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Tracing the Contours of the Ninth Amendment

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I. Introduction

One of the biggest debates surrounding the adoption of the Constitution was its lack of a Bill of Rights. Many states refused to ratify the document until they were promised that a Bill of Rights would be on the agenda of the First Congress. Despite many strong arguments by the Federalist drafters of the Constitution that such a Bill of Rights was not only unnecessary, but potentially dangerous, these Antifederalist states won the day. Thus James Madison and many others pored over the recommendations submitted by the states for potential amendments to the Constitution and eventually proposed twelve articles of Amendment, ten of which were adopted.\(^1\)

The eleventh of these articles, which became the Ninth Amendment, was added by Madison as a safeguard against the dangers he had earlier outlined against a Bill of Rights.\(^2\) These dangers included an incomplete enumeration of rights, as well as the potential to counteract the view of a government of limited powers. To combat these twin dangers, Madison created the Ninth Amendment which reads: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”\(^3\) Despite the sweeping promise of the Ninth Amendment that unenumerated rights were to be protected, that promise has largely rung hollow.\(^4\) Instead the Court has sought to locate new rights in the substantive component of the Due Process Clause of the 14\(^{th}\) Amendment.

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\(^1\) See, infra, Section III(a).
\(^2\) See, infra, note 24 and accompanying text.
\(^3\) U.S. CONST. Amend. IX.
\(^4\) See, infra, Section II(b).
One potential reason for this mis-location of unenumerated rights has been a fear of the apparently boundless nature of the Ninth Amendment combined with an iron faithfulness to the concept of *stare decisis*. Unlike other amendments, the Ninth Amendment appears to offer no guidance to courts in interpreting it. Thus, many have challenged that the Amendment is a conduit for judges to impose their own views on the Constitution.\(^5\) Having once started down the road of utilizing the Due Process Clause, *stare decisis* causes the Court to continue to follow the same reasoning rather than looking elsewhere for a source of these unenumerated rights. Thus, since the 1960’s, the Court has relied on the much-maligned concept of substantive due process to locate rights that would more properly be found in the Ninth Amendment. This paper proposes an alternative.

Part Two of this paper takes a more in-depth look at the substantive due process doctrine that has arisen under the 14\(^{th}\) Amendment and examines the various critiques that have been leveled against it. It then offers an answer to these critiques – locate new rights in the Ninth Amendment. Part Three then examines the viability of this solution by asking if the Ninth Amendment actually protects substantive rights, or if, as some have contended, it is just to be interpreted as a canon of construction. After tracing the thoughts of the Ninth Amendment’s author, it examines the more modern scholarship on the Amendment and concludes that the Ninth Amendment does indeed protect substantive rights.

Part Four then takes on the most difficult question of attempting to trace the contours of this neglected amendment. This question has troubled scholars of the Ninth Amendment for many years. How does one define unenumerated rights without either

\(^5\) See, *infra*, Section III(b).
rendering an incomplete enumeration or granting a judge sweeping discretion to locate whatever rights he or she may wish to find? This paper argues that the appropriate way to locate the rights protected is to look at the rights that have been recognized under the 14th Amendment, and to utilize a standard canon of construction to protect unenumerated rights while placing an appropriate limit on the judges asked to protect these rights.

Specifically, the familiar canons of *noscitur a sociis* and *ejusdem generis*, which hold that where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar to those enumerated by the specific words. By applying these same canons to the Ninth Amendment, judges can protect unenumerated rights without imposing their own views on the Constitution.\(^6\)

II. Problems With Using the Due Process Clause of the 14th Amendment to Secure Rights

The Court has, for the last century, relied on the substantive component of the Due Process Clause of the 14th Amendment to protect unenumerated rights. This focus on the 14th Amendment, coupled with the doctrine of *stare decisis*, detracts attention from the Ninth Amendment and thus prevents the Court from considering it as an alternative. As long as the Court chooses to locate rights within this arguably inappropriate locale in the Constitution, the Courts will shy away from utilizing the Ninth Amendment.\(^7\) The irony with the Court’s reliance on this provision is that not only was it entirely unanticipated by the framers of the 14th Amendment, it provides even less guidance to

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\(^6\) Another question that will have to be dealt with is whether the Ninth Amendment is incorporated against the states through the 14th Amendment. While this question is beyond the scope of the current paper, it is important to note that at least 30 states have their own versions of the Ninth Amendment, and thus the test suggested here could be adopted by State Supreme Courts.

\(^7\) This paper argues that the Ninth Amendment is a more appropriate place to locate these unenumerated rights because the text of the Amendment specifically mentions them, while the 14th Amendment does not. This textual grounding grants a greater legitimacy to the protection of these rights. See, *infra*, Section IV.
courts seeking to locate rights than the Ninth Amendment can. Currently, the Court uses the Due Process Clause of the 14th Amendment to protect rights not mentioned in the text of the Constitution. Thus, when protecting the right to privacy, abortion, education or a whole host of other rights, the Court looks to the 14th, as opposed to the Ninth Amendment. This has lead several scholars to critique the whole doctrine of unenumerated rights as baseless and not grounded in the Constitution.

a. Critique of the Due Process Clause

The strongest critique leveled against the use of the Due Process Clause of the 14th Amendment for the location of unenumerated rights is the lack of textual basis for doing so. There is nothing within the phrase “due process of law” that would indicate that it was meant to contain substantive rights. Indeed, the Fifth Amendment contains identical language and, prior to the substantive due process doctrine announced in *Lochner v. New York*, it had never been read to contain such substantive rights.  

