

CURIOSITY KILLED THE CONGRESS:
THE NINTH LIFE OF THE NINTH AMENDMENT

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*“To every suggestion concerning a bill of rights,
the citizens of the United States may always say,
We reserve the right to do what we please.”¹*

INTRODUCTION

For a “forgotten amendment,” the Ninth Amendment has received extensive analysis and discussion over the last thirty years.² Despite the Amendment’s plain language promise that the “enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people,”³ the courts have been increasingly hesitant to recognize such rights.⁴ Although eminent constitutional scholars have undertaken exhaustive research in recent decades to determine the original meaning of the Ninth Amendment,⁵ scholarship in this field tends to focus on judicial interpretation.⁶ This Comment takes a somewhat different approach and turns its gaze

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¹ James Wilson, Member of the Constitutional Convention, Speech at the Pennsylvania Ratifying Convention (Nov. 28, 1787), in 2 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 437 (Jonathan Elliot ed., 2d ed. 1836).

² See Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 10–21 (2006) (discussing the modern academic debate on the original meaning of the Ninth Amendment).

³ U.S. CONST. amend. IX.

⁴ See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022) (holding that, for an unenumerated right to be protected by the Constitution, “any such right must be deeply rooted in this Nation’s history and tradition and implicit in the concept of ordered liberty” (internal quotation marks omitted) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997))).

⁵ Compare Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331, 337–38 (2004) [hereinafter *Lost Original Meaning*] (arguing for a states-rights interpretation on originalist grounds), with Barnett, *supra* note 2, at 76–81 (arguing for an individual natural rights interpretation on originalist grounds).

⁶ See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 241 (2004) [hereinafter *LOST CONSTITUTION*] (arguing forcefully for judicial enforcement of unenumerated rights).

instead up the hill to Congress by expanding on the groundwork laid by Professor Brian Kalt.⁷

Toward the goal of increasing public confidence,⁸ this Comment argues the Ninth Amendment was—and still is—home to extensive, unenumerated, individual rights that now require Congressional recognition to counter judicial overreach.

In forming this argument, this Comment first provides necessary background on academic and judicial understandings of the Ninth Amendment and Congressional power. Part I discusses current Ninth Amendment scholarship, which has focused primarily on the original meaning of the Ninth Amendment without discussion of historical changes.⁹ Part II analyzes the changing views of fundamental and unenumerated rights before and after the adoption of the Ninth Amendment, and demonstrates that a shift in judicial interpretations resulted in a restriction of unenumerated individual rights. By employing a longitudinal historical analysis to Ninth Amendment jurisprudence, this Comment will show that, although federal courts originally recognized the constitutional protection of unenumerated rights, judicial interpretations have strayed from this original understanding.

The remaining part of this Comment argues that Congress has not only a right, but also a responsibility, to check encroachments on civil rights by the judiciary. Part III(A) argues that Congress has the power to protect against judicial infringement of constitutionally guaranteed rights under the Ninth Amendment. Part III(B) combines a separation of powers analysis with the principles of legislative duty to suggest that current judicial overreach requires Congress to articulate additional unenumerated rights protected by the Ninth Amendment.

⁷ Brian Kalt is a Professor of Law and Harold Norris Faculty Scholar at the Michigan State University College of Law. See Brian C. Kalt, *The Ninth Amendment in Congress*, 40 PER. L. REV. 75, 77 (2012) (discussing the ability of Congress to consider which rights are protected by the Ninth Amendment and arguing that “Congress should act to vindicate these valuable rights”).

⁸ The Ratifying Conventions “expressed a Desire, in Order to prevent misconstruction or abuse of [Constitutional] Powers, that further declaratory and restrictive Clauses should be added” in the form of a Bill of Rights. This Bill of Rights was intended to “extend[] the Ground of public Confidence in the Government [to] best insure the beneficent ends of its Institution.” U.S. CONST. amend. I–X pmbl.

⁹ See Part I, *infra*.

BACKGROUND

I. WHAT THE NINTH AMENDMENT SAYS AND WHAT IT COULD MEAN.

The Ninth Amendment of the Bill of Rights states simply that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”¹⁰ George Mason proposed the inclusion of a bill of rights three days before the end of the Constitutional Convention, once most of the Constitution had been drafted.¹¹ The Convention had already considered and rejected individual rights proposals including early versions of the First, Fourth, and Eighth Amendments.¹² When the Constitution was passed without these protections, the issue of individual rights then moved to the state ratifying conventions, where the absence of a bill of rights was discussed at length.¹³

The first draft of the Ninth Amendment was born in the Virginia Ratifying Convention.¹⁴ Concerned about the absence of a bill of rights, the convention proposed the following disclaimer be added to the Constitution:

That those clauses which declare that Congress shall not exercise certain powers, be not interpreted in any manner whatsoever, to extend the powers of Congress; but that they be construed either as making exceptions to the specified powers where this shall be the case, or otherwise, as inserted merely for greater caution.¹⁵

James Madison took this language and presented it with his list of proposed amendments at the first meeting of the newly formed Congress.¹⁶

¹⁰ U.S. CONST. amend IX.

¹¹ Chase J. Sanders, *Ninth Life: An Interpretive Theory of the Ninth Amendment*, 69 IND. L.J. 759, 763 (1994).

¹² See 37 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION AND THE BILL OF RIGHTS 124 (Merril Jenson et al. eds., 2020) [hereinafter DOCUMENTARY HISTORY] (excerpts from the proceedings of Congress for May 29, 1787).

¹³ See Sanders, *supra* note 11, at 763.

¹⁴ See DOCUMENTARY HISTORY, *supra* note 12, at 255 (excerpts from the Virginia Convention, June 27, 1788).

¹⁵ *Id.*

¹⁶ KURT LASH, THE LOST HISTORY OF THE NINTH AMENDMENT 14–15 (2009).

After discussion of the amendment in Congress in June of 1789, Madison revised the proposed language.¹⁷ He specified that the rights were retained by the people, rather than by the states, and that the rights were limitations of power rather than exceptions to power.¹⁸ After these revisions, the second draft of the Ninth Amendment stated that:

The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be construed as to diminish the just importance of other rights retained by the people; or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.¹⁹

Congress referred this language to committee.²⁰ The committee revised the Ninth Amendment into its modern form.²¹ While the committee recorded at least one alternative structure for the Ninth Amendment,²² it did not record why the modern form was chosen over the alternatives.²³

As a result of this limited legislative history, the “most common approach to the Ninth Amendment today is to avoid approaching it at all.”²⁴ Scholars assert with regularity that “[f]ew courts have ever used it as the basis of a decision.”²⁵ Therefore, in forming arguments for the protection—or lack of protection—for certain rights, textualist scholars tend to apply the amendment to their existing constitutional philosophy—namely libertarian or federalist interpretations.²⁶

¹⁷ DOCUMENTARY HISTORY, *supra* note 12, at 317 (excerpts from the proceedings of Congress for June 8, 1789).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ LASH, *supra* note 16, at 43.

²¹ *Id.* at 43–50.

²² Roger Sherman of New York drafted a version of the Amendment that read: “The people have certain natural rights which are retained by them when they enter into society. Such are the rights of conscience in matters of religion; of acquiring property, and of pursuing happiness and safety; Of [sic] speaking and writing and publishing their sentiments with decency and freedom; of peaceably assembling to consult their common good, and of applying to government by petition or remonstrance for redress of grievances. Of these rights therefore they shall not be deprived by their government of the United States.” *Id.* at 44 (quoting Robert Sherman’s Proposed Committee Report, July 21–28, 1789).

²³ *Id.* at 49–50.

²⁴ See Mitchell Gordon, *Getting to the Bottom of the Ninth: Continuity, Discontinuity, and the Rights Retained by the People*, 50 IND. L. REV. 421, 424–25 (2017).

²⁵ See, e.g., *id.* at 423.

²⁶ See Barnett, *supra* note 2, at 3. Barnett articulates five “originalist models” of the ninth amendment. For ease of discussion, this Comment treats Barnett’s “individual natural rights” and “federalism” models as generally libertarian interpretations, and Barnett’s “state law rights” and

A. *Libertarian Interpretations of the Ninth Amendment*

The libertarian perspective argues for a judicially enforceable set of unenumerated rights.²⁷ This perspective suggests that the first nine amendments secured rights retained by the people.²⁸ During the ratifying conventions, an individual with this perspective argued that the Ninth Amendment secured rights because “[i]f you intend to reserve your unalienable rights, you must have the most express stipulation.”²⁹

Professor Randy Barnett has led the modern scholarship in this field.³⁰ Barnett argues that the Ninth Amendment’s “other rights” are “individual, natural, preexisting rights.”³¹ Therefore, any constitutional “construction” that “protect[s] only enumerated rights and leave[s] unenumerated rights unprotected” is incorrect.³² Under this model, the question for judges is whether a regulation excessively interferes with an individual’s liberty, regardless of whether that liberty derives from enumerated or natural rights.³³

B. *Federalist Interpretations of the Ninth Amendment*

The federalist approach to the Ninth Amendment suggests it was intended to constrain federal action and protect the states.³⁴ The

“residual rights” models as generally federalist interpretations. This Comment also treats Akhil Amar’s “collective rights” model as an extension of the federalist interpretation. See AKHIL REED AMAR, *THE BILL OF RIGHTS* 120 (1998). Barnett has argued persuasively that the collective rights model is not incompatible with his individual rights model, but that distinction is beyond the scope of this Comment. See Barnett, *supra* note 2, at 16.

²⁷ See, e.g., LOST CONSTITUTION, *supra* note 6, at 54–55.

²⁸ *Id.*

²⁹ Patrick Henry, Member of the Virginia Ratifying Convention, Speech at the Virginia Ratifying Convention (Jun. 14, 1788), in 3 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 445 (Jonathan Elliot ed., Washington, 2d ed. 1836).

³⁰ See LOST CONSTITUTION, *supra* note 6, 235–42.

³¹ Barnett, *supra* note 2, at 13.

³² *Id.* at 14.

³³ See *id.* at 15.

³⁴ See, e.g., LASH, *supra* note 16, at 31–34 (“[T]he rights and powers ‘retained by the people’ could be viewed as rights and powers ‘retained by the states.’”); see also Christopher J. Schmidt, *Revitalizing the Quiet Ninth Amendment: Determining Unenumerated Rights and Eliminating Substantive Due Process*, 32 U. BAL. L. REV. 169, 233 (2003) (arguing for judicial enumeration of rights to eliminate the need for substantive due process); Stephanie Hall Barclay, *Retained by the People: Federalism, the Ultimate Sovereign, and Natural Limits on Government Power*, 23 WM. & MARY BILL RTS. J. 257, 285–87 (2014) (interpreting the Ninth Amendment as a means of balancing state and federal police powers).

Supreme Court has adopted this approach in recent years.³⁵ Proponents of this interpretation argue that "the Ninth Amendment is not a cornucopia of undefined federal rights."³⁶ Rather, it "simply provides that the individual rights contained in state law are to continue in force under the Constitution."³⁷

Alexander Hamilton argued for a variation of this approach in the Federalist Papers during the ratification process.³⁸ In Federalist 84, Hamilton asserts that a bill of rights would be "not only unnecessary in the proposed constitution, but would even be dangerous."³⁹ For Hamilton, a bill of rights was redundant because it "contain[s] various exceptions to powers which are not granted."⁴⁰ Modern federalist scholarship similarly argues that the "[N]inth [A]mendment serves the unique function of safeguarding the system of enumerated powers."⁴¹ Such an interpretation suggests that the purpose of the Ninth Amendment was to ensure the federal government did not impose on political rights of "the people" as a group, rather than against individual rights.⁴²

The federalist interpretation has reemerged recently as a justification for "narrow or strict construction of enumerated federal powers."⁴³ Led by Professor Kurt Lash, the modern federalist interpretation argues that the Ninth Amendment creates a "judicially enforceable rule of construction limiting the power of the federal government to interfere with the retained right of the people to local self-government."⁴⁴ This is a rule of construction, however, rather than a power of Congress, and results in courts treating the Ninth Amendment as a "truism."⁴⁵

³⁵ See Part III, G-H, *infra*.

³⁶ Russel L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 227 (1983).

³⁷ *Id.* at 228.

³⁸ See THE FEDERALIST No. 84 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

³⁹ *Id.* at 513.

⁴⁰ *Id.*

⁴¹ Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1306-07 (1990).

⁴² See AMAR, *supra* note 26, at 120.

⁴³ Barnett, *supra* note 2, at 17-18.

⁴⁴ *Lost Original Meaning*, *supra* note 5, at 346.

⁴⁵ *Massachusetts v. Upton*, 466 U.S. 727, 737 (1984) (Stevens, J., concurring in the judgment).

II. THE FIRST EIGHT LIVES OF THE NINTH AMENDMENT.

The assertion that “[f]ew courts have ever used [the Ninth Amendment] as the basis of a decision” is wrong.⁴⁶ Indeed, the courts recognized unenumerated individual rights, often directly affirmed or drawn from the Ninth Amendment, until the 1970s.⁴⁷ Thus, Justice Scalia’s 1992 assertion that the courts had not, for “almost 200 years” recognized the Ninth Amendment as a home of “additional, unnamed” rights is ahistorical.⁴⁸ Unenumerated individual rights—secured by the Ninth Amendment—have had at least eight distinct lives to date, with the Court declining to recognize them only in very recent history.⁴⁹

A. *Pre-Colonial Roots of Fundamental Rights*

The first life of the Ninth Amendment began long before the United States and adoption of the Bill of Rights, in the common law of medieval Europe.⁵⁰ Before the Renaissance or the Enlightenment, medieval courts recognized certain natural rights, drawn from responsibilities of the “community.”⁵¹ Medieval courts recognized many rights that look familiar today.⁵² For example, the courts recognized a freedom of religion, even under fiefdoms dominated by a single religion.⁵³ Medieval courts also recognized a common law right to due process of law.⁵⁴

Some medieval courts recognized additional rights that are flatly denied, or permissively restricted, today.⁵⁵ Medieval courts recognized a right to welfare, finding that natural rights included the right of the poor

⁴⁶ Compare Gordon, *supra* note 24, at 423 with Part III. A–H, *infra*.

