated rights. Just as Congress may not use its legislative power to establish a state religion, it may not use its legislative power to trench upon ninth amendment rights. Since the substance of those rights is to be found in state constitutions, the citizens of a state, through the medium of their constitutions, possess the apparent authority to disable Congress from limiting any rights the states specify as worthy of constitutional protection. A number of difficulties exist with such a view. While some are daunting, none are insuperable.

A. Ninth Amendment Rights—Static or Dynamic?

The first question posed is whether the “rights retained by the people” are a set of rights antecedent to federal constitutionalization and, thus, effectively frozen in time and content, or whether such rights constitute a dynamic, evolving list that changes as sentiment shifts within the states. Much can be said for the proposition that ninth amendment rights are static. The word “retained” surely suggests that these rights existed prior to the Constitution. One must remember, however, that the ninth amendment was likely intended as a source of both natural rights (which certainly predated any government) and positive rights (those created by, or incidental to, the act of political union). Thus, it is plausible that the term “retained” was meant to apply only to those ninth amendment rights that were natural. Yet from the perspective of 1791, all natural rights, as well as all rights enumerated in state constitutions, would have predated federal constitutional union. It is equally logical to suppose that both categories of rights would be “retained” by the people. It is thus unconvincing in both method and result to contend that the word “retained” was originally meant to apply only to natural rights.

88. See supra text accompanying notes 11-12 and Massey, supra note 2, at 312-23.
89. See Barnett, supra note 2, at 27 n.88 & accompanying text.
90. An egregious example of the aridity of this methodology of constitutional interpretation may be seen by examining an episode in Canadian constitutional law. Section 24 of the Constitution Act of 1867 (formerly the British North America Act) provides that “qualified Persons” may be appointed to the Senate. In 1928, the Supreme Court of Canada unanimously concluded that the word “persons” did not include women because it was unthinkable that the drafters of the 1867 Act could have meant for it to do so. No attempt was made to search for any more contemporary meaning. See In the matter of a Reference
Fortunately, there are other sources, more definitive than suppositions concerning original intent, that aid resolution of this issue. The addition over time of new states both complicates and simplifies matters. A frozen conception of ninth amendment rights would deny citizens of newly admitted states the most fundamental right apparently preserved by the ninth amendment: the right to decide the limits of governmental power to invade individual liberty and to make that decision effective against the people's federal agents. Moreover, denying this right to newly admitted states while conferring it upon the original states through a frozen conception of ninth amendment rights would violate the principle that each newly admitted state is admitted "on an equal footing with the original States in all respects whatsoever," a principle followed since the beginning of the American union.

Finally, a static conception of ninth amendment rights would undermine the principle that such rights are to be treated on a par with the other rights enumerated in the Constitution. With the possible exception of the seventh amendment's right to a civil jury trial, no other enumerated constitutional right is treated as frozen in time. Even the seventh amendment right necessarily bends with the times, given the necessity of fashioning analogues from 1791 practice to present-day causes of action unknown two centuries ago.

Given the inherent shortcomings of the static view of rights, a dynamic conception holds more promise. The dynamic view, however,

as to the Meaning of the Word "Persons" in Section 24 of the British North America Act, 1867 [1928] S.C.R. 276. On appeal, the Judicial Committee of the Privy Council reversed, contending that the historicist method was inconclusive and would produce results redolent "of days more barbarous than ours." Edwards v. Attorney-General for Canada [1930] App. Cas. 124, 128. Instead, Lord Sankey declared Canada's basic constitutional document to be "a living tree capable of growth and expansion within its natural limits." Id. at 136.

91. Coyle v. Oklahoma, 221 U.S. 559, 567 (1911), quoting from the act admitting Tennessee into the Union in 1796.

92. Although "the thrust of the [Seventh] Amendment was to preserve the right to jury trial as it existed in 1791," Curtis v. Loether, 415 U.S. 189, 198 (1974), the Court has necessarily been required to determine whether "actions brought to enforce statutory rights ... are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty." Granfinanciera, S.A. v. Nordberg, 109 S. Ct. 2782, 2790 (1989). If analogous to the former, the seventh amendment right attaches. But to reach the conclusion, the Court undertakes the following inquiry: historical comparison of the determination of whether the remedy sought is legal or equitable, and, if "these two factors indicate that a party is entitled to a jury trial under the Seventh Amendment, ... [deciding] whether Congress may assign and has assigned resolution of the relevant claim to a non-Article III adjudicative body that does not use a jury as factfinder." Id. (footnote omitted). Congress may do so with respect to "public rights," which are not simply issues arising between the government and private citizens, but may encompass private disputes that are "so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution ...." Thomas v. Union Carbide Agricultural Prods. Co., 473 U.S. 568, 586 (1985) (Brennan, J., concurring). See also Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442, 455 (1977). The end result is that the parallels between 1791 and 1991 are not exact.
requires us to confront the issue of whether federal ninth amendment rights can ever be applied uniformly across the country. Further, it raises the problem of whether such rights, once created by a state constitution and thus federalized by the ninth amendment, may be altered thereafter by unilateral action of the state polity.

Uniformity of ninth amendment rights is probably not possible, for it presents the courts with the truly Herculean task of stitching together a common—and consistent—fabric of rights from fifty-one different sources. Because this is unlikely, ninth amendment decisional law would develop a richly variegated pattern. Such a result is the probable intention of the ninth amendment, part of the legacy of a system of dual sovereignty, and in any case, a virtue. The citizens of each state would be entitled to define their relationship with all of their governmental agents. They would be able to do this both immediately (with the state via the state constitution) and, within the other constraining limits of the federal constitution, mediately (with the national government via the ninth amendment's incorporation of state constitutional guarantees). It has not proven burdensome for the federal courts to manage with fifty-one different legal regimes in diversity cases under the rule of Erie Railroad Co. v. Tompkins.93 Thus, 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.