In fact, the logical place to locate such rights would be the Privileges and Immunities Clause of the 14th Amendment, but the Court has shied away from utilizing this provision ever since it decided the *Slaughterhouse Cases*. There, the Court held that the first ten amendments to the Constitution were not “privileges and immunities” within the meaning of the Clause. As a result, the Court turned to the due process clause in the

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8 It should be noted that in the wake of *Lochner* the Court has utilized the Due Process Clause of the Fifth Amendment to apply its substantive due process decisions to the federal government. The Court has also read an equal protection component into the Fifth Amendment’s Due Process Clause. See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

9 83 U.S. 36 (1872).

10 See also James L. Wright & M. Mathew Williams, “Remember the Alamo: The Seventh Amendment to the U.S. Constitution, the Doctrine of Incorporation, and State Caps on Jury Awards,” 45 S. Tx. L.R. 449, 476 (2004).
now much-maligned case of *Lochner v. New York*.\(^{11}\) As one commentator has explained “Lochner effectively immortalized the substantive due process mechanism that is still the standard for analyzing claims regarding unenumerated constitutional rights today.”\(^{12}\)

The Court continued the *Lochner* tradition in *Meyer v. Nebraska*.\(^{13}\) *Meyer* perhaps best illustrates the lack of textual support for the substantive due process doctrine. There, the Court dealt with a statute which prohibited the teaching of German to children. The Court ruled that the statute conflicted with the right of the instructor to teach and the parent’s right to seek instruction for their child protected by the liberty component of the 14\(^{th}\) Amendment.\(^{14}\) This shows the flaw in the reliance on the Due Process Clause. A fundamental right was at issue, not a liberty interest.\(^{15}\) Since the 14\(^{th}\) Amendment only guarantees a protection of “liberty” rather than the protection of fundamental rights, there is no textual basis for the Court’s decision. This seriously undermines the legitimacy of the decision, along with its progeny. As a result, the whole doctrine of substantive due process has been stained since its beginnings in *Lochner*.

Of course, the Court invalidated *Lochner* in *West Coast Hotel v. Parish*,\(^{16}\) but it revitalized the substantive due process doctrine in *Griswold v. Connecticut*.\(^{17}\) There, Justice Douglas located a right to privacy that sprang from the “penumbras formed by emanations” of the First, Third, Fourth, Fifth and Ninth Amendments, applied to the states via the Fourteenth.\(^{18}\) Justice Douglas wrote for himself in framing this opinion, but

\(^{11}\) 198 U.S. 45 (1905).
\(^{13}\) 262 U.S. 390 (1923).
\(^{14}\) Schmidt, *supra* note 12, at 173.
\(^{15}\) Id.
\(^{16}\) 300 U.S. 379 (1937).
\(^{17}\) 381 U.S. 479
\(^{18}\) Id.
several Justices concurred. In doing so, they looked to the substantive component of the
Due Process Clause of the 14th Amendment.\footnote{See concurring opinions of Justice Harlan and Justice White.} However, one Justice, Justice Goldberg, relied on the Ninth Amendment as the home of this newly enunciated right.\footnote{Griswold, 381 U.S. at 486 (Goldberg, J. concurring).}

Justice Goldberg examined the history as well as the text of the Ninth Amendment and concluded that the Framers believed that the Constitution protected rights not recognized elsewhere.\footnote{Id. at 490-91 (Goldberg, J. concurring)(internal citations omitted).}

While this Court has had little occasion to interpret the Ninth Amendment “[i]t cannot be presumed that any clause of the constitution is intended to be without effect.” In interpreting the Constitution “real effect should be given to all the words it uses.” The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold.\footnote{Id.}

Here, Justice Goldberg looked to the Ninth Amendment to safeguard rights that are not explicitly mentioned in the Constitution. It is the position of this paper that Justice Goldberg was correct in this holding, and that when the Court wishes to protect unenumerated rights it should look to the Ninth Amendment to do so.

b. Proposed solution - Use the Ninth Amendment

However, as innovative as Justice Goldberg was in first looking to the Ninth Amendment, he did not go far enough in his exposition of its reach. First of all, he refuses to define the Ninth Amendment as an independent source of rights.\footnote{Id.} He merely believed that “[t]he Ninth Amendment simply shows the intent of the Constitution’s authors that other fundamental personal rights should not be denied such protection or
disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments.”

While I do not believe this understanding of the Ninth Amendment goes far enough, I do applaud the Justice for taking the first step in rejecting the improper use of the 14th Amendment to safeguard rights and to launch a lengthy scholarly debate about the Ninth Amendment. Indeed, Justice Goldberg’s decision served as the starting point for a whole host of scholarship about the utilization, breadth and meaning of the Ninth Amendment.

