

EMPLOYING THE NINTH AMENDMENT TO SUPPLEMENT SUBSTANTIVE DUE PROCESS: RECOGNIZING THE HISTORY OF THE NINTH AMENDMENT AND THE EXISTENCE OF NONFUNDAMENTAL UNENUMERATED RIGHTS

Abstract: Asserted liberty rights not enumerated in the U.S. Constitution are generally considered under the substantive due process doctrine. Courts look only at narrowly defined interests and their history and traditions, and recognize only fundamental rights. This approach, however, fails to acknowledge the existence of nonfundamental rights that deserve recognition and a level of protection from improper legislation. As a supplement to its incomplete substantive due process jurisprudence, the Supreme Court should examine the Ninth Amendment's history and traditions. Looking to this history and tradition will provide better guideposts for what types of rights should be protected. Employing the Ninth Amendment in this way will also help alleviate three primary reasons for the Amendment's disuse: the Ninth Amendment was not meant to apply against states, judges have no power to protect unenumerated rights, and the Ninth Amendment was only relevant under the now-disfavored penumbras and emanations test.

INTRODUCTION

According to the U.S. Supreme Court, individual rights not listed in the U.S. Constitution are affirmatively recognized only if they are deemed fundamental.¹ Courts use the Fifth and Fourteenth Amendments of the Constitution to prevent federal and state governments from depriving people of their liberty interests in unenumerated rights without due process of law.² When people bring claims that their rights have been violated by government regulation, courts narrowly define the asserted liberty interest, look at the history and traditions of protecting that interest, and then determine if it is fundamental to the

¹ See *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997).

² See U.S. CONST. amends. V, XIV, § 1; *Glucksberg*, 521 U.S. at 719-20. Due process has both substantive and procedural components. *Glucksberg*, 521 U.S. at 719.

concept of ordered liberty.³ If a court determines that the interest is fundamental, the government must narrowly tailor its law to serve a compelling interest.⁴

This test, developed from the substantive due process doctrine, does not adequately protect otherwise valid rights that courts do not deem fundamental.⁵ If a law infringes a right that is not considered fundamental, the government merely must demonstrate some rational basis for passing the law.⁶ This rational basis threshold is a low one—otherwise valid rights can be ignored based on the government's arguments for a law, regardless of the acceptability of its assumptions.⁷ This lack of consideration for nonfundamental rights also requires courts to view asserted liberty interests as an all-or-nothing gambit—unenumerated rights are either fundamental or they are not rights at all.⁸ Abortion rights, sexual privacy rights, and the right to refuse medical treatment have all been examined under variations of this approach.⁹

Contrary to this all-or-nothing approach to rights, the framers of the Constitution, including the Ninth Amendment's drafter, James Madison, understood there to be a vast number of rights and different levels of protections for them.¹⁰ Madison drafted the Ninth Amendment

³ *Glucksberg*, 521 U.S. at 720–22.

⁴ *Id.* at 720–21.

⁵ *See id.* at 720–22.

⁶ *See id.* at 722.

⁷ *See id.*; *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 819–20 (11th Cir. 2004) (holding that even if the assumptions underlying the government's belief in preventing homosexuals from adopting are wrong, the mere fact that they can be argued is sufficient to pass rational basis review).

⁸ *See Glucksberg*, 521 U.S. at 720–22.

⁹ *See Planned Parenthood v. Casey*, 505 U.S. 833, 857 (1992) (affirming fundamental right to have an abortion); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 279, 281 (1990) (acknowledging the right to refuse medical treatment); *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986) (denying the existence of right to engage in homosexual sodomy), *overruled by* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (invalidating law that prohibited homosexual sodomy); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (holding that there is a fundamental right to have an abortion, in light of the right of privacy). Although the majority opinion in *Cruzan* did not hold that the right to refuse medical treatment is fundamental, five Justices attempted to answer this question and considered the answer integral to the decision. *See Cruzan*, 497 U.S. at 295 (Scalia, J., concurring); *id.* at 302, 304 (Brennan, J., dissenting); *id.* at 341–42 (Stevens, J., dissenting).

¹⁰ *See* James Madison, Speech to the House of Representatives (June 8, 1789), *reprinted in* JACK N. RAKOVE, *DECLARING RIGHTS: A BRIEF HISTORY WITH DOCUMENTS* 176–79 (1998) [hereinafter Madison's Bill of Rights Speech]; *see also* Randy E. Barnett, *Introduction: Implementing the Ninth Amendment*, in 2 *THE RIGHTS RETAINED BY THE PEOPLE* 8–9 (Randy E. Barnett ed., 1993) (citing 1 *ANNALS OF CONG.* 759–60 (Joseph Gales & William Seaton eds., 1834) (statement of Rep. Sedgwick)) [hereinafter Statement of Rep. Sedgwick]; James Ire-

to alleviate concerns that rights not listed in the Constitution or the Bill of Rights would be left unprotected.¹¹ The Amendment's final wording was important enough to extend significantly the debate between the Virginia state convention and the U.S. Congress about whether to ratify the draft Bill of Rights.¹²

The Ninth Amendment was also at the heart of the U.S. Supreme Court case that first recognized a right to privacy, even though that right is not specifically mentioned in the Constitution.¹³ The Ninth Amendment states that unenumerated rights should not be disparaged or denied merely because they have not been enumerated in the Constitution.¹⁴ And yet, today the Ninth Amendment still languishes in jurisprudential obscurity and confusion.¹⁵

This Note argues that courts should employ the Ninth Amendment to affirm that some unenumerated rights test is required generally, and to supplement the substantive due process doctrine by recognizing non-fundamental unenumerated rights and providing additional decision-

dell, Speech in the North Carolina Ratification Convention (July 28, 1788), *reprinted in* RAKOVE, *supra*, at 146 [hereinafter Iredell's Speech in the North Carolina Convention]; *infra* notes 108–128 and accompanying text (explaining the history of the Ninth Amendment and the views of its drafter).

¹¹ See Madison's Bill of Rights Speech, *supra* note 10, at 178–79; see also RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* 235 (2004); CALVIN R. MASSEY, *SILENT RIGHTS: THE NINTH AMENDMENT AND THE CONSTITUTION'S UNENUMERATED RIGHTS* 13 (1995).

¹² See RAKOVE, *supra* note 10, at 113–14, 168, 202; Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331, 333, 371 (2004). Virginia withheld ratification until 1791 after reassurances from the Ninth Amendment's drafter, Madison, that the Amendment could be used to protect against broad interpretations of federal power. Lash, *supra*, at 392–93 (citing James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791)).

¹³ See *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965); *id.* at 487–93 (Goldberg, J., concurring).

¹⁴ U.S. CONST. amend. IX; see BARNETT, *supra* note 11, at 235; MASSEY, *supra* note 11, at 71.

¹⁵ See *infra* notes 129–183 and accompanying text. Although the majority in *Griswold* mentioned the Ninth Amendment and Justice Goldberg explored it in his concurring opinion, Justice Black in dissent referred to the Ninth Amendment as a recent discovery. *Griswold*, 381 U.S. at 518 (Black, J., dissenting). Within and since *Griswold*, several Justices have referred to certain individual rights as Ninth Amendment rights. See *Troxel v. Granville*, 530 U.S. 57, 91–92 (2000) (Scalia, J., dissenting) (right of parents to direct the upbringing of their children); *Lubin v. Panish*, 415 U.S. 709, 721 (1974) (Douglas, J., concurring) (voting rights); *Griswold*, 381 U.S. at 531 (Stewart, J., dissenting) (right to persuade elected representatives). Some lower courts have referred to the Ninth Amendment as a more general protector of unenumerated rights. See *Gibson v. Matthews*, 926 F.2d 532, 537 (6th Cir. 1991); *Charles v. Brown*, 495 F. Supp. 862, 863–64 (N.D. Ala. 1980). In general, however, the Ninth Amendment is not a particularly common constitutional topic for judges. See BARNETT, *supra* note 11, at 234–35.

making guideposts.¹⁶ Part I provides the current parameters for examining liberty interests under substantive due process and the presumption of constitutionality for legislative action.¹⁷ Part II of this Note considers the text of the Ninth Amendment, and reviews its ratification history.¹⁸ Part III discusses the varied case law employing or avoiding the Ninth Amendment.¹⁹ Part IV argues that the Ninth Amendment should be employed as support for an unenumerated rights test generally and for supplementing substantive due process specifically.²⁰ Part IV also provides a summary and example of the proposed supplemented unenumerated rights test.²¹ Finally, Part V contends that the three primary reasons the Ninth Amendment has been judicially avoided are answerable.²²

I. THE CURRENT UNENUMERATED RIGHTS TEST: SUBSTANTIVE DUE PROCESS IN *GLUCKSBERG*

Substantive due process is a constitutional doctrine that protects individuals' rights from government infringement.²³ The U.S. Supreme Court's most recent enunciation of the test for determining unenumerated individual rights under substantive due process appeared in 1997 in *Washington v. Glucksberg*.²⁴ If the asserted right is not fundamental, any infringing law maintains a strong presumption of constitutionality, as discussed in Section B.²⁵

¹⁶ See *infra* notes 198–270 and accompanying text.

¹⁷ See *infra* notes 23–59 and accompanying text.

¹⁸ See *infra* notes 60–128 and accompanying text.

¹⁹ See *infra* notes 129–197 and accompanying text.

²⁰ See *infra* notes 198–270 and accompanying text.

²¹ See *infra* notes 271–303 and accompanying text.

²² See *infra* notes 304–349 and accompanying text.

²³ See Kermit Roosevelt III, *Forget the Fundamentals: Fixing Substantive Due Process*, 8 U. PA. J. CONST. L. 983, 993–94 (2006). This Note focuses on court recognition of liberty interests under substantive due process. Though it is possible that the Ninth Amendment, substantive due process, or a combination thereof could be used also to recognize unenumerated property rights, the Supreme Court has provided little guidance in this area. See Robert J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 GEO. L.J. 555, 591, 609 (1997) (arguing that, despite the Court's lack of attention to property for due process purposes, certain interests in "property" merit substantive due process recognition and protection). But see *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 584–85 (1996) (suggesting that fundamental property interests exist in holding that a two-million-dollar punitive damage award was grossly excessive in relation to legitimate state interests).

²⁴ 521 U.S. 702, 720–22 (1997).

²⁵ See *infra* notes 48–59 and accompanying text.

A. Substantive Due Process in *Washington v. Glucksberg*

In *Glucksberg*, the Supreme Court thoroughly analyzed substantive due process and stated the current test for recognizing rights not listed in the Constitution.²⁶ The Court held that the plaintiff-patients in the case had no right to physician-assisted suicide, nor did the plaintiff-physicians have a right to assist them.²⁷

The Court's unenumerated rights test is essentially a fundamental rights test.²⁸ First, a court carefully and narrowly defines the asserted liberty interest.²⁹ Then, the court determines whether this defined right is fundamental based on the tradition and history of protections for that interest, and whether it is necessary to the concept of ordered liberty.³⁰ If the asserted right is determined to be fundamental, the court requires the infringing legislation to be narrowly tailored to achieve a compelling government interest.³¹ If the asserted right is not determined to be fundamental, the legislature must simply show some rational basis for enacting the law.³² This method generally does not recognize or affirmatively protect nonfundamental rights.³³

The Court in *Glucksberg* did, however, list unenumerated fundamental rights that have been protected by courts through due process

²⁶ See 521 U.S. at 720–22; Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 836–39 (2003).

²⁷ See *Glucksberg*, 521 U.S. at 723, 735. The plaintiffs in this case asserted that they had a liberty interest that was protected by the Fourteenth Amendment's Due Process Clause to choose how to die and to control one's final days. *Id.* at 722. The U.S. Court of Appeals for the Ninth Circuit had found for the plaintiffs after defining the interest as a general right to die. *See id.* at 709. The U.S. Supreme Court, however, defined the asserted interest as a right to commit suicide and a right to have assistance in doing so. *Id.* at 723.

²⁸ See *id.* at 719–22. For this test, the court determines whether the Due Process Clause of the Fourteenth Amendment, which states that no person shall be deprived of liberty by state governments without due process of law, protects a certain right. *Id.* at 719–20; see U.S. CONST. amend. XIV, § 1. The Supreme Court in *Glucksberg* first acknowledged that the Due Process Clause of the Fourteenth Amendment guarantees more than just fair procedural process. 521 U.S. at 719–20; see U.S. CONST. amend. XIV, § 1. The Due Process Clause also protects liberty beyond physical restraint, providing heightened protection against government interference with certain fundamental rights and liberty interests. *Glucksberg*, 521 U.S. at 719–20.

²⁹ *Glucksberg*, 521 U.S. at 721.

³⁰ *Id.* at 720–21.

³¹ See Rubin, *supra* note 26, at 842.

³² See *Glucksberg*, 521 U.S. at 720–22.

³³ See *id.* at 719–22; Rubin, *supra* note 26, at 844. Two Supreme Court cases have recognized individual liberty interests without describing them as fundamental, though both were heavily divided opinions as to the nature of these rights. See *Lawrence v. Texas*, 539 U.S. 558, 561, 577–78 (2003) (sexual act privacy); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 263–64, 279, 281 (1990) (refusal of medical treatment).

analysis.³⁴ These include the right to marry,³⁵ to direct the education and upbringing of one's children,³⁶ to have children,³⁷ to marital privacy,³⁸ to use contraception,³⁹ to bodily integrity,⁴⁰ and to have an abortion.⁴¹ The Court also has strongly suggested that a right to refuse unwanted life-saving medical treatment exists.⁴²

Nevertheless, the Court tempered its unenumerated fundamental rights analysis by noting its reluctance to expand the concept of substantive due process.⁴³ According to the Court, this reluctance is due to the scarce and open-ended guideposts for responsible decision making in this area.⁴⁴ Although the outlines of the liberty protected by the Fourteenth Amendment have never been fully clarified, and may not be capable of such clarification, the Court stated that the substantive due process doctrine at least has been carefully refined by the listed concrete examples.⁴⁵ Thus, the Court can now avoid balancing competing interests in every case.⁴⁶ Furthermore, responsible decision making is important in this area because the Court faces a difficult question: should unelected federal judges determine policy and make value judgments rather than elected representatives?⁴⁷

B. *Limiting Rights: The Presumption of Constitutionality*

In 1938 in *United States v. Carolene Products Co.*, the Supreme Court, in its famous "Footnote Four," wrote that state legislation has the pre-

³⁴ *Glucksberg*, 521 U.S. at 720; Rubin, *supra* note 26, at 843-44.

³⁵ See *Turner v. Safley*, 482 U.S. 78, 94-99 (1987); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); Rubin, *supra* note 26, at 843-44.

³⁶ See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923).

³⁷ See *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 535, 541 (1942); see also *Glucksberg*, 521 U.S. at 720 (describing *Skinner* as a case implicating the fundamental right to have children).

³⁸ See *Griswold v. Connecticut*, 381 U.S. 479, 481, 484 (1965).

³⁹ See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold*, 381 U.S. at 485.

⁴⁰ See *Rochin v. California*, 342 U.S. 165, 173 (1952).

⁴¹ See *Planned Parenthood v. Casey*, 505 U.S. 833, 857-58 (1992).

⁴² See *Glucksberg*, 521 U.S. at 720; *Cruzan*, 497 U.S. at 279.

⁴³ *Glucksberg*, 521 U.S. at 720.

⁴⁴ *Id.* at 720-21.

⁴⁵ *Id.* at 722.

⁴⁶ *Id.*

⁴⁷ See Jonathan T. Molot, *Principled Minimalism: Restriking the Balance Between Judicial Minimalism and Neutral Principles*, 90 VA. L. REV. 1753, 1754-55 (2004); Michael Perry, *Protecting Human Rights in a Democracy: What Role for the Courts?*, 38 WAKE FOREST L. REV. 635, 637 (2003). But see Roosevelt, *supra* note 23, at 994 (arguing that the cost of errors in this area is lower for courts than for legislatures because of the availability of judicial review).

sumption of constitutionality unless it violates a direct prohibition in the Bill of Rights.⁴⁸ Later substantive due process decisions expanded this presumption to cover unenumerated but fundamental rights.⁴⁹ State legislation is thus presumed to be constitutional unless it violates direct prohibitions in the first ten amendments, prohibitions elsewhere in the Constitution, or judicially determined fundamental rights.⁵⁰

State governments' long history of broad police powers generally supports this presumption of constitutionality.⁵¹ There has been, however, some question as to how limitless these police powers should be.⁵² As far back as the late nineteenth and early twentieth centuries, some scholars argued for judicial limits to the state police power as it affected personal liberty interests.⁵³ Also, state courts have invalidated legislation for going beyond the scope of the police power.⁵⁴

Then, in 2003 in *Lawrence v. Texas*, the U.S. Supreme Court invalidated a state law that prohibited homosexual sodomy, without applying an equal protection claim or determining that the law violated a fundamental right.⁵⁵ Rather, the Court held that the Texas legislature had no legitimate purpose in invading the liberty interests of the individual plaintiffs under substantive due process.⁵⁶ It appears that the majority invalidated the law as having no rational basis, but this was not explicitly stated by the Court.⁵⁷ The Court did not specifically

⁴⁸ 304 U.S. 144, 152 & n.4 (1938); BARNETT, *supra* note 11, at 229–30.