Skeptics will observe that the natural consequence of viewing ninth amendment rights as dynamic is that some Americans will enjoy more individual liberty than others. They will. But all Americans will enjoy the same package of federal constitutional rights that owe their substance to federal law. Only with respect to the ninth amendment will federal constitutional rights vary with one's residence. Thus, for example, if Californians believe privacy to be constitutionally desirable and Michiganders do not, Michiganders can hardly complain if Congress invades their personal privacy in a fashion the ninth amendment would not permit with respect to Californians. To the extent the package of individual liberties provided by the federal Constitution and a state constitution is insufficient, state citizens will respond by altering their state constitutions or departing 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 homes while the citizens of every other state face fines or imprisonment for the same conduct.94

93. 304 U.S. 64 (1938).
94. Ravin v. State, 537 P.2d 494, 504, 511 (Alaska 1975). In November 1990, however, Alaskans amended the Alaska statutes by a ballot initiative to impose criminal penalties on the possession or use of marijuana in one's home. Since Ravin held that the
Acceptance of the dynamic conception, however, poses another problem. Once a state polity has created a right under its own constitution, and thereby transmuted the right into a federal constitutional guarantee via the ninth amendment, may that same state polity rescind the federal ninth amendment right by rescinding the underlying state right? Two other vexing issues relate to resolving this question: first, are ninth amendment rights enforceable only against the federal government or also against the states that create their substantive content; and second, are federal courts to acquire the power, in a case involving a ninth amendment right, to review de novo a state supreme court's legal conclusions as to the meaning of the state constitution?

The principle that helps to resolve all three issues is that, while ninth amendment rights are federal, their substance is derived wholly from state constitutional law. This is consistent with the animating desire of the ninth amendment's proponents: to reserve to the people their rights under local law, and to insulate those rights from federal invasion. With these principles in mind, it seems appropriate for a state polity to have within its own control the continued vitality of any given state constitutional right.

States, as a matter of independent state constitutional law, may alter their own constitutions. They may direct courts in their respective jurisdictions to interpret independent state guarantees of individual liberty no more generously than their federal counterparts. Under my view of the ninth amendment, the states would also continue to control the existence and substance of those ninth amendment rights that owe their initial viability to state constitutional action. This is quite similar to established Erie practice. In diversity cases, federal courts are required to follow the rule of law announced by the highest court of the state whose law is applicable. For this reason, and the fact that through the "adequate and independent" state grounds doctrine states are free...
to determine their own law, the law applicable in federal diversity cases is generally of state origin.

The same result would be true in ninth amendment cases: the asserted right, though federal, owes its entire substantive vitality to state constitutional action. Through the adequate and independent state grounds doctrine, the states remain free to establish and alter their constitutional law. That such alteration would have a collateral impact on a federal constitutional right is simply part of the ninth amendment's design. 98

Ninth amendment rights originating in state constitutions are dynamic organisms. Their dynamism is rendered less destabilizing than it might otherwise be by the fact that such rights, while federal, operate only as a barrier to federal and state governmental action with respect to the state of origin. They are thus dynamic in substance but cramped in geographic application.

B. Do Ninth Amendment Rights Based in State Constitutions Apply Only to the Federal Government or Also to the State of Origin?

Most commentators agree that the ninth amendment operates, if at all, only against federal action. 99 It is, of course, quite clear that the framers and ratifiers of the Bill of Rights intended it to bind only the actions of the federal government. Portions of the Bill of Rights control the states only through the medium of selective incorporation inferred in the fourteenth amendment's due process clause. The ninth amendment has, of course, never been so incorporated; at least at this point in our constitutional history, there is thought to be virtually nothing to incorporate. 100 However, because ninth amendment rights originate in and derive substance from state constitutional law they also apply to the state of origin through the constitution of the state. Thus, there

98. Other aspects of the federal Constitution may limit a state's ability to alter or remove certain guarantees of human liberty from the state constitution and the ninth amendment. Former Justice Hans Linde has suggested that although the federal Constitution's guarantee clause (U.S. Const. art. IV, § 4) is not justiciable in federal court (Luther v. Borden, 48 U.S. (7 How.) 1 (1849)), it may be justiciable in state courts. Further, it may operate to prevent certain substantive alterations of state constitutions. See Linde, When is Initiative Lawmaking not 'Republican Government'?, 17 Hastings Const. L.Q. 159 (1989).

99. See, e.g., J. Ely, supra note 2, at 37; Berger, supra note 2, at 23-24; Caplan, supra note 2, at 264. But see Redlich, supra note 2, at 807-08; Massey, supra note 2, at 309-19, 322-31; Barnett, supra note 2, at 9-11, 14-22, 30-42. The ninth amendment has never been expressly incorporated into the fourteenth amendment's due process clause and thus is not currently applicable to the states through that familiar medium. Presumably the rule of Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833)—that the provisions of the Bill of Rights limit only the powers of the federal government—currently applies to the ninth amendment.