⁴⁷ See Part III. A–H, *infra*.

⁴⁸ Compare Part III. A–H, *infra*, with *Planned Parenthood Se. Pa. v. Casey*, 505 U.S. 833, 1000 (1992) (Scalia, J., concurring).

⁴⁹ Compare *Calder v. Bull*, 3 U.S. 386, 387–88 (1798) (finding and upholding unenumerated rights in the Constitution, primarily within terms of the social contract) and *McIntire v. Wood*, 11 U.S. 504, 506 (1813) with *Griswold v. Connecticut*, 381 U.S. 479, 492 (1965) (Goldberg, J. concurring) (“[T]he Ninth Amendment [does not] constitute[] an independent source of rights protected from infringement.”) and *Casey*, 505 U.S. at 1000 (Scalia, J., concurring). See also Part III. A–H, *infra*.

⁵⁰ See Richard H. Helmholz, *Fundamental Human Rights in Medieval Law* 3 (Maurice and Muriel Fulton Lecture Series, May 2, 2001) (citing BRIAN TIERNEY, *MEDIEVAL POOR LAW: A SKETCH OF CANONICAL THEORY AND ITS APPLICATION IN ENGLAND* 37–38 (1959)).

⁵¹ *Id.*

⁵² See, e.g., *id.* at 10, 12–13.

⁵³ *Id.* at 10.

⁵⁴ *Id.* at 12–13.

⁵⁵ See, e.g., *id.* at 3.

to receive “sustenance in times of necessity . . . from the superfluous wealth of the community.”⁵⁶ These courts also recognized a right to vote, holding that the “freedom in the exercise of the right . . . [is comparable] to the freedom to enter into a marriage.”⁵⁷ Most significantly, these natural rights could be affirmative—enforced against the lord when he failed to provide for his people.⁵⁸

B. 1492-1776: Colonial America and Life, Liberty, and Property

The principles of the Ninth Amendment continued to develop and entered a “second life” during the Enlightenment.⁵⁹ Through the articulation of natural law and the social contract, natural rights began to form the philosophical foundation of ordered liberty.⁶⁰ As this age saw a dramatic increase in intellectual history and legal writing,⁶¹ it is not possible to thoroughly discuss this period in this Comment. However, even a cursory introduction demonstrates that during the formative years of the American colonies the prevailing legal philosophy recognized an expansive set of natural, unenumerated rights that the government must protect.⁶² Speaking in terms of social contract, John Locke observed in 1690 that a legislature has a duty to enact laws for the public good and ensure equal protection of the laws.⁶³

During this period, government was not merely security, but also a set of tools from which the people could achieve greater liberty than they could outside of society.⁶⁴ As Blackstone explained in 1753, “law not only regards life and member, and protects every man in the

⁵⁶ Richard H. Helmholz, *Fundamental Human Rights in Medieval Law* 3 (Maurice and Muriel Fulton Lecture Series, May 2, 2001) (citing BRIAN TIERNEY, *MEDIEVAL POOR LAW: A SKETCH OF CANONICAL THEORY AND ITS APPLICATION IN ENGLAND* 37–38 (1959)) (internal quotation marks omitted).

⁵⁷ *Id.* at 7.

⁵⁸ *See id.* at 4.

⁵⁹ *See, e.g.*, JOHN LOCKE, *AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT, AND END OF CIVIL GOVERNMENT* ch. XI, § 142 (1690).

⁶⁰ *See, e.g., id.*

⁶¹ *See* RONALD S. LOVE, *THE ENLIGHTENMENT* xiii (Marsha L. Frey & Linda S. Frey eds., 2008).

⁶² *See* LOCKE, *supra* note 59, at ch. XI, § 142; THOMAS G. WEST, *THE POLITICAL THEORY OF THE AMERICAN FOUNDING* 19 (2017) (noting that “[t]he natural rights doctrine—including the concepts of equality, the laws of nature, and the social compact basis of government—is the core of the founders’ political theory”).

⁶³ LOCKE, *supra* note 59, at ch. XI, § 142.

⁶⁴ 1 WILLIAM BLACKSTONE, *COMMENTARIES* *127.

enjoyment of them, but also *furnishes him with every thing necessary* for their support.”⁶⁵

C. *1776-1789: Critical Beginnings and Protections of Unenumerated Rights*

The founding fathers were prolific readers and scholars of intellectual history.⁶⁶ Thus, the writings of the American Revolution leaned heavily on Enlightenment philosophy, including the need for government to protect individual interests.⁶⁷ The Declaration of Independence declares there to be “certain unalienable rights which *among these* are life, liberty, and the pursuit of happiness.”⁶⁸

After declaring independence and before adopting the Constitution, many newly formed American states echoed this protection for unenumerated rights in their state declarations of rights.⁶⁹ All of these declarations rested on strong Enlightenment ideals and acknowledged the existence of inherent, unenumerated rights.⁷⁰

⁶⁵ *Id.* (emphasis added).

⁶⁶ See RICHARD B. BERNSTEIN, *THE FOUNDING FATHERS RECONSIDERED* 35–36 (2009) (casting the Founding Fathers as the authors of the “American enlightenment”).

⁶⁷ See *THE DECLARATION OF INDEPENDENCE* (U.S. 1776).

⁶⁸ *Id.* (emphasis added).

⁶⁹ See, e.g., DOCUMENTARY HISTORY, *supra* note 12, at 64–65 (Delaware Declaration of Rights, establishing in 1776 that “government of right originates from the people,” there is “a natural and unalienable right to worship,” and that “every member of society has a right to be protected in the enjoyment of life, liberty, and property”), 76 (Massachusetts Declaration of Rights, guaranteeing in 1780 that “all men are born free and equal, and have certain natural, essential, and unalienable rights”), 82 (New Hampshire Bill of Rights, noting in 1784 that “when men enter into a state of society, they surrender up some of their natural rights to that society” but noting that “among the natural rights, some are in their very nature unalienable”), 92 (North Carolina Declaration of Rights in 1776, declaring “a natural and unalienable right” is freedom of religion), 94 (Pennsylvania Declaration of Rights, stating in 1776 that “all men are born equally free and independent” and therefore “have certain natural inherent, and unalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety”), 103 (Vermont Declaration of Rights in 1777 declaring that “all men are born equally free and independent, and have certain natural, inherent, and unalienable rights; amongst which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining happiness and safety”), 107–09 (Vermont Declaration of Rights in 1777, declaring a number of “natural and unalienable rights”), 111 (Virginia Declaration of Rights, providing in 1776 that “all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity”).

⁷⁰ See, e.g., *id.*

Virginia was the first new state to publish a Declaration of Rights, articulating fundamental rights to avoid government abuses.⁷¹ In 1776, the Virginia legislature declared:

[A]ll men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.⁷²

These inherent rights were by their very nature unenumerated because they were idealistic abstractions.⁷³

Vermont followed suit in 1777, declaring that its citizens had “natural and unalienable rights” not only to religion but also to “reform or alter government, in such manner as shall be, by that community, judged most conducive to the public weal.”⁷⁴ Vermont also declared its citizens maintained the “right to elect officers, and be elected into office” and “right to emigrate” among many others.⁷⁵

By 1780, the Massachusetts Declaration of Rights provided “[t]he people” with “every power, jurisdiction, and right, which is not, or may not hereafter, be by them expressly delegated to the United States of America, in Congress assembled.”⁷⁶ Soon after, the New Hampshire Bill of Rights provided nearly identical protections.⁷⁷ Note the collective nature of rights protected: the people reserved all rights not expressly delegated to the federal government.⁷⁸

⁷¹ *Id.* at 111–12.

⁷² *Id.* at 111.

⁷³ *See id.*

⁷⁴ *Id.* at 106–07.

⁷⁵ 37 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION AND THE BILL OF RIGHTS 106–09 (Merril Jenson et al. eds., 2020) (Excerpts from the Proceedings of Congress for May 29, 1787).

⁷⁶ *Id.* at 77.

⁷⁷ *See id.* at 81–82 (providing in 1784 that “[t]he people of this state, have the sole and exclusive right of governing themselves as a free, sovereign, and independent state, and do, and forever hereafter shall exercise and enjoy every power, jurisdiction, and right pertaining thereto, which is not, or may not hereafter be by them expressly delegated to the United States of America, in Congress assembled”).

⁷⁸ *Id.* at 77.

These enactments matched the political philosophy of the age.⁷⁹ John Stuart Mill believed that legislatures had a duty to provide a good life to their citizens.⁸⁰ Thomas Paine agreed, writing that “[i]t is a perversion of terms to say that a charter gives rights. It operates by a contrary effect, that of taking rights away. Rights are inherently in all the inhabitants.”⁸¹ There are thus certain rights that individuals cannot give away, and any government that takes them away or restricts them is tyrannical.⁸²

D. 1789-1833: *Early Discussions of Individual Rights Under the New Constitution*

In the early days of the new Constitution, states and courts agreed that the Constitution protected unenumerated individual rights.⁸³ During the ratification debates between 1789 and 1790, multiple states voted to recommend an amendment clarifying that the enumeration of a bill of rights would not restrict the “rights retained by the people.”⁸⁴ Indeed, when Congress ultimately considered the language of the Ninth Amendment as revised by the committee,⁸⁵ the House received only a singular amendment to the language, and receiving no second to the motion, voted to adopt the Ninth Amendment.⁸⁶ Members suggested the principle of unenumerated and protected rights was self-evident.⁸⁷

The Virginia Senate foresaw the risks of the Ninth Amendment’s modern misinterpretation from the beginning.⁸⁸ In June 1788, the Virginia

⁷⁹ See, e.g., Thomas Payne, *Rights of Man* (1791), in *THE RIGHTS OF MAN: BEING AN ANSWER TO MR. BURKE’S ATTACK ON THE FRENCH REVOLUTION* 319 (The Floating Press 2010) (arguing that rights are “inherent” rather than given by statute).

⁸⁰ See, e.g., John Stuart Mill, *Utilitarianism* (1789), in *ENGLISH PHILOSOPHERS FROM BACON TO MILL* 988–90 (Edwin A Burt ed., 1994) (discussing the duty of society to provide justice).

⁸¹ Payne, *supra* note 79, at 319.

⁸² *Id.*

⁸³ See, e.g., *Calder v. Bull*, 3 U.S. 386, 387–88 (1798) (holding that *post facto* laws are “contrary to the great first principles of the social compact”); *McIntire v. Wood*, 11 U.S. 504, 506 (1813) (observing a legislative power to create enforceable individual rights); *DOCUMENTARY HISTORY*, *supra* note 12, at 407.

⁸⁴ *DOCUMENTARY HISTORY*, *supra* note 12, at 233. Some form of amendment clarifying that unenumerated rights are retained by the people was recommended by the Ratifying Conventions in Pennsylvania, Maryland, Virginia, New York, North Carolina, and Rhode Island. *Id.*

⁸⁵ LASH, *supra* note 16, at 43.

⁸⁶ *DOCUMENTARY HISTORY*, *supra* note 12, at 407.

⁸⁷ See *id.*

⁸⁸ See *id.* at 592–93.

Convention recommended an early version of the Ninth Amendment be added to the Constitution.⁸⁹ Madison introduced Virginia's proposed language and then revised the text of the amendment based on the discussion in Congress.⁹⁰ Upon hearing of Congress' consideration of Madison's revised amendment, the Virginia Senate was concerned.⁹¹ They observed:

[A]s it respects personal rights, [Madison's amendment] might be dangerous, because, should the rights of the people be invaded or called in question, they might be required to shew by the constitution what rights they have *retained*; and such as could not from that instrument be proved to be retained by them, they might be denied to possess.⁹²

This concern of the Virginia Senate has been realized today, where the Ninth Amendment is used exclusively in concert with other rights.⁹³

After the Ninth Amendment was adopted, legal philosophers continued advocating much as they had in the years prior.⁹⁴ Thomas Paine for example, argued in 1797 that legislatures must provide welfare rights to impoverished citizens to perform their role in the social contract and protect the individual rights of constitutions.⁹⁵

Early American courts agreed that the Constitution provided protection of unenumerated individual rights.⁹⁶ In *Calder v. Bull*, the newly formed Supreme Court held that states are forbidden from

⁸⁹ *Id.* at 255 ("That those clauses which declare that Congress shall not exercise certain powers . . . [shall] be construed either as making exceptions to the specified powers where this shall be the case, or otherwise, as inserted merely for greater caution."); *see also* Part I, *supra*.

⁹⁰ *See* LASH, *supra* note 16, at 43; DOCUMENTARY HISTORY, *supra* note 12, at 317 (The revised clause read, "The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be construed as to diminish the just importance of other rights retained by the people; or as to enlarge the powers delegated by the [C]onstitution; but either as actual limitations of such powers, or as inserted merely for greater caution.").