Despite this scholarship, the Ninth Amendment has received little attention by courts, and thus the 14th Amendment remains the primary means for recognizing unenumerated rights. I believe that this must change. However, one problem with utilizing the Ninth Amendment to protect rights is determining the scope of rights protected. This paper makes an attempt to define the contours of this Amendment in its later sections. But before it can turn to the scope of the Ninth Amendment, it must first answer the question posed by Justice Goldberg’s opinion – namely, does the Ninth Amendment protect substantive rights? It is to this question that this paper now turns.

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24 Id.
III. Does the Ninth Amendment Protect Substantive Rights?

Perhaps the biggest question surrounding the Ninth Amendment, even greater than what rights the Amendment protects, is the predicate question of whether or not the Amendment protects any substantive rights at all. Only when one answers this question in the affirmative does one turn to the former question about which rights are protected. However, an affirmative answer to the latter question is hardly undisputed. An examination of the history surrounding the adoption of the Ninth Amendment, as well as the various arguments made by modern scholars, lead to only one conclusion: that the Amendment’s author, James Madison, intended the Ninth Amendment to protect substantive rights.

a. The History and Background of the Ninth Amendment

More so than any other Amendment, the Ninth Amendment can be seen as the brainchild of one man. At first an opponent of any Bill of Rights at all, James Madison soon became the primary author of the first ten amendments to the Constitution. Once Madison realized that a Bill of Rights was necessary to secure passage of the Constitution, he set about drafting a series of amendments that would safeguard all of the rights that the former colonists held so dear.

Principal among Madison’s concerns was a fear, shared by many federalists, that the enumeration of a Bill of Rights would be both incomplete and dangerous: incomplete because no man can list all of the rights that ought to be protected from government
infringement, and dangerous in that some may read a specific enumeration of rights to deny the existence of any right not so enumerated.\textsuperscript{26}

In order to combat these twin dangers Madison proposed an amendment following the specific enumerations that would guarantee that unenumerated rights would be neither denied nor disparaged. Thus, Madison proposed the last clause of his fourth resolution, which was eventually adopted as the Ninth Amendment.

i. Madison's Draft

Madison’s initial draft of the Ninth Amendment, while quite a bit different than the version eventually adopted by the Congress, still contained the basis for the final draft. By looking at this initial draft, we can begin to understand Madison’s vision of the Ninth Amendment and share in his views of the goals of this Amendment. Madison presented the following draft of the provision that became the Ninth Amendment:

\begin{quote}
The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.\textsuperscript{27}
\end{quote}

Here, Madison attempted to protect against the dual dangers outlined above, and thus the first clause is designed to protect unenumerated rights. It also guards against the harm that the enumeration of certain rights might be read to grant powers to the government that it was never meant to have. One of the Federalists’ greatest fears was that the enumeration of a Bill of Rights would reverse the idea of a government of limited

\textsuperscript{26} James Madison, “Speech of the House Explaining His Proposed Amendments and His Notes for the Amendment Speech,” 1 The Debates and Proceedings in the Congress of the United States 448 (J. Gales & W. Seaton ed. 1834) reprinted in 1 The Rights Retained by the People: The History and Meaning of the Ninth Amendment 51, 60 (Randy Barnett ed. 1989).

powers, and instead grant to the general government all powers that were not reserved.\textsuperscript{28} The Federalists believed that a Bill of Rights was unnecessary because the general government was restricted to the powers in Article I, Section 8. They feared that by protecting certain rights, this view would be reversed, and that courts would read the Constitution to allow the government to act in all cases not specifically prohibited. According to the Federalists, the First Amendment’s prohibition against regulating the press implies that absent that Amendment, Congress could regulate the press. This was not their intent, and they feared that this reasoning would bleed over into other areas not protected by the enumerated rights.\textsuperscript{29}

To remedy this potential misconception, Madison made it clear that the enumeration of rights was not intended to enlarge the powers of government. Rather, these enumerations were meant to act as either “actual limitations of such powers” or were inserted “merely for greater caution.” This latter phrase is especially important for understanding the reach of all the amendments that Madison proposed.

For example, the First Amendment has long been recognized as one of the most sacred rights protected by the Constitution.\textsuperscript{30} It has always been given substantive meaning. Yet according to Madison’s draft of the Ninth Amendment, it may merely have

\textsuperscript{28} Madison, \textit{supra} note 26.

\textsuperscript{29} Indeed, Justice Black in his dissent to \textit{Griswold} confirmed this fear. “I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has the right to invade it unless prohibited by some specific constitutional provision.” 381 U.S. at 510 (Black, J. dissenting).

been inserted “for greater caution.”\textsuperscript{31} In fact, the Court has found substantive content in all of the Amendments listed in the Bill of Rights that it has considered, despite Madison’s statement that at least some may have been inserted for caution. Thus, an amendment’s status as cautionary is not exclusive of it having substantive content. It seems clear that the Ninth Amendment, which itself was a cautionary addition, should be given the same treatment by the Court. Therefore, the very language and drafting of Madison’s initial proposal for the Ninth Amendment shows that he intended to protect substantive rights.

ii. Madison's speech to the House

Madison gave a lengthy speech to the House when he proposed his amendments. Madison, who initially opposed a Bill of Rights, felt it necessary to fulfill the promise that he and the other Founders had made to secure the passage of the Constitution. He noted that by incorporating a Bill of Rights into the Constitution, the courts of the United States would work to defend them.