100. Judge Bork, for example, regards the ninth amendment as analogous to "an amendment that says 'Congress shall make no' and then there is an ink blot and you cannot read the rest of it . . . . " Bork Hearings, supra note 50, at 249.
is no need for the ninth amendment to act directly upon the state. Indeed, limiting the ninth amendment to bar only federal action would simplify matters. Unfortunately, it is a bit unrealistic to do so, for the ninth amendment may also encompass a "natural law" dimension, and the unenumerated rights developed in that strain have no necessary foundation in state constitutions. For these "natural law" unenumerated rights to be treated on a par with enumerated rights incorporated into the fourteenth amendment's due process clause it may well be necessary to enforce them against the states. It would be illogical to develop a ninth amendment doctrine that applies only selectively against the states but no more illogical than the selective incorporation doctrine now attending the fourteenth amendment's due process clause. Accordingly, I argue that, like most of the Bill of Rights, the ninth amendment should apply to the states as well as the federal government.

Superficially, it would appear that Russell Caplan is correct when he contends that it is not "logically possible to 'incorporate' the ninth amendment through the fourteenth to apply as a prohibition against the states, because the ninth amendment was designed not to circumscribe but to protect the enactments of the states."101 Caplan seeks to reinforce his point by observing that, in its modern dimension, the fourteenth amendment protects only unenumerated federal rights against state action. Thus, the right of privacy, grounded in the substantive due process clause, and the closest analogue to an enforceable ninth amendment right, owes its legal existence to a conclusion that it is a federal right, not one grounded in state law.102

There are two things wrong with this view. First, ninth amendment rights are federal rights; they just owe their substance to another source of law. Thus, "if one considers that the federal character of ninth amendment ... rights derives from state action, application of the ninth amendment to the states would merely amount to a federally enforced right to make the states abide by their own law."103 Surely, a requirement that a government abide by its own law is the essence of due process.104 Second, the United States Supreme Court has begun, perhaps unwittingly, to do precisely that under the equal protection clause of the fourteenth amendment.

In Allegheny Pittsburgh Coal Co. v. County Comm'r of Webster

103. Massey, supra note 2, at 327.
104. See Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1855) ("The words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in Magna Charta"); see also Corwin, The 'Higher Law' Background of American Constitutional Law, 42 Harv. L. Rev. 365, 378 (1929).
a West Virginia county tax assessor assessed property on the basis of its recent purchase price, but made only minor modifications to assessments of land not recently sold. As a result, the taxes imposed on similar property were wildly disparate. The Supreme Court held that this practice violated the equal protection clause of the fourteenth amendment because the West Virginia Constitution provided that “taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value . . . .”

While conceding that West Virginia was free to “divide different kinds of property into classes and assign to each class a different tax burden so long as those divisions and burdens are reasonable,” the Court concluded that since the state’s constitution had expressly directed otherwise, the tax assessor violated Allegheny Pittsburgh’s federal equal protection rights. This is nothing more than a conclusion that West Virginia must comply with its own law, and that a federal court may compel a state actor to do so. While the Court used the rubric of federal equal protection law for this purpose, it could just as easily have relied on due process or, were it justiciable, the guarantee clause.

Although the Court made no mention of it, the result in Allegheny Pittsburgh is at odds with Pennhurst State School & Hospital v. Halderman, which held that the eleventh amendment prohibited a federal court from enjoining a state official from further violations of state law. The holdings may be harmonized by observing that Allegheny Pittsburgh posed an issue of federal law, albeit one the substance of which was supplied by a state constitution, while Pennhurst raised a claim of pure state law, with no claimed federal medium to transmute the asserted state right into a federal guarantee.

Allegheny Pittsburgh suggests that the Court is prepared to accept state sources of law as the substantive core of federal guarantees. There is no theoretical or conceptual reason to suppose that this approach must be confined to the equal protection clause. Indeed, with only minimal adherence to the ninth amendment’s text, historical context and structural place within the constitutional plan, it is hard to find a portion of the Constitution more suited to the job of federalizing state constitutional guarantees of individual rights, rendering them imperious to invasion by either the federal or state governments.

As might be expected there are problems with this view. For example, suppose that a criminal defendant is prosecuted in state court

and evidence is introduced that the defendant contends was seized in violation of the state constitution's version of the fourth amendment. Both parties concede that the federal fourth amendment poses no barrier to the admissibility of the evidence, so the issue is one purely of state constitutional law. On appeal, the state supreme court concludes that the evidence was properly admissible under the state constitution. The luckless convict now files a habeas corpus petition in federal district court, alleging that her federal ninth amendment rights were violated by the introduction of the evidence. Does the federal district court have the opportunity to revisit the same legal issue and decide it differently from the state supreme court, on the ground that the issue is one of federal constitutional law? I think not.

When this problem was introduced earlier it was resolved by noting that, while ninth amendment rights are federal, their substance is wholly derived from state constitutional law. Given that these rights would remain dormant but for a state polity's creation of them in its state constitution, it seems consistent with both the structure of the ninth amendment and the apparent intention of the ninth amendment's Anti-Federalist proponents to defer to the states' decision on the substantive meaning of a ninth amendment right. Similarly, in an Erie case, the federal courts would look to state law to supply the rule of decision. The difference here, of course, is that it is a state rule that drives the federal constitutional decision. That peculiarity is at the heart of the interdependent and mutually equal federal scheme that the Anti-Federalists envisioned in adopting the ninth amendment.