⁹¹ *See* DOCUMENTARY HISTORY, *supra* note 12, at 592-93 (The Virginia Senate declared that "the people of Virginia should be consulted with respect to [the proposed Amendment]" because it was "highly exceptionable." The Virginia Senate was concerned that "[i]f [the proposed Amendment was] meant to guard against the extension of the powers of Congress by implication, it [was] greatly defective and d[id] by no means comprehend the idea expressed in [Virginia's proposal].").

⁹² *Id.* (emphasis in original).

⁹³ *See, e.g.,* *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

⁹⁴ *See, e.g.,* THOMAS PAINE, *AGRARIAN JUSTICE* (1797).

⁹⁵ *Id.* at 7, 12.

⁹⁶ *See, e.g.,* *Calder v. Bull*, 3 U.S. 386, 387-88 (1798) (holding that *post facto* laws unconstitutionally endanger individual rights "contrary to the great first principles of the social compact").

enacting *post facto* laws.⁹⁷ Using language reminiscent of Thomas Paine's social contract, the Court reasoned that the Constitution secures a "social compact" that limits the government.⁹⁸ Therefore, state *post facto* laws that endanger individual rights, although not enumerated as a right under the Constitution, are "contrary to the great first principles of the social compact" and are therefore invalid.⁹⁹ In the same case, the Court recognized that unenumerated rights include the freedom to contract.¹⁰⁰ The Court in this period of American history also recognized unenumerated individual rights to property and to seek judicial remedies for violations of rights.¹⁰¹

For these early years of the development of American law, the Supreme Court also took a broad interpretation of the power of Congress to recognize and protect unenumerated individual rights.¹⁰² In the key case of *Fletcher v. Peck*, the Court cited the protection of individual rights as grounds to question a state's ability to interfere with the freedom to contract because the "[C]onstitution of the United States contains what may be deemed a bill of rights for the people of each state."¹⁰³ The dissent agreed that "the object of the convention was to afford a general protection to individual rights."¹⁰⁴ Lower courts also implied that the unenumerated individual rights could supersede

⁹⁷ *Id.* at 390.

⁹⁸ *Id.* at 388 (holding that "[a]n ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority" (emphasis in original)).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Marbury v. Madison*, 5 U.S. 137, 166 (1803) ("[W]here a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.").

¹⁰² *Compare* *McIntire v. Wood*, 11 U.S. 504, 506 (1813) (observing a legislative power to create judicially enforceable individual rights) *with* *Young v. Bank of Alexandria*, 8 U.S. 384, 397 (1807) (noting that the right to appeal in the District of Columbia does not exist absent legislative action) *and* *Matthews v. Zane*, 20 U.S. 164, 196 (1822) (observing no individual right to purchase land *absent a legislative action*, and stating that "the individual right to purchase is also . . . entirely subject to legislative [enactment]").

¹⁰³ *Fletcher v. Peck*, 10 U.S. 87, 138 (1810).

¹⁰⁴ *Id.* at 144 (Johnson, J., dissenting).

enumerated Congressional powers,¹⁰⁵ and recognized a congressional power to create individual rights enforceable by the judiciary.¹⁰⁶

As a result of the focus on individual rights in the early nineteenth century, the Supreme Court relied at times on "general principles" that protect individual rights and supersede the ability of the government to constrain individual liberty.¹⁰⁷ Only a generation after the founders, the Court noted that "a law . . . is a rule prescribed for future conduct, not a legislative interference with existing rights."¹⁰⁸ As a result, the Court observed that "[t]he framers of the [C]onstitution would hardly have given the appellation of *law* to violent invasions of individual right, or individual property . . . and, therefore, further provision against such acts was not so necessary as against other mischiefs."¹⁰⁹ The consistent jurisprudence of this critical chapter of American law was that the power of government derives from the protection of individual rights.¹¹⁰

Thus, the Constitution was a tool, protecting individual rights from government encroachment.¹¹¹ As Justice Johnson explained clearly in 1830, "the object [of the Constitution was] the security of individual right."¹¹² Relying on a similar reasoning, the Court held in 1832 that although an act by a "public officer or tribunal" may be "binding" on a specific issue, the act cannot interfere even "collaterally" with any "individual right."¹¹³ This uniform position of the Court—that the

¹⁰⁵ See, e.g., *Evans v. Robinson*, 8 F. Cas. 886, 888 (C.C.D. Md. 1813) (suggesting the challenged legislation is only constitutional because it "does not impair the obligation of contracts, or interfere with any rights previously acquired by the community; that on the contrary, the legislature has evinced its attention to individual rights").

¹⁰⁶ *McIntire*, 11 U.S. at 506 ("Had the 11th section of the judiciary act covered the whole ground of the constitution, there would be much reason for exercising this power in many cases wherein some ministerial act is necessary to the completion of an individual right arising under laws of the United States.").

¹⁰⁷ See, e.g., *Ogden v. Saunders*, 25 U.S. 213, 251 (1827).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* (emphasis in original).

¹¹⁰ See, e.g., *Satterlee v. Matthewson*, 27 U.S. 380, 407 (1829) ("The great object of our constitution is to preserve individual rights, not to destroy them. There is no power in the government but what is given for this end.").

¹¹¹ *Van Ness v. City of Washington*, 29 U.S. 232, 250–51 (1830) ("[W]hen [government] acts upon individual rights, the party whose person is violated . . . may invoke the constitution and law for his protection and indemnity.").

¹¹² *Craig v. Missouri*, 29 U.S. 410, 441 (1830) (Johnson, J., dissenting).

¹¹³ *United States v. Arredondo*, 31 U.S. 691, 729 (1832).

Constitution was designed to protect individual rights—continued from the late nineteenth into the early twentieth centuries.¹¹⁴

E. *1833-1913: Judicial Recognition of the Ninth Amendment as a Source of Unenumerated Rights*

Beginning at least as early as 1833, American courts relied on the Ninth Amendment as a source of unenumerated individual rights.¹¹⁵ In an early case addressing the Ninth Amendment directly, the District Court for the Eastern District of Pennsylvania held plainly that “personal rights are protected by . . . the [A]mendment.”¹¹⁶

In 1840, the Supreme Court again upheld protections of unenumerated rights—now explicitly under the Ninth Amendment.¹¹⁷ In *Holmes v. Jennison*, the Court held that “instead of limiting the powers of the general government, [the Ninth Amendment] directly calls into action those powers for the protection of the citizen.”¹¹⁸ Discussing this holding, the Court observed that “the establishment of contrary doctrine would essentially weaken the security of the people; since it would leave without the protection of the paramount and superintending power of the Union, the great and fundamental right of personal liberty.”¹¹⁹ For over a century, the Court relied on this interpretation,¹²⁰ finding it persuasive on economic issues including a right to property¹²¹ and the right to payment in coin for contracts.¹²²

In the later nineteenth century, the concept of a social contract being secured by the Constitution, including the Ninth Amendment, remained

¹¹⁴ See, e.g., *Holmes v. Jennison*, 39 U.S. 540, 557 (1840) (recognizing a “great and fundamental right of personal liberty”).

¹¹⁵ See, e.g., *Magill v. Brown*, 16 F. Cas. 408, 428 (C.C.E.D. Pa. 1833).

¹¹⁶ *Id.*

¹¹⁷ See *Holmes*, 39 U.S. at 557.

¹¹⁸ *Id.* This vitally important principle, which requires the government to affirmatively protect citizens under the Ninth Amendment, is absent from modern individual rights cases. See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022); Part IV, *infra*.

¹¹⁹ *Holmes*, 39 U.S. at 557.

¹²⁰ Compare *id.* with *Bute v. Illinois*, 333 U.S. 640, 651–52 (1948) (both treating the Ninth Amendment as a strong protection of unenumerated individual rights).

¹²¹ *Roosevelt v. Meyer*, 68 U.S. 512, 516 (1863) (“Under the several clauses of the Constitution mentioned in it . . . a *right of property*, sacred under the fundamental law of the Union” (emphasis in original)), *overruled on other grounds by* *Trebilcock v. Wilson*, 79 U.S. 687, 693 (1871).

¹²² *Trebilcock*, 79 U.S. at 693, 699 (discussing *Roosevelt*, 68 U.S. 512, “plaintiff in error in that case claimed the right to have the bond of the defendant paid in gold or silver coin under the [Ninth Amendment]”).

decisive.¹²³ In 1874, the Court declared that an “essential nature of all free governments” is an “[i]mplied reservations of individual rights, without which the social compact could not exist.”¹²⁴ Among these implied reservations, the Court observed, were the right to marriage and the right to due process.¹²⁵ Near the end of the nineteenth century, the Court also recognized a fundamental right to control one’s “own person” and held that subjecting a woman’s body to physical inspection was unconstitutional.¹²⁶

F. 1913-1965: *The Ninth Amendment as a National Cause of Action*

The first half of the twentieth century saw a continued expansion of individual rights, including recognition of the Ninth Amendment as a legal cause of action.¹²⁷ While this development in Ninth Amendment jurisprudence stemmed from the Enlightenment-style reasoning of the late nineteenth century, the Court’s recognition of a cause of action for violation of limited government principles stands in contrast with the personal liberty arguments of previous centuries.¹²⁸ In 1913, the Supreme Court permitted a lawsuit under the Ninth Amendment, and found a Ninth Amendment “right and privilege of a person to move between states.”¹²⁹ The natural limit of Ninth Amendment rights, which

¹²³ *Citizens’ Sav. & Loan Ass’n v. City of Topeka*, 87 U.S. 655, 663 (1874).

¹²⁴ *Id.*

¹²⁵ *Id.* (“Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A. and B. who were husband and wife to each other should be so no longer, but that A. should thereafter be the husband of C., and B. the wife of D. Or which should enact that the homestead now owned by A. should no longer be his, but should henceforth be the property of B.”)

¹²⁶ See *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251, 257 (1891). This historical protection was abruptly eroded in 2022, without acknowledging the long tradition of judicial protection under the Ninth Amendment. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022).

¹²⁷ See, e.g., *Hoke v. United States*, 227 U.S. 308, 320–21 (1913) (permitting a suit under the Ninth Amendment); *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 143–44 (1939) (discussing “a cause of action for alleged infractions of the Ninth Amendment,” but rejecting standing for the specific plaintiff).

¹²⁸ Compare *Union Pac. R. Co.*, 141 U.S. at 251 (1891) (relying on Enlightenment-style concepts of fundamental liberties) with *United Pub. Workers v. Mitchell*, 330 U.S. 75, 96 (1947) (relying on a limited federal government argument as the basis for retained state and individual sovereignty).

¹²⁹ *Hoke*, 227 U.S. at 320–21 (recognizing that “it is the right and privilege of a person to move between states,” while clarifying that prostitution is so “perverted” that “a right exercised in morality . . . [cannot] sustain a right to be exercised in immorality”).

ensure “maintenance of the rights retained by the people,” was defined by the Court as being simply “the rights which are expressly granted to the federal government.”¹³⁰ The Ninth Amendment’s affirmative liberties include a right to “acquire property and employ it in a lawful business,” although such a right can be reasonably regulated between private parties.¹³¹

The early twentieth century continued to recognize constitutional protections for many of the same unenumerated rights recognized in the proceeding centuries, including both personal and political rights.¹³² For example, the Supreme Court held a law sterilizing repeat criminal offenders unconstitutional.¹³³ The Court reasoned that such a law violated “one of the basic civil rights of man,” that the Court specified include “[m]arriage and procreation” because they are “fundamental” rights.¹³⁴

Similarly, the Supreme Court held the Ninth Amendment was a source of “political rights reserved to the people.”¹³⁵ The Court reasoned that “[t]he powers granted in the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people.”¹³⁶ As such, a cause of action under the Ninth Amendment is “directed toward the granted power” and only “if granted [federal] power is found” does the cause of action fail.¹³⁷ The Ninth Amendment was understood, at its core, to be a means of securing unalienable rights.¹³⁸

¹³⁰ *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 330–31 (1936).

¹³¹ *Tenn. Elec. Power Co.*, 306 U.S. at 135–36, 143–44 (1939) (While not specifically persuasive in this case regarding regulation of two private companies, the Court discusses an unenumerated cause of action for depriving “the people . . . of their guaranteed liberty to earn a livelihood and to acquire and use property subject only to state regulation.”).

¹³² See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (recognizing a fundamental right to marriage and procreation); *Mitchell*, 330 U.S. at 94–96 (recognizing a fundamental right to free political association).

¹³³ *Skinner*, 316 U.S. at 541.

¹³⁴ *Id.* (“Marriage and procreation are fundamental.”).

¹³⁵ *Mitchell*, 330 U.S. at 94. *But see* *Int’l Ass’n Machinists v. Street*, 367 U.S. 740, 775 (1961) (declining to consider a Ninth Amendment claim without discussion but deciding similarly on other grounds).

¹³⁶ *Mitchell*, 330 U.S. at 95–96.

¹³⁷ *Id.* at 96; *accord* *Commonwealth & S. Corp. v. Sec. & Exch. Comm’n*, 134 F.2d 747, 753 (3d Cir. 1943) (“[Since] the order here complained of is within the commerce power Commonwealth’s contention that the order violates the Fifth, Ninth and Tenth amendments necessarily fails.”).