If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.\textsuperscript{32}

However, Madison did not wish to cause fear that those rights that remained unenumerated would not receive the same protection. In the course of his speech,

\textsuperscript{31} According to Madison, at least some of the Amendments were inserted for this purpose. But even if the First Amendment was not a cautionary amendment, it does not counter the argument that at least some were, and they have all been given some substantive content.

\textsuperscript{32} James Madison, “Speech of the House Explaining His Proposed Amendments and His Notes for the Amendment Speech,” 1 The Debates and Proceedings in the Congress of the United States 448 (J. Gales & W. Seaton ed. 1834) reprinted in 1 The Rights Retained by the People: The History and Meaning of the Ninth Amendment 51, 60-61 (Randy Barnett ed. 1989).
Madison revisited the argument made by the Federalists, including Madison himself, against a Bill of Rights and then offered his solution.

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

From Madison’s own lips we have his explanation for the purpose behind the Ninth Amendment. The Ninth Amendment was specifically designed, according to Madison, to prevent the assigning of unenumerated rights into the hands of the General Government. It was hoped that by adding this provision to the Bill of Rights, the courts would be just as jealous in guarding rights that were not enumerated.

iii. Others who commented

Madison was not alone in his fear of enumeration. Many of the Founders spoke out against the specific enumeration of a Bill of Rights. These men believed strongly in the natural rights tradition, and felt that any enumeration of rights was not only impossible, but dangerous. James Wilson, one of the most vocal opponents of a Bill of Rights had this to say:

In all societies, there are many powers and rights, which cannot be particularly enumerated. A bill of rights annexed to a constitution is an enumeration of the powers reserved. If we attempt an enumeration, everything that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied

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33 Id. at 60.
power into the scale of the government, and the rights of the people would be rendered incomplete.  

Here, Wilson makes clear the dangers of enumerating certain rights, and it is to respond to these concerns that Madison proposed the Ninth Amendment.

Others who spoke against the Bill of Rights did so because they thought that enumerating rights was pointless and redundant. Theodore Sedgwick, in speaking against the inclusion of a right to assembly, argued that such a right was “self-evident” and “unalienable.” He argued that enumerating such rights as assembly was a waste of the Congress’s time. “[The Committee] might have declared that a man should have a right to wear his hat if he pleased; that he might get up when he pleased, and go to bed when he thought proper.” As Randy Barnett points out, Sedgwick was not arguing that men did not have these rights, but rather that such rights were inherent and unalienable, just as the right to assemble was.

This analogy helps provide some idea of the rights that the Founders thought were important. The Congress did eventually decide to protect the right to peaceably assemble in the First Amendment, and thus there is no doubt that courts should do so when confronted with a challenge to that right. Based on Sedgwick’s analogy, the right to wear a hat, rise and go to bed as one pleases are every bit as sacred despite the fact that these rights appear no where in the Bill of Rights. It is rights like these that are “retained by the people” that Madison intended to protect with the Ninth Amendment. If the Ninth Amendment does not protect substantive rights, then many of these rights, which the

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35 Barnett, Restoring the Lost Constitution, at 58.
36 Id.
37 Id. at 59.
Founding Fathers thought were inherent, and therefore “retained” by the people, would receive no protection whatsoever. This would not only give life to the very fears expressed by the Federalists, that the enumeration of certain rights has in fact led to a rejection of others, it flies in the face of the clear language of the Ninth Amendment that these other rights are not to be “denied or disparaged.”

b. Modern Scholarship

While most in the scholarly community agree with the history outlined above, many disagree as to how to interpret this history. Several scholars, such as Randy Barnett, believe that the Ninth Amendment was intended to protect substantive rights. On the other hand, scholars such as Thomas McAffee believe that the proper role of the Ninth Amendment is to serve as a rule of statutory construction. Those scholars in the latter camp prefer the rights-powers doctrine, which holds that the unenumerated rights are merely the other side of the delegated powers coin, while those in the former camp believe that the Ninth Amendment secures independent substantive rights. A third view, enunciated by Justice Goldberg in Griswold v. Connecticut, holds that the Ninth Amendment recognizes the existence of unenumerated rights, but is not itself a source of rights. The views of these camps will be examined below.

i. The Ninth Amendment Doesn't Protect Substantive Rights

The view expressed above is hardly universally recognized. Several scholars, including Raoul Berger, Robert Bork and Thomas McAffee, argue that the Ninth Amendment serves as a rule of construction rather than as a repository of substantive

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38 See, infra, note 40 and accompanying text.
39 For a discussion of Justice Goldberg’s view, see, infra, Section IV(a).
rights. Thomas McAffee has stated that “the other rights retained by the people are defined *residually* from the powers granted to the national government.” McAffee believes that the amendment was solely intended to serve the purpose of preserving the original view that the Constitution set out enumerated powers.