Moreover, such a result reinforces the earlier conclusion that state polities should retain the power to alter state constitutional rights and, thereby, alter the substance of federal ninth amendment rights. If ninth amendment rights were of a "ratchet" type—once created by state constitutional action they could never be reclaimed from the federal Constitution—it would be necessary to concede to federal courts the power to review such rights de novo. Such rights would have acquired a peculiar federal status, wholly disembodied from their state origins. This seems at odds with the intended nature of ninth amendment rights grounded in state constitutions and would inspire unnecessary conflict between the states and the federal government.

Finally, the principle of comity between the states and the federal government suggests, if not compels, deference to state authority. The United States Supreme Court continues, even after Garcia v. San Antonio Metropolitan Transit Authority, to conduct a "judicial patrol of the frontier between federal and state sovereignty" with respect

10. See supra text following note 93.
to the exercise of federal judicial power under article III of the Constitution.\textsuperscript{113} The principles employed by the Court to check federal judicial power—abstention, independent and adequate state grounds, the \textit{Erie} doctrine, exhaustion of state administrative remedies, to name just a few—are better thought of as “tenth amendment guarantees, or . . . rooted in tenth amendment principles of residual sovereignty, rather than seemingly unconnected and disparate doctrines . . .”\textsuperscript{114} Thus, as discussed, the tenth amendment operates to reinforce the original vision of the ninth amendment. The amendments were intended to work in tandem to preserve individual rights secured through state action and the power of states to act. In this instance, both amendments could operate as designed: to use the states, rather than the federal government, as structural bulwarks of human liberty.\textsuperscript{115}

\textbf{C. The Relationship between the Ninth Amendment and the Supremacy Clause}

One might argue that this view of the ninth amendment violates the supremacy clause. One reason it does not is simply because the ninth amendment incorporates into the federal Constitution state constitutional rights and secures them against federal invasion in the same way that the Constitution protects other federal constitutional rights. Just as the first amendment prevents Congress from mandating religious orthodoxy, the ninth amendment bars Congress from intruding upon the constitutionally secured right of privacy of an Alaskan or Californian. It is true, however, that this theory would create the possibility of conflicts between two federal constitutional rights, one based in state law and the other in federal law.

This is a serious problem; such a view of the ninth amendment cannot survive without some mechanism to resolve the inevitable inconsistencies arising between rights enumerated in the federal Constitution and rights unenumerated yet still extant in state constitutions. A number of examples illustrate the scope of this problem. First, sup-

\begin{itemize}
  \item \textsuperscript{113} \textit{Id.}
  \item \textsuperscript{114} \textit{Id.} at 74.
  \item \textsuperscript{115} There is another way in which the two amendments reinforce one another. The adequate and independent state grounds doctrine has generally been thought to be constitutionally compelled since Murdock v. Memphis, 87 U.S. (20 Wall.) 590 (1874). That conclusion is certainly not explicit in Murdock. Rather, Murdock is a case that merely raises doubts about the power of Congress to enable the federal courts to review and decide issues of state law independent of the state courts. \textit{Id.} at 626, 633. \textit{See also} L. Tribe, \textit{American Constitutional Law} 380 (2d. ed. 1988) (Murdock has a “constitutional resonance” that prevents Congress from authorizing the Supreme Court to review pure state law issues). My view of the ninth amendment validates Murdock and suggests that the ninth and tenth amendments, operating together, require the existence of the independent and adequate state grounds doctrine.
\end{itemize}
pose that a state constitution provides that fetuses are persons and enjoy all the constitutional rights provided other persons. Let us also assume that *Roe v. Wade* is still good law. This situation creates a plain conflict between the ninth amendment rights of the fetus and the fourteenth amendment substantive due process rights of the pregnant woman. Which prevails? This is an example of a pure constitutional conflict; Congress has not attempted to preempt the state constitutional right in any fashion.

Second, suppose the people of a state attempt to secure in their constitution an individual right to practice private racial discrimination. In response, Congress exercises its power under section 5 of the fourteenth amendment to prohibit the states from enforcing such a right. Shall the fourteenth or the ninth amendment prevail? This constitutes what would normally be a simple instance of preemption. In light of the theory of ninth amendment rights advanced here, however, such a conclusion would be unavailable.

Resolution of the first hypothetical, that of a purely constitutional nature, involves an unavoidable conflict. However, if one right must yield, the supremacy clause appears to dictate that the right with its substantive source in federal law should prevail. Thus, if a state's constitution guaranteed a woman's right to terminate an unwanted pregnancy and if the United States Supreme Court were to, hypothetically, reverse *Roe* and conclude that fetuses are persons, the federally created rights of the fetus would prevail. Such is the inevitable consequence of obedience to the supremacy of federally created rights and obligations.

Resolution of the second illustration, that involving racial discrimination, is more difficult. Preliminarily, there are several answers. First, the text and history of the fourteenth amendment reveal a clear intention to displace contrary state laws. Thus, it is consistent to resolve this textual conflict between competing federal rights by preferring the right with its substantive source in federal law. As in the case of the purely constitutional conflict, the structural role of the supremacy clause bolsters this resolution. Moreover, because a major purpose behind the ninth amendment was to insulate individual liberty from governmental intrusion, the operative rule, in instances of conflict, must be the one that pays most deference to the individual challenged by governmental authority or that which maximizes individual liberty.