¹³⁸ *Bute v. Illinois*, 333 U.S. 640, 651–52 (1948) (“[T]he reserved powers of . . . the people were emphasized in the Ninth [Amendment.] The Constitution was conceived in large part in the

G. *1961-1969: The Ninth Amendment as Mere Enhancement to Other Rights*

In the middle of the twentieth century, the Court shifted from applying the Ninth Amendment as an independent cause of action to an enhancement in concert with other protected rights under the Constitution.¹³⁹ Beginning around 1961, when the government overextended into the realm of private affairs, the Ninth Amendment, in concert with other enumerated rights, continued to protect individuals from their government.¹⁴⁰

This transition was most clearly articulated in the landmark case *Griswold v. Connecticut*.¹⁴¹ In *Griswold*, the Court explicitly recognized that a right to privacy, although unenumerated, was protected by the Ninth Amendment in concert with the First, Third, Fourth, and Fifth Amendments.¹⁴² Concurring in the judgment, Justice Goldberg suggested that a judicial construction against a fundamental right would explicitly violate the Ninth Amendment.¹⁴³ This transition had immediate effects on the tenor of the discourse around the Ninth Amendment.

Although *Griswold* is heralded as a significant advancement in progressive protection of individual rights,¹⁴⁴ the case actually marks the beginning of the end of unenumerated constitutional protections under the Ninth Amendment.¹⁴⁵ Perhaps inadvertently¹⁴⁶ shifting the

spirit of the Declaration of Independence which declared that to secure such unalienable Rights.” (internal quotations omitted)).

¹³⁹ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

¹⁴⁰ See, e.g., *Slagle v. Ohio*, 366 U.S. 259, 261 n.4, 267–68 (1961) (holding that a conviction for contempt for failure to answer questions before the Ohio Un-American Activities Commission violated both the Ninth Amendment and the Fourteenth Amendment).

¹⁴¹ *Griswold*, 381 U.S. at 484.

¹⁴² *Id.* (relying on “various guarantees” from the First, Third, Fourth, Fifth, and Ninth Amendment to “create zones of privacy”).

¹⁴³ *Id.* at 492 (Goldberg, J., concurring). After an extensive discussion of Madison’s involvement in proposing the amendment and an originalist argument that real effect should be given to all words in the Constitution, Justice Goldberg concluded that “the Ninth Amendment shows a belief of the Constitution’s authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive.” *Id.* at 490–92.

¹⁴⁴ See, e.g., *Griswold v. Connecticut*, PLANNED PARENTHOOD ACTION FUND, <https://www.plannedparenthoodaction.org/issues/birth-control/griswold-v-connecticut>.

¹⁴⁵ See Part II, H, *infra*.

¹⁴⁶ See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2257 (2022) (discussing the history of Constitutional individual rights protections).

long understanding of the Ninth Amendment in a single sentence, Justice Goldberg stated, without citation, that “the Ninth Amendment [does not] constitute[] an independent source of rights protected from infringement.”¹⁴⁷ Such an interpretation changed the Ninth Amendment from a guarantee to a truism.¹⁴⁸ In his concurrence, Justice Goldberg argued that for a right to be fundamental, it must be rooted in the “traditions and collective conscience of [the] people” and “of such character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.”¹⁴⁹ Dissenting in the judgment, Justice Stewart agreed that the Ninth Amendment was never intended to grant judicial authority to overpower actions of the legislature.¹⁵⁰

Following *Griswold*, the Court recognized the Ninth Amendment as a protection against government overreach only in concert with other amendments.¹⁵¹ This restrictive interpretation is precisely the danger expressed by the Virginia Senate nearly a century and a half earlier.¹⁵² However, the unenumerated rights of Americans continued to be recognized by the Court, including a reaffirmation of the right to marriage in *Loving v. Virginia*.¹⁵³ Justice Douglas suggested that unenumerated rights are those “essential to the exercise of other rights guaranteed by [the Constitution].”¹⁵⁴ Thus, during the 1960’s, the rights of the people had not yet been violated by the Court, even if the interpretations of the Court had diverged from the original meaning of the Ninth Amendment.¹⁵⁵

¹⁴⁷ *Griswold*, 381 U.S. at 492 (Goldberg, J., concurring).

¹⁴⁸ *Massachusetts v. Upton*, 466 U.S. 727, 737–38 (Stevens, J., concurring in the judgment).

¹⁴⁹ *Griswold*, 381 U.S. at 493 (Goldberg, J., concurring) (cleaned up).

¹⁵⁰ *See id.* at 530 (Stewart, J., dissenting).

¹⁵¹ *See, e.g., Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (“The integrity of the family unit has found protection in . . . the Fourteenth Amendment and the Ninth Amendment” (internal citations omitted)).

¹⁵² DOCUMENTARY HISTORY, *supra* note 12, at 592–93 (“[The Ninth Amendment] might be dangerous, because, should the rights of the people be invaded or called in question, they might be required to shew by the constitution what rights they have *retained*.” (emphasis in original)).

¹⁵³ *Loving v. Virginia*, 388 U.S. 1, 12 (holding that “[m]arriage is one of the ‘basic civil rights of man,’ fundamental” (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942))).

¹⁵⁴ *Osborn v. United States*, 385 U.S. 323, 341 (1966) (Douglas, J., concurring) (“Privacy, though not expressly mentioned in the Constitution, is essential to the exercise of other rights guaranteed by it.”).

¹⁵⁵ *C.f. Holmes v. Jennison*, 39 U.S. 540, 557 (1840) (“[T]he ninth article was deemed necessary as it regarded the rights declared to exist, in order to prevent the people from being deprived of others by implication, that might not be included in the enumeration.”).

H. 1969-2022: Back to an "Old Way" That Never Existed

In the decades following *Griswold* and *Loving*, courts used the Supreme Court's new restrictive test to move away from recognizing the protection of unenumerated individual rights, often declining to seriously consider claims brought under the Ninth Amendment.¹⁵⁶ Despite this, Justice Douglas' dissents of the 1970s continued to rely on the Ninth Amendment for arguments regarding the protection of individual rights.¹⁵⁷ In *Palmer v. Thompson*, Justice Douglas's dissent argued that the Court's upholding of a city's closing of an African American pool violated the Ninth Amendment because some rights are "so elementary to our way of life that they have been labeled as basic rights" such as the "right to travel from State to State . . . [and] the right to marry."¹⁵⁸ The dissent's reasoning is consistent with both the Court's two hundred years of precedent before the mid-twentieth century,¹⁵⁹ and the *Griswold* framework of the Ninth Amendment only protecting rights in concert with enumerated rights elsewhere provided.¹⁶⁰

The dissent in *Palmer* also recognized a flaw in the *Griswold* framework: a court cannot, consistent with the Ninth Amendment, determine an unenumerated right by only checking the enumerated ones.¹⁶¹ The Ninth Amendment provides that rights are not restrained to mere extensions of those enumerated.¹⁶² For example, despite not being enumerated by the first eight amendments,¹⁶³ the "right of the people to education or to work or to recreation . . . like the right to pure air and pure water, may well be rights 'retained by the people' under the Ninth Amendment."¹⁶⁴ Using the same reasoning, Justice Douglas argued that the Ninth Amendment protects "at least the fundamental rights,"

¹⁵⁶ See, e.g., *Rogers v. Bellei*, 401 U.S. 815, 836 (1971) (dismissing, without discussion, a Ninth Amendment claim for a right to citizenship for foreign-born citizens living abroad).

¹⁵⁷ See, e.g., *Palmer v. Thompson*, 403 U.S. 217, 233-34 (1971) (Douglas, J., dissenting) (discussing protection for unenumerated rights under the Ninth Amendment).

¹⁵⁸ *Id.* at 233 (arguing the Ninth Amendment provided sufficient protections for basic rights while upholding the closing of the pool over Fourteenth Amendment objections).

¹⁵⁹ See Part I.A-G, *supra*.

¹⁶⁰ See *Palmer*, 403 U.S. at 233 (Douglas, J., dissenting) (observing that "'rights' retained by the people within the meaning of the Ninth Amendment may be related to those 'rights' which are enumerated in the Constitution").

¹⁶¹ See *id.* at 233-34 (Douglas, J., dissenting).

¹⁶² U.S. CONST. amend. IX.

¹⁶³ See U.S. CONST. amend. I-VIII.

¹⁶⁴ *Palmer*, 403 U.S. at 233-34 (Douglas, J., dissenting).

including the right to “hair style . . . taste in food,” and preference in “music, art, reading, [and] recreation.”¹⁶⁵ Many of these dissents were on denials on writs of certiorari.¹⁶⁶

When the Supreme Court *did* discuss the Ninth Amendment in the 1970s, it determined that certain unenumerated rights were protected under the *Griswold* framework if they were drawn from enumerated rights.¹⁶⁷ The Court held that the “integrity of the family unit” was protected by the Ninth Amendment in concert with other clauses.¹⁶⁸ The right to privacy—drawn from the Ninth Amendment and other clauses—was found to protect women from an overly broad restriction on abortion.¹⁶⁹ The right to vote in state elections was recognized as “one of the rights [protected by] the Ninth Amendment.”¹⁷⁰ The Court also held the right to political expression was protected by the First Amendment, in concert with the Fifth and Ninth Amendment.¹⁷¹

In the 1970s, most circuit courts followed the Supreme Court’s new paradigm against recognizing new rights unless drawing from an enumerated right in the first eight amendments,¹⁷² or declined to consider Ninth Amendment claims entirely.¹⁷³ The Second Circuit held that the Ninth Amendment did not protect a right to sue the United States for torts¹⁷⁴ nor the right to use a mailbox for something other

¹⁶⁵ *Oloff v. E. Side Union High Sch. Dist.*, 404 U.S. 1042, 1044–45 (1972) (Douglas, J., dissenting); *accord Freeman v. Flake*, 405 U.S. 1032, 1032 (1972) (Douglas, J., dissenting).

¹⁶⁶ *See, e.g., Freedman*, 405 U.S. at 1032 (Douglas, J., dissenting).

¹⁶⁷ *See, e.g., Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (“The integrity of the family unit has found protection in . . . the Fourteenth Amendment . . . [and] the Ninth Amendment.”).

¹⁶⁸ *Id.* (holding, based on the due process clause and the Ninth Amendment, that a father has the right to a hearing on fitness as a parent before children could be taken away).

¹⁶⁹ *Roe v. Wade*, 410 U.S. 113, 153 (1973) (“[P]rivacy, whether it be founded in the Fourteenth Amendment[] . . . [or] in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”), *overruled by Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022).

¹⁷⁰ *Lubin v. Panish*, 415 U.S. 709, 719 n.5 (1974).

¹⁷¹ *Buckley v. Valeo*, 424 U.S. 1, 58–59, 59 n.67 (1976) (reversing a restriction on personal campaign expenditure, answering a certified question regarding the First, Fifth, and Ninth Amendment collectively in the affirmative).

¹⁷² *See, e.g., Gardner v. United States*, 446 F.2d 1195, 1198 (2d Cir. 1971) (refusing to extend a right to sue the Federal government in tort under a Ninth Amendment theory).

¹⁷³ *See, e.g., United States v. Uhl*, 436 F.2d 773, 774 (9th Cir. 1970) (dismissing a Ninth Amendment claim against the military draft as “without merit” in a single sentence).

¹⁷⁴ *Gardner*, 446 F.2d at 1198 (“[W]e find no merit in the appellant’s contention that he has a right to sue the United States, guaranteed by the ninth amendment to the federal Constitution.”).

than mail.¹⁷⁵ The Sixth Circuit held the Ninth Amendment did not enable federal interference with a “state’s disciplinary procedures” in schools¹⁷⁶ and that it similarly provided no unenumerated right to possess an unregistered submachine gun.¹⁷⁷ The Eighth Circuit declined to recognize a Ninth Amendment right to not be housed in a maximum security prison.¹⁷⁸ The Ninth Circuit often dismissed Ninth Amendment claims without discussion¹⁷⁹ or adopted the *Griswold* framework.¹⁸⁰

During this period, Congress’s positive enumerated powers remained, as before, the only exception to unenumerated rights in most of the country.¹⁸¹ The Tenth Circuit explicitly declined to follow *Griswold*, and held that the enumerated congressional power over immigration superseded any Ninth Amendment right to integrity of a

¹⁷⁵ *Rockville Reminder Inc. v. U.S. Postal Serv.*, 480 F.2d 4, 8 (2d Cir. 1973) (“[W]e cannot say that the Postal Service regulations limiting use of the mailbox itself exclusively for mail are unreasonable or that they violate the Constitutional rights of any of the appellants.”).

¹⁷⁶ *Bright v. Nunn*, 4 F.2d 245, 249 (6th Cir. 1971) (“We see no basis here for federal interference with the state’s disciplinary procedures in the operation of its schools.”). The Sixth Circuit also deviated from the historical philosophy of the Ninth Amendment but noted that it proved insufficient grounds to “implicate basic constitutional values.” *Id.*

¹⁷⁷ *United States v. Warin*, 530 F.2d 103, 108 (6th Cir. 1976) (“We simply do not conceive of the possession of an unregistered submachine gun as one of those ‘additional fundamental rights.’”).

¹⁷⁸ *Burns v. Swenson*, 430 F.2d 771, 778 (8th Cir. 1970) (rejecting a concededly expansive claim).

¹⁷⁹ See, e.g., *United States v. Uhl*, 436 F.2d 773, 774 (9th Cir. 1970) (“Appellant contends that the draft law, as applied to him during a period in which there is no dire national emergency, violates the Ninth Amendment. The contention is novel, but without merit.”); *United States v. Farrell*, 443 F.2d 355, 356 (9th Cir. 1971) (“Farrell asserts that the Selective Service Act violates the Ninth Amendment of the Constitution. This contention is without merit.”); *United States v. Zaugh*, 445 F.2d 300, 300 (9th Cir. 1971) (“Zaugh’s contention that the Selective Service System is unconstitutional under the Ninth Amendment is without merit.”); *United States v. Sowul*, 447 F.2d 1103, 1105 (9th Cir. 1971) (“The suggestion that the Selective Service Act violates the Ninth Amendment to the Constitution has been rejected by us.”).