McAffee has also argued that the Ninth Amendment “refers not to a repository of inalienable natural rights . . . but solely to whatever rights are ‘reserved’ after powers are enumerated.” This view argues that the Ninth Amendment protects the rights remaining after the government has reached the outer limits of its power. Anything not delegated to the federal government is “retained” by the people, and thus the Ninth Amendment protects those rights. It does not, however, serve as an independent source of rights. Rather, it merely serves as a rule of construction that the enumeration of certain rights was not meant to transform the federal government into a government of general powers.

He points to the concerns of James Wilson as support for his theory. “If we attempt an enumeration [of rights], everything that is not enumerated is presumed to be given. The consequence is that an imperfect enumeration would throw all implied power into the scale of government, and the rights of the people would be rendered incomplete.”

McAffee concludes that “Wilson’s argument is properly understood as expressing the fear that the Bill of Rights would destroy Article I’s enumerated powers

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44 Id.
system for securing rights."\textsuperscript{46} McAfee believes that the Ninth Amendment was meant to allay the fears held by Wilson and serve as a reminder that the federal government is one of limited powers.

ii. The Ninth Does Protect Substantive Rights

Those who argue that the Ninth Amendment protects substantive rights look to the “natural rights” philosophy relied on by the founders.\textsuperscript{47} This philosophy holds that people have rights independent of those that are granted by the government and that the people retain those rights they fail to delegate to the government.\textsuperscript{48} These rights, like enumerated rights, serve the dual functions of operating as both means-constraints and ends-constraints.\textsuperscript{49} That is, not only do they prohibit the federal government from achieving certain goals, they will also serve to limit the ways in which the government may achieve permissible goals.

According to this view of unenumerated rights, the government may restrict certain activities, but only if it does so justly. What is just is in turn defined by answering the dual questions of whether the end is permissible, and if so, whether the means used to achieve these ends are legitimate.\textsuperscript{50} This test should be well recognized by constitutional scholars because it is the same test utilized by the courts when examining questions under the Fourteenth Amendment.\textsuperscript{51} It is this test which allows an easy transition from the current model of seeking unenumerated rights in the Fourteenth Amendment to looking

\textsuperscript{46} Id.
\textsuperscript{48} Id. at *3.
\textsuperscript{49} Id. at *4
\textsuperscript{50} Id. at *11
for these rights in the Ninth Amendment where they belong. Properly understood, this conception of unenumerated rights changes the view of the Constitution from protecting islands of rights within a sea of powers to the intended view of islands of powers surrounded by a sea of rights.52

Randy Barnett specifically attacks what he calls the “rights-powers” conception of the Ninth Amendment because this view, advocated by the opposing camp, renders the Ninth Amendment nugatory.53 Under this view, which will be more fully elucidated below, the Ninth Amendment protects rights which are the logical complements of the powers granted to the general government in the Constitution.54

Professor Barnett attacks this view because there is no case or controversy in which the Ninth Amendment could arise under this view. If the rights and powers are logically complementary, then the rights begin only where the powers end, and thus, they could never be in conflict.55 Given the long-standing canon of construction against reading out provisions of the Constitution, this conception cannot be the correct one. Certainly, given the history outlined above, Madison never intended for the Ninth Amendment to be toothless. Indeed, he specifically stated that he saw the Ninth Amendment serving two purposes. The conception urged by those who would adopt the right-powers view undermines both of those purposes.

Professor Barnett goes on to argue that if this conception were correct, it would have to apply with equal force to the enumerated rights contained in the Constitution.56

52 Id. at 13
54 Id.
55 Id.
56 Id. at *5.
He believes that if rights are the converse of powers, this would be true of all rights.\textsuperscript{57} However, courts have never taken this view of enumerated rights. Given the Ninth Amendment’s command that unenumerated rights are not to be denied or disparaged, they must receive the same treatment as those that the founders chose to enumerate. To do otherwise would be a clear disparagement of unenumerated rights.

Barnett’s alternative to the rights-powers conception, which views rights and powers as logically complementary, is a power-constraint conception which views these items as functionally complementary.\textsuperscript{58} This view relies on the ends-constraints and means-constraints function of constitutional rights. This view comports with Madison’s view that the Ninth Amendment’s unenumerated rights serve as “actual limitations on [governmental] powers.”\textsuperscript{59}

This view is further supported by Madison’s statement regarding enumerated rights. Since Madison believed that courts would be the bulwarks against infringement of enumerated rights he would have seen the same role in regards to unenumerated rights.\textsuperscript{60}

There is nothing in the Federalist argument . . . to suggest that judicial review could be based only on enumerated rights. On the contrary, insofar as they believed in the judicial protection of rights, the Federalists’ fear that enumerating rights would diminish other, unenumerated rights suggests only that they wanted these unenumerated rights protected every bit as much as the enumerated rights. In other words, in the absence of a bill of rights, a Federalist who believed in the judicial protection of rights would have had to envision enforcing only the unenumerated rights retained by the people.\textsuperscript{61}