⁴⁹ BARNETT, *supra* note 11, at 233–34; see *Griswold*, 381 U.S. at 486; see also *Carolene Prods.*, 304 U.S. at 152 & n.4.

⁵⁰ BARNETT, *supra* note 11, at 233–34; see U.S. CONST. amends. I–VIII; *Griswold*, 381 U.S. at 486; *Carolene Prods.*, 304 U.S. at 152 & n.4.

⁵¹ See RAKOVE, *supra* note 10, at 119. At the founding of the Constitution, states were governments of broad legislative powers while the federal government was limited to enumerated powers. See James Wilson, Statehouse Speech (Oct. 6, 1787), reprinted in RAKOVE, *supra* note 10, at 121–22 [hereinafter Wilson Statehouse Speech].

⁵² See Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 430, 434 (2004).

⁵³ See *id.* at 475. See generally ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* (1904); CHRISTOPHER G. TIEDMAN, *A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES* (1886).

⁵⁴ See, e.g., *Powell v. State*, 510 S.E.2d 18, 25 (Ga. 1998) (invalidating antisodomy law for going beyond the proper scope of the police power); *People v. Onofre*, 415 N.E.2d 936, 943 (N.Y. 1980) (same); *Commonwealth v. Bonadio*, 415 A.2d 47, 49–50 (Pa. 1980) (same).

⁵⁵ See 539 U.S. at 564–79. Justice O'Connor did use an equal protection theory in her concurring opinion, stating that because the antisodomy law applied only to homosexuals, it violated equal protection. *Id.* at 579 (O'Connor, J., concurring).

⁵⁶ *Id.* at 577–78 (majority opinion).

⁵⁷ See *id.*; John G. Culhane, *Writing On, Around, and Through Lawrence v. Texas*, 38 CREIGHTON L. REV. 493, 497, 503 (2005); Suzanne B. Goldberg, *Morals-Based Justifications*

define any right at issue, fundamental or otherwise, but rather a general liberty interest.⁵⁸ Additionally, the Court did not provide guideposts for future determinations.⁵⁹

II. THE TEXT AND RATIFICATION OF THE NINTH AMENDMENT

In *Marbury v. Madison* in 1803, the U.S. Supreme Court stated that every clause in the Constitution was intended to have some effect.⁶⁰ A construction that would deny a clause any effect would be improper unless the text itself required it.⁶¹ Yet, Supreme Court majorities have avoided construing the Ninth Amendment and have left it with essentially no binding meaning despite its plain language.⁶² To understand why, it is necessary to examine the text and ratification history of the Ninth Amendment.⁶³

A. *The Text of the Ninth Amendment*

The Ninth Amendment to the U.S. Constitution was ratified in 1791 and states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."⁶⁴ An "enumeration" referred to a listing of specific items, of which there are two relevant to this Note.⁶⁵ First, the legitimate powers of the federal government are all enumerated in the Constitution.⁶⁶ Second,

for Lawmaking: *Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233, 1281–83 (2004); Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1113 (2004).

⁵⁸ See *Lawrence*, 539 U.S. at 564, 578.

⁵⁹ See *id.* at 563–79; see also Gregory A. Kalscheur, S.J., *Moral Limits on Morals Legislation: Lessons for U.S. Law from the Declaration on Human Freedom*, 16 S. CAL. INTERDISC. L.J. 1, 3 (2006) (noting that *Lawrence* failed to provide guideposts for determining valid morals-based justifications for state laws).

⁶⁰ 5 U.S. (1 Cranch) 137, 174 (1803).

⁶¹ *Id.*

⁶² See Jeffrey D. Jackson, *The Modalities of the Ninth Amendment: Ways of Thinking About Unenumerated Rights Inspired by Philip Bobbitt's Constitutional Fate*, 75 MISS. L.J. 495, 495–96 (2006); *infra* notes 129–183 and accompanying text.

⁶³ See *infra* notes 64–128 and accompanying text.

⁶⁴ U.S. CONST. amend. IX; see Lash, *supra* note 12, at 341.

⁶⁵ See 1 DR. SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 352 (4th ed. 1773); *infra* notes 66–68 and accompanying text. Dr. Johnson's influential eighteenth-century dictionary describes "enumeration" as "the act of numbering." 1 JOHNSON, *supra*, at 352. For the history and importance of Dr. Johnson's dictionary, see generally HENRY HITCHINGS, *DEFINING THE WORLD: THE EXTRAORDINARY STORY OF DR. JOHNSON'S DICTIONARY* (2005).

⁶⁶ See U.S. CONST. art. I, § 8, cls. 1–18; RAKOVE, *supra* note 10, at 111.

there are individual rights enumerated throughout the Constitution.⁶⁷ The clause "of certain rights" in the Ninth Amendment references the latter of these enumerations.⁶⁸

The phrase "shall not be construed" was a declaration against a particular type of interpretation or explanation.⁶⁹ To "deny" a right meant to disregard it or fail to accept that it exists.⁷⁰ To "disparage" an unenumerated right meant to injure it or place it into an inferior condition, even while recognizing its existence, in part because it was not one of the rights listed in the Constitution.⁷¹ Rights "retained" are those unenumerated rights that the people did not dismiss, and still held, after the Constitution was drafted.⁷² At the time of the drafting of the Constitution, "by the people" seems to have referred to the citizens of the respective states.⁷³

⁶⁷ See U.S. CONST. art. I, § 9, cls. 1–8; *id.* amends. I–VIII; RAKOVE, *supra* note 10, at 113–14; David N. Mayer, *The Natural Rights Basis of the Ninth Amendment: A Reply to Professor McAfee*, 16 S. ILL. U. L.J. 313, 314 (1992).

⁶⁸ See BENNETT B. PATTERSON, *THE FORGOTTEN NINTH AMENDMENT* 12 (1955). A common conception among framers of the Constitution was that individual rights and limits on government powers were interwoven. *Id.* Protecting rights would, in theory, limit power and limiting powers would protect rights. See *id.* These rights are contained predominantly in the Bill of Rights, but are also spelled out elsewhere in the Constitution. See U.S. CONST. art. I, § 9, cls. 1–8; *id.* amends. I–VIII; PATTERSON, *supra*, at 12. The drafter of the Ninth Amendment, James Madison, wanted to insert this Amendment into the middle of the Constitution, after Article I, § 9, to make clear that rights were enumerated throughout the Constitution. PATTERSON, *supra*, at 12; see EDWARD DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 44 (1957). It is also relevant that the framers were not generally concerned with protecting the people from their state governments. See *Massachusetts v. Upton*, 466 U.S. 727, 738–39 (1984) (Stevens, J., concurring). Yet, the framers' general conception of the reciprocity of rights and powers did apply to both federal and state governments. See Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 15 (2006). There was a greater need for bills of rights in state governments because of their broader powers, as compared to the federal government. See Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1252–54 (1990). Madison did make some proposals to protect rights specifically against state governments, but they were not ratified. See DUMBAULD, *supra*, at 8, 41, 46–47.

⁶⁹ See 1 JOHNSON, *supra* note 65, at 222.

⁷⁰ See *id.* at 278.

⁷¹ See *id.* at 303.

⁷² See BARNETT, *supra* note 11, at 54–55; 2 JOHNSON, *supra* note 65, at 259. Many framers of the Constitution subscribed to the idea that rights are inherent in the people and that only certain rights are given up to a government upon its creation. See BARNETT, *supra* note 11, at 55; Laurence Claus, *Protecting Rights from Rights: Enumeration, Disparagement, and the Ninth Amendment*, 79 NOTRE DAME L. REV. 585, 593 (2004).

⁷³ See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (stating that "people" in the Ninth Amendment and other amendments refers to a group of persons who are part of a national community or who have otherwise developed sufficient connection with that country); Claus, *supra* note 72, at 593–94.

This language meant essentially the same in 1791 as it means today.⁷⁴ The text of the Ninth Amendment states that the listing of certain rights throughout the Constitution should not be interpreted to reject that other rights exist or to diminish the importance of unlisted rights that the people did not give away, simply because certain rights were enumerated.⁷⁵ The text does not limit this construction to the federal government; in fact, it does not mention the federal government at all.⁷⁶

B. Ratification of the Ninth Amendment

James Madison and the drafters of the Constitution encountered an important enumeration problem in 1787, when political pressure led them to add a list of particular individual rights to be protected by the Constitution.⁷⁷ A Constitutional Convention, consisting of representatives of twelve of the thirteen states, had come together in Philadelphia to modify the Articles of Confederation.⁷⁸ Despite the Convention's intent and the understanding of the nation that they would merely modify the Articles, the delegates created a new Constitution.⁷⁹

The Constitution established a federal government of enumerated and limited powers, meaning that it could only act if it was authorized to do so by provisions of the Constitution.⁸⁰ State governments, however, had more general police powers, meaning that their legislatures could pass laws within the proper scope of the police power unless they were denied the power by the people, acting through their respective

⁷⁴ See Barnett, *supra* note 68, at 5.

⁷⁵ See *supra* notes 66–74 and accompanying text; see also PATTERSON, *supra* note 68, at 19 (stating that although certain rights are enumerated, the reservation should not be taken to deny or disparage any unenumerated right not so apparently protected).

⁷⁶ See U.S. CONST. amend. IX.

⁷⁷ See RAKOVE, *supra* note 10, at 108, 119; *infra* notes 78–128 and accompanying text.

⁷⁸ JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 106–07 (Ronald D. Rotunda & John E. Nowak eds., Carolina Academic Press 1987) (1833); see Nat'l Constitution Ctr., Delegates to the Constitutional Convention, <http://www.constitutioncenter.org/explore/FoundingFathers/index.shtml> (last visited Mar. 2, 2007) (stating that Rhode Island did not send a delegation to the Constitutional Convention). The Articles of Confederation constituted the first attempt of the states to establish a federal government structure for the newly formed United States of America. ROBERT J. MORGAN, JAMES MADISON ON THE CONSTITUTION AND THE BILL OF RIGHTS 12–13 (1988). The attempt failed, in part, because it did not provide the federal government with sufficient governing powers. MASSEY, *supra* note 11, at 55; MORGAN, *supra*, at 12–13.

⁷⁹ RAKOVE, *supra* note 10, at 109; STORY, *supra* note 78, at 106–07.

⁸⁰ RAKOVE, *supra* note 10, at 119; see, e.g., U.S. CONST. art. I, § 8 (granting Congress the power to lay and collect taxes).

state constitutions.⁸¹ Inherent in both the state and federal conceptions of government was the belief that people possessed their full natural rights before the formation of governments.⁸² The people handed over only certain rights and privileges upon the formation of government—enumerated powers to the federal government and broad, but not limitless, police powers to the state governments.⁸³ The people retained the power to change this structure as well.⁸⁴

1. Distrust: Antifederalists' Call for a Bill of Rights

There were differing views on how well this constitutional structure of limited federal powers would achieve its goals.⁸⁵ The delegates at the Constitutional Convention, for the most part, believed that limiting the federal government's powers would adequately protect the rights of the people.⁸⁶ Nevertheless, there was opposition to the proposed draft from people known as Antifederalists.⁸⁷ Antifederalists were primarily concerned that the federal government's power could be extended beyond its supposed constitutional limits.⁸⁸ Expansive readings of the "necessary and proper" power and the taxing power particularly concerned them.⁸⁹

Antifederalists argued that the answer to the potential dilemma of overreaching federal power was the addition of a bill of rights to the Constitution.⁹⁰ Despite Antifederalist weakness at the Convention, con-

⁸¹ RAKOVE, *supra* note 10, at 119. The broad state police powers are not without their limits. See *Powell v. State*, 510 S.E.2d 18, 25 (Ga. 1998) (invalidating antisodomy law as beyond the proper scope of the police power); *People v. Onofre*, 415 N.E.2d 936, 943 (N.Y. 1980) (same); *Commonwealth v. Bonadio*, 415 A.2d 47, 49–50 (Pa. 1980) (same).

⁸² See BARNETT, *supra* note 11, at 55; PATTERSON, *supra* note 68, at 19–20.

⁸³ See PATTERSON, *supra* note 68, at 19–20.

⁸⁴ See AKHIL REED AMAR, *AMERICA'S CONSTITUTION* 327 (2005).

⁸⁵ See *infra* notes 86–107 and accompanying text.

⁸⁶ See STORY, *supra* note 78, at 693–94; Lash, *supra* note 12, at 348.

⁸⁷ RAKOVE, *supra* note 10, at 116–17.

⁸⁸ *Id.* at 125; STORY, *supra* note 78, at 110–12.

⁸⁹ See U.S. CONST. art. I, § 8, cls. 1, 18; RAKOVE, *supra* note 10, at 125. The Antifederalists asked why, under this structure, the federal government could not reintroduce the hated Stamp Act of 1765 which taxed newspapers and thereby restricted the free flow of information and the people's right to freedom of press. RAKOVE, *supra* note 10, at 125. Because freedom of the press was particularly at risk to government interference in the recent past, it was apt for specific protection in a bill of rights. *Id.*

⁹⁰ See RAKOVE, *supra* note 10, at 125–26; STORY, *supra* note 78, at 693–96. The state delegations at the Convention, which were mostly comprised of Federalists, unanimously struck down a proposal of two delegates to appoint a committee to prepare a bill of rights for the Constitution. See RAKOVE, *supra* note 10, at 113–14 (identifying the two delegates as George Mason of Virginia and Elbridge Gerry of Massachusetts).

cern over the potential expansiveness of the now-strengthened federal government spread to state ratifying conventions.⁹¹ Many state convention delegates contended that a bill of rights was necessary for setting up guideposts that showed when the federal government had overstepped its boundaries.⁹² The addition of a bill of rights became a rallying cry for Antifederalists opposing the Constitution.⁹³

2. Federalists' Fears of a Bill of Rights

Supporters of the Constitution, the Federalists, argued that a bill of rights was not necessary because rights were adequately protected by the enumerated federal powers scheme.⁹⁴ Properly limiting powers would in turn adequately protect rights.⁹⁵ The Federalists contended that the new federal government would be quite different in structure from state governments.⁹⁶ The people invested state governments with all the rights and powers that the people did not reserve, and therefore silence on an issue favored the legitimacy of the state's legislative action.⁹⁷ The federal government could not legislate as states did because its power was collected only from positive grants and not by any form of broad implication, such as the states' police power.⁹⁸

Some Federalists argued that inserting a bill of rights might actually be dangerous.⁹⁹ The federal government, so the argument went, potentially could state that the people had protected only those particular rights that were enumerated.¹⁰⁰ At the same time, complete enumeration was not possible—the drafters could not resort to listing every legitimate right, including such minutia as the right to wear a hat or wake up when one pleased.¹⁰¹ Similarly, some Federalists argued that

⁹¹ See MORGAN, *supra* note 78, at 132–33; PATTERSON, *supra* note 68, at 8–9.

⁹² RAKOVE, *supra* note 10, at 125–26; see STORY, *supra* note 78, at 696; The Federal Farmer, Letter XVI (Jan. 20, 1788), reprinted in RAKOVE, *supra* note 10, at 133–35 (hereinafter Federal Farmer, Letter XVI).

⁹³ McAfee, *supra* note 68, at 1227–28.

⁹⁴ See STORY, *supra* note 78, at 693–94; Lash, *supra* note 12, at 348.

⁹⁵ See STORY, *supra* note 78, at 693–94; Lash, *supra* note 12, at 348.

⁹⁶ See Wilson Statehouse Speech, *supra* note 51, at 121–22.

⁹⁷ *Id.* Therefore, for state constitutions, bills of rights were more effective, and necessary, protectors of rights. See McAfee, *supra* note 68, at 1253–54.

⁹⁸ See MASSEY, *supra* note 11, at 56; Wilson Statehouse Speech, *supra* note 51, at 121–22.

⁹⁹ MASSEY, *supra* note 11, at 63; see Iredell's Speech in the North Carolina Convention, *supra* note 10, at 145–46.

¹⁰⁰ See MASSEY, *supra* note 11, at 62.