¹⁸⁰ See, e.g., *United States v. Choate*, 576 F.2d 165, 181 (9th Cir. 1978) (declining to recognize a Ninth Amendment right to privacy in one’s mail, asserting that “[r]ights under the Ninth Amendment are only those ‘so basic and fundamental and so deep-rooted in our society’ to be truly essential rights”) (citing *Griswold v. Connecticut*, 381 U.S. 479, 488–89, 491 (1965) (Goldberg, J., concurring)).

¹⁸¹ See, e.g., *Fiallo v. Bell*, 430 U.S. 787, 799–800 (holding enumerated congressional powers supersede unenumerated Ninth Amendment rights). The discourse regarding interplay between Congressional enumerated powers and unenumerated individual rights was also discussed in some detail in dissenting opinions. See, e.g., *United States v. Orito*, 413 U.S. 139 (1973) (Brennan, J., dissenting) (arguing broad language of a statute violated the First and Ninth Amendment, despite commerce power to regulate “transportation of obscene materials”); *United States v. Caldwell*, 408 U.S. 665, 713–14 (1972) (Douglas, J., dissenting) (arguing Ninth Amendment freedom from revealing confidential communications absent compelling national interest should be treated as a strong counterbalance to enumerated legislative power).

family unit.¹⁸² A year later, in *Fiallo v. Bell*, the Supreme Court mirrored the Tenth Circuit's reasoning.¹⁸³ By contrast, the Seventh Circuit relied on the Ninth Amendment—in conjunction with other amendments—to recognize some unenumerated rights, such as the right to an individual hair style for non-military citizens,¹⁸⁴ but not others, such as the right to exclusive notice.¹⁸⁵

The 1980s saw a similar trend in the Supreme Court: rejecting Ninth Amendment claims with little or no discussion.¹⁸⁶ The Supreme Court rejected without discussion Ninth Amendment claims for a right to Medicaid funding for abortion,¹⁸⁷ a right of the public and press to attend criminal trials,¹⁸⁸ and a due process right for discharged federal employees.¹⁸⁹ The Court also bypassed a Ninth Amendment claim when it held an unequal distribution of Native American school funding violated equal protection,¹⁹⁰ and in a separate case relied on national security implications of the Administrative Procedure Act to avoid discussing the plaintiff's Ninth Amendment claims.¹⁹¹

¹⁸² See *Cervantes v. Immigr. & Naturalization Serv.*, Dep't of Just., 510 F.2d 89, 91–92 (10th Cir. 1975).

¹⁸³ Compare *id.* (relying on an enumerated Congressional power argument) with *Fiallo v. Bell*, 430 U.S. 787, 799–800 (holding enumerated congressional powers supersede unenumerated Ninth Amendment rights while reconciling the reasoning with *Griswold* in passing rather than taking the Tenth Circuit's path of declining to follow the precedent).

¹⁸⁴ See *Anderson v. Laird*, 437 F.2d 912, 914 (7th Cir. 1971). In the same case, Judge Reynolds's opinion goes further, affirming that “[u]nder the Ninth Amendment, the Government including the military, has no right to unnecessarily interfere with the private lives of citizens whether they be in the military or not.” *Id.* at 916 (Reynolds, J., concurring in part and dissenting in part).

¹⁸⁵ *United States v. Cerone*, 452 F.2d 274, 286–87 (7th Cir. 1971) (finding use of a state statute in federal prosecution to be constitutional over Ninth Amendment notice objections).

¹⁸⁶ See, e.g., *Davis v. Scherer*, 468 U.S. 183, 187 n. 3 (1984) (dismissing the Ninth Amendment claim in a footnote).

¹⁸⁷ *Harris v. McRae*, 448 U.S. 297, 303, 316–17 (1980).

¹⁸⁸ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580–81 (1980) (recognizing instead a First and Fourteenth Amendment right); see also, *id.* at 603 (Blackmun, J., concurring) (noting the majority's lack of discussion of the Ninth Amendment).

¹⁸⁹ *Davis*, 468 U.S. at 187 n.3 (1984) (mentioning the Ninth Amendment claim, not addressed in the opinion, in a footnote).

¹⁹⁰ *Papasan v. Allain*, 478 U.S. 265, 274 n.8 (1986) (noting only “petitioners sought various forms of relief for breach of the trust regarding the Chickasaw Cession Sixteenth Section lands and for denial of equal protection”).

¹⁹¹ *Webster v. Doe*, 486 U.S. 592, 596 (1988) (noting only that “[h]e also complained that the Director's termination of his employment deprived him of constitutionally protected rights to property, liberty, and privacy in violation of the First, Fourth, Fifth, and Ninth Amendments”).

The Supreme Court also avoided addressing Ninth Amendment claims in two cases about sexual orientation.¹⁹² First, the Court denied a writ of certiorari regarding the right of public employees to express private sexual preferences.¹⁹³ Dissenting from the denial, Justices Brennan and Marshall note that “discrimination based on sexual preference . . . infringe[s] various fundamental constitutional rights, such as the rights to privacy or freedom of expression.”¹⁹⁴ Second, the Court held in *Bowers v. Hardwick*, in 1986, that there was no fundamental constitutional right to same sex intimacy, and declined to reverse *Griswold* explicitly.¹⁹⁵ Writing in dissent, Justices Blackmun, Brennan, Marshall, and Stevens noted that the plaintiff had “stated a cognizable claim that [the statute] interfere[d] with constitutionally protected interests in privacy and freedom of intimate association.”¹⁹⁶

Absent clear guidance from the Supreme Court on how to continue to apply the Ninth Amendment, circuits began to split in their approach during the 1980s.¹⁹⁷ The Second Circuit used the Ninth Amendment as a statutory interpretation tool to recognize an unenumerated right to testify.¹⁹⁸ The Third Circuit held that the Ninth Amendment provided a right to access pretrial criminal proceedings as part of the underlying “right to receive information” implied by the First Amendment.¹⁹⁹ The Fourth Circuit rejected a Ninth Amendment claim for a “fundamental

¹⁹² *Rowland v. Mad River Loc. Sch. Dist.*, 730 F.2d 444, 446 (6th Cir. 1984), *cert. denied*, 470 U.S. 1009 (1985); *Bowers v. Hardwick*, 478 U.S. 186, 189–91 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

¹⁹³ *See Rowland*, 470 U.S. 1009 (1985).

¹⁹⁴ *Id.* at 1015 (Brennan, J., dissenting).

¹⁹⁵ *See Bowers*, 478 U.S. at 190–91 (“[W]e think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy.”).

¹⁹⁶ *Id.* at 202 (Blackmun, J., dissenting).

¹⁹⁷ *Compare* *United States v. Bifield*, 702 F.2d 342, 349 (2d Cir. 1983) (applying the Ninth Amendment as a rule of construction) *with* *United States v. Fry*, 787 F.2d 903, 905 (4th Cir. 1986) (declining a Ninth Amendment claim for the right to produce or distribute marijuana based on a fundamental rights argument).

¹⁹⁸ *See Bifield*, 702 F.2d at 349 (“That this unmentioned right is a constitutional one is further fortified by the rule of construction contained in the Ninth Amendment. . . . The full scope of the specific guarantees is not limited by the text, but embraces their purpose to provide broad freedom from all arbitrary impositions and purposeless restraints.” (internal quotations omitted)).

¹⁹⁹ *See United States v. Criden*, 675 F.2d 550, 556 (3d Cir. 1982) (“[T]he Constitution explicitly provides neither a right of access nor a right to receive information. However . . . both the concept of penumbral guarantees and the ninth amendment support the existence of rights not explicitly mentioned.”) (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575, 579 n.15 (1980)).

right to produce or distribute marijuana commercially.”²⁰⁰ The Fifth Circuit dismissed—without discussion—Ninth Amendment claims for a right to privacy²⁰¹ and a right to refuse to testify to a grand jury.²⁰²

The Seventh Circuit rejected a claim for a Ninth Amendment right to possess firearms, stating—erroneously²⁰³—that the Supreme Court had never held that “any specific right is protected by the [N]inth [A]mendment” and rejected the contention that “the [N]inth [A]mendment should be read to recognize an unwritten, fundamental, individual right.”²⁰⁴ Similarly, the Ninth Circuit, after extensive discussion, held that there was not a Ninth Amendment right to conscientiously object to taxes during a war, in light of the positive enumerated congressional power to tax.²⁰⁵

The 1990s saw a growing modern movement towards restricting existing rights and away from recognizing new rights under the Ninth Amendment.²⁰⁶ While the Supreme Court did uphold the right to an abortion, it permitted regulations that did not impose an “undue burden” on the right.²⁰⁷ Concurring in the opinion but dissenting on this point, Justice Scalia *erroneously*²⁰⁸ notes the Court’s “contrary

²⁰⁰ *Fry*, 787 F.2d at 905.

²⁰¹ See *United States v. Martino*, 648 F.2d 367, 381 (5th Cir. 1981) (“We likewise reject the proposition that [the statute] violates the Ninth and Tenth Amendments.”), *on reconsideration in part sub nom. United States v. Holt*, 650 F.2d 651 (5th Cir. 1981), *on reh’g*, *United States v. Martino*, 681 F.2d 952 (5th Cir. 1982), *aff’d sub nom. Russello v. United States*, 464 U.S. 16 (1983).

²⁰² See *In re Grand Jury Proc.*, 643 F.2d 226, 229 (5th Cir. 1981) (“Appellant’s . . . Ninth Amendment claims have no merit.”).

²⁰³ See Part II, D–F, *supra*.

²⁰⁴ *Quilici v. Vill. of Morton Grove*, 695 F.2d 261, 271 (7th Cir. 1982).

²⁰⁵ *Barton v. Comm’r*, 737 F.2d 822, 823–24 (9th Cir. 1984) (“[A Ninth Amendment] inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights . . . must fail.”) (quoting *United Pub. Workers v. Mitchell*, 330 U.S. 75, 96 (1947)). The Ninth Circuit’s discussion of the Ninth Amendment was uniquely thorough for the 1980s. Compare *Quilici*, 695 F.2d at 271 (resolving the Ninth Amendment issue in five sentences) with *Barton*, 737 F.2d at 823–24 (9th Cir. 1984) (devoting the entire *per curiam* decision to Ninth Amendment analysis).

²⁰⁶ See, e.g., *Alden v. Maine*, 527 U.S. 706, 763 n.2 (1999) (Souter, J., dissenting).

²⁰⁷ *Planned Parenthood v. Casey*, 505 U.S. 833, 878 (1992), *overruled by Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2284 (2022); see also *Hodgson v. Minnesota*, 497 U.S. 417, 447 (1990) (noting, in the context of parental notification for abortions, the Ninth Amendment’s guarantee of “integrity of the family unit” and that “[a] natural parent who has demonstrated sufficient commitment to his or her children is thereafter entitled to raise the children free from undue state interference” (citing *Stanley v. Illinois*, 405 U.S. 645, 651 (1972))).

²⁰⁸ See Part III, A–G, *supra*.

understanding for almost 200 years” of the Ninth Amendment.²⁰⁹ By the end of the 1990s, the Court had solidified the opinion that the Ninth Amendment did not “constitutionalize all common law individual rights.”²¹⁰ Unfortunately, this modern conception does not reflect the actual history of Ninth Amendment jurisprudence.²¹¹

During this time, the circuits also solidified this restrictive view of the Ninth Amendment,²¹² with uniform disregard for 200 years of protections for unenumerated individual rights.²¹³ The First Circuit held that “[t]he Ninth Amendment . . . does not create substantive rights beyond those conferred by governing law.”²¹⁴ The Second Circuit went further, holding that “the application of federal law in a federal forum does not implicate the Ninth Amendment.”²¹⁵ The Fourth Circuit held that there was no Ninth Amendment “guarantee of personal liberty rights” for public nudity.²¹⁶ The Fifth Circuit rejected a Ninth Amendment “right to be left alone”²¹⁷ and a right to bear arms beyond the Second Amendment.²¹⁸ The Sixth Circuit rejected a Ninth Amendment right to abortion for a prisoner who was prevented from getting an abortion by bureaucratic delays.²¹⁹ The Seventh Circuit held both that the Ninth Amendment does not empower states to create constitutional rights that “truncate the power of Congress under Article I by preempting

²⁰⁹ *Casey*, 505 U.S. at 1000 (Scalia, J., concurring in part and dissenting in part).

²¹⁰ *See Alden*, 527 U.S. at 763 n.2 (Souter, J., dissenting) (“I know of no reason to suppose . . . the Ninth Amendment constitutionalized all common law individual rights.”).

²¹¹ *See* Part III, A–G, *supra*.

²¹² *See, e.g., United States v. Arditti*, 955 F.2d 331, 344 (5th Cir. 1992).

²¹³ *See* Part III, A–G, *supra*.

²¹⁴ *Vega-Rodriguez v. Puerto Rico Tel. Co.*, 110 F.3d 174, 182 (1st Cir. 1997); *see also* *Martinez-Rivera v. Sanchez Ramos*, 498 F.3d 3, 9 (1st Cir. 2007) (quoting and reaffirming *Vega-Rodriguez*).

²¹⁵ *United States v. Melendez*, 60 F.3d 41, 50 (2d Cir. 1995), *cert. granted, judgment vacated sub nom. Colon v. United States*, 516 U.S. 1105 (1996).

²¹⁶ *United States v. Biocic*, 928 F.2d 112, 116 (4th Cir. 1991) (“[The plaintiff’s] essential effort is to equate a right to public nudity at the whim of the actor to the profound rights of personhood and privacy recognized in *Griswold* and *Roe*.”).