To better understand the role of the supremacy clause in the adjudication of ninth amendment rights, consider another hypothetical—one that eliminates the fourteenth amendment as part of any solution. Suppose that the New York Constitution establishes the right to buy and sell securities traded on national securities markets while in pos-

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session of material inside information obtained in the performance of a fiduciary obligation of trust to the corporate issuer of the securities. Does the ninth amendment trump section 10b of the Securities and Exchange Act of 1934 \(^{117}\) and Rule 10b-5, \(^{118}\) which clearly prohibit such practices? If so, then states will freely evade and obviate congressional authority, precluding needed uniform national policies regarding financial markets. \(^{119}\)

There are two reasons why such a result would be inconsistent with the intended purpose of the ninth amendment. First, a broad purpose of the ninth amendment was to strike a balance between federal power and the individual liberties of citizens whom that power could affect. It was not an attempt to override the original Constitution which was intended, in part, to create a national marketplace and end state trade practices of preference and exclusion. Since the hypothetical New York constitutional provision would effectively balkanize national economic life, it is not within the intended purposes of the ninth amendment.

Second, the hypothetical right posed is one with no plausible connection to fundamental individual liberty. It would be necessary to separate judicially-created state constitutional rights that preserve fundamental human liberty against governmental invasion from those rights that seek only to preserve structural arrangements of the state government or to mediate between individuals. Some judicial good sense would be necessary to sort the “liberty-bearing norms” from the purely administrative ones. \(^{120}\) Thus, it is clear that courts need a test that will enable them to identify these “liberty-bearing norms.” In the best (or perhaps worst) tradition of the “formulaic” Constitution, \(^{121}\) I propose a three-part test to accomplish this task.

III. A Proposed Test

If the ninth amendment were interpreted in the “pure” Anti-Federalist fashion I have described, it would permit the states to frustrate national policies squarely within the legitimate powers of the national government. The proper structural function of the ninth amendment, however, is to permit the people, through their state governments, to


\(^{118}\) 17 C.F.R. § 240.10b-5 (1990).

\(^{119}\) I make no contention that state statutes are in any way insulated from federal preemption by virtue of the ninth amendment.

\(^{120}\) For instance, there is a world of difference between a right to cumulative voting in corporate shareholder elections and a right to be free of mandatory governmental drug testing without probable cause.

limit the ability of any government—state or federal—to invade the individual rights the sovereign people deem precious. This inherent paradox requires some device to enable the judiciary to enforce ninth amendment rights that promote the latter function while denying recognition to those purported ninth amendment rights that serve the former function.

It is also important to state precisely what this test is designed to accomplish. It is only part of a larger inquiry. As outlined earlier, the ninth amendment can be read as stating a presumption that the rights contained in state constitutions are federal constitutional rights retained through the ninth amendment. This presumption, however, can be overcome by a showing that the substance of the state constitutional right asserted as a ninth amendment right is in conflict with other parts of the federal Constitution. A form of constitutional preemption would operate conclusively to rebut the asserted ninth amendment right. So, as an extreme example, should a state include in its constitution a provision guaranteeing the right of its citizens to “own” people as slaves, the attempt to assert such a “right” as a ninth amendment right would be an absurdity, given the preemptive effect of the thirteenth amendment. It is only when the asserted ninth amendment right is not preempted by the federal Constitution or federal constitutional case law that the proposed test would operate. It is, to repeat, a test designed to sift the wheat—fundamental “liberty-bearing” rights—from the chaff.

The desirability of permitting the people, through their state constitutions, to define their fundamental liberties suggests that at least one criterion for any test is that the proposed right qualify as “fundamental.” Moreover, because the ninth amendment’s structural role in the Constitution seems to be to preserve fundamental individual rights free of governmental invasion, any test should limit ninth amendment rights to those that preclude governmental action. However, the creation of new rights can reduce the stock of rights held by other people. For example, if the right to speak freely includes the right to hurl racial insults, there is a corresponding reduction in another’s claimed right to be free of racial harrassment. For this reason, it is important to limit putative ninth amendment rights to those that do not significantly impair other existing and recognized fundamental rights. Finally, in order to control the possible abuse of state constitutions as devices to frustrate legitimate national policies, it would be necessary to refuse to recognize claimed ninth amendment rights that are, in essence, attempts by a state to capture some perceived benefit for its citizens while leaving the cost of providing the benefit to be borne by out-of-staters. With these objectives in mind, the following test is offered.
A. Does the Asserted Ninth Amendment Right Preserve a Fundamental Individual Liberty against Governmental Invasion?

The problem of identifying fundamental rights in a principled fashion has plagued constitutional law for some time.122 This has not, however, restrained the Court from vigorous attempts to formulate diverse criteria for locating such rights. Justice Stone sought to justify “exact ing judicial scrutiny” with respect to “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation,” specifically including statutes “directed . . . against discrete and insular minorities.”123 Justice Cardozo tried to limit fundamental rights to those “implicit in the concept of ordered liberty.”124 Justice Douglas argued that fundamental rights may be found in the “penumbras, formed by emanations from . . . [the] guarantees [in the Bill of Rights] that help give them life and substance.”125 Justice Powell contended that such rights could be limited to those “explicitly or implicitly guaranteed by the [federal] Constitution”126 but could not be determined by the “relative societal significance” of the asserted right.127 Chief Justice Rehnquist and Justice Scalia now advocate reliance on history, in the form of the “most specific tradition available.”128 By contrast, the second Justice Harlan stated that the proper historical inquiry relevant to locating fundamental rights is one that seeks more generally to determine “what history teaches are the traditions from which [our constitutional principles] developed as well as the traditions from which it broke. That tradition is a living thing.”129 To Harlan, unlike Rehnquist and Scalia, history is a moving picture, not a snapshot frozen in time.