\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{59} Id. at *8, quoting 1 The Debates and Proceedings in the Congress of the United States, 452 (J. Gales & W. Seaton eds. 1834) (Speech of Rep. J. Madison).
\textsuperscript{60} Id. at *10
\textsuperscript{61} Id.
Indeed, if the Federalist argument had carried the day during the Constitutional Convention, the only rights protected by courts would be unenumerated by definition. Clearly, no Federalist believed in surrendering all rights to the General Government. Quite the opposite was true. To say that by enumerating certain rights, they intended to surrender all other rights is non-sensical. Indeed, Madison specifically argued against such a reading when he proposed the Ninth Amendment to “guard against” this very idea.\textsuperscript{62} This reading is also mitigated by the fact that several rights proposed by the states were not adopted by the Convention. It cannot be true that the states surrendered these rights by voting for the Bill of Rights. Rather, they were satisfied that these rights were protected by the Ninth Amendment. In light of all these arguments, many scholars believe that the Ninth Amendment does protect substantive rights.

Those in the McAffee camp would argue that the rights/powers view takes these criticisms into account. The Court does not need to protect these rights as such because the powers do not extend far enough to infringe them. The problem with this analysis is that it requires faith that the legislature will not overstep its bounds. Under the rights/powers conception, no Congressional overreaching could be challenged because the rights that plaintiffs would be seeking to protect are merely the corollary to the power exercised by Congress. Thus, the argument goes, if Congress has exercised the power, the right must not be a bar to it. This reading is not consistent with the views expressed by Madison.\textsuperscript{63}

c. Which View is Correct?

\textsuperscript{62} See footnote 32 and accompanying text.
\textsuperscript{63} See, \textit{supra}, Section II.
The views expressed by those in McAffee’s camp seem to require a rather cramped reading of the Ninth Amendment. As Randy Barnett has pointed out, this view of the Ninth Amendment renders it meaningless, because it can serve no limiting purpose. Under McAffee’s definition, the rights protected by the Ninth Amendment come into play only after the government has exercised its granted powers. As such, the Ninth Amendment can never be read to limit that power.

If retained rights are only the other side of the delegated powers coin, these rights can never be used to limit those powers. While McAffee’s view may serve the purpose outlined by Madison that the rights were inserted “for greater caution,” it does nothing to address his other envisioned role for the amendment as an actual limit on the powers of government.

Additionally, McAffee’s view of the amendment appears to violate its plain text. If, as McAffee argues, the Ninth Amendment provides no power to limit the general government, then it must imply that these “retained” rights do not have the same powers-limiting function as the enumerated rights. This would, in effect, treat enumerated and unenumerated rights differently. And this different treatment “disparages” those unenumerated rights, which violates the amendment’s clear command. If this is a correct reading of McAffee’s thesis, this view of the amendment should be rejected in favor of one that recognizes the amendment’s true power – to serve as a substantive limit on both the ends chosen by Congress and the means chosen to effectuate those ends. To adopt a lesser view is to relegate the Ninth Amendment to the dust-bin of history, along with the Privileges and Immunities Clause of the Fourteenth Amendment. A clearer disparagement of those rights retained by the people is harder to imagine.

64 See, infra, Section III(a).
Moreover, this reading of the Ninth Amendment renders the Tenth Amendment redundant, or the Ninth Amendment unnecessary. As Knowlton Kelsey has argued, “[w]hen the [Ninth and Tenth Amendments] are laid beside each other, it becomes evident that there was some distinction in the minds of the framers of those amendments between declarations of right and limitations on or prohibitions of power. If no distinction had been in mind, the Ninth Amendment would have been unnecessary.”

McAffee’s reading of the Amendment blurs the distinction between declarations of right and prohibitions of power, thus rendering one of the Amendments surplussage.

As Professor Barnett has argued, the Tenth Amendment does the work of the rights-powers conception, guaranteeing that all powers not delegated to the federal government are reserved. “There was absolutely no need for another amendment, confusingly written in terms of ‘rights’ that are ‘retained by the people,’ to express exactly the same idea.” This is another reason to reject McAffee’s view of the Ninth Amendment. Scholars and judges should favor a view that grants both the Ninth and Tenth Amendments independent meaning. The only reading of the Ninth Amendment that does this, is the power-constraint conception, which recognizes that the Ninth Amendment protects substantive rights.

IV. Content of the Ninth Amendment

Perhaps the hardest task that faces any scholar who wishes to utilize the Ninth Amendment is to formulate a test that protects rights without granting a judge unbridled

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66 Barnett, Reconceiving the Ninth Amendment, supra note 52, at *4
67 Id.
discretion to find whatever rights he or she wishes contained in the amendment. The benchmark for any test purporting to replace the current reliance on the 14th Amendment is its ability to protect some of the unenumerated rights currently recognized, while at the same time providing limits that are not currently found in this doctrine. Any change from current doctrine must provide some method of locating unenumerated rights while at the same time placing a limit on judges’ abilities to find whatever rights they wish.