¹⁰¹ Statement of Rep. Sedgwick, *supra* note 10, at 8–9; see Iredell's Speech in the North Carolina Convention, *supra* note 10, at 145–46.

the federal government could be given powers by implication through the addition of a bill of rights.¹⁰² If exceptions were necessary to limit federal power to protect certain rights, then this implied that the government had some power to infringe those rights in the first place.¹⁰³

The Antifederalists did not necessarily disagree with these assertions.¹⁰⁴ Any problems that a bill of rights would create, though, were merely similar problems that Antifederalists felt were likely to arise anyway.¹⁰⁵ One Antifederalist author hypothesized that the addition of a bill of rights would, however, help the people determine and appreciate when the government had overstepped its proscribed limits.¹⁰⁶ At least with affirmative protections, the people could know when they had certain rights that the government should not violate.¹⁰⁷

3. The Ninth Amendment as the Answer to the Enumeration Problem

The Ninth Amendment was not thrust upon the states, but rather was rooted in their demands submitted to the Constitutional Convention.¹⁰⁸ Generally, the states' recommendations about a bill of rights included precursors to the Ninth Amendment that asserted that the enumeration of certain rights should not be read to deny or disparage other rights, nor to constructively expand federal power.¹⁰⁹ Various state con-

¹⁰² See Wilson Statehouse Speech, *supra* note 51, at 122.

¹⁰³ See *id.*; see also McAfee, *supra* note 68, at 1307. For example, the Federalists contended that the federal government had no power to regulate the press. See THE FEDERALIST NO. 84 (Alexander Hamilton). If, however, an amendment were added to the Constitution stating that the federal government shall not abridge the freedom of the press, this would imply that the federal government had been given some power over the press in the first place. See *id.* Antifederalists responded that such implications had already been written into the Constitution. Mayer, *supra* note 67, at 314. The Constitution already stated that no religious test for public office could be required, and, the Antifederalists responded, this limit implied that the federal government had some power over religion. *Id.* Thus, a freedom of religion clause *was* necessary, not redundant. *Id.*

¹⁰⁴ See Claus, *supra* note 72, at 604–05.

¹⁰⁵ See *id.* Antifederalists contended that the propensity of all officeholders to seek power needed to be restricted in every way. See BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 56–58 (enlarged ed. 1992).

¹⁰⁶ See Federal Farmer, Letter XVI, *supra* note 92, at 134–35.

¹⁰⁷ See *id.*

¹⁰⁸ See Jackson, *supra* note 62, at 502–03; Lash, *supra* note 12, at 350. Madison later wrote to President Washington that the Virginia proposals, at least, played a role in his draft of the Bill of Rights that he proposed to Congress. See Lash, *supra* note 12, at 358 n.122 (citing Letter from James Madison to George Washington (Nov. 20, 1789)).

¹⁰⁹ See Lash, *supra* note 12, at 355–58 & n.122. These proposals appear to be responses to Federalists' arguments that a bill of rights would not be able to cover all possible rights. See *supra* notes 99–103 and accompanying text.

stitutions already had provisions somewhat similar to the Ninth Amendment, although they were applicable only within their state government structures.¹¹⁰ The Ninth Amendment was, thus, not a total invention by the state ratifying conventions or by Convention delegate and Ninth Amendment drafter James Madison.¹¹¹ In light of this mounting political pressure, Madison, a Federalist, eventually acquiesced and accepted the need for a federal bill of rights.¹¹²

The addition of a bill of rights had become a dead issue in the House of Representatives, and so Madison could only get a select committee to listen to his proposals.¹¹³ He explained to this committee that a bill of rights was important because, even if the federal government kept to its enumerated powers, its discretion as to the means of executing those powers could lead to limited abuses.¹¹⁴ A bill of rights would act as a more secure safeguard against legislative power subject to abuse than the draft Constitution.¹¹⁵

Madison then tried to counter the enumeration concern that a specific list of rights could potentially exclude all others not listed.¹¹⁶ His

¹¹⁰ See John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967, 1009 (1993).

¹¹¹ Yoo, *supra* note 110, at 1008–10 & nn.168–69 (describing the states that had similar provisions before and after ratification of the Ninth Amendment, and contending that this shows the states' understanding that such a provision directly protects rights and is not merely a rule of construction).

¹¹² See DUMBAULD, *supra* note 68, at 38; MORGAN, *supra* note 78, at 131. While Madison was still considering the issue, Thomas Jefferson attempted to persuade him to accept some form of a bill of rights. See RAKOVE, *supra* note 10, at 164; Letter from Thomas Jefferson to James Madison (Mar. 15, 1788), reprinted in RAKOVE, *supra* note 10, at 165–66 [hereinafter Letter from Jefferson to Madison]. Even if Madison were correct in his objections to a bill of rights, Jefferson reassured, protecting some rights more fully and others weakly was still better than not protecting them at all. See RAKOVE, *supra* note 10, at 164; Letter from Jefferson to Madison, *supra*, at 165–66.

¹¹³ See PATTERSON, *supra* note 68, at 11. Madison's speech to the House became the first public record and, thus, the first official discussion of the issue of a bill of rights. See RAKOVE, *supra* note 10, at 168–69.

¹¹⁴ See Madison's Bill of Rights Speech, *supra* note 10, at 177–78; see also RAKOVE, *supra* note 10, at 125. These limited abuses, Madison said, were similar to the indefinite abuses that arose from state legislatures of general powers. See Madison's Bill of Rights Speech, *supra* note 10, at 180; see also STORY, *supra* note 78, at 696.

¹¹⁵ See Madison's Bill of Rights Speech, *supra* note 10, at 171; see also MORGAN, *supra* note 78, at 138–39; STORY, *supra* note 78, at 114.

¹¹⁶ See Madison's Bill of Rights Speech, *supra* note 10, at 177–79. In his most famous statement on the Ninth Amendment, Madison said:

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration, and it might follow by implication, that those rights which were not singled out, were intended to be assigned into

answer to the Federalists was his early draft of the Ninth Amendment, which attempted to retain the drafters' initial constitutional objectives of limiting federal powers so as to protect rights, despite the explicit protection of certain rights added to the Constitution in the Bill of Rights.¹¹⁷ This early draft stated that exceptions in the Bill of Rights, or elsewhere, made in favor of certain rights should not be construed to diminish rights retained by the people or to enlarge the federal powers.¹¹⁸ These exceptions, Madison said, should only be construed as limitations on the federal powers or as calls for caution against expansive federal power.¹¹⁹ Madison noted that the "necessary and proper" power could be read accurately to infringe on certain rights unless affirmative protections were present.¹²⁰ The Ninth Amendment, and the Bill of Rights collectively, were apparently Madison's attempt to prevent Congress alone from possessing the discretionary power of the "necessary and proper" clause.¹²¹ Rights were listed, therefore, to ensure their proper protection, but not to elevate their status.¹²²

A House Select Committee, which included Madison, reviewed his proposals and presented a streamlined version of the Ninth Amendment.¹²³ This version no longer contained Madison's reference to preventing constructive enlargement of federal power and, furthermore, made no mention of government powers at all.¹²⁴ It did, however,

the hands of the general government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the 4th resolution.

Id. At the time, the Ninth Amendment as it exists today was Madison's "Fourth Resolution." See Lash, *supra* note 12, at 349–50 n.78.

¹¹⁷ Madison's Bill of Rights Speech, *supra* note 10, at 177–79; see MASSEY, *supra* note 11, at 69–70.

¹¹⁸ Lash, *supra* note 12, at 349–50 n.78. This language was very similar to many state convention proposals. See *id.* at 358 & n.122.

¹¹⁹ See *id.* at 349–50 n.78.

¹²⁰ Madison's Bill of Rights Speech, *supra* note 10, at 172; see also Lash, *supra* note 12, at 353. The rights specifically enumerated may have been listed just because they were so apt to be infringed by broad, but otherwise valid, federal powers. See BARNETT, *supra* note 11, at 249.

¹²¹ See Madison's Bill of Rights Speech, *supra* note 10, at 178–79; see also Lash, *supra* note 12, at 353. Madison did not go into great detail about what other rights were retained, although his notes for the speech referred to the natural rights of the people. See BARNETT, *supra* note 11, at 54–55.

¹²² Barnett, *supra* note 68, at 28–29.

¹²³ See PATTERSON, *supra* note 68, at 14; Lash, *supra* note 12, at 368.

¹²⁴ See Lash, *supra* note 12, at 349–50 n.78, 368–69.

maintain the statement on how to construe the enumeration of rights that is in the current version of the Ninth Amendment.¹²⁵

Madison told President Washington that the reason for this deletion was the reciprocal nature of rights and powers.¹²⁶ As limiting powers adequately protected rights, conversely, protecting rights would adequately and appropriately limit the federal powers.¹²⁷ To reassure those wary of the deletion, Madison used the final version one year later in a speech before the House of Representatives to show that it could limit federal power by arguing that the creation of the Bank of the United States was unconstitutional.¹²⁸

III. THE VARIED NINTH AMENDMENT JURISPRUDENCE

In general, the Bill of Rights was not a focal point of constitutional law during the nineteenth century.¹²⁹ In 1819 the U.S. Supreme Court in *McCulloch v. Maryland* did, however, greatly expand federal power soon after the ratification of the Bill of Rights and the Ninth Amendment by upholding the very government power that James Madison had argued the Ninth Amendment prevented—federal power to create a National Bank.¹³⁰ The Court implicitly rejected one of the Ninth Amend-

¹²⁵ See U.S. CONST. amend. IX; Lash, *supra* note 12, at 368. The Virginia convention was especially concerned about the removal of the explicit prevention of expansive federal power, and debated two more years because of this concern. Lash, *supra* note 12, at 333, 371, 380–81. Virginia Assembly member Hardin Burnley wrote to Madison that their chief concern was that there was no mechanism for determining if a particular unenumerated right was protected or not. See Lash, *supra* note 12, at 371–72 (citing Letter from Hardin Burnley to James Madison (Nov. 28, 1789)); *id.* at 380–81 (citing Entry of Dec. 12, 1789, in JOURNAL OF THE SENATE OF THE COMMONWEALTH OF VIRGINIA (Richmond 1828)).

¹²⁶ See Lash, *supra* note 12, at 374.

¹²⁷ See MASSEY, *supra* note 11, at 62–63, 67; Lash, *supra* note 12, at 374.

¹²⁸ See Lash, *supra* note 12, at 383–85 (citing James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791)). Soon after this speech, the Virginia delegation finally relented and ratified the full Bill of Rights, including the Ninth Amendment. See RAKOVE, *supra* note 10, at 193; Lash, *supra* note 12, at 392–93.

¹²⁹ RAKOVE, *supra* note 10, at 194. The Bill of Rights did not apply to the states until the adoption of the Fourteenth Amendment, which made many of these rights protections equally applicable against state governments. See RAOUL BERGER, THE 14TH AMENDMENT AND THE BILL OF RIGHTS 5–7 (1989); see also *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 249–50 (1833) (holding that if Congress had tried to improve the constitutions of the states as well to provide additional protections it clearly would have declared this in plain language).

¹³⁰ See 17 U.S. (4 Wheat.) 316, 316, 407 (1819); Lash, *supra* note 12, at 415–16. The Court observed that the issue had passed through the legislature without significant debate and was ultimately signed by then-President Madison, despite his earlier opposition. See *McCulloch*, 17 U.S. at 380. Madison would later assert that he signed the National Bank into law only out of political necessity and not because he believed that creation of the

ment's supposed purposes—preventing broad constructions of federal power.¹³¹

After this period, but before 1965, courts generally dealt with the Ninth Amendment in adjudicating competing powers between federal and state governments.¹³² During the New Deal, from 1930 to 1936, courts cited to the Ninth Amendment, generally in tandem with the Tenth Amendment, as support for questioning the constitutionality of federally implemented New Deal programs.¹³³ This use of the Ninth Amendment to protect states' rights eventually fell out of favor, however, simply because the Ninth Amendment was superfluous to the Tenth Amendment analysis.¹³⁴

A. *The Emergence of Griswold v. Connecticut: Using the Ninth Amendment to Protect Individual Rights*

After the New Deal, the Ninth Amendment once again fell into disfavor, despite calls from commentators for its use in protecting individual rights.¹³⁵ Then, in 1965 in *Griswold v. Connecticut*, the U.S. Su-

Bank was constitutional. See Lash, *supra* note 12, at 414–15, 420 (citing Letter from James Madison to Mr. Ingersoll (June 25, 1831)). The nature and language of the Constitution, the *McCulloch* Court noted, only marked the outlines of federal powers generally; specifically, the exceptions to the enumerated federal powers implied that federal powers could be given a broad consideration. See *McCulloch*, 17 U.S. at 407–08. According to the Court, the founders omitted any restricting terms against a fair and just interpretation that the federal powers could be extended to such necessities as the creation of a federal bank. See *id.*

¹³¹ See RAKOVE, *supra* note 10, at 125; STORY, *supra* note 78, at 696; Lash, *supra* note 12, at 415–17.

¹³² See *State v. Antonio*, 5 S.C.L. (3 Brev.) 562, 567–68, 570 (1816) (determining that the power to punish persons passing counterfeit coins was a power retained by the states according to the lack of enumeration of such power to the federal government, and in light of the Ninth and Tenth Amendments); see also Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 Tex. L. Rev. 597, 601–02 (2005) (stating that, during this time, the Ninth and Tenth Amendments were used to assert state autonomy against federal intervention).

¹³³ Lash, *supra* note 132, at 679–84; see, e.g., *Acme, Inc. v. Besson*, 10 F. Supp. 1, 6–7 (D.N.J. 1935) (invalidating federal legislation regulating the hours and wages of state manufacturers); *Hart Coal Corp. v. Sparks*, 7 F. Supp. 16, 21 (W.D. Ky. 1934) (limiting federal power to that expressly or impliedly given to the federal government, particularly in light of the Ninth and Tenth Amendments).

¹³⁴ See Lash, *supra* note 132, at 602, 689.

¹³⁵ See Lash, *supra* note 132, at 674, 680; see also Knowlton H. Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L.J. 309, 309, 313–14 (1935–36) (contending that powers to regulate various items need not necessarily be in either the federal or state government but could reside solely with the people, and that the rights retained by the people were the natural rights of Englishmen). See generally PATTERSON, *supra* note 68 (advocating a revival of Ninth Amendment jurisprudence). Patterson's influence in particular was far-reaching on

preme Court finally gave a substantive review of the relevance of the Ninth Amendment to unenumerated individual rights, in concurring and dissenting opinions.¹³⁶ The majority held that there was an inherent right of privacy that protected the intimate marital relationship.¹³⁷ It stated that emanations or penumbras of various guarantees in the Bill of Rights collectively created a zone of privacy in marriage.¹³⁸ These included the right of association in the First Amendment; the prohibition against quartering soldiers in the Third Amendment; the right of the people to be secure in their persons, houses, paper, and effects, and against unreasonable searches and seizures in the Fourth Amendment; and the zone of privacy that a person may create by invoking the Self-Incrimination Clause of the Fifth Amendment.¹³⁹ The Court then stated simply the text of the Ninth Amendment as support for protecting the right of privacy though the right is unenumerated in the Constitution.¹⁴⁰

Justice Goldberg contributed a much more substantial review of the Ninth Amendment in his concurring opinion.¹⁴¹ Justice Goldberg referred to the Ninth Amendment as entirely the work of James Madi-

this topic. See *Griswold v. Connecticut*, 381 U.S. 479, 490-91 n.6 (1965) (Goldberg, J., concurring). Nonetheless, prior to *Griswold*, only a couple of courts suggested that the Ninth Amendment could serve as a repository of individual rights. See *In re Guardianship of Thompson*, 32 Haw. 479, 485-86 (1932) (holding that the right of a father to have custody and care of his child was not an inalienable and unwritten right of the type that could be worthy of protection under the Ninth Amendment); see also *Roman Catholic Archbishop v. Baker*, 15 P.2d 391, 395-96 (Or. 1932) (stating that the right to own property is an inherent right based on history and in light of the Ninth Amendment).

¹³⁶ See 381 U.S. at 486-99 (Goldberg, J., concurring); *id.* at 499-502 (Harlan, J., concurring); *id.* at 507-27 (Black, J., dissenting); *id.* at 527-31 (Stewart, J., dissenting).

¹³⁷ See *id.* at 484-86 (majority opinion) (striking down a Connecticut law that prohibited the use of contraceptives). The Court also listed other rights it has protected, even though they are not specifically listed in the text of the Constitution. See *id.* at 482. These included the right to educate a child in a school of the parents' choice, see *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925), and the right to distribute, receive, and read via the First Amendment's freedom of speech and press, see *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943).

