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Laurence Claus

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PROTECTING RIGHTS FROM RIGHTS: ENUMERATION, DISPARAGEMENT, AND THE NINTH AMENDMENT

*Laurence Claus**

INTRODUCTION

Did adopting the Bill of Rights affect other legal rights that Americans possessed at the Founding and possess today? Under the laws of the states in 1789, citizens enjoyed, for example, a right to reputation.¹ Citizens also enjoyed a right to speak freely.² The tension between those two rights was as obvious then as it is now. The laws of the states could have resolved that tension entirely in favor of one right or the other; instead, those laws provided some protection for each right. Freedom of speech was protected at common law by courts' refusal to impose prior restraints on publication.³ Reputation was protected at common law through ex post remedies for defamation.⁴ That was the balance that state common, statutory, and constitutional law struck between the competing legal rights to speech and to reputation.⁵ Did adopting the Bill of Rights change that balance?

* Associate Professor of Law, University of San Diego. The thesis of this Article was triggered by a conversation I had with my former co-clerk, Nicholas Quinn Rosenkranz, about the problem of tension between legal rights. I am grateful for his comments on successive drafts, and for comments from Morgan Skye Adessa, Larry Alexander, Carl Auerbach, Larry Kramer, Dylan Malagrino, Saikrishna Prakash, Michael Ramsey, Michael Rappaport, Steven Smith, and Christopher Wonnell. I am also grateful for excellent research assistance from Morgan Skye Adessa, Alex Papaefthimiou, and Melanie Moultry, and for a summer research grant from the University of San Diego School of Law.

1 See, e.g., *Respublica v. Oswald*, 1 U.S. (1 Dall.) 319, 324–25 (Penn. 1788); 1 WILLIAM BLACKSTONE, COMMENTARIES *134.

2 See, e.g., *Respublica*, 1 U.S. (1 Dall.) at 325.

3 See, e.g., *id.*; *Near v. Minnesota ex rel. Olsen*, 283 U.S. 697, 713–14 (1931); 4 BLACKSTONE, *supra* note 1, at *151–52.

4 See, e.g., *Near*, 283 U.S. at 713–14 (1931); *Respublica*, 1 U.S. (1 Dall.) at 325; 4 BLACKSTONE, *supra* note 1, at *151–52.

5 See *infra* Part IV.

The Bill of Rights called the freedom of speech a federal constitutional right, but the Bill of Rights did not mention the right to reputation. Did enumeration in the Constitution of the freedom of speech imply that protection for speech should be expanded at the expense of the right to reputation? In other words, did "[t]he enumeration in the Constitution of certain rights," including the freedom of speech, diminish the protection afforded "others retained by the people," including the right to reputation?⁶ The Supreme Court in *New York Times Co. v. Sullivan* said "yes."⁷ The Ninth Amendment seems to say "no." "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."⁸ Though the Court in *New York Times v. Sullivan* ignored the Ninth Amendment, my thesis in this Article is that the Ninth Amendment holds the key to that case, and to countless other cases of tension between rights.

Was tension between rights the *particular* problem that was on the Founders' minds when they proposed and adopted the Ninth Amendment? No. Is tension between rights an instance of the *general* problem that was on the Founders' minds when they proposed and adopted the Ninth Amendment? Yes. The Founders' general concern was that listing federal constitutional rights might negatively affect the status of other rights. The Founders were particularly concerned that listing federal constitutional rights might imply that the federal government had broader powers than the Constitution was meant to confer.⁹ But the Founders chose to frame the Ninth Amendment as a general declaration that listing federal constitutional rights should not negatively affect the status of other existing rights. Given the nature of the Founders' particular concern about overreaching exercises of federal legislative power, there is every reason to find the Ninth Amendment justiciable.¹⁰ When, in the wake of the Fourteenth Amendment, the leading provisions of the Bill of Rights were held to limit state law,¹¹ the problem of tension between rights

6 See U.S. CONST. amend. IX.

7 376 U.S. 254, 283 (1964).

8 U.S. CONST. amend. IX.

9 See *infra* Part III.

10 See, e.g., 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 553 (Jonathan Elliot ed., New York, Burt Franklin 1888) [hereinafter ELLIOT'S DEBATES] (statement of John Marshall, Virginia Ratification Convention).

11 U.S. CONST. amend. XIV, § 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

emerged as a significant scenario to which the Ninth Amendment speaks. Until the Fourteenth Amendment, tension between constitutional rights and "others retained by the people" could arise only to the extent that federal common law (or perhaps federal statutes) protected other rights "retained by the people," or to the very limited extent that the original Constitution created constitutional rights against the states.¹² Since the Fourteenth Amendment, the problem of competing rights has become much more apparent.¹³ The Founders quite understandably did not have the problem of tension between rights specifically in mind when they proposed and adopted the Ninth Amendment. But the problem falls within the compass of their general concern.

The Ninth Amendment concerns the status that other rights "retained by the people" would have enjoyed in the absence of the Bill of Rights. It is not a command to treat other rights "retained by the people" as if they were *in* the Bill of Rights. The Ninth Amendment does not turn other rights "retained by the people" into "federal constitutional" rights.¹⁴ It just requires that those other rights not be *diminished* in status by adoption of the Bill of Rights. The right to reputation is not relevantly denied or disparaged unless listing certain rights in the Constitution is construed to leave reputation less protected than it would *otherwise have been*. If other rights "retained by the people," such as reputation, were not federal constitutional rights when the Ninth Amendment was proposed in 1789, then they were not federal constitutional rights when the Ninth Amendment took effect in 1791.

they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

See *Duncan v. Louisiana*, 391 U.S. 145, 147–48 (1968); *Adamson v. California*, 332 U.S. 46, 51 (1947); *Palko v. Connecticut*, 302 U.S. 319, 323–25 (1937); AKHIL REED AMAR, *THE BILL OF RIGHTS* 218–23 (1998).

12 See U.S. CONST. art. I, § 10.

13 See *infra* Part III.C.

14 I use the term "federal constitutional" rights to connote rights that courts recognize to trump legislation when those courts are adjudicating under the authority of the Constitution. Courts may conceive of some legislation-trumping rights as having their ultimate source in the natural moral order, but where those courts' authority to adjudicate derives from positive legal text, they have almost invariably couched attempts to enforce "natural" rights in terms of textual implication, adopting at least an "illustrative" conception of the authoritative text. See Laurence Claus, *Implication and the Concept of a Constitution*, 69 AUST. L.J. 887 *passim* (1995).

Under this interpretation, the Ninth Amendment makes a substantial contribution to the constitutional scheme, but one fully consistent with the Founders' choice to constitutionalize particular individual rights through "enumeration." Leading rival interpretations do too little or too much. Some say that the Ninth Amendment is a dead letter. Others argue that it is a blank check.¹⁵ Either way, the amendment unsatisfactorily serves the purposes of law. We do not like law to mean nothing, nor do we like it to mean everything. We assume that lawgivers share our dislike of these two possibilities, because both possibilities demean the project of lawgiving. They compromise our claim to have "a government of laws and not of men."¹⁶

I. RIVAL INTERPRETATIONS

A. "Dead Letter" Interpretations

1. Confirming the Enumeration of Powers

Dissenting in *Griswold v. Connecticut*, Justice Hugo Black contended that the Ninth Amendment

was passed, not to broaden the powers of this Court or any other department of "the General Government," but, as every student of history knows, to assure the people that the Constitution in all its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication.¹⁷

The Constitution drafted at Philadelphia in 1787 purported to limit the federal Congress's legislative power. It did so by listing the subjects to which federal legislative power extended. This listing is commonly called an enumeration, though the list in Article I, Section 8 is not explicitly numbered. During the ratification debates, proponents of the Constitution argued that federal power was sufficiently limited by the enumeration of powers, and that adding a bill of rights would actually expand federal power.¹⁸ How would it do that? By implying that federal legislative power extended to everything except the specifically constitutionalized rights. In other words, adding a bill of rights would invert the Constitution's power-limiting principle from

15 I am grateful to Steven Smith for the "dead letter/blank check" characterization of existing interpretations.

16 MASS. CONST. pt. I, art. XXX (1780); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

17 381 U.S. 479, 520 (1965) (Black & Stewart, JJ., dissenting); see also Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1219 (1990).

18 See *infra* Part III.

one of listed powers to one of listed rights. But this objection to a bill of rights could be met simply by saying that the bill did not undermine the limitations to which federal power was already subject. The Founders said that in the Tenth Amendment.¹⁹ Perhaps, as Justice Black suggested, the Ninth Amendment made the same point; but if that was all it did, then it was redundant.

2. Acknowledging State Law

Other scholars have argued that the Ninth Amendment just acknowledges that individual rights under state law are operative unless and until courts hold that those rights are unconstitutional or have been preempted by federal law.²⁰ These scholars do not recognize a role for the amendment in determining *whether* state law rights are unconstitutional. On their view, the Ninth Amendment simply notes that the rights listed in the federal Constitution do not exhaust the universe of rights possessed within American society. In John Hart Ely's words:

We thus run up against an inference that seems so silly it would not have needed rebutting. What felt need could there have been to rebut the inference that the Bill of Rights, controlling only federal action, had somehow preempted the efforts of the people of the various states to control the actions of their state governments?²¹

As Ely adds, such an inference concerning nonconstitutional state law rights would have been even more improbable.²² "Acknowledgement" interpretations make the Ninth Amendment a truism.

B. "Blank Check" Interpretations

These interpretations share an understanding "that the Ninth Amendment was intended to signal the existence of federal constitutional rights beyond those specifically enumerated in the Constitu-

19 U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

20 See Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 243 (1983); see also Michael W. McConnell, *A Moral Realist Defense of Constitutional Democracy*, in 2 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 71, 77 (Randy E. Barnett ed., 1993) [hereinafter RIGHTS RETAINED] (including rights created under nonconstitutional federal law and rights derived from nongovernmental sources).