²¹⁷ *Arditti*, 955 F.2d at 344 (“[The] Ninth Amendment argument that a person’s liberty, or right to be left alone, is violated when the government persists in attempts to engage the individual in criminal conduct after he has declined to become involved [is not required by the Constitution].” (internal quotations omitted)).

²¹⁸ *See United States v. Broussard*, 80 F.3d 1025, 1041 (5th Cir. 1996) (“We are not persuaded to discover or declare a new constitutional right to possess weapons under the Ninth Amendment.”).

²¹⁹ *See Gibson v. Matthews*, 926 F.2d 532, 537 (6th Cir. 1991) (“[T]he [N]inth [A]mendment does not confer substantive rights in addition to those conferred by other portions of our governing law.”).

federal legislation,”²²⁰ and that the Ninth Amendment is intended as a rule of interpretation rather than an independent source of rights.²²¹ The Eighth Circuit held that there is no fundamental right under the Ninth Amendment to be free of nonnatural radiation.²²² The Ninth and Eleventh Circuits both rejected Ninth Amendment claims for the right to bear firearms beyond the Second Amendment.²²³

For the first two decades of the 2000s, the Court continued to rely on post-*Griswold* ahistorical dicta to reject claims for Ninth Amendment rights in spite of the Court’s renewed focus on textualism and originalism.²²⁴ In *Troxel v. Granville*, a case regarding visitation rights, Justice Scalia discussed this apparent contradiction.²²⁵ Dissenting from the opinion, Justice Scalia noted that “a right of parents to direct the upbringing of their children is among the unalienable Rights that the Declaration of Independence proclaims . . . and . . . is also among the other rights retained by the people [under] the Ninth Amendment.”²²⁶ His concern focused on judicial overreach. He observed that “the Constitution’s refusal to deny or disparage other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges’ list against laws duly enacted by the people.”²²⁷ In a pair of subsequent cases, the Court recognized, partially by reference to the Ninth Amendment, the individual right to bear arms regardless of state regulations.²²⁸ Dissenting from the opinion, but agreeing with others

²²⁰ *United States v. Spencer*, 160 F.3d 413, 414–15 (7th Cir. 1998). The Court relied on a series of law review articles to deviate from Ninth Amendment precedent. *Id.*

²²¹ *Froehlich v. Dep’t of Corr.*, 196 F.3d 800, 801 (7th Cir. 1999) (“[The Ninth Amendment’s] purpose is to make clear that the enumeration of specific rights in the Bill of Rights is not intended . . . to deny the existence of unenumerated rights.”) (citing *Gibson v. Matthews*, 926 F.2d 532, 537 (6th Cir. 1991)).

²²² *Concerned Citizens of Nebraska v. U.S. Nuclear Regul. Comm’n*, 970 F.2d 421, 426–27 (8th Cir. 1992).

²²³ *San Diego Cnty. Gun Rts. Comm. v. Reno*, 98 F.3d 1121, 1125 (9th Cir. 1996) (“[T]he Ninth Amendment does not encompass an unenumerated, fundamental, individual right to bear firearms.”); *United States v. Wright*, 117 F.3d 1265, 1275 (11th Cir. 1997) (“[We] refuse to establish a new constitutional right to possess weapons under th[e Ninth A]mendment.”), *vacated in part on other grounds on reh’g*, 133 F.3d 1412 (11th Cir. 1998).

²²⁴ *See, e.g., Troxel v. Granville*, 530 U.S. 57, 91–92 (2000) (Scalia, J., dissenting).

²²⁵ *Id.*

²²⁶ *Id.* at 91 (internal quotations omitted).

²²⁷ *Id.* (internal quotations omitted).

²²⁸ *D.C. v. Heller*, 554 U.S. 570, 579 (2008) (stating the Ninth Amendment “unambiguously refer[s] to individual rights, not ‘collective’ rights, or rights that may be exercised only through

on this point, Justice Stevens noted that there are certain fundamental rights such that “no legal document ever could” be the “source of our basic freedoms.”²²⁹

Courts in the twenty-first century have uniformly assumed the Ninth Amendment “is not an independent source of individual rights.”²³⁰ In the 2000s, federal circuits rejected or dismissed Ninth Amendment claims to good prison conditions,²³¹ smoking in a public place,²³² and the unrestricted right to bear firearms.²³³ In the 2010s, federal circuits repeatedly rejected Ninth Amendment claims including “the right to choose one’s cellmate,”²³⁴ “the right to use a particular post office,”²³⁵ and the right of a parent to prevent their child from entering foster care.²³⁶ Similarly, courts in the early twenty-first century held there is no Ninth Amendment right to deportation proceedings;²³⁷ to smoke in

participation in some corporate body”); *McDonald v. City of Chicago*, 561 U.S. 742, 851 n.20 (2010) (Thomas, J., concurring in part) (noting that the rights protected by the Constitution include unenumerated ones).

²²⁹ See *McDonald*, 561 U.S. at 862–63 (Stevens, J., dissenting) (treating the Ninth Amendment as reinforcing protections).

²³⁰ *Jenkins v. Comm’r*, 483 F.3d 90, 92–94 (2d Cir. 2007); *Barnett v. Carberry*, 420 F. App’x 67, 69 (2d Cir. 2011); *accord Phillips v. City of New York*, 775 F.3d 538, 544 (2d Cir. 2015) (“Because plaintiffs fail plausibly to allege a violation of any other constitutional right, their effort to recast their unsuccessful claims as a violation of the Ninth Amendment also fails.”); *Johnson v. Tex. Bd. of Crim. Just.*, 281 F. App’x 319, 320 (5th Cir. 2008) (rejecting a Ninth Amendment claim for substantive rights); *Steele v. County of Beltrami*, 238 F. App’x 180, 181 (8th Cir. 2007) (dismissing a Ninth Amendment claim on separation of powers grounds); *United States v. Baer*, 235 F.3d 561, 564 (10th Cir. 2000) (noting the “uniform[] reject[ion]” of Ninth Amendment arguments for firearms).

²³¹ See *Johnson*, 281 F. App’x at 320 (“The Ninth Amendment does not confer substantive rights upon which civil rights claims may be based.”).

²³² *Steele*, 238 F. App’x at 181 (“[The] Constitution does not provide judicial remedies for every social and economic ill.”). The court dismissed the Ninth Amendment claim without discussion, explicitly noting that “adjustment[s] of individual liberties [are] *better left to the people acting through legislative processes*.” *Id.* (emphasis in original).

²³³ See *Mendoza v. Lima*, 98 F. App’x 583, 585 (9th Cir. 2004) (“The Ninth Amendment does not encompass an unenumerated individual right to bear arms.”); *Baer*, 235 F.3d at 564 (“The circuits have uniformly rejected the argument that the Ninth Amendment encompasses an unenumerated, fundamental, individual right to bear firearms.” (internal quotations omitted)); *United States v. Fuentes*, 119 F. App’x 248, 250 (10th Cir. 2004) (“[F]irearms statutes barring possession of firearms by felons do not violate the Ninth or Tenth Amendments.”).

²³⁴ *Murray v. Bledsoe*, 650 F.3d 246, 247 (3d Cir. 2011).

²³⁵ *Xenos v. Corvino*, 473 F. App’x 169, 172 (3d Cir. 2012).

²³⁶ See *Clayworth v. Luzerne County*, 513 F. App’x 134, 137 (3d Cir. 2013).

²³⁷ See *Cooper Butt ex rel Q.T.R. v. Barr*, 954 F.3d 901, 908 (6th Cir. 2020) (“[T]he Ninth Amendment does not confer substantive rights.”).

public;²³⁸ to grow²³⁹ or distribute²⁴⁰ medical marijuana; to parole;²⁴¹ or to self-defense.²⁴² In the 2020s, while some members of the Supreme Court suggested that unenumerated rights may be retained by the people,²⁴³ the Court actively rejected Ninth Amendment claims for unenumerated rights of the kind protected for hundreds of years.²⁴⁴ In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court held that a right not enumerated in the Constitution must be “deeply rooted in this Nation's history and tradition,” without reference to or analysis of the Ninth Amendment.²⁴⁵ The Court then found that a woman's individual right to bodily autonomy, recognized since at least 1891,²⁴⁶ was not sufficiently rooted in history to be protected.²⁴⁷

From this history it is apparent that the current position of the federal judiciary is that the Ninth Amendment only protects extensions of individual rights enumerated elsewhere in the Constitution.²⁴⁸ However, this modern doctrine is not consistent with the text of the Amendment²⁴⁹ nor the preceding two hundred years of jurisprudence.²⁵⁰ As the courts have continued to stray from the intended protections of the Ninth Amendment, the political branches must intervene under the separation of powers to protect individual rights.²⁵¹ The extensive body

²³⁸ *Goodpaster v. City of Indianapolis*, 736 F.3d 1060, 1075 (7th Cir. 2013).

²³⁹ *Montana Caregivers Ass'n, LLC v. United States*, 526 F. App'x 756, 758–59 (9th Cir. 2013).

²⁴⁰ *Sacramento Nonprofit Collective v. Holder*, 552 F. App'x 680, 683 (9th Cir. 2014).

²⁴¹ *Heath v. Norwood*, 772 F. App'x 706, 709 (10th Cir. 2019). The court dismissed—without discussion—the claim for a Ninth Amendment right to parole. *Id.*

²⁴² *United States v. Hunt*, 419 F. App'x 949, 950 (11th Cir. 2011) (“[S]ince the Ninth Amendment does not provide an inherent right to self defense, [the statute] cannot be unconstitutional on these grounds.”). The court did not explain this assertion. *Id.*

²⁴³ See, e.g., *Chiafalo v. Washington*, 140 S. Ct. 2316, 2334 (2020) (Thomas, J., concurring in the judgment) (observing that “where the Constitution is silent about the exercise of a particular power . . . the power is either delegated to the state government or retained by the people.” (internal quotations omitted)).

²⁴⁴ Compare *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891) (establishing a “right of every individual to the possession and control of [their] own person”) with *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284 (rejecting a woman's right to an abortion).

²⁴⁵ *Dobbs*, 142 S. Ct. at 2242 (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

²⁴⁶ See *Botsford*, 141 U.S. at 251.

²⁴⁷ See *Dobbs*, 142 S. Ct. at 2242.

²⁴⁸ See, e.g., *Phillips v. City of New York*, 775 F.3d 538, 544 (2d Cir. 2015).

²⁴⁹ U.S. CONST. art. IX.

²⁵⁰ See Part I, A–G, *supra*.

²⁵¹ See DOCUMENTARY HISTORY, *supra* note 12, at 319; Part III, *infra*.

of recent jurisprudence does not foreclose congressional correction of the law and protection of individual liberty.²⁵²

ANALYSIS

III. THE NINTH LIFE OF THE NINTH AMENDMENT.

As a result of the Supreme Court's encroachment of individual rights,²⁵³ Congress has both the power to enumerate rights protected by the Ninth Amendment and the duty to do so to restore the separation of powers. Congress must act on this power to bring a ninth life to the Ninth Amendment.

A. *Congress has the Power to Act*

Congress can use the Ninth Amendment to pass legislation affirming Constitutionally protected rights.²⁵⁴ The role of the Ninth Amendment in congressional decision making has been explored at length by Professor Brian Kalt.²⁵⁵ He argues that "Congress . . . is well-suited to vindicate the Ninth Amendment's 'other' rights."²⁵⁶ As the political branch most responsive to the people, "[t]he Ninth Amendment directs Congress *not* to use the Bill of Rights as a checklist," but rather as an opportunity to "act to vindicate these valuable rights."²⁵⁷ Kalt's argument relies on a brief examination of positive and negative rights and focuses on the issues "Congress should consider . . . before it passes laws."²⁵⁸ Kalt is clear that he is "not calling on Congress to pass unprecedented sorts of legislation so much as [he] is calling on Congress to think differently about what it is already doing."²⁵⁹ Kalt stops short however of calling for

²⁵² See *Troxel v. Granville*, 530 U.S. 57, 91–92 (2000) (Scalia, J., dissenting) (arguing questions of individual unenumerated rights can be left to "legislative chambers"); Robin West, *Unenumerated Duties*, 9 U. PA. J. CONST. L. 221, 231 (2006) ("[T]his widely shared view that the Due Process Clause, the Fourteenth Amendment, and the Constitution generally protect negative and not positive rights, even if true, clearly does not imply that legislators have no positive duties to legislate toward welfarist ends").

²⁵³ See, e.g., *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022).

²⁵⁴ Kalt, *supra* note 7, at 77.

²⁵⁵ *Id.* at 76.

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 76–77 (emphasis added).

²⁵⁸ *Id.* at 82–92.

²⁵⁹ *Id.* at 89.

independent constitutional interpretation contrary to judicial doctrine, instead suggesting that Congress merely debate constitutional questions as the bills arise on the floor.²⁶⁰ Kalt is not alone in this line of thinking, with a number of eminent scholars arguing for a role of Congress in constitutional interpretation.²⁶¹

Although scholars disagree on the specific power of Congress to counter judicial doctrine, they tend to agree that the legislature does have *some* role in constitutional interpretation.²⁶² The question is whether as a constitutional and originalist matter Congress can interpret the Constitution through normal legislation that runs contrary to judicial pronouncement.²⁶³

As a constitutional matter, Congress has the power to correct the judiciary's Constitutional interpretations through normal legislation.²⁶⁴ Congress holds "all legislative Powers herein granted," including the power "to make all Laws which shall be necessary and proper for carrying into Execution . . . all other powers vested by this Constitution in the Government."²⁶⁵ The Constitution, however, also provides that "judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution."²⁶⁶ In this way, neither Congress nor the judicial branch is given final say on the meaning of the Constitution.²⁶⁷ As a

²⁶⁰ See Brian Kalt, *The Ninth Amendment in Congress*, 40 PEP. L. REV. 75, 84 (2012).