While some have criticized as essentially standardless judicial at-

122. It is arguable that this problem dates back to the origins of American constitutional law. In Calder v. Bull, 3 U.S. (3 Dall.) 246 (1798), justices Chase and Iredell engaged in their now famous debate over the role of natural law in constitutional interpretation. Chase contended that “[a]n act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.” Id. at 271, 3 Dall. at 271. By contrast, Iredell protested that the Court lacked authority to invalidate legislation “merely because it is, in their judgment, contrary to the principles of natural justice.” Id. at 282. Prefigured in this is the modern debate over the legitimacy of rights wholly implied from the Constitution. Compare Griswold v. Connecticut, 381 U.S. 479 (1965), and Roe v. Wade, 410 U.S. 113 (1973), with Robert Bork's condemnation of Griswold as “an unprincipled decision, both in the way in which it derives a new constitutional right and the way in which it defines the right or, rather, fails to define it.” Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 9 (1971).

127. Id.
tempts to locate fundamental rights, and even defenders of the quest admit it to be an exercise fraught with indeterminacy, the courts have persisted in operating in this milieu because of a sense of the purposes the American democratic experiment was designed to accomplish. Philip Bobbitt describes this endeavor as "the character, or ethos, of the American polity" and devotes a substantial portion of his book Constitutional Fate to discussion of this ethical mode of constitutional interpretation. To Bobbitt, the enumerated rights in the "Bill of Rights . . . [act] to give us a constitutional motif, a cadence for our rights, so that once heard we can supply the rest on our own."

While that may be so, we must not lose sight of the constitutional guidance provided by the ninth amendment: rights that derive their substance from sources located outside the federal Constitution must be given deference equal to that given constitutionally enumerated rights. Accordingly, it would subvert the ninth amendment and render it meaningless to limit such rights to those "explicitly or implicitly guaranteed by the [federal] Constitution." The purpose of asking whether a ninth amendment right grounded in a state constitution is "fundamental" is to ensure that we recognize only those rights that are compatible with the ethos of our nation. No such salutary purpose would be served were rights recognized that are inimical to either rights inherent in national citizenship or to the legitimate functioning of national policy.

In pursuing this inquiry we could usefully employ the various devices extant for locating fundamental rights, but in the context of ninth amendment rights they should not be dispositive. Randy Barnett has argued that "the Ninth Amendment can be viewed as establishing a general constitutional presumption in favor of individual liberty." If such a presumption were observed, the tests currently employed, such as reliance upon history and tradition, would provide evidence bearing upon rebuttal of the presumption, rather than dispositive in and of themselves. Similar to the enumerated rights, governmental intrusion upon otherwise lawful individual conduct would be presumed

133. Id. at 93-242.
134. Id. at 177.
invalid unless found justified by a neutral magistrate. Barnett would place the burden of justification on the government,\(^\text{137}\) for as Stephen Macedo has noted, the Constitution established islands of governmental powers “surrounded by a sea of individual rights,” not “islands [of individual rights] surrounded by a sea of governmental powers.”\(^\text{138}\) The ninth amendment is a critical link in preventing the sea of individual rights from being drained by the engineers of governmental power.

Application of this test to the foregoing hypotheticals is reasonably straightforward. Few would seriously contend that securities trading based on inside information entrusted for corporate purposes is a fundamental right.\(^\text{139}\) It is hard to imagine this right as one implicit in ordered liberty, essential to a free people.\(^\text{140}\) Moreover, neither is such a practice part of “the most specific tradition available.”\(^\text{141}\) Similarly, if tradition is viewed as an evolving organism, the vector of our traditions suggests that we have repeatedly sought to limit commercial practices that injure society. Nor can this right be thought of as a right implicit in, or even emanating from, other enumerated rights.\(^\text{142}\)

The second illustration—the assertion of a right to practice private racial discrimination—has slightly more to commend it, but not enough. In an abstract sense, this nation certainly has a history and tradition of immunizing private choice, however odious, from governmental control. Even brief scrutiny of the “traditions from which we broke,” however, would condemn an asserted right to practice private racial discrimination. Nor could this right be thought of as one linked in some implicit manner to enumerated rights. To the contrary, it is a right that has its legitimacy called into question by the existence of other enumerated rights plainly hostile in spirit to it.

Paradoxically, the easiest question is posed by a state constitutional right securing to a fetus a right to be born, or to a woman the right to terminate an unwanted pregnancy. In the absence of a contrary federal constitutional right—necessarily controlling because of the supremacy clause\(^\text{143}\)—it would seem that the state-created right would be presumed fundamental. A provision securing a woman’s choice to end

\(^{137}\) Id. at 37.


\(^{139}\) But see H. Manne, Insider Trading and the Stock Market (1966) (questioning the economic wisdom of prohibiting insider trading); Carlton & Fischel, The Regulation of Insider Trading, 35 Stan. L. Rev. 857, 858, 866-68 (1983) (asserting that capital markets might be more efficient in equating price with real value if insider trading were permitted). To do justice to the authors, I doubt that any of them would assert that inside trading, however beneficial economically, is a fundamental right.

\(^{140}\) Supra note 127.

\(^{141}\) Supra note 128.

\(^{142}\) Supra note 129.

\(^{143}\) See supra text following note 115.
a pregnancy is one squarely within the idea of disabling governments from preventing individuals from exercising lawful private choices. Such a provision, moreover, is consonant with the direction in which our traditions have moved. Indeed, there is in the common law a reasonably specific tradition protecting against governmental penalty abortions obtained prior to fetal viability. A provision securing a fetal right to be born, at least regarding governmental attempts to deny the right, seems implicit in any concept of ordered liberty, to say nothing of the possibility that the right could be implied in the constitutional guarantee of due process of law. It is with respect to the second prong of the test that this right might encounter difficulty.