21 JOHN HART ELY, *DEMOCRACY AND DISTRUST* 37 (1980).

22 *Id.* at 37 n.*.

tion.”²³ This conclusion, to the extent that it acknowledges *justiciable* federal constitutional rights, presupposes two propositions. First, the Founders thought that courts, confronted with the 1787 Constitution, would likely have superimposed some set of “federal constitutional” rights upon its structure even if the Constitution had listed none. Second, the Founders wanted courts to recognize as federal constitutional rights some set of rights that had been omitted from the Constitution’s list. These two propositions are not supported by James Madison’s explanation to Congress of his draft Bill of Rights. In that speech, Madison emphasized that judicial enforcement would follow from having “rights expressly stipulated for in the constitution.”²⁴ Nowhere in his speech did Madison recognize a possibility that courts would constitutionalize rights anyway, or could be empowered to do so with a one-sentence delegation of authority. And that speech is our most compelling evidence of what the Founders sought to accomplish through the Ninth Amendment.²⁵

“Blank check” interpretations of the Ninth Amendment depend on the proposition that rights like those expressed in the Bill of Rights would likely have been enforced by courts as *federal constitutional* rights even if the Bill of Rights had not been adopted. That proposition is necessary to the “blank check” conclusion that “deny or disparage” means “fail to accord federal constitutional status.” On this understanding, at least some of the rights expressed in the Bill of Rights were, *ex ante*, part of a set of extra-textual “federal constitutional” rights. By acknowledging in text that some of the set had federal constitutional status, so this theory goes, the Founders risked denying or disparaging the federal constitutional status of the other rights in the set. The Founders obviated that risk by adopting the Ninth Amendment.

This understanding of the Ninth Amendment is difficult to reconcile with Madison’s explanation of what the Bill of Rights was meant to achieve. Madison fully appreciated the potential for judicial enforcement of federal constitutional rights, but seemed to tie that potential to federal constitutional *enumeration*.²⁶ Madison implied that enumeration *elevated* the legal status of rights, not that enumeration merely acknowledged some pre-existing condition. But if explicit

23 *Id.* at 38; *see also, e.g.*, CALVIN R. MASSEY, SILENT RIGHTS 217 (1995); Charles L. Black, *On Reading and Using the Ninth Amendment*, in 1 RIGHTS RETAINED, *supra* note 20, at 337, 337; Thomas C. Grey, *The Uses of an Unwritten Constitution*, 64 CHI.-KENT L. REV. 211, 220 (1988).

24 1 CONG. REG. 434 (1789); 1 ANNALS OF CONG. 439 (Joseph Gales ed., 1789).

25 *See infra* Part III.B.

26 1 CONG. REG. 433–34 (1789); 1 ANNALS OF CONG. 439 (Joseph Gales ed., 1789).

inclusion in the Constitution's text *elevated* rights, then what did *denying or disparaging* other rights mean? Denying or disparaging had to mean something more negative than treating other rights differently from the elevated rights. To be denied or disparaged is to be made worse off than before, not merely to miss out on being made better off.

The Ninth Amendment is not a declaration that rights "retained by the people" are as important as federal constitutional rights. The Ninth Amendment *is* a declaration that rights "retained by the people" are no less important than they would have been had no rights been enumerated. To return to the example with which I began, rights to freedom of speech and to reputation were each recognized and protected under the laws of the states in 1789.²⁷ One of those rights—the freedom of speech—was elevated by express inclusion in the federal Constitution. The other—the right to reputation—was not. The right to reputation was not denied or disparaged by missing out on elevation to a status it had never had. The right to reputation might have been denied or disparaged if it had suffered a loss or diminution of status. How might the enumeration in the Constitution of the freedom of speech have diminished the status of the right to reputation? By encouraging courts to construe the freedom of speech more broadly than before, at the expense of the right to reputation. And that is a scenario to which the Ninth Amendment plausibly speaks.

II. PROTECTING RIGHTS FROM RIGHTS

As I shall recount in Part II.A, the Founders' attention was focused on one particular negative effect that constitutionalizing some rights might have upon other rights. That effect was an inference that federal power extended to everything but the constitutionalized rights. The ratification debates repeatedly record concern that a bill of rights would undermine the constitutional enumeration of powers. The concern most frequently expressed was that the enumeration of powers would be ignored. In the Tenth Amendment, the Founders fully addressed that particular concern.²⁸ Yet they chose, in the Ninth

27 *Near v. Minnesota ex rel. Olsen*, 283 U.S. 697, 713–14 (1931); *Respublica v. Oswald*, 1 U.S. (1 Dall.) 319, 325 (Penn. 1788); 4 BLACKSTONE, *supra* note 1, at *134.

28 The Tenth Amendment drew on the final clause of the eighth resolution that Madison proposed to the First Congress. See 1 ANNALS OF CONG. 436 (Joseph Gales ed., 1789) ("The powers not delegated by this constitution, nor prohibited by it to the States, are reserved to the States respectively."). The adopted Tenth Amendment included the additional words "or to the people," and obviated any risk that the Bill of Rights would imply federal powers beyond those delegated.

Amendment, to provide more generally that constitutionalizing some rights should not have negative effects upon other rights.

The Founders did not purport to detail the range of other negative effects there might be, any more than they traversed the range of expression that might warrant protection under the First Amendment or the range of punishments that might stand condemned by the Eighth Amendment. They left to those who came after the task of noticing negative effects, and of finding in the Ninth Amendment a warrant to resist those effects. One such negative effect was an inference that federal powers should be read broadly enough to reach the constitutionally enumerated rights, thus sweeping up many nonconstitutional rights en route.²⁹ Had that been the only other negative effect that the Founders could have conceived and cared to guard against, they would surely have precluded it specifically. The Founders chose to provide more generally that constitutionally enumerating some rights should not have negative effects upon other rights.

A. *Preliminary Interpretive Questions*

The Ninth Amendment protects rights from rights. How does it do so? The text of the amendment is susceptible of more than one interpretation: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."³⁰ When we parse this text, a series of multi-pronged interpretive possibilities appear.

1. "Rights"

What are *rights* within the phrase "others retained by the people"? The preceding eight amendments list vertical rights against government. They are rights, mainly individual, but some arguably collective, to be free from government action. Tension between vertical rights (or the vertical aspects of rights) is certainly possible—consider the tension between the Establishment and Free Exercise Clauses of the First Amendment. But tension is far more frequent between vertical rights on the one hand, and horizontal rights (to be free from actions by other persons) on the other. "[O]thers retained by the people" is plausibly understood to include legal rights against other persons, not just legal rights against government. In other words, rights retained by the people include rights to government protection from other persons, not just rights to government protection from

29 See *infra* Part V.A.

30 See U.S. CONST. amend. IX.

government. Blackstone's conceptualization of fundamental rights certainly embraced both.³¹

2. "Retained by the People"

Does the concept of retention by the people refer to *how* rights are retained or only to *whose* rights are retained? The phrase echoes a proposition regularly recited during the debates over ratification of the Constitution: "That which is not expressly granted, is of course retained."³² At the North Carolina Ratification Convention, one delegate opined: "We retain all those rights which we have not given away to the general government."³³ The people retained those individual and collective rights that they had not surrendered through the Constitution's delegation of powers to the federal government. But does "retained by the people" refer not only to who holds the rights (namely, the people) but also to how those rights are held? If so, then the rights at issue are rights recognized and protected by the people in their law. It would follow from this interpretation that the rights "retained by the people" do not include mere moral (or "natural law") claims that positive law does not respect. On the other hand, if "retained by the people" refers *only* to whose rights are retained, then the phrase could cover moral claims that have escaped translation into positive law.

3. "The People"

Who are "the people" within the phrase "others retained by the people"? The people may be viewed through a national lens, or within their states. If the people are viewed nationally, then the rights retained by the people are a set of rights that are *shared* by the people of the several states. Some states may have recognized more rights than have other states, or may have protected rights more elaborately than have other states. On a "national" view of "the people," only the protections for rights that are common among the states would count as "others retained by the people." Another view would include in the set of "others retained by the people" the greatest protections for the least commonly recognized rights to be found anywhere among the states. A third view would vary the rights "retained by the people" from state to state, so that when a particular state's actions are chal-

31 1 BLACKSTONE, *supra* note 1, at *125.

32 See John DeWitt, *To the Free Citizens of the Commonwealth of Massachusetts*, in 4 THE COMPLETE ANTIFEDERALIST 21 (Herbert J. Storing ed., 1981).

33 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 938 (1971) (statement of Archibald Maclaine, July 25, 1788).

lenged as violating federal constitutional rights, the rights "retained by the people" are ascertained by reference to that state's actions alone.

4. "Others Retained by the People"

Are "others retained by the people" limited to rights that law has explicitly fashioned as such—that is, rights for which the law affords persons a vindicating cause of action and remedy? I will call this the narrow conception of rights. Broader conceptions of "others retained by the people" are possible, even so far as those rights are understood to be rights under positive law. "Governmental interests" or "public interests" that courts find legitimate can always be recharacterized as human interests. When a law fosters and protects those interests, it can be characterized as fashioning legal rights, even though courts do not always recognize it to have done so for purposes of standing to sue. A law that prohibits misleading advertising, for example, may be characterized as creating a legal right not to be misled. Clearly that right is in tension with a constitutional right to freedom of speech. Under the Supreme Court's jurisprudence, that tension is resolved entirely in favor of the nonconstitutional legal right not to be misled. Laws that prohibit objectively misleading advertising are valid, notwithstanding the First Amendment.³⁴

Some might argue that whichever conception of rights is accepted, to be "others retained by the people" within the meaning of the Ninth Amendment, those rights must *also* fit within a coherent theory of natural law.³⁵

5. Mechanisms of Retention

If the narrow conception of rights is adopted, then rights may be retained by the people only through their state constitutions, through legislation adopted by their representatives, or through their acquiescence in the common law. If the broad conception of rights-as-inter-

34 See, e.g., *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367 (2002).

35 See MASSEY, *supra* note 23, at 175–76; Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 152 (1928); Thomas C. Grey, *Do We have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 715–16 (1975); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 844 n.8 (1978); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1166–67 (1987); cf. Walter Berns, *Judicial Review and the Rights and Laws of Nature*, 1982 SUP. CT. REV. 49, 77; Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 907–08 (1993).

ests is adopted, then rights may also be retained through executive action.

6. When are Rights Retained?

The amendment's use of the past tense nudges in favor of finding rights to have been "retained" only if they were protected by state law (or possessed naturally) in 1789. On this view, the people may choose to cease retaining in positive law the rights they had in 1789, but cannot expand the set of retained rights. An alternative view is that "retained" means "retained from time to time." While the primary meaning of "retain" is to keep what one already has, the word may also refer to employing something new.³⁶ If the latter view is taken, then the people may expand the set of retained rights, and may do so through their federal government as well as through their states.