But before one can measure the legitimacy of the new test I will propose, one must first discern what that test is to be. The first place to look when trying to locate the meaning of the Ninth Amendment is the paucity of Supreme Court opinions that do exist on the subject. The most famous of these is Justice Goldberg’s concurrence in Griswold v. Connecticut.68

a. Use of the Ninth Amendment in case law

The Ninth Amendment has been critically examined by the Supreme Court in only one case – Griswold v. Connecticut.69 There, Justice Goldberg based his concurring opinion, recognizing a right to privacy and striking down a Connecticut birth control law, entirely on the Ninth Amendment, applied to the states by virtue of the Fourteenth. Justice Goldberg was of the belief that the Ninth Amendment protected substantive rights.70

The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.71

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68 381 U.S. 479.
69 Id.
70 Id.
71 Id. at 487.
This view of the Ninth Amendment is clearly one that recognizes a substantive component. Justice Goldberg continues to express this view when he cites *Marbury v. Madison*’s language that “[i]t cannot be presumed that any clause in the constitution is intended to be without effect.” Justice Goldberg refused to make such a presumption and instead found that a right to marital privacy was alive and well and protected by the Ninth Amendment. Indeed, he stated that to find that this “fundamental right” was not protected “because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment . . . .” It is clear from this statement that Justice Goldberg believed the amendment had some teeth.

But his support of the Ninth Amendment was not unqualified. Later in his opinion he hedges his bets arguing that he “[doesn’t] mean to state that the Ninth Amendment constitutes an independent source of rights protected from infringement by either the States or the Federal Government.” Instead, Justice Goldberg looks to the Fifth and Fourteenth Amendments as the source of these unenumerated rights.

As argued above, I believe the 14th Amendment to be an improper source of those rights, and that the Ninth Amendment makes the most textual sense in these cases. One reason Justice Goldberg may have shied away from utilizing the Ninth Amendment was its seemingly boundless nature. This argument, even if true, is unconvincing because the Fourteenth Amendment’s blanket protection of “liberty” is just as boundless. However, I acknowledge that many scholars and justices will avoid utilizing the Ninth Amendment

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72 Id. at 491, quoting *Marbury v. Madison*, 1 Cranch 137, 174 (1803).
73 Id. at 491.
74 Id. at 492.
75 Id.
absent some test which provides guidance in limiting its reach. I now turn to my proposal for such a test.

b. A new test

In order to help identify the substantive rights to be protected by the Ninth Amendment, I propose a new test that will help judges identify rights to be protected while at the same time providing limits on a judge’s discretion in identifying these rights. It is based on the "established interpretative canons of noscitur a sociis and ejusdem generis, where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar to those enumerated by the specific words." The same is true of the Ninth Amendment.

Essentially, the Ninth Amendment is a general right following a list of specific rights. Using the canons of construction outlined above, the Ninth Amendment protects rights that are similar to the rights protected by the other eight amendments. Hence, privacy is encompassed by the Ninth because the Third and Fourth Amendments protect a similar right, or marriage could be protected because it's similar to a free association right found within the First Amendment.

Turning to the test articulated at the beginning of this section, we must now examine the unenumerated rights that have already been recognized. They are:

[T]he right to provide one’s children with religious education, the right to educate one’s children in one’s native language, the right to associate with

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77 See Griswold.
78 The associational right is in turn found in the right to peaceably assemble, and has been long recognized by the Supreme Court under the First Amendment. See Boy Scouts of America v. Dale, 530 U.S. 640 (2000).
others, the right to choose and follow a profession, the right to marry or not to marry, the right to decide whether or not to have children, the right to decide how to rear one’s children, and the unenumerated right to privacy that has been explicitly protected for over thirty-five years.\textsuperscript{79}

As noted above, if the test I have outlined can be seen to protect many of these rights, while also excluding others that may be proposed, that will provide an indication that the test is legitimate. The test I have outlined can certainly be seen to protect many of the unenumerated rights that are currently recognized by the Court. The right to provide one’s children with religious education can be analogized from the right to free exercise of religion. The right to educate one’s child in one’s native language can be seen to flow from the protection of free speech. As noted above, the right to marry flows from the right of free association, which in turn flows from the right to peaceably assemble protected by the First Amendment. The right to privacy can be traced to the Third and Fourth Amendments, and the right to have children and to choose how to raise them flows from that privacy right.

This leaves only the right to choose and follow a profession, which the Court has previously recognized as stemming from the liberty and property rights protected by the 14\textsuperscript{th} Amendment.\textsuperscript{80} One easy solution is to note that the Fifth Amendment contains similar language and thus this is the basis of that right. This however, falls within the critique of substantive due process noted in Part II of this paper. However, this does not condemn the test I have articulated. On the contrary, it bolsters the legitimacy of the test I have proposed for it shows that some claimed rights are not protected. Thus, the test provides a meaningful limit on the articulation and protection of unenumerated rights,

\textsuperscript{79} Randy Barnett, \textit{Restoring the Lost Constitution: The Presumption of Liberty}, Princeton University Press, Princeton and Oxford, 2004, pg. 254. This is probably not a complete list of currently recognized unenumerated rights, but it is fairly comprehensive and provides a good starting point for the new test.\textsuperscript{80} See \textit{Allgeyer v. Louisville}, 165 U.S. 578 (1897).
and does not serve as a blank slate on which judges may inscribe whatever rights they wish.