²⁶¹ See, e.g., Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 1336–37 (2001); Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1113 (1986).

²⁶² Compare Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707, 708–09 (1985) (discussing the long history of Congressional debate on constitutional issues throughout American history) with Katyal, *supra* note 261, at 1336–37 (arguing not only that Congress can interpret the Constitution but "should take popular values and beliefs into account when formulating constitutional principles" and that Congress can "change constitutional pronouncements through ordinary legislation") and Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1362 (1992) (arguing that constitutional interpretations must be settled by the judiciary alone while acknowledging "a consensus has developed among scholars and officials" that Congress has at least a limited role in constitutional interpretation).

²⁶³ See Alexander & Schauer, *supra* note 262, at 1360–61; Katyal, *supra* note 261, at 1366–67. While the issue of *realpolitik* is relevant to this consideration, it is outside the scope of this Comment.

²⁶⁴ See Katyal, *supra* note 261, at 1359.

²⁶⁵ U.S. CONST. ART I, §§ 1, 8.

²⁶⁶ U.S. CONST. ART III, § 2.

²⁶⁷ See *id.*; U.S. CONST. ART I, § 1.

result, if Congress "believes that the Court has improperly amended the Constitution," it can "use its legislative power to overrule the Court."²⁶⁸

From an originalist perspective, this sort of constitutional interpretation is Congress' proper role.²⁶⁹ Congress is intended to "refine and enlarge the public views . . . [to] discern the true interest of [the] country."²⁷⁰ Judicial supremacy of the like declared in *Marbury v. Madison*²⁷¹ is an expansion of the original intent for the Court, which the Federalist papers argued would have "neither FORCE nor WILL."²⁷² Hamilton believed the Court could merely "keep the [legislature] within the limits assigned to their authority" within the constitutional system.²⁷³ This limitation only envisions striking unconstitutional statutes, and does not address Congressional legislating against unconstitutional judicial interpretations.²⁷⁴ Indeed, even *Marbury* itself does not foreclose legislative interpretation of this kind.²⁷⁵

The question remains: can Congress enumerate unenumerated rights? James Wilson thought such a task was impossible in 1787.²⁷⁶ However, in modern constitutional law, Congress has a broad authority to articulate²⁷⁷ individual rights,²⁷⁸ whether or not the Courts have

²⁶⁸ Katyal, *supra* note 261, at 1359.

²⁶⁹ See *id.* at 1359, 1361 (arguing that "Congress can, in limited circumstances, use its legislative power to overrule the Court" when the court's actions constrain liberty).

²⁷⁰ THE FEDERALIST No. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961).

²⁷¹ See *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

²⁷² THE FEDERALIST No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

²⁷³ *Id.* at 467.

²⁷⁴ See *id.*; Katyal, *supra* note 261, at 1359, 1361.

²⁷⁵ See Katyal, *supra* note 261, at 1367 n.112 (discussing modern judicial interpretations reading *Marbury* to support a strong view of judicial supremacy which is not inherent in the Court's opinion).

²⁷⁶ Wilson, *supra* note 1, at 454 ("Enumerate all the rights of men! I am sure, sir, that no gentleman . . . would have attempted such a thing.").

²⁷⁷ The author suggests that fundamental rights are discovered, and like Michelangelo finding sculptures in the stone, are therefore 'articulated' rather than granted or given. Cf. *McDonald*, 561 U.S. at 862-63 (Stevens, J., dissenting) ("The Due Process Clause cannot claim to be the source of our basic freedoms—no legal document ever could."); Payne, *supra* note 79, at 319 ("It is a perversion of terms to say that a charter gives rights. . . . Rights are inherently in all the inhabitants.").

²⁷⁸ See Edmund Pendleton to Richard Henry Lee, June 14, 1788, in 2 THE LETTERS AND PAPERS OF EDMUND PENDLETON, 1734-1803, at 532-33 (David John Mays ed., 1967) [hereinafter Pendleton Letter].

interpreted them to be protected by the Constitution.²⁷⁹ Both those who believe Congress *should* have a role in constitutional interpretation, and those who do not, “seem to concede that Congress *can* do something with unenumerated rights.”²⁸⁰

The power of Congress to articulate new individual rights is well established.²⁸¹ In fact, the role of Congress as the key player in defining individual rights has a long history and tradition.²⁸² Although Congress has seldom exercised its authority to enumerate rights, most modern scholars are in agreement that such an authority is clear and unambiguous.²⁸³ The Constitution grants Congress the power to “make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”²⁸⁴ The Necessary and Proper Clause gives Congress “broad authority to enact federal legislation.”²⁸⁵ A law establishing a constitutionally protected right would be “useful” and “conducive” to the structure of the Constitution, as a protection for individual rights against government overreach, and would be “incidental” to the enumerated provisions of the Ninth Amendment—as such, it would be necessary and proper.²⁸⁶ Such legislation by default need only survive rational basis review.²⁸⁷

In interpreting the Constitution, the Court has dictated that every part of the document must be given full force and effect;²⁸⁸ therefore, the Ninth Amendment should not be read as redundant with the Necessary and Proper Clause.²⁸⁹ Congress can therefore legislate to protect the

²⁷⁹ See Paul Brest, *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57, 73–75 (1986); *United States v. Schooner Peggy*, 5 U.S. 103, 110 (1801) (recognizing the need for judicial deference to legislative directives).

²⁸⁰ Kalt, *supra* note 7, at 80 (emphasis in original).

²⁸¹ See Fisher, *supra* note 262, at 708–18.

²⁸² See *id.*

²⁸³ See *id.* at 717–20.

²⁸⁴ U.S. CONST. ART. I, § 8.

²⁸⁵ *United States v. Comstock*, 560 U.S. 126, 133 (2010).

²⁸⁶ See *Comstock*, 560 U.S. at 133–34 (quoting *M'Culloch v. Maryland*, 17 U.S. 316, 413, 418 (1819)); *Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 560 (2012).

²⁸⁷ See *M'Culloch*, 17 U.S. at 421 (1819) (“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”).

²⁸⁸ See, e.g., *id.* at 406.

²⁸⁹ Compare U.S. CONST. ART. I, § Sec. 8 with U.S. CONST. AMEND. IX.

Ninth Amendment, like the first eight amendments.²⁹⁰ As such, four modern challenges to Congressional authority in this area deserve a direct response.

First, modern dicta suggesting that Congress cannot expand the list of rights through ordinary legislation without constitutional amendment²⁹¹ are confined to the Fourteenth Amendment's enforcement clause context.²⁹² Congress has declared statutory rights to be secure in financial property,²⁹³ a right to a social security check,²⁹⁴ a right to free public education for disabled children,²⁹⁵ and a fundamental right to transparent government.²⁹⁶ Congress has taken measures to secure a judicially announced right to vote.²⁹⁷ This is possible because the protection of individual rights guaranteed by the Ninth Amendment is traditionally an *inherent* power of legislatures, implicit in the role of a republican government.²⁹⁸ The Ninth Amendment "dictates that 'the full scope of the specific guarantees in the Constitution is not limited by the text, but embraces their purpose.'"²⁹⁹ Congress has the power to protect these existing Constitutional rights through regular legislation.³⁰⁰

Second, the modern assertion of some courts that the Ninth Amendment was only intended to reinforce existing state's rights

²⁹⁰ Katyal, *supra* note 261, at 1359 (arguing that Congress can engage in Constitutional interpretation when drafting legislation).

²⁹¹ See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) ("Congress does not enforce a constitutional right by changing what the right is.").

²⁹² See, e.g., *id.* at 536 (striking down legislation enacted under the 14th Amendment's Enforcement Clause which lay outside the bounds of that Amendment).

²⁹³ See 18 U.S.C. § 2113.

²⁹⁴ See Social Security Act, 42 U.S.C. § 405(g) (creating a private cause of action to sue for a failed social security payment).

²⁹⁵ 20 U.S.C. §1408(a)(2)(C)(i).

²⁹⁶ OPEN Government Act of 2007, Pub. L. No. 110-175 § 2(6), 121 Stat. 2524, 2524 (2007).

²⁹⁷ See U.S. CONST. amend. XIV-XVI; see also Voting Rights Act of 1965, 52 U.S.C. § 10101 *et seq.*

²⁹⁸ See *Ping v. United States*, 130 U.S. 581, 600-01 (1889) (discussing the "rights vested in [the people] under the laws of congress" in the context of legislative supremacy over domestic laws to bring force and effect to international treaties); LOCKE, *supra* note 59, at ch. XI, § 134.

²⁹⁹ *Jenkins v. Comm'r*, 483 F.3d 90, 92-94 (2007) (quoting *United States v. Bifield*, 702 F.2d 342, 349 (2d Cir. 1983)).

³⁰⁰ *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 61-62 (1980) ("The Fifteenth Amendment does not confer the right of suffrage upon any one, but has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress." (internal quotations omitted)).

protection rather than as an independent power³⁰¹ is untenable. This reading would make the Ninth Amendment redundant with the Tenth Amendment.³⁰² Furthermore, although many of the same principles exist in state constitutions, this is not an argument against federal protection.³⁰³ As the Supreme Court observed in 1840:

Some of the state constitutions also contain the prohibition against passing ex post facto laws; but does this weaken the authority of the same restriction upon the states in the general Constitution? And is it not, moreover, very proper, that the state constitutions should themselves embrace all the provisions necessary to a good government, whether they are needed for the present, or not; since it cannot be foreseen what further amendments or alterations may take place in the Constitution of the United States.³⁰⁴

The Supreme Court for most of American history recognized that further developments in American society would require recognition of new, constitutionally protected, individual rights.³⁰⁵ In the words of Edmund Pendleton in 1788, we have “in the progress of things, discovered some great and Important [rights], which we don’t now think of.”³⁰⁶

Third, some argue that an unenumerated right does not automatically create a legislative power, and indeed, the founders were hesitant of legislative power.³⁰⁷ The Court effectively addressed this concern in 1840.³⁰⁸ The Court observed that the differentiation between “rights” in the Ninth Amendment, and “powers” in the Tenth Amendment demonstrates the framer’s understanding that the two are “distinct.”³⁰⁹ As such, the Ninth Amendment “was deemed necessary as it regarded the rights declared to exist, in order to prevent the people from being deprived of others by implication, that might not

³⁰¹ See, e.g., *Beiersdorfer v. LaRose*, No. 20-3557, 2021 WL 3702211, at *15 (6th Cir. Aug. 20, 2021) (holding “there is no substantive ‘right of local, community self-government’ that the courts may enforce against the states”).

³⁰² See *Holmes v. Jennison*, 39 U.S. 540, 557 (1840) (clarifying that the “rights” of the Ninth Amendment belong to the people whereas the “powers” of the Tenth Amendment belong to the States). If the Ninth Amendment is read as a reinforcement of State power only, then the Ninth and Tenth Amendments provide the same protection. *Id.*

³⁰³ See *id.*

³⁰⁴ *Id.*

³⁰⁵ See Part II, A–F, *supra*.

³⁰⁶ Pendleton Letter, *supra* note 278, at 533.

³⁰⁷ THE FEDERALIST NO. 51 (James Madison).

³⁰⁸ See *Holmes*, 39 U.S. at 557.

³⁰⁹ *Id.*

be included in the enumeration.”³¹⁰ Therefore, “instead of limiting the powers of the general government,” the Ninth Amendment “directly calls into action those powers for the protection of the citizen.”³¹¹ The Ninth Amendment “forms a part of the supreme law of the land, by which all the authorities of the states, as well as those of the Union, are bound.”³¹² The Ninth Amendment is best treated as part of the “powers vested by this Constitution in the Government” in the Necessary and Proper Clause.³¹³

Finally, Congress has the power to counter judicial doctrine.³¹⁴ The modern assertion that Congress and the Judiciary are “coequal branches” notably arose during the end of the twentieth century,³¹⁵ at the same time when the Court was reversing historical recognition of constitutionally protected individual rights.³¹⁶ A historically and constitutionally faithful understanding of the separation of powers permits the judiciary to determine that specific legislative acts are unconstitutional, but does not foreclose and even encourages legislative oversight of judicial overreach.³¹⁷

Restrictions on federal power constrain *infringement* rather than *expansion* of individual rights.³¹⁸ Although the courts have often taken the role of interpreting issues of individual rights, the courts have also recognized that whenever possible “adjustments of individual liberties [are] *better left to the people acting through legislative processes.*”³¹⁹

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

³¹³ See U.S. CONST. Art. I, § 8.

³¹⁴ *Brest, supra* note 279, at 66; see also *United States v. Schooner Peggy*, 5 U.S. 103, 110 (1801) (“[T]he court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.”).

³¹⁵ See DAVID J. SIEMERS, *THE MYTH OF COEQUAL BRANCHES* 112–13, 148 (2018).

³¹⁶ See Part II, *supra*.

³¹⁷ See SIEMERS, *supra* note 315, at 132–35.

³¹⁸ See *THE FEDERALIST* No. 51 (James Madison).

³¹⁹ See, e.g., *Steele v. County of Beltrami*, 238 F. App’x 180, 181 (2007) (emphasis in original).