7. Denial or Disparagement

What counts as denying or disparaging? Does any diminution of the protection accorded to a retained right deny or disparage that right? If so, then the retained rights operate as brittle limits on the construction of federal constitutional rights. An alternative understanding is that rights are denied or disparaged when they do not receive due weight within an optimal array of individual rights. Optimality may be determined by, among other things, balancing the interests underlying retained rights against the interests underlying federal constitutional rights.

Now we are ready to consider how the Ninth Amendment protects rights from rights. There are at least two arguable understandings of how the amendment fulfils this function. I shall call them the hard and soft versions.

B. The Hard Version

The hard version adopts the first answer to each of the last seven interpretive questions. Within this conception, the Ninth Amendment protects the explicit rights that people enjoyed under the laws of all the states in 1789. Federal constitutional rights must be construed, if possible, not to reduce the protection that state law explicitly accords other rights, in so far as state law protects those other rights no further than it did in 1789. The rights retained by the people are the

³⁶ 1 SAMUEL JOHNSON, *DICTIONARY OF THE ENGLISH LANGUAGE* (London, W. Strahan 1755) ("To keep; not to lose . . . To keep in pay; to hire . . . To belong to; to depend on.").

legal rights that were cherished in the America of 1789. These might be found in the common law, in state statutes, or in constitutions and charters. They are the rights that were "secured within the customary constitutional tradition."³⁷ They were "constitutional" in the sense of "constitutive of the political order." Returning to our example, state law in 1789 recognized and protected both a right to reputation and a right to freedom of speech.³⁸ Under the hard version, the Ninth Amendment requires that the federal constitutional freedom of speech be construed not to reduce the protection that state law accords the right to reputation below the level of protection accorded in 1789. Whatever accommodation state law made between the freedom of speech and the right to reputation in 1789 is, on this view, effectively preserved. Retained rights are defeasible at the option of state lawmakers, but may not be shriveled through federal constitutional interpretation. The breadth of federal constitutional rights is confined accordingly.

In identifying a shared set of rights retained by the people of the several states in 1789, a court might consult William Blackstone's account of fundamental rights under English law. His *Commentaries* acquired a large and deferential audience in the American colonies: "Edmund Burke, speaking on reconciliation with America in the House of Commons in 1775, told that body that almost as many copies of the *Commentaries* had been sold in America as in England."³⁹ Arthur Sutherland recounts that "[l]awyers cited Blackstone in American courts as today they cite opinions of their state's highest court."⁴⁰ The set of explicit rights so identified is likely to be modest, and their operation as brittle limits on the construction of federal constitutional rights would be correspondingly modest. Moreover, they are necessarily subject to explicit constitutional preclusion. They operate as limits on federal constitutional rights only where those constitutional rights are susceptible of a construction that admits of those limits.

37 Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4, 39 (2001).

38 See *infra* Part IV.

39 ARTHUR E. SUTHERLAND, *THE LAW AT HARVARD* 25 (1967). Young James Iredell wrote to this father in London, in July 1771, asking him to

be so obliging as to procure Dr. Blackstone's *Commentaries* on the Laws of England for me and send them by the first opportunity? I have indeed read them through by the favor of Mr. Johnston who lent them to me; but it is proper I should read them frequently and with great attention.

Id. at 24.

40 *Id.* at 24.

C. *The Soft Version*

The soft version conceives of the Ninth Amendment as authorizing the adjudicative balancing task in which courts have always engaged when applying the Bill of Rights. The soft version allows for, though it does not require, a more expansive and evolving conception of the rights retained by the people. They may be understood as the interests that the people recognize and foster and protect through the laws that their representatives enact, their courts expound, and their executives implement. The task of adjudicating by reference to the Bill of Rights involves asking whether a given law or executive action conflicts with a federal constitutional right. Where that law or action implements a public interest, it may be understood to recognize and serve a right “retained by the people”—such rights are the interests that the community recognizes and protects through its laws. The Ninth Amendment, on this view, calls for reconciling tension between federal constitutional rights and whatever other legal “rights” are “retained by the people” from time to time. Consider what the Supreme Court asked last term when examining a law that prohibited advertisements for certain drugs:

Under the test we ask as a threshold matter whether the commercial speech concerns unlawful activity or is misleading. If so, then the speech is not protected by the First Amendment. If the speech concerns lawful activity and is not misleading, however, we next ask “whether the asserted governmental interest is substantial.” If it is, then we “determine whether the regulation directly advances the governmental interest asserted,” and, finally, “whether it is not more extensive than is necessary to serve that interest.” Each of these latter three inquiries must be answered in the affirmative for the regulation to be found constitutional.⁴¹

As already noted, “governmental interests” or “public interests” that courts find legitimate can always be recharacterized as human interests. When a law fosters and protects those interests, it can be characterized as fashioning legal rights, even though courts do not always recognize it to have done so for purposes of standing to sue.

When the Tenth Amendment speaks of powers being reserved to the states or to the people, it means the people collectively, exercising their collective power to create law. When the Ninth Amendment speaks of rights retained by the people, it may coordinately be understood to mean the people collectively, recognizing and upholding certain interests through the laws they collectively create or implement. It is the people who confer the power to legislate or act in ways that

41 *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367 (2002) (citation omitted).

may negatively affect rights. It is they who may through the laws they make positively foster rights. That positive fostering is not to be denied or disparaged by their choice to give certain rights law-trumping weight through federal constitutionalization. If a law is in tension with a federal constitutional right, the constitutional right should be interpreted with due regard to the interest served by that law. That interest should not be treated as nonexistent (denied), nor given less weight than it deserves (disparaged).

Courts acknowledge the "just importance"⁴² of other interests by weighing that importance when deciding the scope of federal constitutional rights. The post-New Deal Supreme Court often characterized this task as applying a rebuttable "presumption of constitutionality."⁴³ Consider the Court's recent encounter with tension between a religious canvasser's First Amendment right to express the tenets of her religious faith and a householder's nonconstitutional right under municipal law not to be bothered at home.⁴⁴ As the first right enjoys federal constitutional protection and the second does not,⁴⁵ are laws that foster the second right invalid as applied to any circumstance in which they appear to limit the first, constitutional right? Not necessarily. The Court weighed the interests underlying the federal constitutional right to speech against those underlying the law at issue in the case.

The Village argues that three interests are served by its ordinance: the prevention of fraud, the prevention of crime, and the protection of residents' privacy. We have no difficulty concluding, in light of our precedent, that these are important interests that the Village may seek to safeguard through some form of regulation of solicitation activity.⁴⁶

42 1 CONG. REG. 428 (1789); 1 ANNALS OF CONG. 435 (Joseph Gales ed., 1789) (speech of James Madison).

43 The phrase was first used in the Supreme Court in *In re Kemmler*, 136 U.S. 436, 442 (1890), but its regular invocation followed Justice Brandeis's reference in *O'Gorman & Young v. Hartford Fire Ins. Co.*, 282 U.S. 251, 256 n.1 (1931). See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938); *W. Coast Hotel v. Parrish*, 300 U.S. 379, 397 (1937); *United States v. Butler*, 297 U.S. 1, 83 (1936) (Stone, J., dissenting).

44 *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 165, 168 (2002).

45 *Id.* at 168-69. The Court did not treat the municipal law as creating a property right protected by the Takings and Due Process Clauses. Had it done so, its tension-resolving analysis would likely have been little different. The soft version of the Ninth Amendment reminds courts that such analysis is required even when only one of the rights in tension has federal constitutional status.

46 *Id.* at 164-65.

The Court struck down the ordinance, but “central” to its conclusion of unconstitutionality was a finding that the measure was “not tailored to the Village’s stated interests.”⁴⁷ Dissenting, Chief Justice Rehnquist quoted from an earlier decision: “Great as is the value of exposing citizens to novel views, home is one place where a man ought to be able to shut himself up in his own ideas if he desires.”⁴⁸ Disagreement between the Chief Justice and his Court concerned how to construe the federal constitutional right to freedom of speech in light of the retained but nonconstitutional right to quiet enjoyment of private property. But there was no disagreement that the retained right was relevant to the Court’s enquiry. The obvious relevance of a federal constitutional right to the facts did not necessarily mean that the party invoking it would prevail. Indeed, under the *hard* version of the Ninth Amendment, the party invoking the federal constitutional right in *Stratton* would likely have failed. In his account of late eighteenth century common law, Blackstone wrote:

So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. . . . Besides, the public good is in nothing more essentially interested, than in the protection of every individual’s private rights, as modelled [sic] by the municipal law.⁴⁹

The soft version of the Ninth Amendment constitutionalizes a rule that federal constitutional rights are not to be construed to ride roughshod over other legal rights in the event of tension. Courts are charged with resolving the conflict without assuming that the federal constitutional status of one of the rights means that the other must inevitably give way. And this, of course, is precisely what courts do.

47 *Id.* at 168. That analysis comports with the Tenth Circuit’s recent stay of a district court injunction that had prevented the Federal Trade Commission’s (FTC) implementation of its national “do-not-call” registry. *Fed. Trade Comm’n v. Mainstream Mktg. Servs., Inc.*, 345 F.3d 850, 860–61 (10th Cir. 2003). The district court had ruled that the FTC’s regulatory regime infringed telemarketers’ First Amendment speech rights. *Mainstream Mktg. Servs., Inc. v. Fed. Trade Comm’n*, 283 F. Supp. 2d 1151, 1160–68 (D. Colo. 2003). In staying the district court’s injunction, the Tenth Circuit panel held that the Federal Trade Commission had shown a substantial likelihood of success on the merits. *Mainstream Mktg. Servs.*, 345 F.3d at 853–60. The constitutional right to speech was unlikely to be construed so broadly as to displace the privacy right that Congress had sought to protect. *See* H.R. 3161, 108th Cong. (2003).

48 *Watchtower Bible & Tract Soc’y*, 536 U.S. at 176 (Rehnquist, C.J., dissenting) (quoting *Hynes v. Mayor & Council of Oradell*, 425 U.S. 610, 619 (1976) (citing *Z. CHAFEE, FREE SPEECH IN THE UNITED STATES* 406 (1954))).

49 1 BLACKSTONE, *supra* note 1, at *139.