¹³⁸ See *Griswold*, 381 U.S. at 484-86. The right of privacy essentially exists from the breadth of these more explicit protections. See *id.*

¹³⁹ *Id.* at 484.

¹⁴⁰ See *id.*; Christopher J. Schmidt, *Revitalizing the Quiet Ninth Amendment: Determining Unenumerated Rights and Eliminating Substantive Due Process*, 32 U. BALT. L. REV. 169, 175 (2003) (discussing the Ninth Amendment's use here as "left dangling").

¹⁴¹ See *Griswold*, 381 U.S. at 486-99 (Goldberg, J., concurring). The impetus for Justice Goldberg's reliance on the Ninth Amendment appears to be its rediscovery by Patterson in *The Forgotten Ninth Amendment*. See *id.* at 490-91 n.6. At least one scholar predicted that the state law at issue in *Griswold* would herald the Ninth Amendment as a source of protection for individual rights. See Norman Redlich, *Are There "Certain Rights . . . Retained by the People"?*, 37 N.Y.U. L. REV. 787, 804 (1962).

son, who introduced it in Congress, and as having passed with little or no debate and minimal change in language.¹⁴² The purpose of the Ninth Amendment, he wrote, was to allay fears that a bill of enumerated rights could not possibly cover all valid rights and would be construed to deny others left unenumerated.¹⁴³ To argue that the traditional and historical right of privacy in marriage could be infringed just because it was not enumerated in the Constitution would be to directly ignore the construction mandated by the Ninth Amendment.¹⁴⁴

Foremost, Justice Goldberg's contention was that the Ninth Amendment shows that the individual liberties protected by the Fifth and Fourteenth Amendments are not exhaustively listed in the first eight amendments to the Constitution.¹⁴⁵ Despite its importance in furthering rights analysis, however, the Ninth Amendment is not itself a source of rights.¹⁴⁶ He acknowledged the Court's use of due process protection of the rights contained in the first eight amendments, and then used the Ninth Amendment to extend this protection to other unenumerated rights.¹⁴⁷ Justice Goldberg's test was whether these unenumerated rights are so rooted in the traditions and conscience of the people as to be fundamental.¹⁴⁸

Justice Harlan added a concurring opinion, which asserted that the Fourteenth Amendment's Due Process Clause analysis could stand on its own as a protector of unenumerated rights.¹⁴⁹ It did not require assistance from emanations of any of the enumerated rights or the Ninth Amendment.¹⁵⁰

Justice Black dissented in *Griswold* and made the very argument that the Ninth Amendment was designed to prevent—that privacy cannot be a fundamental right because there is no provision in the Constitution protecting it.¹⁵¹ He stated the Ninth Amendment was only intended to protect against the idea that unenumerated rights were as-

¹⁴² *Griswold*, 381 U.S. at 488 (Goldberg, J., concurring); see PATTERSON, *supra* note 68, at 18.

¹⁴³ *Griswold*, 381 U.S. at 488–89 (Goldberg, J., concurring).

¹⁴⁴ *Id.* at 491–92.

¹⁴⁵ *Id.* at 493; see U.S. CONST. amends. V, XIV, § 1; *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

¹⁴⁶ *Griswold*, 381 U.S. at 492 (Goldberg, J., concurring).

¹⁴⁷ *Id.* at 487, 488–93.

¹⁴⁸ *Id.* at 493.

¹⁴⁹ See *id.* at 500 (Harlan, J., concurring).

¹⁵⁰ See *id.*

¹⁵¹ See *Griswold*, 381 U.S. at 508–10 (Black, J., dissenting) (stating that, although he enjoys his own privacy, he accepts that the government has a right to invade it unless expressly prohibited).

signed into the hands of the federal government and thus insecure.¹⁵² The power was, however, reserved to the states.¹⁵³

Justice Stewart also dissented and wrote that use of the Ninth Amendment by the federal judiciary to strike down state law would have caused Madison no little wonder because it had been written to limit federal powers.¹⁵⁴ He then urged the people of Connecticut to repeal this disfavored law through proper constitutional channels—using their “Ninth and Tenth Amendment rights” to persuade their elected representatives.¹⁵⁵

B. *Protecting Rights Through the Ninth Amendment After Griswold*

Since *Griswold*, the Ninth Amendment has received a larger share of judicial consideration among lower courts and concurring and dissenting Supreme Court opinions, although its usage has been fairly inconsistent.¹⁵⁶ Some of this inconsistency likely stems from the differing views found in *Griswold* itself.¹⁵⁷

1. The Ninth Amendment as a Source of Rights

A number of cases after *Griswold* used the Ninth Amendment as a source of rights that are inherent in the constitutional structure.¹⁵⁸ In 1970, the U.S. District Court for the Western District of Pennsylvania in *United States v. Cook* stated that the purpose of the Ninth Amendment was to guarantee to individuals those rights that are not enumerated in the Bill of Rights, but that are inherent in citizenship in democracies, such as the right to one's own life.¹⁵⁹ In the 1971 case of *Anderson v. Laird*, the U.S. Court of Appeals for the Seventh Circuit

¹⁵² *Id.* at 519–20.

¹⁵³ *Id.* at 520. Justice Black added that the Court's method of review would lead to unrestrainable control of state law by the federal judiciary. *Id.* at 521–22.

¹⁵⁴ *Id.* at 530 (Stewart, J., dissenting).

¹⁵⁵ *Id.* at 531.

¹⁵⁶ See *infra* notes 158–183 and accompanying text. To date, there is no Supreme Court opinion that provides binding precedent regarding the Ninth Amendment as it relates to protecting individual rights. MASSEY, *supra* note 11, at 9–10; see *infra* notes 158–183 and accompanying text.

¹⁵⁷ See *Griswold*, 381 U.S. at 492 (Goldberg, J., concurring) (stating that the Ninth Amendment is not itself a repository of individual rights, even as he asserted the right to privacy); *id.* at 531 (Stewart, J., dissenting) (referring to the people of Connecticut's Ninth Amendment rights to persuade their elected representatives to repeal a law they did not like, despite his criticisms of protecting unenumerated rights).

¹⁵⁸ See *infra* notes 159–170 and accompanying text.

¹⁵⁹ 311 F. Supp. 618, 620 (W.D. Pa. 1970).

held that there is a Ninth Amendment right to grow hair the length one desires, although it can be subordinate to military discretion.¹⁶⁰ Additionally, in a dissenting opinion in *Palmer v. Thompson* in 1971, Supreme Court Justice Douglas, the author of the majority opinion in *Griswold*, asserted that basic rights under the Ninth Amendment must include things like a right to pure air and water, or the right to recreation by swimming.¹⁶¹

In 1973 in *Adler v. Montefiore Hospital Ass'n*, the Pennsylvania Supreme Court held that there was a Ninth Amendment right for patients to be treated by the physician of their choosing.¹⁶² In 1974, in *Lubin v. Panish*, Justice Douglas wrote in a concurring opinion that the right to vote in state elections is historically "retained by the people" in the Ninth Amendment.¹⁶³ In 1977, in *Sorrentino v. Family & Children's Services*, the New Jersey Supreme Court referred to the custody rights of parents as Ninth Amendment rights.¹⁶⁴ A number of other courts have implied that rights may be protected by the Ninth Amendment by determining that certain asserted rights do *not* fall under this classification, including a right to smoke marijuana at home,¹⁶⁵ to a pollution-free environment,¹⁶⁶ to have an unregistered machine gun,¹⁶⁷ and to be able to enter into same-sex marriages.¹⁶⁸

More recently, Supreme Court Justice Scalia asserted that other rights retained by the people under the Ninth Amendment do exist, but that judges have no power to enforce them.¹⁶⁹ In *Troxel v. Granville* in 2000, Justice Scalia wrote in a dissenting opinion that the right of

¹⁶⁰ 437 F.2d 912, 914–15 (7th Cir. 1971); see also *Murphy v. Pocatello Sch. Dist.*, 480 P.2d 878, 884 (Idaho 1971) (holding that Ninth Amendment rights should be left to judicial determination just as the liberty interests of the Fourteenth Amendment are). But see *Kraus v. Bd. of Educ.*, 492 S.W.2d 783, 786 (Mo. 1973) (holding that regulation of men's hair length was not violative of the Ninth Amendment).

¹⁶¹ 403 U.S. 217, 233–34 (1971) (Douglas, J., dissenting). Justice Douglas's particular contention in this opinion was that freedom from discrimination based on race, creed, or color had become, by reason of the Thirteenth, Fourteenth, and Fifteenth Amendments, one of the unenumerated rights under the Ninth Amendment. *Id.* at 237.

¹⁶² 311 A.2d 634, 642 (Pa. 1973) (holding, however, that the public hospital's use of particular surgeons for difficult tasks was not violative of this Ninth Amendment right).

¹⁶³ 415 U.S. 709, 721 (1974) (Douglas, J., concurring).

¹⁶⁴ 378 A.2d 18, 20–21 (N.J. 1977).

¹⁶⁵ See *Commonwealth v. Leis*, 243 N.E.2d 898, 903–04 (Mass. 1969).

¹⁶⁶ See *Concerned Citizens of Neb. v. U.S. Nuclear Regulatory Comm'n*, 970 F.2d 421, 426–27 (8th Cir. 1992).

¹⁶⁷ See *United States v. Warin*, 530 F.2d 103, 108 (6th Cir. 1976).

¹⁶⁸ See *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971).

¹⁶⁹ See *Troxel v. Granville*, 530 U.S. 57, 91–92 (2000) (Scalia, J., dissenting).

parents to direct the upbringing of their children is among the other rights retained by the people in the Ninth Amendment.¹⁷⁰

2. The Ninth Amendment Protecting Rights Found Elsewhere in the Constitution

The Supreme Court has acknowledged that the Ninth Amendment is a savings clause that affords courts the ability to protect unenumerated rights.¹⁷¹ In *Stanley v. Illinois* in 1972, the Court followed Justice Goldberg's concurrence in *Griswold*, holding that the Ninth Amendment provides support for a Fourteenth Amendment claim to liberty protection.¹⁷² Some courts have simply acknowledged *Griswold*'s penumbra determination of fundamental rights and used the Ninth Amendment as support for this assertion.¹⁷³ More recently, in *United States v. Extreme Associates* in 2005, the Third Circuit upheld a federal statute that regulated the distribution of obscenity, after considering the constitutional right of privacy which, the court stated, was embodied in the Ninth Amendment and the *Griswold* line of cases.¹⁷⁴

Other courts have noted more generally the Ninth Amendment's overarching importance.¹⁷⁵ In 1980 in *Charles v. Brown*, the U.S. District Court for the Northern District of Alabama held that although the Ninth Amendment does not itself specify rights, it prevents unenumerated rights from being lowered, degraded, or rejected simply because they were unenumerated.¹⁷⁶ In *Grossman v. Gilchrist* in 1981, the U.S. District Court for the Northern District of Illinois described the Ninth Amendment as having been drafted to cope with the fear that rights had been omitted from the Bill of Rights and that ambiguities of language might adversely affect rights that were intended to be included.¹⁷⁷ In 1984 in *Massachusetts v. Upton*, U.S. Supreme Court Justice Stevens

¹⁷⁰ *Id.* Justice Scalia argued that, although he was a judge, he nonetheless had no power to deny the legal effect of rules that infringed only unenumerated rights. *Id.* at 92.

¹⁷¹ See *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

¹⁷² See *id.* (supporting the fundamental liberty interest of natural parents to the care, custody, and management of their children, under the Due Process and Equal Protection Clauses); *Griswold*, 381 U.S. at 495-96 (Goldberg, J., concurring).

¹⁷³ See *benShalom v. Sec'y of Army*, 489 F. Supp. 964, 975-76 (E.D. Wis. 1980); *Merriken v. Cressman*, 364 F. Supp. 913, 918 (E.D. Pa. 1973).

¹⁷⁴ 431 F.3d 150, 159 (3d Cir. 2005).

¹⁷⁵ See *infra* notes 176-179 and accompanying text.

¹⁷⁶ 495 F. Supp. 862, 863-64 (N.D. Ala. 1980). In 1991, the Sixth Circuit in *Gibson v. Matthews* supported the *Charles* opinion regarding the Ninth Amendment. See 926 F.2d 532, 537 (6th Cir. 1991).

¹⁷⁷ 519 F. Supp. 173, 176-77 (N.D. Ill. 1981).

wrote in his concurring opinion that the Ninth Amendment goes to the core of the constitutional structure.¹⁷⁸ He criticized the Massachusetts Supreme Judicial Court for using the enumeration in the federal Constitution to disparage rights retained by the people of Massachusetts that, in this case, were whatever the state court ultimately determined those rights to be.¹⁷⁹

Also, although the Supreme Court has rarely mentioned the Ninth Amendment, it has specifically acknowledged, and subsequently ignored, a number of Ninth Amendment claims to protection.¹⁸⁰ The Supreme Court in *Roe v. Wade* in 1973 only acknowledged the preceding lower court's use of the Ninth Amendment as a basis for the right of a woman to have an abortion, in light of the right of privacy established in *Griswold*.¹⁸¹ But later, in the 1986 case of *Bowers v. Hardwick*, which has subsequently been overruled, the Court specifically disagreed with the circuit court, which had used the Ninth Amendment to invalidate a law that criminalized sodomy.¹⁸² The Eleventh Circuit, in *Hardwick v. Bowers* in 1985, held that the conduct criminalized by Georgia involved important associational interests that were beyond the reach of state regulation and protected by the Ninth Amendment.¹⁸³

C. Brief Overview of How the Ninth Amendment Is Viewed Outside the Courtroom

If *Griswold* ignited discussion about the Ninth Amendment, the testimony during the Robert Bork Supreme Court confirmation hear-

¹⁷⁸ 466 U.S. 727, 737 (1984) (Stevens, J., concurring).

¹⁷⁹ *Id.* at 737–38.

¹⁸⁰ See, e.g., *Christopher v. Harbury*, 536 U.S. 403, 409 (2002) (ignoring a Ninth Amendment claim to a right to family integrity); *United States v. Oakland Cannabis Buyer's Coop.*, 532 U.S. 483, 494 (2001) (ignoring a Ninth Amendment claim to a right to possession of marijuana); *United States v. Fordice*, 505 U.S. 717, 723 (1992) (ignoring a Ninth Amendment claim to a right to desegregated public schools).

¹⁸¹ *Roe v. Wade*, 410 U.S. 113, 120, 153 (1973); see *Doe v. Rampton*, 366 F. Supp. 189, 192 (C.D. Utah 1973) (supporting the right of privacy by referencing the Ninth Amendment); *Abele v. Markle*, 342 F. Supp. 800, 805 (D. Conn. 1972) (stating that the right of privacy's basis is imprecise, but is either grounded in the Ninth Amendment, or the penumbras of the Bill of Rights and the Ninth Amendment, as incorporated by the Fourteenth Amendment), *vacated on other grounds*, 410 U.S. 951 (1973).

¹⁸² See 478 U.S. 186, 189 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); see also *Hardwick v. Bowers*, 760 F.2d 1202, 1212–13 (11th Cir. 1985), *rev'd*, 478 U.S. 186 (1986), *overruled by* *Lawrence*, 539 U.S. at 578.

¹⁸³ *Hardwick*, 760 F.2d at 1212–13, *rev'd*, 478 U.S. 186, *overruled by* *Lawrence*, 539 U.S. at 578.

ings of 1987 set it ablaze.¹⁸⁴ Judge Bork controversially referred to the Ninth Amendment as an ink blot that could not be used because the framers of the Constitution did not provide any method by which to apply it.¹⁸⁵ Like Justice Scalia after him, Judge Bork stated that he felt judges had no power to enforce unenumerated rights.¹⁸⁶ His testimony struck a disruptive chord and he ultimately was not confirmed.¹⁸⁷

Despite the vigor with which the Ninth Amendment was debated in 1987, it was essentially ignored by Supreme Court nominees John Roberts and Samuel Alito in their 2005 and 2006 confirmation hearings, as well as by the Senators questioning them.¹⁸⁸ Chief Justice Roberts did not once mention the Ninth Amendment, nor was he asked about it, even when discussing the right to privacy held fundamental in *Griswold*.¹⁸⁹ Both he and Justice Alito stated that substantive due process analysis has overtaken the penumbras and emanations argument of the majority in *Griswold* for unenumerated rights analysis.¹⁹⁰ The Senators seemed content with this outlook, so long as the nominees respected that a right to privacy exists.¹⁹¹

¹⁸⁴ See *Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 100th Cong. 117 (1989)* (testimony of Robert Bork), reprinted in 2 *THE RIGHTS RETAINED BY THE PEOPLE*, *supra* note 10, at 441–42 app. B [hereinafter *Bork Confirmation Hearings*]; Barnett, *supra* note 10, at 1; *supra* notes 136–157 and accompanying text.