B. *Congress has a Responsibility to Act*

As a result of the Supreme Court's failure to recognize Ninth Amendment rights,³²⁰ Congress has a legislative duty under the separation of powers to protect these rights.³²¹

1. Articulation of Individual Rights is Legislative Power.

Separation of powers analysis tends to proceed in two steps.³²² First, determine whether the "nature of the decision" is clearly identifiable to one branch of government.³²³ Then if the action is not clearly legislative, judicial, or executive, determine the balance of power over the decision.³²⁴ In the case of defining individual rights under the Ninth Amendment, the analysis concludes at step one.

The nature of defining individual rights is clearly identifiable to the legislature.³²⁵ In the words of John Locke, "the first and fundamental positive Law of all Commonwealths is the establishing of the Legislative power; as the first and fundamental natural Law, which is to govern even the Legislative itself, is the preservation of the Society, and (as far as will consist with the public good) of every person in it."³²⁶ Locke reasoned that because the legislative power derives most directly from the people, this power is "sacred and unalterable."³²⁷

³²⁰ See II.A., *supra*.

³²¹ See Raoul Berger, *The Ninth Amendment: The Beckoning Mirage*, 42 RUTGERS L. REV. 951, 962 (1990) (arguing defining individual rights is a legislative power); West, *supra* note 252, at 229–30.

³²² The Court tends to apply this or a similar analysis to Separation of Powers issues, when a rare case survives the political questions doctrine, standing, ripeness, and all other procedural barriers. See, e.g., *Immigr. & Naturalization Serv. v. Chadha*, 462 U.S. 919, 951–55 (1983) (applying functionalistic separation of powers analysis). Scholars have advocated similar analytical frameworks for other separation of powers issues for decades. See, e.g., Michael J. Wieser, *Beyond Bowsher: A Separation of Powers Approach to the Delegation of Budgetary Authority*, 55 BROOK. L. REV. 1405, 1448 (1990) (proposing a similar "functionalistic" separation of powers model for appropriations discussions).

³²³ See *Chadha*, 462 U.S. at 951–55.

³²⁴ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (Jackson, J., concurring in the judgment).

³²⁵ See Berger, *supra* note 321, at 962.

³²⁶ LOCKE, *supra* note 59, ch. XI, § 134 (cleaned up).

³²⁷ *Id.*

In modern times, federal courts themselves have acknowledged that the definition of individual and Constitutional rights is better left to the legislature.³²⁸ The Supreme Court held that the legislature, not the courts, can grant compensation for the violation of individual rights, and noted that when the legislature changes the law in response to a court's ruling, the courts are bound by the new law.³²⁹ On similar grounds, the Eighth Circuit dismissed without discussion a Ninth Amendment claim for the right to smoke in a public place, explicitly noting that "adjustments of individual liberties [are] *better left to the people acting through legislative processes*."³³⁰ As Justice Stevens observed, even if the Ninth Amendment is a truism, "that truism goes to the very core of the constitutional relationship between the individual and governmental authority."³³¹ Some members of the Court have acknowledged the uniquely unenumerated nature of rights outside of the Ninth Amendment context, but have declined to extend this reasoning to Ninth Amendment cases.³³² Indeed, the Court recently unanimously agreed that "the individual liberty secured by federalism is not simply derivative of the rights of the States."³³³

Once Congress has declared a right to exist in the people that previously was unenumerated, the judicial branch should—within its own jurisprudential framework—follow such a proclamation.³³⁴ This method of constitutional interpretation for the extension of individual rights, led by the legislature and followed by the courts is more consistent with the founder's intended roles for the branches.³³⁵

³²⁸ See, e.g., *Steele v. County of Beltrami*, 238 F. App'x 180, 181 (2007).

³²⁹ See *United States v. Schooner Peggy*, 5 U.S. 103, 110 (1801).

³³⁰ *Steele*, 238 F. App'x at 181 (emphasis in original).

³³¹ *Massachusetts v. Upton*, 466 U.S. 727, 737–38 (1984) (Stevens, J., concurring in the judgment).

³³² See, e.g., *McDonald v. City of Chicago*, 561 U.S. 742, 851 n.20 (2010) (Thomas, J., concurring in part) (discussing the Privileges or Immunities Clause, U.S. CONST. amend. XIV, § 1, cl. 2, "[Justice Thomas saw] no reason to assume that the constitutionally enumerated rights . . . consist of all the rights recognized in the Bill of Rights and no others").

³³³ *Bond v. United States*, 564 U.S. 211, 222 (2011).

³³⁴ Katyal, *supra* note 261, at 1341–42.

³³⁵ See *Troxel v. Granville*, 530 U.S. 57, 91–92 (2000) (Scalia, J., dissenting) ("I do not believe that the power which the Constitution confers upon me *as a judge* entitles me to [define] unenumerated right[s].") (emphasis in original)).

2. The Judicial Branch Violated the Separation of Powers.

The separation of powers also provides mechanisms for checking encroachments.³³⁶ Particularly to prevent government from endangering individual rights, the “legislative, executive, and judicial branches shall be kept separate and distinct.”³³⁷ To ensure this separation “in practice is to provide such checks, as will prevent the encroachment of the one upon the other.”³³⁸

At least one founder foresaw the potential for judicial infringement of individual rights.³³⁹ In the debate on adopting the Constitution, a State Senator in Virginia encouraged the adoption of a bill of rights lest “valuable rights be infringed or violated by the arbitrary decisions of Judges.”³⁴⁰ The concerns about adopting such a bill of rights previewed precisely the “enhancement” test developed by the Supreme Court in the 1960s.³⁴¹ The State Senator argued in favor of the Ninth Amendment, for without it, “should the rights of the people be invaded or called in question, they might be required to shew by the constitution what rights they have *retained*; and such as could not from that instrument be proved to be retained by them, they might be denied to possess.”³⁴² As such, the Ninth Amendment was inserted to avoid this precise eventuality by clarifying that “those rights which were not singled out” were nevertheless in the hands of the people.³⁴³

In response to these concerns, Madison developed the separation of powers such that “[t]he prescriptions in favor of liberty, ought to be levelled against the quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power.”³⁴⁴ For much of American history, this was not the judicial branch.³⁴⁵ Indeed, for most of history any judicial act could only bind an individual on a “subject

³³⁶ See DOCUMENTARY HISTORY, *supra* note 12, at 319 (statement of James Madison in Congress, June 8, 1789).

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *Id.* at 591.

³⁴⁰ *Id.*

³⁴¹ See *Griswold v. Connecticut*, 381 U.S. 479, 492 (1965) (Goldberg, J., concurring).

³⁴² DOCUMENTARY HISTORY, *supra* note 12, at 592.

³⁴³ *Id.* at 322.

³⁴⁴ *Id.* at 320.

³⁴⁵ See SIEMERS, *supra* note 315, at 132–35.

matter” but could not interfere, even “collaterally,” with any “individual right.”³⁴⁶

Although much of the founders’ concerns were focused on securing legislative power from abuse in restricting individual rights,³⁴⁷ the core of their concerns were threats to liberty.³⁴⁸ Today, the judiciary has restricted individual liberty in much the same way as Madison feared the legislature might.³⁴⁹ When any one branch oversteps and assumes a power of another branch, it is the role of the remaining branches to check the overreach.³⁵⁰

3. Congress Has a Duty to Define Previously Unenumerated Rights.

The Constitution provides Congress with affirmative legislative duties.³⁵¹ From these enumerated affirmative duties, a number of unenumerated affirmative duties are covered under the Necessary and Proper Clause³⁵² including the “affirmative duty to appropriate money for compensating the President” and other officers.³⁵³ Similarly, Congress has a duty to “provide for the common Defense” implied from the structure and text of the taxation power.³⁵⁴ Legislative duties need not be “expressly declared” but are rather “derived from a grant of a power that is held in trust.”³⁵⁵ Indeed, by entering into a social contract

³⁴⁶ See, e.g., *United States v. Arredondo*, 31 U.S. 691, 729 (1832) (also representing the historical understanding of the limited judicial power in the United States); accord ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 174 (Eduardo Nolla, ed., James T. Schleifer, trans., 2012) (“[W]hen a judge challenges a law in an obscure debate on a particular application, he partially conceals the importance of the challenge from the eyes of the public. His decision intends only to strike an individual interest; the law is harmed only by chance. . . . I do not know whether the way in which the American courts act, at the same time that it is most favorable to public order, is not most favorable to liberty as well.”).

³⁴⁷ See THE FEDERALIST NO. 51 (James Madison).

³⁴⁸ See DOCUMENTARY HISTORY, *supra* note 12, at 320.

³⁴⁹ See Part II, *supra*.

³⁵⁰ DOCUMENTARY HISTORY, *supra* note 12, at 319; see also, Brest, *supra* note 279, at 62.

³⁵¹ See, e.g., U.S. CONST. Art. I, § 2 (“[A]ctual Enumeration shall be made [by Congress].”); §2 (“The House of Representatives shall chuse their Speaker.”); §3 (“The Senate shall chuse their other Officers.”); §4 (“The Congress shall assemble.”); §5 (“Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members [and] shall keep a Journal of its Proceedings, and from time to time publish the same.”).

³⁵² U.S. CONST. Art I, § 8.

³⁵³ Black, *supra* note 261, at 1113.

³⁵⁴ See U.S. CONST. Art. I, § 8; Black, *supra* note 261, at 1113–14.

³⁵⁵ Black, *supra* note 261, at 1114.

with its citizen a government takes on responsibility for the welfare of its citizens, including the protection of their individual rights within the society.³⁵⁶ In this sense, the “positive moral obligations of state actors . . . [create] positive duties to pass laws that serve welfarist ends.”³⁵⁷ The extensive academic discussion on legislative duty, however, seldom mentions the Ninth Amendment.³⁵⁸

The Ninth Amendment forms a constitutional hook to fulfil this legislative duty. Even if the Ninth Amendment only defines and protects negative rights,³⁵⁹ a violation of negative rights creates an affirmative, positive right to be relieved of that trespass by someone with power.³⁶⁰ In the case of legislative powers, Congress has plenary power to counter judicial overreach.³⁶¹ When the judiciary encroaches on legislative power, the legislature can enact new laws that the judiciary and executive are bound to enforce.³⁶² While the list of individual rights requiring protection will change with “changing social views,”³⁶³ this creates an even greater constitutional duty on the political branches to recognize and protect new and evolving understandings of Ninth Amendment protections.³⁶⁴ Thus, the Ninth

³⁵⁶ See Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 514–16 (1991).

³⁵⁷ West, *supra* note 252, at 229–30. Such arguments are not constrained to the political left. See, e.g., Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (Mar. 31, 2020) (arguing that conservative faith and morality can form a basis for legislative and judicial duty to reinterpret the Constitution).

³⁵⁸ Kalt, *supra* note 7, at 81.

³⁵⁹ See McAfee, *supra* note 41, at 1221 (arguing the Ninth Amendment is exclusively a source of residual or negative rights that limit government power).

³⁶⁰ See West, *supra* note 252, at 227–28 (discussing the creation of affirmative rights made by the violation of negative rights); Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1212–13 (arguing that legislatures may enforce constitutional norms underenforced by the federal judiciary); see also CALVIN R. MASSEY, SILENT RIGHTS: THE NINTH AMENDMENT AND THE CONSTITUTION’S UNENUMERATED RIGHTS 129–31 (1995) (discussing the creation of new positive rights); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 6–32 (1999) (discussing the constitutional roles and duties of the legislature).

³⁶¹ Brest, *supra* note 279, at 62.

³⁶² *United States v. Schooner Peggy*, 5 U.S. 103, 110 (1801) (noting that when the legislature changes law in response to court rulings, the courts are bound by the new law so long as the law is constitutional); U.S. CONST. ART. II, § 3 (requiring the President to faithfully execute the law).

³⁶³ See *Sacramento Nonprofit Collective v. Holder*, 552 F. App’x 680, 683 (9th Cir. 2014).

³⁶⁴ See Black, *supra* note 261, at 162–63.

Amendment creates a legislative duty in the Congress to protect individual rights.³⁶⁵

CONCLUSION

Modern courts are getting the Ninth Amendment wrong.³⁶⁶ What once was a clear protection of unenumerated rights, drawn from the social contract, has now become precisely what the opponents of the bill of rights feared: a checklist against which government action is measured.³⁶⁷ This shift was developed by the federal courts within the last few decades and broke from centuries of precedent.³⁶⁸

By viewing this recent development against recognizing individual rights through the separation of powers lens, it is clear that the balance of power must be resolved in favor of returning to "the people" the liberty that was theirs to begin with. The legislative power, vested in the Congress to create all laws necessary and proper for the protection of individual rights,³⁶⁹ drawn from the Ninth Amendment, is well positioned to counter this judicial overreach. As Congress has the power to act, and the judicial branch has drifted from the correct and longstanding interpretation of the Constitution, the Congress has not only a right but a *duty* to fulfill its envisioned check on the judicial branch and return our unalienable individual liberty to us—the people.

Congress is, or at least was supposed to have been, the soul of republican government.³⁷⁰ By returning these debates over individual rights to the halls of Congress and away from the judicial branch, the country can better ensure democratic accountability for individual rights, respect the original separation of powers intended by the founders, and work to create a more perfect union.

³⁶⁵ See Barclay, *supra* note 34, at 285–86 (interpreting the Ninth Amendment as a means of balancing state and federal police powers and arguing that there is a fiduciary duty of the federal government to protect natural rights).

³⁶⁶ See Part III, *supra*.

³⁶⁷ *Id.*

³⁶⁸ *Id.*

³⁶⁹ U.S. CONST. Art I, §§ 1, 8.

³⁷⁰ See THE FEDERALIST No. 51 (James Madison); SIEMERS, *supra* note 315, at 163.