The point of the Ninth Amendment is not that governments cannot curtail other rights retained by the people, but that governments are authorized to continue providing for those other rights, should they wish to do so, even when those other rights are in tension with federal constitutional rights. When the freedom of speech runs up against the law of trespass, speech need not be construed to prevail. When the right to bear arms runs into the law of nuisance, gun-toting need not be construed to prevail. Thus the Ninth Amendment provides a textual foundation for many of the limitations that courts have construed federal constitutional rights to have—consider time, place and manner restrictions on speech,⁵⁰ or the obscenity limitation.⁵¹

The soft version of the Ninth Amendment involves a balancing enquiry⁵² that resembles, in some respects, a European-style proportionality analysis.⁵³ Even more analogous is the reasoning by which the Supreme Court of Canada implements Section 1 of the Canadian Charter of Rights, which provides: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Peter Hogg notes that this general limitation on the reach of enumerated rights reflects the influence of similar limitations on the rights guaranteed by the International Covenant on Civil and Political Rights and the European Convention on Human Rights.⁵⁴

D. Which Version?

Recall that before articulating two visions of the Ninth Amendment's function, I posed a series of questions about how the text of the amendment should be interpreted. The hard and soft versions do not exhaust the combinations of answers that might be given to those

50 *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 298–99 (1984).

51 *Miller v. California*, 413 U.S. 15, 36–37 (1973).

52 See generally Alexander T. Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

53 See Draft Treaty Establishing a Constitution for Europe, pt. I, art. 9, § 4, 2003 O.J. (C 169) 1, 10 ("Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Constitution.").

54 PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 728 (2001). See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, arts. 8 § 2, 9 § 2, 10 § 2, 11 § 2, 15 § 1, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) (as amended by Protocol No. 4, Sept. 16, 1963, art. 2 §§ 3–4); International Covenant on Civil and Political Rights, Dec. 19, 1966, arts. 4 § 1, 12 § 3, 14 § 1, 18 § 3, 19 § 3, 21, 22 § 2, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

questions. Other combinations may be tenable; in describing the hard and soft versions, I seek merely to identify the most plausible combinations of answers.

Adopting the soft version of Ninth Amendment interpretation would make little appreciable change to judicial reasoning in federal constitutional adjudication. It is a call to do what courts have instinctively done. Adopting the hard version of Ninth Amendment interpretation would, on the other hand, clearly call for some landmarks of constitutional adjudication to be decided differently.

The hard version will appeal to those who dislike applying balancing tests to interpret ostensibly absolute constitutional rights.⁵⁵ The soft version will be favored by those who consider such tests integral to asking what federal constitutional rights mean. What "the freedom of speech" means, they will observe, is inevitably a function of the relative value we accord the human interests with which free expression is in tension. Prohibitions of expression ranging from perjury, false advertising, and obscenity, to the rump of defamation law, survive only because the interests that underlie them have been weighed against the interest that underlies the First Amendment and have been found weightier.

As I shall describe below, the ratification debates focused on one particular way in which constitutionalizing some rights might negatively affect other rights. That possible negative effect was foreclosed by the Tenth Amendment. The Founders did not focus on other negative effects, yet they chose to add the Ninth Amendment. Doing so made sense only if the Founders wished to guard against whatever other negative effects constitutionalizing some rights might have on other rights. But which version of the Ninth Amendment's tension-resolving role does history support?

III. THE HISTORY OF ADOPTION

A. *The Ratification Debates*

The Ninth and Tenth Amendments were responses to arguments made during the debate over ratification of the 1787 Constitution as to whether a bill of rights ought to be added. The shared concern of those arguments was that constitutionalizing some rights would leave other legal rights less protected than before. To the extent the con-

55 See Edmond Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 557 (1962); cf. U.S. CONST. amend. IV (prohibiting *unreasonable* searches and seizures, which explicitly invites a balancing of interests).

cern was expressed in this general form, the Ninth Amendment responded directly to it.

When the leading federalist opponents of a bill of rights sought to explain how constitutionalizing some rights might undermine other rights, they focused on the reach of federal powers. Listing federal constitutional rights, they argued, would undermine the existing constitutional enumeration of federal powers, by implying that federal power extended beyond its enumerated subjects to everything except the listed constitutional rights. In Pennsylvania, James Wilson put the point succinctly:

A Bill of Rights annexed to a constitution is *an enumeration of the powers* reserved. If we attempt an enumeration, every thing 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 the government, and the rights of the people would be rendered incomplete.⁵⁶

According to Wilson, listing federal constitutional rights would imply that only power to impair those rights was kept from government. All other powers would implicitly pass to the federal government, undermining the constitutional enumeration of federal powers.

In North Carolina, James Iredell expressed the same concern that the constitutional enumeration of powers might be undermined:

But when it is evident that the exercise of any power not given up would be a usurpation, it would be not only useless, but dangerous, to enumerate a number of rights which are not intended to be given up; because it would be implying, in the strongest manner, that every right not included in the exception might be impaired by the government without usurpation; and it would be impossible to enumerate every one.⁵⁷

When Iredell spoke of usurpation, he meant exercise of powers not delegated in the constitutional enumeration of federal powers. Under the 1787 Constitution, he argued, the federal government was prevented from tampering with myriad important individual rights. How was it prevented from impairing those rights? By the fact that it had only been given a very modest set of powers. Many individual rights were protected from the federal government not because they

56 2 ELLIOT'S DEBATES, *supra* note 10, at 436.

57 4 *id.* at 167; see also Alexander Contee Hanson, *Remarks on the Proposed Plan of a Federal Government*, in PAMPHLETS ON THE CONSTITUTION 241, 243 (Paul Leicester Ford ed., Burt Franklin 1971) (1888) ("[W]e will not suffer it to be understood, that their *new-fangled* federal head shall domineer with the powers not excepted by their precious Bill of Rights.").

were *federal constitutional* rights, but because the federal government's powers did not reach far enough to trouble those rights anyway. Iredell did not believe that the Supreme Court could recognize federal constitutional rights unless those rights were enumerated in the Constitution. He was a textualist, as he made clear in his riposte to the florid natural rights prose of his colleague Samuel Chase in *Calder v. Bull*.⁵⁸

It has been the policy of all the *American* states, which have, individually, framed their state constitutions since the revolution, and of the people of the *United States*, when they framed the Federal Constitution, to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. . . . If . . . the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest of men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.⁵⁹

Earlier in the North Carolina convention's debate, Iredell speculated that, were a bill of rights adopted, a future federal government

58 3 U.S. (3 Dall.) 386, 398–99 (1798). In 1787, Iredell wrote the following in private correspondence:

Without an express Constitution the powers of the Legislature would undoubtedly have been absolute (as the Parliament in Great Britain is held to be), and any act passed *not inconsistent with natural justice* (for that curb is avowed by the judges even in England), would have been binding on the people.

2 GRIFFITH JOHN MCREE, *LIFE AND CORRESPONDENCE OF JAMES IREDELL, ONE OF THE ASSOCIATE JUSTICES OF THE SUPREME COURT* 172 (Peter Smith 1949) (1857). Suzanna Sherry contends that this passage shows Iredell "clearly viewed a written constitution as supplementing natural law rather than replacing it with a single instrument." Sherry, *supra* note 35, at 1143. On the contrary, Iredell was merely acknowledging that where no written constitutional scheme existed, courts in the common law tradition had recognized that legislative supremacy was a principle of the common law, a principle that might yield to other fundamental common law principles in some circumstances. See, most famously, the pronouncement of Sir Edward Coke in *Dr. Bonham's Case*, 8 Coke Rep. 107 (1610). As Iredell made clear in *Calder v. Bull*, courts constituted under, and charged with upholding, "an express Constitution" had no warrant to find limits on legislative power beyond those specified in the constitutional text.

59 *Calder*, 3 U.S. (3 Dall.) at 399.

might respond in the following fashion to claims that it had exceeded its delegated powers:

"We live at a great distance from the time when this Constitution was established. We can judge of it much better by the ideas of it entertained at the time, than by any ideas of our own. The bill of rights, passed at that time, showed that the people did not think every power retained which was not given, else this bill of rights was not only useless, but absurd. . . . So long as the rights enumerated in the bill of rights remain unviolated, you have no reason to complain."⁶⁰

The force of the federalist argument that listing constitutional rights could imply almost plenary powers was widely acknowledged. Even bill of rights supporters articulated it. At the Virginia Ratification Convention, Patrick Henry asked:

What is the inference when you enumerate the rights which you are to enjoy? That those not enumerated are relinquished. . . . Other essential rights—what are they? The world will say that you intend to give them up. When you go into an enumeration of your rights, and stop that enumeration, the inevitable conclusion is, that what is omitted is intended to be surrendered.⁶¹

For Henry, however, the argument simply counted in favor of an elaborate enumeration of rights. Certainly, he conceded, a bill of rights would imply that federal power could reach all rights not included in the bill. But that implication would merely reinforce a construction of federal powers that was likely anyway. Listing constitutional rights posed no extra danger, because the Constitution's attempt to enumerate federal powers was unlikely to be effectual.

I have observed already, that the sense of the European nations, and particularly Great Britain, is against the construction of rights being retained which are not expressly relinquished. I repeat, that all nations have adopted this construction—that all rights not expressly and unequivocally reserved to the people are impliedly and incidentally relinquished to rulers, as necessarily inseparable from the delegated powers.⁶²

George Mason was of the same view. "Unless there were a bill of rights, implication might swallow up all our rights."⁶³ Henry and Mason doubted that the 1787 Constitution's enumeration of powers

60 4 ELLIOT'S DEBATES, *supra* note 10, at 149.

61 3 *id.* at 587–88, 594.

62 3 *id.* at 445.

63 3 *id.*

would stop the federal government from violating the individual rights guaranteed in their state's bill of rights. Their speeches give no credence to the possibility of courts recognizing federal constitutional rights in the absence of a bill of rights.