¹⁸⁵ *Bork Confirmation Hearings*, *supra* note 184, at 441 app. B. Judge Bork's specific statement on the Ninth Amendment was:

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

Id.

¹⁸⁶ See *Troxel*, 530 U.S. at 91–92 (Scalia, J., dissenting); *Bork Confirmation Hearings*, *supra* note 184, at 441–42 app. B.

¹⁸⁷ See Thomas C. Grey, *The Uses of an Unwritten Constitution*, 64 *CHI.-KENT L. REV.* 211, 211 (1988).

¹⁸⁸ See generally *U.S. Senate Judiciary Committee Hearing on Judge John Roberts's Nomination to the Supreme Court* (2005), <http://www.washingtonpost.com/wp-dyn/content/linkset/2005/09/14/LI2005091402149.html> [hereinafter *Roberts Confirmation Hearing*]; *U.S. Senate Judiciary Committee Hearing on Judge Samuel Alito's Nomination to the Supreme Court* (2006), http://blogs.washingtonpost.com/campaignforthecourt/2006/01/hearing_transcr.html [hereinafter *Alito Confirmation Hearing*].

¹⁸⁹ See *Roberts Confirmation Hearing*, *supra* note 188, at Day 1 (Sept. 12), Day 2, pt. VI (Sept. 13).

¹⁹⁰ See *id.* at Day 1 (Sept. 12), Day 2, pt. VI (Sept. 13); *Alito Confirmation Hearing*, *supra* note 188, at Day 2, pt. I (Jan. 10), Day 3, pt. I (Jan. 11).

¹⁹¹ See *Roberts Confirmation Hearing*, *supra* note 188, at Day 1 (Sept. 12), Day 2, pt. VI (Sept. 13); *Alito Confirmation Hearing*, *supra* note 188, at Day 2, pt. I (Jan. 10), Day 3, pt. I (Jan. 11).

Between the Bork and Alito hearings, a number of notable books and articles added to the history and discussion of the Ninth Amendment.¹⁹² One view holds that the Ninth Amendment is merely a further check on expansive federal power and does not protect rights directly.¹⁹³ Another view is that the Ninth Amendment is an affirmative protector of rights, potentially protecting all natural rights as fundamental.¹⁹⁴ The debate on the Ninth Amendment generally focuses on the history and original meaning of the Ninth Amendment.¹⁹⁵ Many authors espouse sharply different viewpoints despite employing much of the same background history.¹⁹⁶ When members of the Supreme Court have actually analyzed the Ninth Amendment, however, they have viewed it as a protector of rights in some way.¹⁹⁷

IV. EMPLOYING THE NINTH AMENDMENT TO SUPPLEMENT SUBSTANTIVE DUE PROCESS

The current unenumerated rights test is unpredictable because it lacks guideposts and considers only fundamental rights; as a result, protecting all rights is put on tenuous ground.¹⁹⁸ There has not been an

¹⁹² See generally, e.g., BARNETT, *supra* note 11; MASSEY, *supra* note 11; Lash, *supra* note 12; Lash, *supra* note 132; McAfee, *supra* note 68.

¹⁹³ See McAfee, *supra* note 68, at 1219–20. Some commentators assert that substantive due process review—protecting fundamental rights through the Fifth and Fourteenth Amendment protections of liberty—is an acceptable test for protecting rights as required by the Ninth Amendment. See, e.g., William O. Bertelsman, *The Ninth Amendment and Due Process of Law—Toward a Viable Theory of Unenumerated Rights*, 37 U. CIN. L. REV. 777, 787 (1968); Cameron Matheson, Note, *The Once and Future Ninth Amendment*, 38 B.C. L. REV. 179, 198 (1996).

¹⁹⁴ See BARNETT, *supra* note 11, at 235. This view holds that the Ninth Amendment provides that the natural rights of the people must be fully protected as fundamental. See *id.* at 54, 235. This could mean that the Ninth Amendment protects the natural personal autonomy rights of the people with the same vigor as any enumerated right in the Bill of Rights. See *id.* For Professor Barnett, natural rights generally mean the right to act within one's autonomy unless or until one's behavior begins to harm others. *Id.* at 261–62. There was a belief at the founding of the Constitution that the people possessed their full scope of rights before the formation of governments, and only handed over certain powers. PATTERSON, *supra* note 68, at 19–20. The Ninth Amendment also has been used to define factors for recognizing the existence of unenumerated rights and determining which deserve protection. See Andrew King, Comment, *What the Supreme Court Isn't Saying About Federalism, the Ninth Amendment, and Medical Marijuana*, 59 ARK. L. REV. 755, 759 (2006).

¹⁹⁵ See generally BARNETT, *supra* note 11; Lash, *supra* note 12; McAfee, *supra* note 68.

¹⁹⁶ Barnett, *supra* note 68, at 5.

¹⁹⁷ See *supra* notes 137, 163, 170–171, 179, 181 and accompanying text.

¹⁹⁸ See BARNETT, *supra* note 11, at 230–34; MASSEY, *supra* note 11, at 159–60; THOMAS B. McAFFEE ET AL., *POWERS RESERVED FOR THE PEOPLE AND THE STATES: A HISTORY OF THE NINTH AND TENTH AMENDMENTS* 238–39 (2006). For a review of the differing and inconsis-

outright declaration of a newly protected fundamental right in the past thirty years.¹⁹⁹ Nonfundamental rights, meanwhile, are ignored.²⁰⁰

To alleviate these concerns, courts should use the Ninth Amendment to supplement the substantive due process analysis in evaluating unenumerated rights.²⁰¹ Courts should use the Ninth Amendment's history to supplement the limited guideposts observed from the history of the narrowly defined interest at stake in the particular case.²⁰² They should also accept the history of the Ninth Amendment as showing that nonfundamental unenumerated rights should be recognized alongside fundamental rights.²⁰³

Employing the Ninth Amendment to supplement substantive due process should not drastically alter the test under this doctrine.²⁰⁴ The supplemented test, discussed in Section B below, simply considers the history and traditions of unenumerated rights more generally and allows for nonfundamental rights to receive some—though limited—formal protection from government interference.²⁰⁵

tent ways that unenumerated rights are protected, see *supra* notes 26–59, 129–183 and accompanying text.

¹⁹⁹ See *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *supra* notes 26–59 and accompanying text.

²⁰⁰ See *Glucksberg*, 521 U.S. at 719–22; Rubin, *supra* note 26, at 844. It could be argued that the Court has recognized nonfundamental rights to refuse medical treatment and to have privacy as to intimate sexual conduct between adults. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 279, 281 (1990).

²⁰¹ See *Glucksberg*, 521 U.S. at 719–22 (outlining the current test); *Griswold v. Connecticut*, 381 U.S. 479, 491–92 (1965) (Goldberg, J., concurring); see also PATTERSON, *supra* note 68, at 19–20; Federal Farmer, Letter XVI, *supra* note 92, at 134–35.

²⁰² See *Glucksberg*, 521 U.S. at 720–21 (describing the Court's reluctance to expand the area of substantive due process because of the lack of guideposts for decision making); AMAR, *supra* note 84, at 329 (discussing different areas of constitutional law to which courts can turn in determining unenumerated rights).

²⁰³ See AMAR, *supra* note 84, at 327–28 (contending that the Ninth Amendment helps protect rights that are implicit in the general structure of the Constitution or implied in conjunction with enumerated rights); RAKOVE, *supra* note 10, at 125–26 (noting the importance of protecting rights so as to limit government powers); see also Statement of Rep. Sedgwick, *supra* note 10, at 8–9; Iredell's Speech in the North Carolina Convention, *supra* note 10, at 145–46.

²⁰⁴ See *Griswold*, 381 U.S. at 488–93 (Goldberg, J., concurring) (employing substantive due process to find a right to privacy, with the support of the Ninth Amendment's history); *infra* notes 271–303 and accompanying text (outlining this Note's proposed test and providing an example for its use).

²⁰⁵ See *infra* notes 271–288 and accompanying text.

A. Why Supplementing Substantive Due Process Is Important

The current test under the substantive due process doctrine—the *Washington v. Glucksberg* test—goes a long way towards achieving the consideration of unenumerated rights that James Madison and the state conventions intended when advocating for a Bill of Rights.²⁰⁶ The test, however, is unpredictable partly because it is incomplete.²⁰⁷ It is incomplete, first, because it lacks guideposts for responsible decision making in the area of unenumerated rights.²⁰⁸ Secondly, the test is incomplete because it focuses solely on fundamental rights.²⁰⁹

Unpredictability is one of the common criticisms of substantive due process.²¹⁰ Courts—and representative governments on the legislative end—must consider whether a right, which is not even firmly defined until a court makes its legal determination, has the support of tradition and history.²¹¹ The Ninth Amendment's history and structural scheme can somewhat limit the unpredictable nature of the substantive due process doctrine.²¹² It may also provide additional justifications for courts making such unenumerated rights determinations at all rather than only legislatures.²¹³

The current test under substantive due process provides an all-or-nothing approach towards individual rights because it recognizes only

²⁰⁶ See *Glucksberg*, 521 U.S. at 720–22; Madison's Bill of Rights Speech, *supra* note 10, at 178–79; see also BARNETT, *supra* note 11, at 55; McAFFEE ET AL., *supra* note 198, at 238–39; Lash, *supra* note 12, at 358 n.122, 391–92.

²⁰⁷ See McAFFEE ET AL., *supra* note 198, at 236 (describing the current confusion created by Supreme Court jurisprudence in the unenumerated rights area).

²⁰⁸ See *Glucksberg*, 521 U.S. at 720–21. Courts should be more interested in establishing guideposts then, rather than not applying any test at all. See RAKOVE, *supra* note 10, at 125–26 (noting state convention delegates' concerns that a bill of rights was necessary to serve as guideposts for showing when the federal government had overstepped its appropriate bounds).

²⁰⁹ See *Glucksberg*, 521 U.S. at 720–22; RAKOVE, *supra* note 10, at 125–26 (noting the importance of protecting rights so as to limit government powers); Statement of Rep. Sedgwick, *supra* note 10, at 8–9; Iredell's Speech in the North Carolina Convention, *supra* note 10, at 145–46.

²¹⁰ Patrick M. Garry, *A Different Model for the Right to Privacy: The Political Question Doctrine as a Substitute for Substantive Due Process*, 61 U. MIAMI L. REV. 169, 192–94 (2006) (discussing the *Lawrence v. Texas* decision overruling *Bowers v. Hardwick* and the disfavored “first era” of substantive due process, which occurred during the New Deal); see also Rubin, *supra* note 26, at 837–39.

²¹¹ *Glucksberg*, 521 U.S. at 720–22; see also McAFFEE ET AL., *supra* note 198, at 236.

²¹² See BARNETT, *supra* note 11, at 234–42; see also *Criswold*, 381 U.S. at 493 (Goldberg, J., concurring).

²¹³ See Madison's Bill of Rights Speech, *supra* note 10, at 177–79; see also Roosevelt, *supra* note 23, at 1000–02.

fundamental rights.²¹⁴ This, in turn, encourages rather than dissuades the current trepidation about expanding judicial protection of rights.²¹⁵ The lack of clear guideposts is particularly important because decisions acknowledging new fundamental rights have far-reaching and controversial implications that may often give courts pause.²¹⁶

1. The Lack of Proper Guideposts

Under current substantive due process analysis, the Supreme Court does not consider the Ninth Amendment's broader history relating to unenumerated rights.²¹⁷ Because of this lack of guideposts for decision making and the ramifications of asserting an interest to be fundamental, courts must proceed cautiously.²¹⁸ Courts, further, narrowly define the liberty interest or right at stake.²¹⁹ Thus, because substantive due process relies solely on the tradition and history of the narrowly defined interest but not the additional history of unenumerated rights generally, its use greatly prevents an accurate and complete analysis of rights protection.²²⁰

Further guideposts for unenumerated rights analysis should come from the textual source of unenumerated rights itself: the Ninth Amend-

²¹⁴ See *Glucksberg*, 521 U.S. at 719–22; Robert Chesney, *Old Wine or New? The Shocks-the-Conscience Standard and the Distinction Between Legislative and Executive Action*, 50 SYRACUSE L. REV. 981, 983 n.14 (2000) (citing *Carlisle v. United States*, 517 U.S. 416, 429 (1996), for the proposition that the consequence for a litigant failing to demonstrate that an asserted right is fundamental is that the Court will often conduct no real review at all).

²¹⁵ See *Glucksberg*, 521 U.S. at 720 (stating that rights analysis must proceed cautiously because of the lack of guideposts); see also *Troxel v. Granville*, 530 U.S. 57, 91–92 (2000) (Scalia, J., dissenting) (stating his hesitation to remove unenumerated rights protection from the legislative forum).

²¹⁶ See *Troxel*, 530 U.S. at 91–92 (Scalia, J., dissenting); *Glucksberg*, 521 U.S. at 720; Thomas B. McAfee, *A Critical Guide to the Ninth Amendment*, 69 TEMP. L. REV. 61, 63–65 (1996).

²¹⁷ See *Glucksberg*, 521 U.S. at 719–22; see also *Criswold*, 381 U.S. at 500 (Harlan, J., concurring) (contending that substantive due process under the Fourteenth Amendment can stand on its own, without support from the Ninth Amendment).

²¹⁸ *Glucksberg*, 521 U.S. at 720 (noting that calling a right fundamental essentially places it outside the arena of public debate and legislative action); see also BARNETT, *supra* note 11, at 235 (discussing the judicial fears associated with employing an open-ended clause like the Ninth Amendment).

²¹⁹ *Glucksberg*, 521 U.S. at 721.

²²⁰ See *Lawrence*, 539 U.S. at 567, 568–70; *Glucksberg*, 521 U.S. at 709, 722–23; *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 819–20 (11th Cir. 2004) (holding that even if the assumptions underlying the government's belief in preventing homosexuals from adopting are wrong, the mere fact that they can be argued is sufficient to pass rational basis review); AMAR, *supra* note 84, at 329; see also BARNETT, *supra* note 11, at 230–34.

ment.²²¹ The Ninth Amendment was specifically written to ensure at least some consideration of rights unenumerated in the Constitution.²²² The Ninth Amendment's history provides the history and traditions as to unenumerated rights generally that current substantive due process analysis lacks, and it comes directly from the Constitution's founders.²²³ James Madison was convinced to add the Bill of Rights to the Constitution, with the Ninth Amendment as a residual clause, because he was persuaded that it was better to protect some rights strongly and others weakly than not to protect any directly at all.²²⁴

In other legal disciplines, courts often review and consider the character of the enumerated items and the purpose of the relevant residual clause to define unenumerated items.²²⁵ For example, the Federal Rules of Evidence provide that all hearsay evidence is inadmissible in court, unless the hearsay fits a particular exception.²²⁶ The drafters of the Federal Rules recognized, however, that the list of hearsay exceptions could never be complete, and so they added a "residual exception" to allow courts to admit hearsay that the drafters had inadvertently left out or not yet considered.²²⁷ Similarly, the enumeration problem arises in many private contractual arrangements, such as financial lenders' security agreements drafted pursuant to state versions of Article 9 of the Uniform Commercial Code, where omnibus clauses are used as catch-alls to ensure that unenumerated collateral is included in the lending contract.²²⁸ These comparisons are admittedly imperfect,

²²¹ See *Griswold*, 381 U.S. at 488–89, 491–92 (Goldberg, J., concurring); AMAR, *supra* note 84, at 328 & n.*.

²²² See Madison's Bill of Rights Speech, *supra* note 10, at 178–79; see also MASSEY, *supra* note 11, at 13; Lash, *supra* note 12, at 363; *supra* notes 68–76 and accompanying text.

²²³ See *Glucksberg*, 521 U.S. at 720 (urging caution in determining unenumerated rights because there are limited guideposts for proper decision making); Madison's Bill of Rights Speech, *supra* note 10, at 178–79 (outlining Madison's views on the Ninth Amendment); *supra* notes 77–128 and accompanying text (describing the ratification histories of the Bill of Rights and the Ninth Amendment).

²²⁴ RAKOVE, *supra* note 10, at 164; Letter from Jefferson to Madison, *supra* note 112, at 165–66.

²²⁵ See *infra* notes 226–229 and accompanying text.

²²⁶ FED. R. EVID. 802. Hearsay is a statement made out of court that is offered as evidence in court to prove the truth of the matter asserted. *Id.* 801(c).