B. Does the Asserted Ninth Amendment Right Preserve Fundamental Individual Liberties Without Significant Invasion of Other Fundamental Individual Liberties?

Our constitutional tradition increasingly asks us to balance asserted rights. For example, is free speech, at bottom, more important than a rape victim's privacy or society's interest in protecting children from exploitation in child pornography? Is protection from the harm inflicted by racist speech more important than free speech? Is

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144. See, e.g., 3 E. Coke, Institutes of the Laws of England *50; 1 W. Blackstone, Commentaries *129-30 (abortion prior to quickening—recognizable fetal movement—was not a common law crime). See also authorities collected in Roe v. Wade, 410 U.S. 113, 135 n.26 (1973).


147. In recent years, a number of public and private educational institutions have begun to promulgate policies seeking to strike a constitutional balance between the rights of 'hate speakers' under the first amendment and the rights of ethnic groups to pursue education free of racial harassment. See, for example, Stanford University's policy on racist speech, which subjects such speech to disciplinary action whenever it "is intended to insult or stigmatize an individual or a small group of individuals"; "is addressed directly to the individual or individuals whom it insults or stigmatizes"; and "makes use of insulting or 'fighting' words," defined as words "which are commonly understood to convey direct and visceral contempt for human beings . . . ." Stanford University Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment, June 1990. The University of Michigan's policy was invalidated in Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989), on grounds of overbreadth and vagueness. At least one chapter of the American Civil Liberties Union (Northern California) has adopted a similar statement of policy, which would permit racist speech on college campuses to be prohibited only when it "is specifically intended to and does harass an individual"; "is addressed directly to the individual or individuals to whom it harasses"; and "creates a hostile and intimidating environment which the speaker reasonably knows or should know will seriously and directly impede the educational opportunities of the individual or individuals to whom it is directly addressed . . . is enforced in a manner consistent with due process protections . . . contains specific illustrations . . . which demonstrate when the policy does or does not apply, is proportionate to the gravity of the offense, and does not impose prior restraint upon expression." ACLU-NC Policy Concerning Racist and other Group-Based Harassment on College Campuses, approved March 8, 1990.
the state's interest in eradicating racial discrimination sufficiently compelling to justify imposing a racial quota in the allocation of contracts or licenses?\textsuperscript{148}

As rights expand they conflict more frequently. This tendency is exacerbated as we begin to conceive of rights as collective rather than individual entitlements. Thus, the \textit{collective} right of an ethnic group to be protected from racial epithets is arrayed against the \textit{individual} claim of a racist to speak freely. Because the collective right asserted in this example is only enforceable against governmental action, the coherence of the state action doctrine has traditionally served as a mediating device, permitting courts to avoid resolution of this clash as a constitutional matter. The state action doctrine, however, has partially broken down,\textsuperscript{149} and legislatures have sought to protect collective rights by statute, thus forcing the courts to confront these competing claims of entitlement. Increasingly, the judicial task includes the responsibility of weighing rights against one another. This portion of the proposed test is but another aspect of that role.

To discharge this aspect of the test, the courts would be required to assess the "fundamental" status of the right being infringed by a claimed ninth amendment right. If deemed fundamental, it would be necessary to determine the degree of infringement. Only if the infringe-
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ment were substantial should the putative ninth amendment right be denied recognition, since it will be recalled that this test operates only when the source of the right in collision with the ninth amendment right is also located outside of the federal Constitution. If the source of the right were congressional legislation, there would be no particular reason to prefer Congress’ judgment to that of the states, especially since the ninth amendment can be read to express an original preference for the state decision.

Thus, a state constitutional provision that seeks to guarantee its citizens the right to practice private racial discrimination is in conflict with federal constitutional law since it amounts to a state practice that coerces or encourages private racial discrimination. This proposed test need not be invoked at all to invalidate the provision. By contrast, a state constitutional right to privacy interpreted to prohibit drug-testing of job applicants by private employers is surely not sufficiently invasive of an employer’s hypothetically fundamental right to select its workforce freely so as to cause the privacy right to be denied ninth amendment protection.

C. Does the Asserted Ninth Amendment Right Operate in a Fashion That Does Not Unreasonably Export the Social Costs of the Right?

The federalist nature of ninth amendment rights requires that some test be used to prevent the kind of economic or social balkanization that the original Constitution was designed to prevent. The problem is a pervasive one, and stems from each political jurisdiction in a polity seeking to better itself at the expense of its neighbors. Small units of government will be tempted to adopt policies that produce benefits for their constituents paid for by residents of other jurisdictions. Similarly, large-scale units of government will be susceptible to factional alliances arranged to capture the machinery of government and deliver benefits to the faction’s members, the costs of which will be borne by citizens not affiliated with the dominant faction. Moreover, small units of government will not incur some costs, like national defense, because the benefit of the burdens is dissipated over the entire polity to such an extent that it makes little economic sense for a single jurisdiction to incur all costs involved. Thus, there is clearly reason to tinker with the jurisdictional authority of political units in order to make the bound-


\[152. \text{See U.S. CONST. art I, § 8 (commerce clause) & art. IV, § 2 (privileges and immunities clause).}\]
aries of such authority congruent with the full costs and benefits of the decisions made by the political unit. Dissonance results in externalities, and politicians shrewdly exploit these opportunities to capture “free” benefits by imposing costs on others. It is a form of political arbitrage which, unlike economic arbitrage, serves less to achieve market equilibrium than to distort and pervert both allocations of public resources and the democratic process itself.