James Madison's position at the Virginia Ratification Convention was that which Wilson and Iredell had taken in their states—that the 1787 document's enumeration of powers was a sufficient safeguard, and that adding a bill of rights would actually expand federal power by implication. "If an enumeration be made of our rights, will it not be implied that every thing omitted is given to the general government? Has not the honorable gentleman admitted that an imperfect enumeration is dangerous?"⁶⁴

John Marshall supportively foreshadowed the reasoning of *Marbury v. Madison*⁶⁵ when explaining why the constitutional enumeration of powers was meaningful:

Has the government of the United States power to make laws on every subject? . . . Can they go beyond the delegated powers? If they were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void.⁶⁶

When the opponents of a bill of rights chose to be particular about how a bill of rights might deny or disparage other rights, they said it would thwart the attempt made in the Constitution to limit federal powers. Listing constitutional rights would imply that federal power extended to everything except the listed rights. Prominent proponents of a bill of rights accepted this. They remained proponents, however, because they thought the attempt to enumerate federal powers was doomed to failure anyway. No one favored allowing a bill of rights to have negative implications for the status of legal rights that did not make the constitutional list. Hence the ease with which a general exclusion of negative implications was added to the list ultimately adopted.

B. James Madison in the First Congress

On June 8, 1789, James Madison rose to address the House of Representatives in the First Congress to meet under the Constitution. Won over to the case for a bill of rights by the weight of popular senti-

⁶⁴ 3 *id.* at 620; *see also* 3 *id.* at 626.

⁶⁵ 5 U.S. (1 Cranch) 137, 176 (1803).

⁶⁶ 3 ELLIOT'S DEBATES, *supra* note 10, at 553.

ment and the advocacy of Thomas Jefferson,⁶⁷ he led its cause in the House. He proposed a series of resolutions for amendments to the new Constitution. His fourth proposed resolution included most of the language that became the Bill of Rights. It ended with the following clause:

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.⁶⁸

Madison's words in this proposed fourth resolution contain two prohibitions—the first is general, the second specific. First, listing federal constitutional rights shall not negatively affect the status of rights that did not make the list. Explicit guarantees of certain rights shall not be construed “to diminish the just importance of other rights retained by the people.” Second, listing federal constitutional rights shall not have one particular negative effect on rights that did not make the list. Explicit guarantees of certain rights shall not be construed “to enlarge the powers delegated by the Constitution.” This was the possible negative effect that had been recognized and debated in the ratification conventions.

Madison's concern in proposing the last clause of his fourth resolution was for the status of legal rights not included in the Bill of Rights. His proposal and his explanation of it suggest he sought to avoid *all* negative effects that listing federal constitutional rights might have on other rights. He did not seek to elevate such other rights beyond the status they already had. He sought to preserve that status:

It has been objected also against a Bill of Rights, that, by enumerating particular exceptions to the grant of power, it would disparage

67 See ADRIENNE KOCH, *JEFFERSON AND MADISON: THE GREAT COLLABORATION* 51–56 (1964); Stuart Leibiger, *James Madison and Amendments to the Constitution, 1787–1789: “Parchment Barriers,”* 59 J. S. LEGAL HIST. 441, 454–55 (1993).

68 1 CONG. REG. 428 (1789); see also 1 ANNALS OF CONG. 435 (Joseph Gales ed., 1789). I quote directly from the *Register* wherever I give both citations.

Contrary to the assumptions of many scholars, Joseph Gales and W.W. Seaton did not include all previously published debates when, beginning in 1834, they compiled the *Annals of Congress*. All other reports for the period of Lloyd's coverage were ignored and his *Congressional Register* was reprinted almost in its entirety.

Marion Tinling, *Thomas Lloyd's Reports of the First Federal Congress*, 18 (n.s.) WM. & MARY Q. 519, 519–20 (1961). The compilers of the *Annals* replaced Lloyd's first semi-colon, which separated the provision's general and specific prohibitions, with a comma. Lloyd heard Madison speak.

those rights which were not placed in that enumeration, and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the general government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a Bill of Rights into this system; but, I conceive, that may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the 4th resolution.⁶⁹

Madison's explanation tracks the general and specific risks against which his provision stood guard: that the Bill of Rights would have negative effects upon other rights, and that the Bill of Rights would imply federal powers that the Constitution had not delegated. Both of these risks were of negative effects upon unlisted rights. But the second was a separately identified subspecies of the first. It was the particular way in which listing some rights might compromise other rights that had been identified during the ratification debates. It was the particular route to denial or disparagement that had been most obvious to Madison. But Madison did not assume that it was the only way that a bill of rights might diminish the status of other rights. He provided both that listing federal constitutional rights should not have negative effects on other rights, and that listing constitutional rights should not have the particular negative effect he could foresee.

In 1987, a handwritten document by Roger Sherman was found among Madison's papers in the Library of Congress. Sherman was a member of the House Select Committee to which Madison's proposals were referred. Randy Barnett has described the document as "a working draft of the Bill of Rights."⁷⁰ Its final paragraph reads as follows:

And the powers not delegated to the Government of the United States by the Constitution, nor prohibited by it to the particular States, are retained by the States respectively, nor shall any [sic] the exercise of power by the Government of the United States particular instances here in enumerated by way of caution, be construed to imply the contrary.⁷¹

69 1 CONG. REG. 433 (1789); *see also* 1 ANNALS OF CONG. 439 (Joseph Gales ed., 1789). In this quotation, the compilers of the *Annals* replaced the comma that follows "enumeration" with a semi-colon! *See also* 1 ANNALS OF CONG. 442 (statement of Andrew Jackson).

70 *Roger Sherman's Draft of the Bill of Rights*, in 1 RIGHTS RETAINED, *supra* note 20, at 351, 351.

71 *Id.* at 352.

The first half of this paragraph clearly tracks the Madisonian language that ultimately became the Tenth Amendment.⁷² It suggests that Sherman thought "retained" a suitable description for residual state powers, which perhaps supports a positivist reading of "retained" rights. The second half of the paragraph, though garbled, also focuses on the reach of federal *powers*. It appears likely to have been meant to address the risk that federal powers would be construed more broadly because of the Bill of Rights.⁷³ Yet the Founders ultimately chose not to frame the Ninth Amendment as a prohibition against overbroad readings of federal powers. Instead, they provided more generally that listing rights should not negatively affect unlisted rights—through overbroad readings of federal powers, or (implicitly) in any other way.

Madison's proposed language suggested that he was concerned with more than the implied expansion of federal powers. He had a broader concern about the effect of listing rights upon the status of rights not listed. This evident concern has caused many commentators to conclude that the Ninth Amendment was meant to afford justiciable federal constitutional status to unlisted rights, or to confirm that those rights had that status already and should not be deprived of it. But the very next paragraph of his speech reveals that this was definitely not what Madison meant to accomplish through the Ninth Amendment. That paragraph begins with the following sentence: "It has been said, that it is unnecessary to load the constitution with this provision, because it was not found effectual in the constitution of the particular states."⁷⁴ "This provision" meant the whole of Madison's fourth resolution, that is, the whole of what was to become the Bill of Rights. The state constitutions and bills of rights that antedated their federal counterpart did not contain anything like the Ninth or Tenth Amendments. Madison continued: "It is true, there are a few particular states in which some of the most valuable articles have not, at one time or other, been violated; but it does not follow but they may have, to a certain degree, a salutary effect against the abuse of power."⁷⁵ This passage confirms that Madison was speaking of the whole Bill of Rights, and it appears he meant to say that bills of rights might have a

72 The Tenth Amendment drew on the final clause of the eighth resolution that Madison proposed to the first Congress. 1 ANNALS OF CONG. 436 (Joseph Gales ed., 1789) ("The powers not delegated by this constitution, nor prohibited by it to the States, are reserved to the States respectively."). The adopted Tenth Amendment included the additional words "or to the people."

73 See *infra* Part V.A.

74 1 CONG. REG. 433 (1789); 1 ANNALS OF CONG. 439 (Joseph Gales ed., 1789).

75 1 CONG. REG. 433 (1789); 1 ANNALS OF CONG. 439 (Joseph Gales ed., 1789).

salutary effect even when sporadically flouted. But then came a more robust reason to adopt the Bill.

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.⁷⁶

Jack Rakove has suggested that “[t]he inspiration for this statement came from [Thomas] Jefferson.”⁷⁷ In Jefferson’s letter to Madison of March 15, 1789, he observed, “In the arguments in favor of a declaration of rights, you omit one which has great weight to me, the legal check which it puts into the hands of the judiciary.”⁷⁸

Madison’s point was that enumeration makes rights judicially enforceable. That argument would not have been available to him, had he actually contemplated, or thought his audience contemplated, that courts would proclaim and enforce federal constitutional rights anyway. Had Madison thought that rights would be implicitly constitutionalized by the courts without a bill of rights, then adding a bill would have had only a “salutary” effect. But Madison thought that adding a bill of rights had a very *substantive* effect; he suggested that enumeration was what let judges enforce rights.⁷⁹ The judiciary would “be naturally led to resist every encroachment upon rights *expressly stipulated for* in the Constitution by the declaration of rights.”⁸⁰

76 1 CONG. REG. 433–34 (1789); 1 ANNALS OF CONG. 439 (Joseph Gales ed., 1789).

77 JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 335 (1996).

78 THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 660 (Neil H. Cogan ed., 1997) (quoting 14 THE PAPERS OF THOMAS JEFFERSON 659–60 (Julian P. Boyd ed., 1950)).

79 Larry Kramer has argued persuasively that judicial review was not a structural centerpiece of the 1787 Constitution. See Kramer, *supra* note 37 *passim*. But Madison’s speech made judicial review a key element of his case for a bill of rights. See *id.* at 77, 124.

80 1 CONG. REG. 434 (1789) (emphasis added); 1 ANNALS OF CONG. 439 (Joseph Gales ed., 1789) (emphasis added). Randy Barnett has claimed that the second provision in Roger Sherman’s draft Bill of Rights “reflects the sentiment that came to be expressed in the Ninth.” Randy E. Barnett, *Introduction: James Madison’s Ninth Amendment*, in 1 RIGHTS RETAINED, *supra* note 20, at 1, 7 n.16. That provision reads:

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 & Safety; of Speaking, writing and publishing their Sentiments with decency and freedom; of peaceably assembling to consult their common good, and of applying to

Perhaps Madison and Jefferson were merely unsure whether courts would proclaim and enforce federal constitutional rights absent a bill of rights. The nascent practice of judicial review in the states left the question in doubt.⁸¹ But Madison and Jefferson were not agnostic about what they wanted courts to do. They wanted courts to enforce federal constitutional rights, and proposed a bill of rights to ensure that courts would do so. Would the Bill of Rights, with the Ninth Amendment among its provisions, authorize courts to recognize or create other federal constitutional rights? That is not what Madison said. He said that the Bill of Rights would authorize courts to protect "rights *expressly stipulated for* in the constitution by the declaration of rights."⁸²

One paragraph earlier in his speech, Madison had explained what he sought to accomplish through the Ninth Amendment.⁸³ Nowhere in that explanation did he mention judicial review. In the Ninth Amendment, Madison sought to preserve the existing status of legal rights that were missing out on inclusion in the Bill of Rights. Did he think that the existing status of unlisted rights could be "federal constitutional"? At most, he was agnostic as to that question. Maybe courts would treat some unlisted rights as federal constitu-

Government by petition or remonstrance for redress of grievances. Of these rights therefore they Shall not be deprived by the Government of the united States.