²²⁷ See *id.* 807; *id.* 803(24) advisory committee's note; *id.* 807 advisory committee's note; *Turbyfill v. Int'l Harvester Co.*, 486 F. Supp. 232, 234 (E.D. Mich. 1980) (stating that a residual exception must be consistent with the policy underlying Rule 803).

²²⁸ See U.C.C. § 9–108(b) (2005) (describing an omnibus clause as having a reasonable classification if it sufficiently describes the category of the collateral in which a security interest is taken); see also *Citizens Bank & Trust v. Gibson Lumber Co.*, 96 B.R. 751, 753 (W.D. Ky. 1989) (holding that, under the Kansas Uniform Commercial Code, omnibus

but they do provide examples of courts' willingness to accept and interpret residual clauses in other contexts.²²⁹

In the unenumerated rights context, courts should look at the purposes behind the addition of the various enumerated rights in the Bill of Rights and the Ninth Amendment to the Constitution.²³⁰ The *Glucksberg* Court has already stated that the unenumerated fundamental rights established by the Court provide guidance as to the outlines of liberty supplied by substantive due process.²³¹ Likewise, the drafters of the Constitution included certain fundamental rights in the Bill of Rights because they were so apt to be infringed by invalid or seemingly valid exercises of federal power.²³² A significant body of scholarly work has buttressed the known history of the Ninth Amendment and, accordingly, of unenumerated rights.²³³ This history can provide clearer guideposts than the current *Glucksberg* test, which even the Supreme Court admits is lacking.²³⁴

Foremost, the direct correlation between rights and powers directly informed Madison in drafting the Ninth Amendment.²³⁵ Where rights ended, powers began; where powers ended, rights began.²³⁶ Be-

clauses, in principle, can adequately describe unenumerated items for a security agreement).

²²⁹ Under Federal Rule of Evidence 807, for example, a court determines whether an offered piece of hearsay evidence is similar enough to the enumerated hearsay exceptions in the Federal Rules because it provides the same guarantees of trustworthiness. See FED. R. EVID. 807; *id.* 803(24) advisory committee's note. This would be akin to courts using the first eight amendments to the U.S. Constitution as guideposts for determining other fundamental rights because of the language of the Ninth Amendment. *Cf. id.* 807; *id.* 803(24) advisory committee's note.

²³⁰ See *Glucksberg*, 521 U.S. at 722 (describing the judicially determined unenumerated fundamental rights as guideposts for substantive due process analysis); *cf. Turbyfill*, 486 F. Supp. at 234 (stating that an unenumerated hearsay exception must be consistent with the policy underlying the rule for listed hearsay exceptions).

²³¹ 521 U.S. at 722.

²³² See BARNETT, *supra* note 11, at 249; RAKOVE, *supra* note 10, at 125-26 (citing the example of freedom of the press, which the Stamp Act of 1765 had put at risk); STORY, *supra* note 78, at 696; Federal Farmer, Letter XVI, *supra* note 92, at 133-35.

²³³ See BARNETT, *supra* note 11, at 234 (commenting on the significant rise in scholarly consideration of the Ninth Amendment since the Judge Bork Supreme Court confirmation hearing); *supra* notes 77-128, 192-196 and accompanying text.

²³⁴ See 521 U.S. at 720-22 (tempering expansion of substantive due process analysis because of the lack of guideposts for decision making).

²³⁵ See MASSEY, *supra* note 11, at 67-68; Lash, *supra* note 12, at 374 (citing Letter from James Madison to George Washington (Nov. 20, 1789)).

²³⁶ See STORY, *supra* note 78, at 693-94; Lash, *supra* note 12, at 348. The people handed over only certain rights and privileges upon the formation of government—enumerated powers to the federal government and broad, but not limitless, police powers to the state

cause courts now rarely protect rights by limiting powers—as Madison would have expected—more affirmative protections are necessary to achieve the Ninth Amendment's original purpose.²³⁷ Courts may also find relevant in their determinations of unenumerated rights that, for example: (1) the purpose of the Ninth Amendment was to ensure that the Bill of Rights was not treated as an exhaustive list;²³⁸ (2) both Federalists and Antifederalists knew not all valid rights could be enumerated;²³⁹ (3) Madison was concerned about the legislature having full control over the interpretations of its potentially expansive powers;²⁴⁰ and (4) Madison referred to the other rights retained by the people as their natural rights in his notes to his Bill of Rights speech in the House.²⁴¹

2. The Value of Recognizing Nonfundamental Rights

The Supreme Court decisions in *Bowers v. Hardwick* and *Lawrence v. Texas*, which overruled *Bowers* just seventeen years later, provide an example of the unpredictability of substantive due process's all-or-nothing approach.²⁴² The *Lawrence* Court defined the same asserted liberty interest differently than the *Bowers* Court and thus reached a different result.²⁴³ The decisions in *Glucksberg*, which denied a right to physician-assisted suicide, and *Roe v. Wade*, which affirmed a right to have an abortion in light of the right to privacy, each seem to rest on the same

governments. See BARNETT, *supra* note 11, at 55; PATTERSON, *supra* note 68, at 19. Presumably, then, the people can also take them back. See AMAR, *supra* note 84, at 327.

²³⁷ See MCAFEE ET AL., *supra* note 198, at 2 (contending the Ninth Amendment's primary purpose was to limit overly broad interpretations of federal powers). Compare *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (granting a presumption of constitutionality to state government legislation), and *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 316, 407 (1819) (stating that there was no clause in the Constitution restricting just interpretations of the federal power), with *Commonwealth v. Bonadio*, 415 A.2d 47, 49–50 (Pa. 1980) (limiting state police power to protect sexual privacy rights).

²³⁸ See Madison's Bill of Rights Speech, *supra* note 10, at 177–79.

²³⁹ See Statement of Rep. Sedgwick, *supra* note 10, at 8–9; Iredell's Speech in the North Carolina Ratification Convention, *supra* note 10, at 145–46; see also Federal Farmer, Letter XVI, *supra* note 92, at 134–35.

²⁴⁰ See Madison's Bill of Rights Speech, *supra* note 10, at 177–78; see also RAKOVE, *supra* note 10, at 125.

²⁴¹ See BARNETT, *supra* note 11, at 54–55.

²⁴² See *Lawrence*, 539 U.S. at 578; *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986), overruled by *Lawrence*, 539 U.S. at 578; Culhane, *supra* note 57, at 496; Garry, *supra* note 210, at 192–93.

²⁴³ *Lawrence*, 539 U.S. at 567; see *Bowers*, 478 U.S. at 190; Culhane, *supra* note 57, at 496.

shaky grounds that *Bowers* did—if the asserted liberty interest is merely defined differently by a later Court, these results may be overruled.²⁴⁴

This unpredictability may stem from the Court's use of a test that recognizes only fundamental rights, and presents the plaintiffs with an all-or-nothing option.²⁴⁵ Had the *Bowers* Court held that there was at least a nonfundamental right to engage in adult consensual sexual activity in the privacy of one's home, but that the state government could invade that privacy on valid police power grounds, the subsequent *Lawrence* Court could have focused on the facts and evidence pertaining to that police power justification.²⁴⁶ Instead, the *Lawrence* Court resorted to an unspecific definition of a general liberty interest, even denying the legitimacy of the traditional state police power to regulate public morality, so that the majority could reach a decision it felt appropriate.²⁴⁷

The liberty interest in *Lawrence* was essentially general and non-fundamental, but the Court did not provide guideposts for how to determine the limits or to ensure the protection of such a broad and undefined liberty interest.²⁴⁸ This nonfundamental liberty interest could still, presumably, be limited in traditional public order situations—such as prostitution or public displays of sex acts—but not in others, such as acts between two consenting adults in the privacy of the home.²⁴⁹ *Lawrence* provided little in the way of guidance for future decisions.²⁵⁰

As discussed below in Section B, the existence of nonfundamental rights does not have to obliterate the presumption of constitutionality for legislative actions, nor should it necessarily lead to an uncontrollable and even more unpredictable discussion of individual rights by the

²⁴⁴ See *Glucksberg*, 521 U.S. at 705–06, 723; *Roe v. Wade*, 410 U.S. 113, 153 (1973). The shaky ground that these decisions rest on is the particularity of the definition that is attached to any asserted liberty interest. See *Glucksberg*, 521 U.S. at 723; *Roe*, 410 U.S. at 153; cf. *Lawrence*, 539 U.S. at 567 (overturning the decision in *Bowers* after redefining the asserted liberty interest).

²⁴⁵ See *Glucksberg*, 521 U.S. at 719–22; Chesney, *supra* note 214, at 983 n.14.

²⁴⁶ See *Lawrence*, 539 U.S. at 567, 570; *Bowers*, 478 U.S. at 190; *Bonadio*, 415 A.2d at 49–51 (considering evidence of whether legislation prohibiting particular sexual acts passed the public requirements of the police power).

²⁴⁷ See *Lawrence*, 539 U.S. at 567, 571, 578; see also Kalscheur, *supra* note 59, at 3. But see Goldberg, *supra* note 57, at 1234–36 (contending that courts stopped accepting moral justifications without empirical evidence long before *Lawrence*).

²⁴⁸ See *Lawrence*, 539 U.S. at 567, 578; Culhane, *supra* note 57, at 494–97; Hunter, *supra* note 57, at 1113–14.

²⁴⁹ See *Lawrence*, 539 U.S. at 578; Culhane, *supra* note 57, at 497–98.

²⁵⁰ See *Lawrence*, 539 U.S. at 563–79; see also Kalscheur, *supra* note 59, at 3; Brian Hawkins, Note, *The Glucksberg Renaissance: Substantive Due Process Since Lawrence v. Texas*, 105 MICH. L. REV. 409, 410–11 (2006) (describing courts' disinterest in using *Lawrence* to guide constitutional interpretation).

courts.²⁵¹ The ability of courts to recognize a nonfundamental right would, however, limit the harm of the current all-or-nothing approach which narrowly defines an asserted interest, and, thus, the severity and likelihood of unpredictable and unstable results.²⁵²

A number of courts have already resorted to finding support for the existence of nonfundamental rights either under the Ninth Amendment or with its support.²⁵³ These courts have employed the Ninth Amendment because certain rights seem intuitive to the nature of being citizens.²⁵⁴ These rights seem as intuitive as the right to wear a hat or wake up when one pleases, rights that certain Constitutional Convention delegates considered so understood and accepted—though not necessarily fundamental—as not to require enumeration in the Constitution to be protected back in 1789.²⁵⁵ The Ninth Amendment was Madison's direct effort to ensure that the enumeration in the Constitution of certain rights did not by itself disparage others not so listed.²⁵⁶ It was *not* meant

²⁵¹ See *Lawrence*, 539 U.S. at 563–79 (declaring a nonfundamental, but broad and general liberty interest while still employing the substantive due process doctrine); *Glucksberg*, 521 U.S. at 719–22 (outlining the current test under substantive due process); *Griswold*, 381 U.S. at 493 (Goldberg, J., concurring) (employing the Ninth Amendment as support for substantive due process in the right of privacy context); see also *Carolene Prods.*, 304 U.S. at 152 & n.4 (proclaiming the presumption of constitutionality for state legislation).

²⁵² See BARNETT, *supra* note 11, at 233–34; MASSEY, *supra* note 11, at 98–99, 159–61; see also MCAFFEE ET AL., *supra* note 198, at 238–39. The particularity of the definition that is attached to an asserted liberty interest coupled with a review of only the traditions and history of that asserted right lead to the shaky ground upon which some substantive due process decisions rely. See *Lawrence*, 539 U.S. at 566–68 (overturning the decision in *Bowers* after redefining the asserted liberty interest); *Glucksberg*, 521 U.S. at 723 (defining an asserted interest as a right to physician-assisted suicide, rather than a right to die); *Roe*, 410 U.S. at 153 (defining an asserted interest as a right to privacy, rather than a right to have an abortion).

²⁵³ See *Troxel*, 530 U.S. at 91–92 (Scalia, J., dissenting); *Anderson v. Laird*, 437 F.2d 912, 914–15 (7th Cir. 1971); *Charles v. Brown*, 495 F. Supp. 862, 863–64 (N.D. Ala. 1980).

²⁵⁴ See *Anderson*, 437 F.2d at 914–15 (stating a nonfundamental right to grow hair the length of one's choosing); *United States v. Cook*, 311 F. Supp. 618, 620 (W.D. Pa. 1970) (holding that the purpose of the Ninth Amendment was to guarantee to individuals those rights inherent to citizenship in democracies that are not enumerated in the Bill of Rights); *Adler v. Montefiore Hosp. Ass'n*, 311 A.2d 634, 642 (Pa. 1973) (describing a Ninth Amendment right to be treated by the physician of one's choosing).

²⁵⁵ See Statement of Rep. Sedgwick, *supra* note 10, at 8–9; Iredell's Speech in the North Carolina Convention, *supra* note 10, at 146. Recently, one court held that there is no constitutional right to dance, although the court did review generally the state's justifications for laws prohibiting cabaret-style dancing. *Festa v. N.Y. City Dep't of Consumer Affairs*, 820 N.Y.S.2d 452, 461 (App. Div. 2006) (holding that this type of dancing did not fall under the First Amendment's freedom of speech protection).

²⁵⁶ See Madison's Bill of Rights Speech, *supra* note 10, at 177–79.

to elevate the status of the enumerated rights, at the expense of other rights or even generally.²⁵⁷

3. Why Use the Ninth Amendment?

The Supreme Court has found ways to protect certain unenumerated rights—such as the fundamental rights to have children and to have marital privacy—as much as it protects enumerated rights.²⁵⁸ This in and of itself is a testament to the overarching significance of the Ninth Amendment's call not to disparage unenumerated rights just because they are unenumerated.²⁵⁹ Ignoring the Ninth Amendment simply leaves the issue of unenumerated rights to the Fifth and Fourteenth Amendments, neither of which was written directly to address that constitutional concern.²⁶⁰

Although the substantive due process doctrine has grown in acceptance, doubts remain as to how well judges can determine unenumerated rights and affirmatively protect them.²⁶¹ If substantive due process is not used to determine unenumerated rights, however, courts are left essentially with no unenumerated rights test.²⁶² If the Ninth Amendment is held to show that the Constitution requires some unenumerated rights test, courts can move to the question of whether use of substantive due process is the *proper* test.²⁶³ The cases using the Ninth

²⁵⁷ Barnett, *supra* note 68, at 33–35; see *The Slaughter-House Cases*, 83 U.S. 36, 118–19 (1873) (Bradley, J., dissenting) (stating that the rights of the people did not require enumeration in the Constitution to deserve constitutional protection).

²⁵⁸ See *Griswold*, 381 U.S. at 481, 484 (protecting the fundamental unenumerated right to marital privacy); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 535, 541 (1942) (protecting the fundamental unenumerated right to have children).

²⁵⁹ See Madison's Bill of Rights Speech, *supra* note 10, at 179 (arguing that a bill of rights would encourage judges to especially protect the rights actually listed); see also Letter from Jefferson to Madison, *supra* note 112, at 166.

²⁶⁰ See MASSEY, *supra* note 11, at 15–16; Roosevelt, *supra* note 23, at 1000–01. At least one Supreme Court Justice and several commentators, however, have suggested that the Privileges and Immunities Clause of the Fourteenth Amendment was meant to protect unenumerated rights. See U.S. CONST. amend. XIV, § 1; *The Slaughter-House Cases*, 83 U.S. at 95–96 (Field, J., dissenting); BARNETT, *supra* note 11, at 193–202; Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 164 (2006). Although relevant, a broader discussion of this issue is beyond the scope of this Note.

²⁶¹ See *Troxel*, 530 U.S. at 91–92 (Scalia, J., dissenting); *Glucksberg*, 521 U.S. at 720–23; MCAFFEE ET AL., *supra* note 198, at 237.

²⁶² See *Troxel*, 530 U.S. at 91–92 (Scalia, J., dissenting) (contending that judges may not protect any unenumerated rights, thus implying that no unenumerated rights test can be valid); *Glucksberg*, 521 U.S. at 720–23; MCAFFEE ET AL., *supra* note 198, at 237.