Based on this analysis, it appears that the test I have proposed provides a strong basis for identifying rights protected by the Ninth Amendment. Now this is not to say it is not without its flaws. Some may argue that “similar to” is a rather broad and flexible standard. I respond that these canons of construction have a long and distinguished history and have been used to determine the scope of statutes for years without incurring many problems. I believe that the same is true in this context. Analogizing from prior precedent is something that all courts are well familiar with. In a common law system such as ours, it is their primary function.

While the standard I have offered is flexible, it does provide some limits on the reach of the Ninth Amendment. Under the test I have proposed a judge could not simply locate any right she wished within the Ninth Amendment. Rather, she would have to draw some connection to some currently recognized right. This I believe provides an adequate limit on the powers of courts to recognize a limitless list of rights while still protecting those rights that the Founders meant to encompass in the Ninth Amendment. By analogizing to the first eight amendments, many of the currently protected rights can find a home in the Ninth Amendment. As such, any other rights that meet this test should receive a presumption of legitimacy.\(^81\)

By looking at a few examples, and applying the test, one can begin to see the limits of the test I propose. For example, one right that many people seek to find within the confines of the 14\(^{th}\) Amendment is the right to die. Nothing in the first eight

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\(^81\) Theodore Sedgwick’s concern about the right to wear a hat could be analogized to the freedom of expression protected by the First Amendment.
amendments can be analogized to this right, and thus, under the proposed test, the Ninth Amendment would not protect it. One could argue that the Fifth Amendment’s protection of life could be analogized, but under the rationale argued above, that the Due Process Clause of the Fifth Amendment does not contain any substantive component, this clause is meant to ensure that adequate procedures are followed before taking someone’s life. Thus, it is not analogous to the right to die, and that right would not find a home in the Ninth Amendment. 82

Gay marriage would also not be protected under the Ninth Amendment. While it is true that I earlier stated marriage would be protected, a position I do not deviate from, I see the question of gay marriage as better analyzed under an equal protection rubric, rather than as a separate marriage right.

Finally, the right to smoke medical marijuana would not be protected under the test I have articulated. Nothing in the first eight amendments can be read to protect the right to imbibe certain substances. Again, the only claim to protect such a right would be to find a substantive component in the Due Process Clause of the Fifth Amendment and argue that there is a “liberty” right to smoke marijuana. Additionally, one could analogize the right from the right to refuse medical treatment. One may argue that there is a concurrent right to the medical treatment of one’s choice. But again, this relies on a substantive reading of the Due Process Clause which I specifically reject.

V. Conclusion

82 This is not to say that states or the federal government could not recognize this right. For instance, the state of Oregon currently permits the practice, and nothing in my test would override the state’s statute. Rather, there would be no constitutional basis for overturning laws that prohibit such a right. This comports with the Court’s existing jurisprudence in Washington v. Glucksberg, 521 U.S. 702 (1997) and Vacco v. Quill, 521 U.S. 793 (1997).
For far too long, scholars and judges have ignored the Ninth Amendment’s command that the unenumerated rights of the people of the United States are not to be denied or disparaged. Even when recognizing that such rights exist, judges look to the Fourteenth Amendment as their repository, an inappropriate home given the specific textual grounding provided by the Ninth Amendment.

In order to properly utilize the Ninth Amendment, courts and scholars must first reject this reliance on the Fourteenth. However, before courts will take this jurisprudential leap, scholars must prove that the Ninth Amendment can be utilized in a principled manner that will not merely be constitutionalizing the personal values of individual judges. I believe this can be done by turning to an often-utilized canon of construction with which courts are intimately familiar.

By looking to the rights protected by the first eight amendments, courts can derive the values that the Framers intended to protect. Applying these values to the Ninth Amendment, courts can begin to give substantive life to this unutilized doctrine while still applying limits. In this way, courts can begin to shift away from the faulty doctrine currently embraced of relying on the Fourteenth Amendment, and turn to a textually based approach that will only serve to increase the legitimacy of courts’ decisions in this area.

The legitimacy of this test is shown by three factors. First, the current test is not a radical departure from current court doctrine, in that many of the currently protected rights will remain protected under the proposed test. Second, the test provides limits not currently found on the Court’s use of the substantive component of the Due Process Clause. Finally, the test has the virtue of relying on a familiar canon of construction that
courts have a long history of applying. Thus, judges will not be left groping in the dark to apply this new test. By applying a familiar canon of construction in a customary way, I believe courts can protect those rights the Founders deemed important without forcing their own views on society. In this way, the promise of the Ninth Amendment can finally be fulfilled.