Id. See Roger Sherman's *Draft of the Bill of Rights*, *supra* note 70, at 351.

This provision looks much more like a precursor to the First Amendment, and to the property parts of the Fifth Amendment. The guarantees of the First Amendment, and the property rights guarantees of the Fifth, are not otherwise reflected in Sherman's draft. The provision appears to record deliberations concerning what rights ought to be *expressly stipulated for*. Ultimately the Founders framed the Fifth Amendment's property rights protections around losing property rather than acquiring it, but that hardly deprives this provision of precursor status. Only the draft's most general phrase ("of pursuing happiness & Safety") failed to find reflection in the express guarantees of the Bill of Rights. That obviously aspirational language echoed the Declaration of Independence and was sensibly omitted from provisions that were intended to be justiciable federal constitutional rights. Far from supporting the case for reading the Ninth Amendment to signal other federal constitutional rights, the arguably inclusive language of this provision counts precisely against that case. Why? Because that inclusive language was dropped, leaving the First and Fifth Amendments to guarantee discrete sets of federal constitutional rights.

81 See WILLIAM E. NELSON, *MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW* 34-37 (2000); Sherry, *supra* note 35, at 1134-46; Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171, 182-222 (1992) [hereinafter Sherry, *Natural Law*]; Suzanna Sherry, *The Ninth Amendment: Righting an Unwritten Constitution*, 64 CHL-KENT L. REV. 1001, 1003-07 (1988) [hereinafter Sherry, *The Ninth Amendment*].

82 1 CONG. REG. 434 (1789); 1 ANNALS OF CONG. 439 (Joseph Gales ed., 1789).

83 1 CONG. REG. 433 (1789); 1 ANNALS OF CONG. 439 (Joseph Gales ed., 1789).

tional rights; maybe they would not. Madison's case for a bill of rights implied at least doubt that courts would do so, and perhaps disagreement with the claim that they could. Nowhere did Madison suggest or imply that his Bill of Rights, with the Ninth Amendment among its provisions, would *authorize* courts to articulate other federal constitutional rights. Had Madison wished to achieve that result, he could have deployed a direct prohibition ("rights retained by the people shall not be infringed"), or a direct rule of construction ("the enumeration of *powers* shall not be construed to disparage rights retained by the people").

The Ninth Amendment's rule of construction did something different. It safeguarded the existing status of unlisted rights, whatever that status was. It did not *dictate* what that status was. Courts could work that out for themselves. If courts decided that other rights had enjoyed federal constitutional status in 1789, then the Ninth Amendment protected that status. If courts decided that only listed rights had ever enjoyed federal constitutional status, then the Ninth Amendment afforded *no reason to quarrel with that conclusion*. The language of denial or disparagement is critical here. A right is not denied or disparaged when it misses out on becoming something it has never been.

Madison's invocation of judicial review has been widely celebrated. His focus on judicial enforcement of constitutional *text* has, however, been insufficiently appreciated. That understanding of judicial review comports with his explanation of the Ninth Amendment, just one paragraph earlier.

In *Democracy and Distrust*, John Hart Ely observes:

It would be a cheap shot to note that there is no legislative history specifically indicating an intention that the Ninth Amendment was to receive judicial enforcement. There was at the time of the original Constitution little legislative history indicating that *any* particular provision was to receive judicial enforcement: the Ninth Amendment was not singled out one way or the other.⁸⁴

Ely is right that the Ninth Amendment was not treated by the Founders as any more or less justiciable than other constitutional provisions. But the legislative history of the Bill of Rights leaves no doubt that judicial enforcement of listed rights *was* expected, indeed that it was among the most important reasons for listing rights at all.

84 ELY, *supra* note 21, at 40.

C. *Conclusions for Interpretation*

If the originalist project is to seek out evidence of how the generation who adopted the Ninth Amendment understood what they were doing, then Madison's speech must be Exhibit A. And any interpreter of the Ninth Amendment, whether self-consciously originalist or not, should give the speech more weight than any other piece of history. No explanation of what the provision did and did not do had more influence on those who amended the Constitution to include its words. Members of the House in the First Congress heard Madison live. Conscientious senators and members of the ratifying state legislatures would inevitably have read him—what source of guidance about meaning could be more obvious than the speech through which the provision was proposed? Madison's speech was published contemporaneously in Thomas Lloyd's *Congressional Register*. Lloyd published his reports of the proceedings of the House of Representatives on a weekly basis, commencing on May 6, 1789. "Most of the members of the House and the Senate, the President, and many other influential men subscribed . . ."⁸⁵ And when they read Madison's speech, they found in adjoining paragraphs an assertion that the Ninth Amendment protected unlisted rights from disparagement and a claim that listing rights was what *ensured* federal constitutional status. Whatever Madison meant by not disparaging unlisted rights, he did not mean that courts should treat those rights as listed.

The *Gazette of the United States* published the following report of Madison's speech:

Mr. Madison further observed, That the proportion of Representatives had been objected to—and particularly the discretionary power of diminishing the number.—There is an impropriety in the Legislatures' determining their own compensation, with a power to vary its amount.—The rights of conscience; liberty of the press; and trial by jury, should be so secured, as to put it out of the power of the Legislature to infringe them.—*Fears respecting the judiciary system, should be entirely done away—and an express declaration made, that all rights not expressly given up, are retained.*—He wished, that a declaration upon these points might be attended to—and if the Constitution can be made better in the view of its most sanguine supporters, by making some alterations in it, we shall not act the part of wise men not to do it—He therefore moved for the appointment of a committee, to propose amendments, which should be laid before

85 Tinling, *supra* note 68, at 527.

the Legislatures of the several States, agreeably to the 5th article of the Constitution.⁸⁶

Thus even in the attenuated report of Madison's speech produced by a leading newspaper and reprinted elsewhere, two critical points appear. First, the proposed Bill of Rights would be enforced by judicial review. Second, the proposed provision concerning retained rights was intended to make clear that the federal government had no powers beyond those delegated to it. Only through the original Constitution's delegation had the people "expressly given up" power to compromise their rights. Readers of the *Gazette* who later encountered the Ninth and Tenth Amendments would have understood those provisions to concern rights that the federal Constitution, in all its provisions, was meant to leave untouched and unaddressed. The Ninth Amendment's concern was framed more generally than the Tenth's, and thus the language of the Ninth Amendment covered more than the particular negative effect on retained rights that Madison specifically sought to preclude.

What conclusions can we draw from this history? First, the Ninth Amendment does not say that unlisted rights have *federal constitutional* status. It says only that listing federal constitutional rights must not negatively affect the status of unlisted rights, whatever that status is. The Ninth Amendment neither urges nor precludes textualism. Second, the Ninth Amendment does overlap with the Tenth, but extends further. The Founders were concerned about a particular negative effect that constitutionalizing some rights might have on other rights. They precluded that effect in the Tenth Amendment. But the Founders had a general concern that constitutionalizing some rights not have negative effects on other rights. They precluded those effects in the Ninth Amendment.

What other negative effects does the Ninth Amendment preclude? Certainly it precludes reading federal powers more broadly because of the Bill of Rights. It also precludes reading *the Bill of Rights* in ways that "deny or disparage" rights "retained by the people." I have discussed hard and soft versions of this prohibition; does history help us choose between them?

The historical record better supports the hard version of the Ninth Amendment's tension-resolving role. The Founders were concerned about the fate of legal rights they already had, not about opti-

86 *Sketch of the Proceedings of Congress in the House of Representatives of the United States*, GAZETTE U.S., June 10, 1789, at 2 (emphasis added), reprinted in CONN. J., June 17, 1789, at 1 (emphasis added).

mizing future flexibility to create legal rights.⁸⁷ References to the risk of unlisted rights being "assigned into the hands of the general government"⁸⁸ necessarily implied that the federal government was not the source of those unlisted rights—their source had to be common law, other state law, or nature. All the hand-wringing about imperfect enumerations of rights also implied that the unlisted rights in the Founders' sights were plausible candidates for listing (if only they had been thought of).⁸⁹ That seems to support the hard version's narrow conception of rights. For originalists, the choice is clear.

The Founders' lack of specific attention to the problem of tension between constitutionally-listed rights and other rights "retained by the people" is thus readily explicable. The guarantees in the Bill of Rights originally applied only against the federal government. In the Ninth Amendment, the Founders provided that listing rights in the Constitution must not have negative effects on other rights "retained by the people." The Founders probably understood other rights retained by the people to be other rights retained in the laws of the states, that is, other existing rights under state law, including common law. State laws protecting ("retaining") other rights (such as the right to reputation) were not subject to challenge for inconsistency with the federal Bill of Rights. The Founders did not intend the Bill of Rights to limit the lawmaking power of the states. Some individual rights guarantees in the original Constitution did limit state power, notably prohibitions of bills of attainder and of laws impairing the obligation of contracts,⁹⁰ but these were hardly obvious candidates for competition with other state law rights.⁹¹ Further obscure potential for tension existed if rights "retained by the people" formed a federal common law in 1789,⁹² or were codified by federal statute in respect of federal territories. The Founders doubtless did not comprehend

87 See *supra* Part III.A.

88 1 CONG. REG. 433 (1789); 1 ANNALS OF CONG. 439 (Joseph Gales ed., 1789) (statement of James Madison).

89 See 2 ELLIOT'S DEBATES, *supra* note 10, at 436 (statement of James Wilson); 3 *id.* at 620 (statement of James Madison); 4 *id.* at 167 (statement of James Iredell).