²⁶³ See *Glucksberg*, 521 U.S. at 719–22 (outlining the current test); *Griswold*, 381 U.S. at 484–86 (outlining a penumbras and emanations test); AMAR, *supra* note 84, at 328–29

Amendment to defend nonfundamental rights show the country's deep need to protect rights beyond the specific list in the Constitution.²⁶⁴

Lastly, there is significant confusion among lower courts and even particular Supreme Court Justices about how to treat the Ninth Amendment and nonfundamental rights.²⁶⁵ Currently, some Justices and scholars believe that there are unenumerated rights, but these rights cannot be protected by judges.²⁶⁶ Others consider the Ninth Amendment to be a core principle of rights analysis.²⁶⁷ Recent Court appointees and the majority of courts, however, ignore it.²⁶⁸ Yet some judges do see the Ninth Amendment as a repository of rights, including even nonfundamental rights.²⁶⁹ If courts are to give meaning to every clause of the Constitution, as *Marbury v. Madison* requires, they should not let the Ninth Amendment—one of the last stumbling blocks for final approval of the Constitution and a reason why Madison relented on the addition of a bill of rights at all—to continue to be ignored and disparaged.²⁷⁰

(suggesting that courts should look to the collective decisions of the people over time, through state constitutions and lived traditions, for unenumerated rights); BARNETT, *supra* note 11, at 237–42 (outlining a fundamental natural rights theory for unenumerated rights).

²⁶⁴ See MASSEY, *supra* note 11, at 5 (stating that “[t]here seems to be a deep need in the American character to preserve and protect some quantum of individual liberty not otherwise specifically accounted for in the charter of our liberties”); *supra* notes 156–183 and accompanying text. Even judges who say they cannot, as judges, use the Ninth Amendment actively to defend unenumerated rights still refer to Ninth Amendment rights or other rights retained by the people as a separate category. See *Troxel*, 530 U.S. at 91 (Scalia, J., dissenting); *Griswold*, 381 U.S. at 530–31 (Stewart, J., dissenting).

²⁶⁵ See MCAFEE ET AL., *supra* note 198, at 236; *supra* notes 156–197 and accompanying text (describing the variety of ways in which the Ninth Amendment has been used).

²⁶⁶ See *Troxel*, 530 U.S. at 91–92 (Scalia, J., dissenting); *Bork Confirmation Hearings*, *supra* note 184, at 441 app. B; Raoul Berger, *The Ninth Amendment: The Beckoning Mirage*, 42 RUTGERS L. REV. 951, 958–59 (1990); Mayer, *supra* note 67, at 323.

²⁶⁷ See *Massachusetts v. Upton*, 466 U.S. 727, 737 (1984) (Stevens, J., dissenting); BARNETT, *supra* note 11, at 240–41.

²⁶⁸ See generally *Roberts Confirmation Hearing*, *supra* note 188; *Alito Confirmation Hearing*, *supra* note 188; *supra* notes 129–180 and accompanying text.

²⁶⁹ See, e.g., *Anderson*, 437 F.2d at 914–15 (stating a nonfundamental right to grow hair the length of one's choosing); *Cook*, 311 F. Supp. at 620 (holding that the purpose of the Ninth Amendment was to guarantee to individuals those rights inherent to citizenship in democracies that are not enumerated in the Bill of Rights); *Adler*, 311 A.2d at 642 (describing a Ninth Amendment right to be treated by the physician of one's choosing); BARNETT, *supra* note 11, at 234–42 (outlining a fundamental natural rights theory of unenumerated rights).

²⁷⁰ See Madison's Bill of Rights Speech, *supra* note 10, at 177–79; see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803); Lash, *supra* note 12, at 371. Madison stated in the House of Representatives that the Ninth Amendment guarded against the most plausible argument that he had heard for keeping out the Bill of Rights: that listing certain

B. *The Supplemented Test and the Ninth Amendment's Role*

The Ninth Amendment is a structural concept.²⁷¹ Madison did not develop this Amendment as a test in and of itself.²⁷² Rather, the Ninth Amendment was designed as a catch-all clause to ensure the consideration of those rights that are unlisted in the Constitution.²⁷³ The Ninth Amendment, and not substantive due process, provides the history and purposes for protecting unenumerated rights.²⁷⁴ The history and purposes of the Bill of Rights, the reasons for specific enumerations therein, and the Ninth Amendment's own history should be the guideposts that judges look to when reviewing claims under the current *Glucksberg* unenumerated rights test.²⁷⁵

1. The Supplemented Test

First, courts may still narrowly define the asserted liberty interest, but should look to *both* the legal traditions and history about that right *and* the traditions and history of unenumerated rights generally, by way of the Ninth Amendment and its ratification history.²⁷⁶ If the court determines that the asserted right is fundamental or is not a right at all with these additional guideposts, it should proceed under

rights would imply that rights left unenumerated were not protected and were insecure. Madison's Bill of Rights Speech, *supra* note 10, at 177-79.

²⁷¹ See AMAR, *supra* note 84, at 327-28; McAFFEE ET AL., *supra* note 198, at 34-35; Lash, *supra* note 12, at 393-94. But see Yoo, *supra* note 110, at 1010 (contending that, because state constitutions had provisions similar to the Ninth Amendment, they must have understood such provisions to declare rights protections directly).

²⁷² See *Griswold*, 381 U.S. at 492 (Goldberg, J., concurring); Lash, *supra* note 12, at 393-94.

²⁷³ See Madison's Bill of Rights Speech, *supra* note 10, at 178-79.

²⁷⁴ See MASSEY, *supra* note 11, at 15-16; see also McAFFEE ET AL., *supra* note 198, at 238-39 (criticizing the approach of those who employ substantive due process to protect unenumerated fundamental rights).

²⁷⁵ See Madison's Bill of Rights Speech, *supra* note 10, at 177-79 (describing his purposes for drafting the Ninth Amendment); see also BARNETT, *supra* note 11, at 249 (discussing a particular right in the Bill of Rights and how it was apt for infringement without specific constitutional protection); RAKOVE, *supra* note 10, at 125-26 (discussing the reasons Antifederalists sought a bill of rights); STORY, *supra* note 78, at 693-96 (same); Federal Farmer, Letter XVI, *supra* note 92, at 133-35.

²⁷⁶ See *Griswold*, 381 U.S. at 488-89, 491-92 (Goldberg, J., concurring); AMAR, *supra* note 84, at 328 & n.* (stating that the relevant question should be what the protection for a certain right was in the absence, or before the existence, of the Bill of Rights); see also *Glucksberg*, 521 U.S. at 720 (urging caution in determining unenumerated rights because there are limited guideposts for proper decision making); MASSEY, *supra* note 11, at 13; Madison's Bill of Rights Speech, *supra* note 10, at 178-79.

the general structure of the current *Glucksberg* test.²⁷⁷ If, however, the court determines that the asserted interest is a valid right, but is not fundamental, it should require the government to show that it has a rational basis for *infringing* that right.²⁷⁸

Importantly, the initial burden would still be on the person asserting the right because the government would have the presumption of constitutionality.²⁷⁹ But if the person asserting the right can counter this presumption with strong evidence that the legislature did not have a sufficient rational basis for infringing the nonfundamental right, the burden would shift to the state government to explain its police power justification, or to the federal government to account for its enumerated powers justification.²⁸⁰

The courts that have used the Ninth Amendment as a protector of rights have generally employed a test similar to that of substantive due process—a reliance on the tradition and history of protections or prohibitions of some asserted liberty interest.²⁸¹ The Ninth Amendment's history, however, would help provide further guideposts.²⁸² Once a right is determined and its proper level of importance is established—

²⁷⁷ See 521 U.S. at 719–22.

²⁷⁸ See *Lawrence*, 539 U.S. at 577–78 (protecting a liberty interest by concluding that the government had no rational basis for infringing the interest); *Glucksberg*, 521 U.S. at 720–22 (requiring the government to show only some rational basis). The Court developed its presumption of constitutionality doctrine in response to its earlier decisions protecting economic rights too strongly. See *Carolene Prods.*, 304 U.S. at 152 & n.4; see also *Lochner v. New York*, 198 U.S. 45, 53–54, 57 (1905), *overruled in part by* *Ferguson v. Skrupa*, 372 U.S. 726 (1963), and *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952).

²⁷⁹ See *Carolene Prods.*, 304 U.S. at 152 n.4; BARNETT, *supra* note 11, at 230–34 (describing the “Footnote Four-Plus” approach to the presumption of constitutionality).

²⁸⁰ See *Goldberg*, *supra* note 57, at 1240–41 (describing theory and importance of empirical bases for legislation, including the morality context). Compare *Powell v. State*, 510 S.E.2d 18, 25 (Ga. 1998) (invalidating antisodomy law for going beyond the proper scope of the police power), with *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804, 819–20 (11th Cir. 2004) (holding that even if the assumptions underlying the government’s belief in preventing homosexuals from adopting are wrong, the mere fact that they can be argued is sufficient to pass rational basis review).

²⁸¹ See *Griswold*, 381 U.S. at 493 (Goldberg, J., concurring); *Cook*, 311 F. Supp. at 619–20 (stating that the purpose of the Ninth Amendment was to guarantee to individuals those rights inherent to citizenship in democracies that are not enumerated in the Bill of Rights); *In re Guardianship of Thompson*, 32 Haw. 479, 485–86 (1932) (denying the inalienable right of a father to the care and custody of his child based on states’ history of removing children from fathers in custody disputes, even without fault). Even natural rights theorists, who argue that the unenumerated rights of the Ninth Amendment are the natural rights of the people and are fundamental, rely on the history of the founders’ beliefs in and protection of natural rights. See BARNETT, *supra* note 11, at 54–60.

²⁸² See *Griswold*, 381 U.S. at 488–89, 491–92 (Goldberg, J., concurring); AMAR, *supra* note 84, at 328 & n.*.

fundamental, nonfundamental, or simply nonexistent—then a more accurate review of the right at stake and the ability of the government to interfere with it can be made.²⁸³

The main rights question Madison and the other drafters of the Constitution considered was whether the government could validly infringe a particular right, not whether a fundamental right existed.²⁸⁴ Instead of focusing entirely on the all-or-nothing question of whether a fundamental right is being asserted, courts should look to whether the government had a proper justification for making a law that infringes on someone's nonfundamental right.²⁸⁵ After a person presents strong evidence against legislation and shifts the burden to the government, the legislation may still infringe upon this right with a showing of some rational basis *to invade that right*.²⁸⁶ It does slightly raise the burden on a government to require it to show that it can validly infringe a right—even if it is a nonfundamental one—rather than merely have some rational basis for passing a law.²⁸⁷ But the presumption of constitutionality for government action remains until the person asserting a right shows that the government has an improper or no rational basis for infringing that right.²⁸⁸

2. Implementing the Supplemented Test for Unenumerated Rights: An Example

A recent survey found that many American people thought there was a right to have a pet somewhere in the Constitution.²⁸⁹ This is a

²⁸³ See *Powell*, 510 S.E.2d at 25. Compare *Lawrence*, 539 U.S. at 566–68 (describing a non-fundamental liberty interest and determining whether the state has the ability to regulate it), and *Bonadio*, 415 A.2d at 49–50 (determining the police power justifications for legislation), with *Lofton*, 358 F.3d at 819–20 (accepting a government's argument as rational, even if its underlying assumptions are wrong).

²⁸⁴ MORGAN, *supra* note 78, at 138–39; Lash, *supra* note 12, at 374.

²⁸⁵ See Raymond Ku, *Swingers: Morality Legislation and the Limits of State Police Power*, 12 ST. THOMAS L. REV. 1, 3 (1999) (discussing the differences between asking whether a person has a right to do X and whether the government has a right to regulate or prohibit X).

²⁸⁶ See Goldberg, *supra* note 57, at 1240–41 (describing theory and importance of empirical bases for legislation, including the morality context); Ku, *supra* note 285, at 3.

²⁸⁷ See *Lawrence*, 539 U.S. at 564–67 (striking down legislation as having no rational basis for infringing a liberty interest); Ku, *supra* note 285, at 3 (discussing whether a government has the power to regulate a right to sexual autonomy). *Contra Lofton*, 358 F.3d at 819–20 (requiring only a rational argument for passing legislation, even if the argument's underlying assumptions are wrong).

²⁸⁸ See *Carolene Prods.*, 304 U.S. at 152 n.4; BARNETT, *supra* note 11, at 230–34 (describing the “Footnote Four-Plus” approach to the presumption of constitutionality).

²⁸⁹ See Associated Press, *Study: More Know ‘Simpsons’ Than Constitution*, Mar. 1, 2006, <http://www.foxnews.com/story/0,2933,186455,00.html>.

right that seems intuitive to the common citizen, and may be a non-fundamental right that deserves at least some protection from the legal system under this supplemented test.²⁹⁰ Assuming that the right to have a pet—focusing more on the right to companionship than property—is appropriately a nonfundamental right, it should not be fully denied merely because it was not, in fact, enumerated in the Constitution.²⁹¹ Those involved in the debates leading up to the Bill of Rights knew they could not list every single valid right.²⁹² A potential plaintiff theoretically could, then, present information regarding the ratification history of the enumerated rights in the Constitution and the Ninth Amendment to help establish that the right to have a pet is at least nonfundamental.²⁹³

Suppose person *Y* has a bird, a cat, and a horse as pets. In light of the potential for the deadly bird flu to enter the United States, assume the government of state *X*, in which person *Y* resides, passes a law that no person may have any pets.²⁹⁴ Under the current unenumerated rights test, if person *Y* challenged this law under the liberty interest protected by the Fourteenth Amendment, *Y* will have a weak case in light of the many existing regulations over pet ownership.²⁹⁵ The government of state *X* would merely have to show that it has a rational ba-

²⁹⁰ See *id.*; cf. Statement of Rep. Sedgwick, *supra* note 10, at 8 (stating that simple rights, such as the rights to wear a hat or wake up when one pleases, were clearly not under the control of the government in 1789 and did not need to be specifically listed in the Constitution to be protected).

²⁹¹ See U.S. CONST. amend. IX; Madison's Bill of Rights Speech, *supra* note 10, at 178–79.

²⁹² See Statement of Rep. Sedgwick, *supra* note 10, at 8–9; Iredell's Speech in the North Carolina Convention, *supra* note 10, at 145–46.

²⁹³ See U.S. CONST. amend. IX; Madison's Bill of Rights Speech, *supra* note 10, at 178–79; see also Statement of Rep. Sedgwick, *supra* note 10, at 8–9; Iredell's Speech in the North Carolina Convention, *supra* note 10, at 145–46.

²⁹⁴ See Carter Dougherty, *Bird Flu Fears and New Rules Rattle German Pet Lovers*, N.Y. TIMES, Mar. 5, 2006, at 13.

²⁹⁵ See *Glucksberg*, 521 U.S. at 720–21 (enunciating the test as whether an asserted liberty interest has been supported by tradition and history so as to be fundamental). There have been a number of regulations about pets and other animals in states over the years—thus, history and tradition appear to fall against the narrowly defined right to own a bird, own a cat, or own a horse being fundamental. See, e.g., MICH. COMP. LAWS GENERAL INDEX 113–16 (2005) (listing the variety of animal disease-related laws in Michigan); N.J. STAT. ANN. § 4:5-2 (1998) (granting the N.J. State Board of Agriculture discretion to act in cases of contagious or infectious diseases in animals as they determine); see also U.S. DEP'T OF TREASURY, U.S. CUSTOMS SERV., PETS AND WILDLIFE: LICENSING AND HEALTH REQUIREMENTS 1–2 (1999), available at http://www.cbp.gov/ImageCache/cgov/content/publications/pets_2epdf/v1/pets.pdf (requiring screening procedures for re-entry of pets into the United States).

sis for this law preventing pet ownership.²⁹⁶ With the substantial hazards of bird flu, this rational basis seems quite easily met for all three animals, regardless of what scientific evidence person *Y* could show about the risks of transmission.²⁹⁷ The presumption of constitutionality would further strengthen the government's argument that it had a rational basis for enacting this extreme measure.²⁹⁸

If, however, the presiding court first determines that person *Y* has a nonfundamental right to have these pets in the first place, at least the court will go through a more thorough and complete analysis.²⁹⁹ Because the infringing legislation is a state law, the court will examine whether the legislation was passed pursuant to the proper police power to protect the health of its other citizens.³⁰⁰ This would likely lead to some scientific consideration of the risks of infection of these animals.³⁰¹ If person *Y* presented strong evidence showing that although birds and cats are susceptible to the bird flu more than humans, horses are no more susceptible than humans, there would be a rational basis presumption for the law preventing *Y* from having cats and birds, but not for the law about horses.³⁰² Later updates or changes to this evidence could affect the validity of the police power justification, but would not change the actual structure of analysis.³⁰³

²⁹⁶ See *Glucksberg*, 521 U.S. at 722.

²⁹⁷ See *id.*; Dougherty, *supra* note 294; *cf. Lofton*, 358 F.3d at 819–20 (holding that even if the assumptions underlying the government's belief in preventing homosexuals from adopting are wrong, the mere fact that they can be argued is sufficient to pass rational basis review).

²⁹⁸ See *Carolene Prods.*, 304 U.S. at 152 n.4; BARNETT, *supra* note 11, at 232–34.