Borrowing from dormant commerce clause jurisprudence, it is possible to address this issue by a series of inquiries. First, is the right at issue one that is facially designed to capture benefits for local residents at the expense of outsiders? If so, it must fail. A state constitutional right preserving New Jersey lands for New Jersey waste would certainly not meet this test. Second, does the right, though facially neutral, impose a disproportionate share of costs on outsiders and vest a disproportionate share of benefits with insiders? This right, too, must fail. Thus, were Arizona to make it a matter of constitutional right to have trains of no longer than seventy freight cars traverse the state, it would likely fail as a ninth amendment right on this ground as well as for failure to demonstrate the fundamental nature of the right involved.

To make the point more concrete, suppose that Nevada's constitution secures the right of its citizens to possess and view child pornography in the privacy of their homes. Assume that Congress, however, has used its commerce power to prohibit the interstate movement of such materials and has also prohibited the production of child pornography. A Nevadan is then prosecuted in federal court because he accepted shipment by mail of child pornography which all parties concede he intended to view and possess solely within his own home. The Nevadan contends that the prosecution is barred by the ninth amendment, even though this right is not part of his federally protected due process privacy rights.

Assuming that Nevada has a statute that bars Nevadans from producing child pornography within Nevada, the asserted right, while facially neutral, certainly seems to impose the social costs of the protected liberty on non-Nevadans. As a result, it does not acquire ninth amendment status. But what if Nevada has no such statute? The problem, at least under the third prong of the proposed test, becomes much tougher. The decision must ultimately rest on an empirical assessment of the in-state and out-of-state impact of the social costs of producing child pornography. Courts will necessarily be forced to rely, to some degree, on social scientific (but not exclusively economic) studies to

155. See Osborne v. Ohio, 110 S. Ct. 1691 (1990) (court concludes that a state may constitutionally proscribe the possession and viewing of child pornography).
assess this empirical impact.\textsuperscript{156} While it is arguable that these problems have not been handled adeptly in the dormant commerce clause area,\textsuperscript{157} they have been handled without evident injury to the federal system.

Thus, the ninth amendment right does not seriously impede the values of the federal system sought to be preserved by the supremacy clause. Nor does it vitiate the substance of ninth amendment rights rooted in state constitutions. My suggested resolution may appear to "disparage" unenumerated rights when placed in conflict with enumerated rights or important values of federal union. This is necessitated by the delicate balance of interests demanded of a truly dual, co-equal partnership in a federal system. Courts can reasonably be asked to make the delicate judgments this test requires. The interstices and intersections of federal and state power require sensitive judgment and a keen appreciation of the value of federalism to human liberty will help courts with the job. Without judicial attention, the framework of federalism will rust and eventually collapse. The ninth amendment is a textual reminder to do the necessary maintenance to avoid this disaster. However difficult these judgments may prove to be, this inquiry is preferable to the alternative: the total disavowal of unenumerated rights, with the attendant consequence that Congress will freely continue to ignore state barriers to the imposition of its authority upon the liberty of individuals.

IV. Conclusion

The ninth amendment is part of the Anti-Federalist constitution. As such, it is an important device to preserve the structural value of federalism. Deeply embedded in the amendment are two ideas. First, to paraphrase Stephen Macedo, government powers are islands in a sea of individual rights, not the sea encompassing islands of enumerated liberties. Second, citizens in our federal system remain free to articulate, through their autonomous state governments, the values of human


\textsuperscript{157} See, e.g., \textit{CTS Corp. v. Dynamics Corp.}, 481 U.S. 69, 95 (1987) (Scalia, J., concurring). Justice Scalia criticizes the aspect of dormant commerce clause jurisprudence that requires courts to assess "whether the burden on commerce imposed by a state statute is clearly excessive in relation to the putative local benefits." \textit{Id.} He prefers the approach advocated by Donald Regan, who argues that the Supreme Court should invalidate, on dormant commerce clause grounds, only those state laws that "discriminate against out-of-state interests." \textit{Id.} See Regan, \textit{The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause}, 84 \textit{MICH. L. REV.} 1091 (1986).
liberty they particularly cherish. The Anti-Federalist legacy is the long-forgotten point that those norms, selected by the citizens of the states, also bind their federal governmental agents.

Because our system was intended to be one of dual sovereignty, one important function of the ninth amendment is to preserve the delicate balance between state autonomy and national uniformity. Of course, use of the ninth amendment in the fashion advocated here will create some friction at the margins; such a condition is probably always present in federal systems. But that friction can be alleviated by a judiciary that understands the importance of federalism to the preservation of human liberty. The ninth amendment stands as a (now) silent reproach to those who urge the abandonment of judicial efforts to police the frontier between federal power and state-guaranteed rights.\(^\text{158}\)

There are, no doubt, many criticisms that may be leveled at the radical and perhaps unsettling approach forwarded here. I hope to see them emerge, for it is my purpose 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 has languished in desuetude for its entire history. It is time to dust off this Anti-Federalist relic, put it to use, and recognize that the Constitution truly created a union—of Federalists as well as Anti-Federalists—intended to foster diverse choices concerning the relationship between individuals and their governmental agents. Let us hope that we have not so abandoned this view of the ninth amendment that today we may not fruitfully mine this fertile constitutional bulwark of human liberty, two centuries after its origin.