90 See U.S. CONST. art. I, § 10, cl. 1.

91 Madison's proposal that U.S. CONST. art. I, § 10 be amended to include further individual rights and limitations on state power failed. See 1 ANNALS OF CONG. 435 (Joseph Gales ed., 1789) ("No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."). It was approved by the House as "the equal rights of conscience, the freedom of speech or of the press, and the right of trial by jury in criminal cases, shall not be infringed by any State," 1 *id.* at 755, but was rejected by the Senate. See AMAR, *supra* note 11, at 144 n.37.

92 See *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 14–22 (1842), *overruled by* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 69–80 (1938). A federal court sitting prior to 1938 could have

all arcane implications of a possible federal common law. At the Founding, then, there was little apparent risk that how federal constitutional rights were construed would negatively affect other rights "retained by the people." But when the Fourteenth Amendment applied federal constitutional rights to the states,⁹³ how those federal constitutional rights were construed potentially affected other rights "retained by the people."⁹⁴ The Fourteenth Amendment created a more significant and appreciable risk of tension between federal constitutional rights and "others retained by the people." Construction of federal constitutional rights became visible as one of the ways in which listing rights in the Constitution might disparage "others retained by the people."

The generation who adopted the Ninth Amendment almost certainly did not have in mind the problem of tension between federal constitutional rights and other retained rights. Does their inattention to the problem of tension mean that the Ninth Amendment does not

held that from 1789 the rights "retained by the people" had been protected by federal common law.

93 U.S. CONST. amend. XIV, § 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

See *Duncan v. Louisiana*, 391 U.S. 145, 146–62 (1968); *Adamson v. California*, 332 U.S. 46, 47–59 (1947); *Palko v. Connecticut*, 302 U.S. 319, 320–29 (1937); AMAR, *supra* note 11, at 218–23.

94 If the Fourteenth Amendment's Privileges or Immunities Clause applies against the states the privileges and immunities guaranteed in the original Constitution and Bill of Rights, *O'Neil v. Vermont*, 144 U.S. 323, 360–64 (1892) (Field, J., dissenting); AMAR, *supra* note 11, at 218–23, then the Ninth Amendment's rule for construing those guarantees feeds through, and produces a uniform construction of those guarantees vis-à-vis both federal and state governments. If, however, the "incorporation" of "federal" rights against the states is achieved through the enumeration of the Due Process Clause in the Fourteenth Amendment, *Duncan*, 391 U.S. at 146–62; *Adamson*, 332 U.S. at 47–59; *Palko*, 302 U.S. at 320–29, then the Ninth Amendment applies to construction of the Fourteenth Amendment's Due Process Clause as a prospective interpretive rule that the Fourteenth Amendment could have changed but did not. See Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2114–20 (2002). On this view, the hard version of the Ninth Amendment's tension-resolving role might call for determining the rights retained by the people of the states as of 1868 rather than 1789 for the purpose of construing the Due Process Clause of the Fourteenth Amendment. Attribution of incorporation to the Privileges or Immunities Clause does, however, seem much more plausible.

apply to that problem? No—they spoke with sufficient generality to cover the case. When a change in the law produced actual cases of tension between federal constitutional rights and other rights retained by the people, the Ninth Amendment insisted that the tensions be resolved in ways that did not deny or disparage the other rights retained by the people. To conclude that the Ninth Amendment applies to methods of denial or disparagement unforeseen at the Founding is surely less controversial than to conclude that some other provision of the Bill of Rights applies to a technology unimagined at the Founding. When the Founders protected speech in the First Amendment and prohibited cruel and unusual punishments in the Eighth Amendment, they succeeded in protecting and prohibiting, respectively, all future forms of the phenomena, not just the ones they specifically had in mind.⁹⁵ The possibilities that the First Amendment protects television broadcasts and that the Eighth Amendment prohibits certain uses of electrocution are not excluded just because the Founders were not specifically thinking of those species of speech and punishment. Likewise, when the Founders prohibited the enumeration of rights from being construed to deny or disparage retained rights, they succeeded in prohibiting all future forms of the phenomenon.

IV. THE TWO VERSIONS COMPARED: *NEW YORK TIMES* V. *SULLIVAN*

To examine the practical operation of the Ninth Amendment, both hard and soft versions, let us consider the legal landscape against which the Supreme Court decided *New York Times v. Sullivan*.⁹⁶ Harry Kalven recounted that the Alabama defamation law there at issue resembled the common law in most other states. "The rule of fair comment in Alabama, like that in the majority of jurisdictions in this country, limit[ed] the privilege to the expression of defamatory opinions based on facts that are established as true."⁹⁷ This comported with the longstanding solicitude of the English common law for rights of reputation. In his *Commentaries*, Blackstone declared that the rights of the English people "may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty;

95 See Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 338–58 (1985); Michael S. Moore, *Do We Have an Unwritten Constitution?*, 63 S. CAL. L. REV. 107, 135–37 (1989).

96 376 U.S. 254 (1964).

97 Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 195.

and the right of private property.”⁹⁸ Under the rubric of personal security, he observed, “The security of his reputation or good name from the arts of detraction and slander, are rights to which every man is entitled, by reason and natural justice; since without these it is impossible to have the perfect enjoyment of any other advantage or right.”⁹⁹

The value of freedom to speak is undermined if a besmirched reputation evacuates one’s audience. But freedom of speech matters too. Blackstone described how the common law reconciled rights to speech with rights to reputation. The common law’s solution was to eschew prior restraints but to afford robust ex post remedies for defamation. “The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published.”¹⁰⁰

On any plausible reading of the Ninth Amendment, the right to reputation falls among the “others retained by the people.” The right to reputation was retained in the laws of the people of the states,¹⁰¹ but not listed in the federal Constitution. By contrast, the right to freedom of speech was both retained and constitutionalized. The state laws that protect and foster a right to reputation are clearly in tension with a constitutional right to freedom of speech. Had the Ninth Amendment been understood to address this tension, how might *New York Times v. Sullivan* have been argued?

The brief for the plaintiff-respondent, Mr. Sullivan, would have articulated the Ninth Amendment basis for his right to rely on state defamation law: The enumeration in the Constitution of the freedom of speech shall not be construed to deny or disparage the right to reputation retained by the people through defamation law. Sullivan might then have argued for the hard version of the Ninth Amendment. In other words, he might have argued that the freedom of speech cannot be construed to diminish the protections for reputation that existed at common law in 1789. The State of Alabama was, of course, free to reduce or eliminate those protections through its

98 1 BLACKSTONE, *supra* note 1, at *129.

99 1 *id.* at *134.

100 4 *id.* at *151; *see also* LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* 13–14 (1985).

101 Pennsylvania even acknowledged the right in its constitution. *See* PA. CONST. art. I, § 1 (“That all men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness.”).

own lawmaking processes. But to the extent that those protections were retained by the state, they could not be diminished through the construction of federal constitutional rights. Provided that the state law protections on which Sullivan relied were not relevantly *more* generous than a plaintiff would have enjoyed in 1789, he was entitled to rely on them.

The defendant-petitioners might have argued as follows for the soft version of the Ninth Amendment: The retained right to reputation is not denied or disparaged if it is accorded the weight that it deserves within an optimal array of individual rights. The Ninth Amendment means that the interest underlying defamation law must be accorded its appropriate weight. If the principle of the Ninth Amendment were not recognized, then a constitutional guarantee of freedom of speech would end state defamation law *entirely*. There is only one reason to read down "the freedom of speech" to accommodate *any* defamation law. That reason is the importance of the human interest in reputation. The Ninth Amendment tells the Court how to construe the freedom of speech when that freedom is in tension with another human interest. The Court must weigh the interest in freedom of speech against the interest in reputation, must decide what constitutes the optimal accommodation between those interests, and must construe the freedom of speech accordingly.

The plaintiff-respondent might have answered that the common law of 1789 settled the accommodation between interests in speech and reputation, and that the Ninth Amendment requires the Court to respect the common law position. As a fall-back, he might have argued that Alabama defamation law *did* reflect an optimal accommodation between the interests in speech and reputation. Any individual right may be cynically misused, but the Court should not permit disgust with a party in litigation to affect its assessment of the relative human interests in speech and reputation.

If the Court had accepted the soft version of the Ninth Amendment, the case would likely have been decided much as it was. The soft version essentially describes the reasoning process in which the Court actually engaged. The Court weighed the competing interests underlying rights to speech and to reputation, and construed the freedom of speech in a way that worked an accommodation between those interests. Had the Court simply deferred to the absolute language of the First Amendment, then state defamation law would have been completely swept away. In fact, it was not. The Court merely narrowed the constitutionally permissible reach of state defamation

law through its "public official" and "actual malice" criteria.¹⁰² That was a *limiting* construction of the constitutional right to freedom of speech. The Court's construction reflected reasoning that, in Justice Goldberg's words, "[p]urely private defamation has little to do with the political ends of a self-governing society. The imposition of liability for private defamation does not abridge the freedom of public speech or any other freedom protected by the First Amendment."¹⁰³ In other words, the interest underlying freedom of speech is less weighty when that speech concerns private individuals than when it concerns public figures. Hence the scales tip in favor of the interest underlying the right to reputation, and private defamation remains actionable.

Justices Goldberg, Black, and Douglas read the First Amendment to leave less room for state defamation law than did the majority, but even they did not simply hold it invalid en bloc. Their proposed absolute immunity was only for speech about public officials performing public duties.¹⁰⁴

Under the hard version of the Ninth Amendment, *New York Times v. Sullivan* was wrongly decided. The Court in *Near v. Minnesota ex rel. Olsen*¹⁰⁵ had read the First Amendment in a way that reconciled tension between rights to speech and rights to reputation much as the old common law had done. Chief Justice Hughes's majority opinion condemned equitable injunctions effecting prior restraints on speech in the following terms: "Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusation in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals."¹⁰⁶ To the extent that *New York Times v. Sullivan* made inroads on ex post remedies for defamation, it violated the hard version of the Ninth Amendment. Under that version, individual rights that were enjoyed under state law in 1789 are brittle limits on the construction of federal constitutional rights. Provided Alabama defamation law was not relevantly more generous to Sullivan than state law in 1789 would have been, he was entitled to its benefit.