²⁹⁹ See *Bonadio*, 415 A.2d at 49–50 (requiring a showing that the state was acting according to its proper police powers); Goldberg, *supra* note 57, at 1240–41.

³⁰⁰ See *Bonadio*, 415 A.2d at 49–50. See generally FREUND, *supra* note 53; TIEDMAN, *supra* note 53; Barnett, *supra* note 52.

³⁰¹ *Cf. People v. Onofre*, 415 N.E.2d 936, 941 (N.Y. 1980) (examining whether a state's justifications for regulation are legitimate enough to invade a nonfundamental right).

³⁰² *Cf. id.* (striking down a law that did not fit the state's proper police powers); *Bonadio*, 415 A.2d at 49–50 (same).

³⁰³ See *supra* notes 242–247 and accompanying text (describing how the overruling of *Bowers* by *Laurence* could have come about if the Court looked more closely at the evidence for police power justifications). One might object to the proposed standard on efficiency grounds, asking whether the government must provide evidence for every type of animal before it enacts legislation, but this objection is mitigated by the legislation's presumption of constitutionality. See *Carolene Prods.*, 304 U.S. at 152 & n.4; BARNETT, *supra* note 11, at 232–33. The burden of persuasion remains on person *Y* to show that horses cannot transmit bird flu any more easily than humans. See *Carolene Prods.*, 304 U.S. at 152 & n.4; BARNETT, *supra* note 11, at 232–33. *Y*'s evidence showing this would carry much more weight, though, if it was presented in light of some right; state governments have always been afforded a presumption of constitutionality, but only *in the face of silence*. See *Carolene Prods.*, 304 U.S. at 152 & n.4.

V. COMBATING REASONS WHY COURTS AVOID THE NINTH AMENDMENT

After establishing a Ninth Amendment construction supplementing substantive due process, there still appear to be three main reasons why courts have avoided the Ninth Amendment since *Griswold v. Connecticut*.³⁰⁴ First, history shows that the Ninth Amendment was originally meant to apply only against the federal government.³⁰⁵ Second, judges may not have the power to enforce unenumerated rights.³⁰⁶ Third, the Ninth Amendment seems tied to the emanations test set forth in *Griswold* but since surpassed by substantive due process.³⁰⁷

A. Application Against the States

The text of the Ninth Amendment says only certain things.³⁰⁸ It says that the Ninth Amendment is meant to deal with the enumeration problem regarding rights listed and those not listed in the Constitution.³⁰⁹ Rights that are unenumerated should not be denied or disparaged merely because the Constitution does not explicitly list them.³¹⁰ Lastly, the Ninth Amendment very much implies that there *are* other rights retained by the people that are not listed in the Constitution.³¹¹

The Ninth Amendment does not mention the federal government; in fact, a clause referring to the powers of the federal government was specifically removed from the final draft.³¹² Although one *purpose* of the Ninth Amendment was to limit federal powers, the *method* of this limitation was to prevent the Bill of Rights from becoming an exhaustive list of rights.³¹³ Most of the first eight amendments became applicable to state governments by incorporation through the Fourteenth Amendment,

³⁰⁴ See *infra* notes 305–349 and accompanying text; see also MCAFFEE ET AL., *supra* note 198, at 236 (describing the confusion in fundamental rights analysis over the past thirty-five years).

³⁰⁵ See Madison's Bill of Rights Speech, *supra* note 10, at 178–79; see also AMAR, *supra* note 84, at 327; Lash, *supra* note 12, at 353.

³⁰⁶ See *Troxel v. Granville*, 530 U.S. 57, 91–92 (2000) (Scalia, J., dissenting); Mayer, *supra* note 67, at 323; see also *Bork Confirmation Hearings*, *supra* note 184, at 441–42 app. B.

³⁰⁷ See *Washington v. Glucksberg*, 521 U.S. 702, 719–22 (1997); *Roberts Confirmation Hearing*, *supra* note 188, at Day 1 (Sept. 12), Day 2, pt. VI (Sept. 13); *Alito Confirmation Hearing*, *supra* note 188, at Day 2, pt. I (Jan. 10), Day 3, pt. I (Jan. 11).

³⁰⁸ See U.S. CONST. amend. IX; *supra* notes 64–76 and accompanying text.

³⁰⁹ See U.S. CONST. amend. IX; Madison's Bill of Rights Speech, *supra* note 10, at 178–79; *supra* notes 64–76 and accompanying text.

³¹⁰ See U.S. CONST. amend. IX.

³¹¹ See *id.*; Madison's Bill of Rights Speech, *supra* note 10, at 178–79; see also Barnett, *supra* note 68, at 2.

³¹² See U.S. CONST. amend. IX; Lash, *supra* note 12, at 349–50 n.78, 368–69.

³¹³ See MASSEY, *supra* note 11, at 67–68, 77; Lash, *supra* note 12, at 349–50 n.78, 368–69.

and this Ninth Amendment structural conception of the Bill of Rights and unenumerated rights should be no less applicable.³¹⁴

The Fourteenth Amendment's drafters did not expect the Ninth Amendment to be directly incorporated.³¹⁵ The question, however, is whether the Ninth Amendment needs to be incorporated at all.³¹⁶ Although the original purpose of the Ninth Amendment was partly to limit the power of the federal government, the method selected was a construction that focuses on how the Bill of Rights should be construed and not specifically on limits to the federal power.³¹⁷

During the Constitutional Convention, delegates like Madison believed that rights and powers were so intertwined that protecting one would limit the other.³¹⁸ This interaction of rights and powers was an important factor in the drafting of the Ninth Amendment.³¹⁹ It was also a theory that generally applied to both states and the federal government, although to varying degrees.³²⁰ The federal government's powers were only those enumerated in the Constitution; beyond them, the rights of the people began.³²¹ The state governments enjoyed broad police powers, but where they ended, the rights of the people also began.³²²

³¹⁴ See MASSEY, *supra* note 11, at 160-61; PATTERSON, *supra* note 68, at 23. One of the results of the adoption of the Fourteenth Amendment was to "incorporate" a number of the rights in the Bill of Rights, so as to apply these protections against state governments as well as the federal government. See Rubin, *supra* note 26, at 835.

³¹⁵ Raoul Berger, *The Ninth Amendment as Perceived by Randy Barnett*, 88 Nw. U. L. REV. 1508, 1520 (1994).

³¹⁶ See MASSEY, *supra* note 11, at 134-42, 160-61. This is not to say definitively that the Ninth Amendment was *not* impliedly incorporated through ratification of the Fourteenth Amendment; rather, this is to say only that if it was not and never will be incorporated, it may still apply against the states, though this would be a slightly weaker argument than direct incorporation. See Barnett, *supra* note 68, at 15; see also *Adamson v. California*, 332 U.S. 46, 70-72 (1947) (Black, J., dissenting) (claiming that the whole Bill of Rights—its ten amendments—is applicable to states by incorporation through the Fourteenth Amendment).

³¹⁷ See MASSEY, *supra* note 11, at 67-69; Barnett, *supra* note 68, at 54.

³¹⁸ See MASSEY, *supra* note 11, at 67-68; Lash, *supra* note 12, at 374.

³¹⁹ See MASSEY, *supra* note 11, at 67-68; Lash, *supra* note 12, at 374.

³²⁰ See PATTERSON, *supra* note 68, at 19-21.

³²¹ See STORY, *supra* note 78, at 693-94; Lash, *supra* note 12, at 348.

³²² See Madison's Bill of Rights Speech, *supra* note 10, at 180 (acknowledging the indefinite abuses created by a state legislature of general powers); see also STORY, *supra* note 78, at 696. For the most part, rights were understood to exist before the creation of a government. See Wilson Statehouse Speech, *supra* note 51, at 121-22. Certain rights, however, had to be given up by the people to form a government which, in turn, could act to protect their rights collectively. See PATTERSON, *supra* note 68, at 21 (quotation omitted); RAKOVE, *supra* note 10, at 120. Other rights, however, may have been inalienable. See Jackson, *supra* note 62, at 506-07.

B. Judicial Power to Enforce Unenumerated Rights

The Ninth Amendment was written to guard against the abuses of unconstitutional legislation.³²³ Madison was already wary of the abuses then occurring in state governments of broad powers when he drafted the Ninth Amendment.³²⁴ If judges have little or no power to protect unenumerated rights, then Madison placed all the control into the hands of the very legislators he meant to restrain.³²⁵ Instead, his statements on the matter reveal a different plan.³²⁶

Madison contended that the Ninth Amendment would help protect unenumerated rights, but not necessarily all unenumerated rights with the same vigor as each enumerated right.³²⁷ At the time, Madison did not doubt that unenumerated rights likely would be protected by judges less ardently than enumerated rights.³²⁸ Thomas Jefferson actually tried to convince Madison that protecting some rights strongly and others weakly was better than not protecting them at all.³²⁹ These statements all presume, however, that they desired unenumerated rights to be actively protected at least in some way.³³⁰

Rights were not listed to elevate their status, but rather to ensure that they were properly protected.³³¹ One of Madison's primary concerns was not allowing democratic legislative majorities to pass whatever laws they felt appropriate against disfavored minorities.³³² There would be no better way to deny or disparage unenumerated rights than to say that they are not worthy of judicial consideration.³³³

Ultimately, the Ninth Amendment was developed to do the following: (1) maintain as close as possible the structure and balance of powers that the drafters first envisioned, before the addition of the Bill of Rights; (2) ensure that all rights would receive at least some protection and not just those enumerated; (3) help protect every simple right that

³²³ See Madison's Bill of Rights Speech, *supra* note 10, at 172, 177-79; see also Lash, *supra* note 12, at 353.

³²⁴ See Madison's Bill of Rights Speech, *supra* note 10, at 177-78.

³²⁵ See *id.* at 178-79. It would seem to greatly disparage unenumerated rights if they are not worthy of judicial consideration. Massey, *supra* note 11, at 13.

³²⁶ See Madison's Bill of Rights Speech, *supra* note 10, at 177-79.

³²⁷ See *id.* at 179.

³²⁸ See *id.*

³²⁹ See Letter from Jefferson to Madison, *supra* note 112, at 166.

³³⁰ See BARNETT, *supra* note 11, at 75-76, 266-67.

³³¹ Barnett, *supra* note 68, at 28-29.

³³² See James S. Liebman & Brandon L. Garrett, *Madisonian Equal Protection*, 104 COLUM. L. REV. 837, 843 (2004) (outlining in detail Madison's conception of equal protection for the new Constitution).

³³³ MASSEY, *supra* note 11, at 13.

could not possibly be enumerated; and (4) prevent expansive readings of the valid federal powers by protecting enumerated and unenumerated rights.³³⁴ Judicial power to enforce unenumerated rights is integral to achieving each of these purposes.³³⁵

C. Disuse of the Emanations Theory

The majority's reasoning in *Griswold*—that unenumerated rights can be recognized as emanations of rights actually listed—is rarely followed today in determining whether asserted liberty interests are fundamental rights.³³⁶ The Ninth Amendment is not as intimately tied to the majority's reasoning in *Griswold* as it appears and, thus, should not be avoided merely because of this reasoning's disuse.³³⁷ The majority's reference to the Ninth Amendment was limited to stating its actual text, with no explanatory analysis.³³⁸ At most, the Ninth Amendment was used to show that some test to determine unenumerated rights is valid and required.³³⁹

The Ninth Amendment was considered more extensively in Justice Goldberg's concurrence.³⁴⁰ Justice Goldberg did not rely entirely on the Ninth Amendment to recognize the right of privacy.³⁴¹ He used the Ninth Amendment to support his argument that substantive due process can be used to protect unenumerated fundamental rights.³⁴² The majority of his analysis of the Ninth Amendment was written to demonstrate the importance of its history to the Constitution as a whole.³⁴³ In another concurrence, Justice Harlan stated that substantive due process

³³⁴ See Madison's Bill of Rights Speech, *supra* note 10, at 177–79; see also MASSEY, *supra* note 11, at 69–70; Lash, *supra* note 12, at 353.

³³⁵ See Madison's Bill of Rights Speech, *supra* note 10, at 177–79; see also MASSEY, *supra* note 11, at 13.

³³⁶ See *Glucksberg*, 521 U.S. at 720–21 (outlining the current unenumerated rights test); *Griswold v. Connecticut*, 381 U.S. 479, 482–84 (1965). In 2005–2006, the two most recent Supreme Court nominees stated that substantive due process analysis had surpassed the emanations test from the majority in *Griswold*, and so this trend appears likely to continue. See *Roberts Confirmation Hearing*, *supra* note 188, at Day 2, pt. VI (Sept. 13); *Alito Confirmation Hearing*, *supra* note 188, at Day 3, pt. I (Jan. 11).

³³⁷ See *Griswold*, 381 U.S. at 484.

³³⁸ See *id.*

³³⁹ See *id.*

³⁴⁰ See *id.* at 486–99 (Goldberg, J., concurring).

³⁴¹ See *id.*

³⁴² See *Griswold*, 381 U.S. at 487, 493 (Goldberg, J., concurring).

³⁴³ See *id.* at 487–93.

can rest on its own strength.³⁴⁴ His opinion is basically what courts follow today.³⁴⁵

This current approach is flawed, however, because substantive due process, which currently exists on its own without Ninth Amendment support, no longer relies on the strong constitutional foundation that Justice Harlan believed it did in *Griswold*.³⁴⁶ The past forty years have seen unpredictable results and only a small number of affirmative protections of unenumerated rights, fundamental or otherwise.³⁴⁷ Numerous tests and theories have been set forth to analyze unenumerated rights.³⁴⁸ Supplementing substantive due process with the Ninth Amendment would provide significant support for the continuing validity of judges protecting unenumerated rights of all degrees.³⁴⁹

CONCLUSION

James Madison drafted the Ninth Amendment to ensure that unenumerated rights were protected in some way, and therefore the Amendment's history should be used to help provide the guideposts for unenumerated rights analysis. Courts today instead use substantive due process alone, but it is incomplete because it focuses solely on fundamental unenumerated rights. This demands an all-or-nothing approach towards rights and furthers the current trepidation about expanding protection of rights. The ability of courts to recognize nonfundamental rights would limit the harm of this approach.

First, courts still should narrowly define the asserted liberty interest, but should look to *both* the legal traditions and history of that right *and* the traditions and history of unenumerated rights generally through the Ninth Amendment's ratification history. If the court determines that the asserted right is fundamental or not a right at all, it should proceed un-

³⁴⁴ See *id.* at 500 (Harlan, J., concurring).

³⁴⁵ See *Glucksberg*, 521 U.S. at 720–22; *Griswold*, 381 U.S. at 500 (Harlan, J., concurring).

³⁴⁶ See *Glucksberg*, 521 U.S. at 720–22; *Griswold*, 381 U.S. at 500 (Harlan, J., concurring); MCAFEE ET AL., *supra* note 198, at 238–39.

³⁴⁷ See *Glucksberg*, 521 U.S. at 720; *supra* notes 26–45, 158–183 and accompanying text.

³⁴⁸ See *Glucksberg*, 521 U.S. at 719–22 (outlining the current test); *Griswold*, 381 U.S. at 484–86 (outlining a penumbras and emanations test); AMAR, *supra* note 84, at 328–29 (suggesting that courts should look to the collective decisions of the people over time, through state constitutions and lived traditions, for unenumerated rights); BARNETT, *supra* note 11, at 237–42 (outlining a fundamental natural rights theory for unenumerated rights).

³⁴⁹ See Madison's Bill of Rights Speech, *supra* note 10, at 177–79; see also *Griswold*, 381 U.S. at 493 (Goldberg, J., concurring); BARNETT, *supra* note 11, at 234–42; Roosevelt, *supra* note 23, at 1000–02.

der the current unenumerated rights test. If, however, the court determines that the asserted interest is a nonfundamental right and a person presents strong evidence against the legislation, the court should require the government to show that it has a rational basis for infringing *that right*.

After establishing a Ninth Amendment construction, there still appear to be three main reasons why the Ninth Amendment has been avoided: it originally applied only against the federal government, judges may not have the power to enforce unenumerated rights, and the Ninth Amendment seems tied to the emanations test which the majority in *Griswold v. Connecticut* used, but which now has been surpassed by substantive due process. These concerns can be alleviated and, accordingly, the inherent problems of employing the Ninth Amendment can subside.

The history and purposes of the Bill of Rights, the reasons for specific enumerations, and the Ninth Amendment should serve as guideposts for judges in examining unenumerated rights. Altering the current unenumerated rights test with this support would reinforce all of the rights retained by the people, fundamental and nonfundamental.

JOSEPH F. KADLEC