102 *N.Y. Times v. Sullivan*, 376 U.S. 254, 279–80 (1964); *cf. id.* at 293–95 (Black & Douglas, JJ., concurring); *id.* at 298–300 (Goldberg & Douglas, JJ., concurring in the result).

103 *Id.* at 301–02 (Goldberg & Douglas, JJ., concurring in the result).

104 *See id.* at 293–97 (Black & Douglas, JJ., concurring); 297–305 (Goldberg & Douglas, JJ., concurring in the result).

105 283 U.S. 697 (1931).

106 *Id.* at 718–19.

As *Sullivan* illustrates, the hard and soft versions of the Ninth Amendment carry very different implications for the Supreme Court's jurisprudence. The soft version really just describes the reasoning process in which the Court has actually engaged when construing the Bill of Rights. The soft version sets up a balancing enquiry every time a constitutional right comes into tension with a nonconstitutional law that fosters a nonconstitutional right. The Court has, throughout its history, observed this version of the Ninth Amendment's injunction *sub silentio*. Repeatedly, the Court has resolved tensions by acknowledging the just importance of the nonconstitutional right, and settling upon a construction of the constitutional right that seeks to serve the interests underlying each right to the fullest extent possible, making each accommodate the other.

Examples in the First Amendment context are legion, and will doubtless be joined by the Court's resolution of the national "do-not-call" litigation that is currently winding its way through the lower federal courts.¹⁰⁷ Laws that prohibit public nuisances create rights to be free of those nuisances that may clash with rights to self-expression.¹⁰⁸ "Content-neutral" judicial analyses of such laws reflect an accommodation between the human interests they serve and the human interest in self-expression.

When attention turns to constitutional rights beyond the First Amendment, judicial interpreters are regularly required to reconcile the Constitution's provision for security of person and property from government, and the provision made by lesser laws for security of person and property from other persons. The soft version of the Ninth Amendment enjoins the courts to consider our need for security from each other when deciding how secure the Constitution makes us from government.¹⁰⁹

The hard version of the Ninth Amendment effectively creates a set of defeasible limitations on federal constitutional rights. Rights retained by the people in their laws limit construction of federal constitutional rights. The hard version is, therefore, only plausible if the rights retained by the people are a fixed set, beyond the power of governments to expand. The hard version is plausible if the rights retained by the people are those "secured within the customary constitutional tradition"¹¹⁰ in 1789—rights "deeply rooted in this Nation's

107 See *supra* note 47.

108 See, e.g., *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 160–64 (2002); *Hill v. Colorado*, 530 U.S. 703, 714–18 (2000).

109 See, e.g., *Terry v. Ohio*, 392 U.S. 1 (1968).

110 *Kramer*, *supra* note 37, at 40.

history and tradition.”¹¹¹ These rights, to the extent not constitutionally listed, depend upon the ongoing sustenance of common law or statutes or state constitutions. Subject to applicable state constitutional limitations, state legislatures may remove these rights at any time. But to the extent that legislatures wish to provide for them, or to allow the common law to continue to do so, these rights limit construction of federal constitutional rights. Retained rights cannot, however, operate as limits to construction beyond those rights’ historic breadth.

To be plausible, the hard version can apply only to nonconstitutional rights that were framed historically as explicit legal rights, and for which the law historically provided judicial remedies. It cannot, as can the soft version, apply to other laws just because those laws serve human interests. Thus the laws that empower executives, state and federal, to protect us from each other could not operate to limit construction of the Fourth and Fifth Amendments under the hard version, even if they serve a historically recognized “natural right to security from the corporal insults of menaces, assaults, beating, and wounding.”¹¹² Not every search or seizure authorized by state law need be held “reasonable.”¹¹³

V. OTHER INTERPRETATIONS COMPARED

A. *The Ninth Amendment’s Rule of Construction*

The Ninth Amendment is a rule of construction. Its operative verb makes that clear:¹¹⁴ “The enumeration in the Constitution of certain rights shall not be *construed* to deny or disparage others retained by the people.”¹¹⁵ All interpreters agree that the amendment concerns how we should construe the *fact* that some rights have been listed in the Constitution. That fact should not be construed to have negative effects on other rights.

If the fact of listing rights is construed to concede federal power to do everything except invade the listed rights, then the Ninth Amendment is violated—but so is the Tenth. If the fact of listing rights is construed to have any other negative effect on nonconstitutional rights, then the Ninth Amendment is violated. The Founders did not focus on other ways that listing constitutional rights might

111 *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977).

112 1 BLACKSTONE, *supra* note 1, at *134.

113 See U.S. CONST. amend. IV.

114 See *Rosenkranz*, *supra* note 94, at 2090 n.12.

115 U.S. CONST. amend. IX (emphasis added).

negatively affect nonconstitutional rights. But we can think of at least two: (1) by implying that federal powers should be construed more broadly than they otherwise would be; and (2) by implying that listed rights should be construed more broadly than they were before listing, at the expense of other rights.

Identifying the second of these two negative effects has been the goal of this Article. The first negative effect has been recognized by other scholars; it is closely related to the "confirming enumerated powers" explanation of the Ninth Amendment, but does not render the amendment redundant. It is a "more subtle thesis"¹¹⁶ that the Ninth Amendment prevents use of the Bill of Rights as a reason to construe enumerated federal powers broadly. How could the Bill of Rights be so used? Through an inference that the Bill of Rights had been necessary in order to rescue its listed rights from the clutches of enumerated federal power. Such an inference seems natural enough. It comports with our expectation that law is not meant to be redundant. If the Founders wished to guard against the inference, they needed to rebut it explicitly. Akhil Amar endorses this explanation of the Ninth Amendment in the following terms:

The Tenth says that Congress must point to some explicit or implicit enumerated power before it can act; and the Ninth addresses the closely related but distinct question of whether such express or implied enumerated power in fact exists. . . . Thus, for example, we must not infer from our First Amendment that Congress was ever given legislative power in the first place to regulate religion in the states, or to censor speech.¹¹⁷

It is unclear how widely the "broad construction" risk was appreciated among the Founders. During the ratification debates, the Constitution's proponents insisted that the subjects of power conferred on the federal government were *inherently* limited. This, they argued, sufficiently safeguarded individual rights.¹¹⁸ That argument presupposed that the federal government's enumerated powers were inherently *not* susceptible of *conscientious* broad interpretation. Debate raged as to whether the Constitution's enumeration of powers

116 See John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967, 988 (1993); see also McAfee, *supra* note 17, at 1307.

117 AMAR, *supra* note 11, at 124.

118 See, e.g., PENNSYLVANIA AND THE FEDERAL CONSTITUTION: 1787-1788, at 143-44 (John Bach McMaster & Frederick D. Stone eds., Lancaster, Inquirer Printing Co. 1888) (citing a speech to the State House by James Wilson, Oct. 6, 1787); THE FEDERALIST NO. 84, at 515 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The truth is, after all the declamations we have heard, that the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS.").

would be taken seriously.¹¹⁹ The apparently shared assumption of the debaters was that if that enumeration were taken seriously, it would be effective to limit federal power and thus to protect rights. The Tenth Amendment fully guarded against the specific risk that the enumeration of powers would not be taken seriously. Alexander Hamilton in *The Federalist* No. 84 did, however, identify the risk of disingenuously broad construction of federal powers.

[B]ills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution but would even be dangerous. They would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power. They might urge with a semblance of reason that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication that a power to prescribe proper regulations concerning it was intended to be vested in the national government. This may serve as a specimen of the numerous handles which would be given to the doctrine of constructive powers, by the indulgence of an injudicious zeal for bills of rights.¹²⁰

To the extent that Hamilton addressed *disingenuously* broad interpretations of federal powers, he merely identified another way in which the enumeration of federal powers might not be taken seriously. To that extent, the Tenth Amendment obviated his concern. But what of the possibility that *conscientious* interpreters of enumerated federal powers might be lured into reading those powers too broadly by the fact that the Constitution listed rights? Only the Ninth Amendment met *that* concern. The recently discovered Sherman draft hints through garbled language that a risk of federal powers being read overbroadly was indeed on the Founders' minds.¹²¹

The "broad construction" explanation does not leave the Ninth Amendment a dead letter, but neither does it exhaust the function of the amendment. The language of the Ninth Amendment would be

119 See *supra* Part III.

120 THE FEDERALIST NO. 84, *supra* note 118, at 513–14 (Alexander Hamilton).

121 See *Roger Sherman's Draft of the Bill of Rights*, *supra* note 70, at 351–52.

an oddly backhanded way to do no more than preclude an inference about the breadth of federal powers. If the Ninth Amendment were, like the Tenth, *just* about the reach of federal powers, why did it not simply say so? "The powers delegated to the United States shall not be construed more broadly because of the enumeration of certain rights." That seemed to be what Sherman was attempting to say in his draft.¹²² Why did he not succeed in keeping the provision's explicit focus on the construction of federal powers? And why did the Ninth Amendment speak of the "enumeration *in the Constitution* of certain rights," not simply of the enumeration of rights in the foregoing eight amendments?

Debate over a bill of rights seems, from the language used in the Ninth Amendment, to have triggered a *general* concern among the Founders about the effects that constitutionalizing some rights would have upon other rights. Implicitly expanding federal powers, whether by ignoring their textual enumeration or by construing that enumeration broadly, was one way in which nonconstitutional rights might be "denied or disparaged." But was it the *only* way in which constitutionalizing some rights might deny or disparage other rights? The language of the Ninth Amendment seems to reflect a broader concern that constitutionalizing some rights not have negative effects upon other rights. By making general provision against such negative effects, the Founders protected against more than they concretely foresaw.

What other negative effects have surfaced since? The practice of judicial review has revealed another. Listing some rights in the Constitution may negatively affect other rights by prompting courts to expand the listed rights at the other rights' expense. The Founders could be forgiven for not focusing on this negative effect, for our own appreciation of it is a creature of judicial review over two centuries. Moreover, it is an effect that flows from the Fourteenth Amendment's application of federal constitutional rights to state law. The Founders doubtless did not foresee this development, but its effects were subject to the Founders' general prohibition of negative effects on rights "retained by the people."

Are there others? Perhaps the Ninth Amendment tells Congress and the Executive that in deciding what laws to enact, they should consider the importance of unlisted rights no less because certain rights have been listed. But is failing to treat unlisted rights as *federal constitutional* rights a negative effect, a denial or disparagement? Yes, if listing some rights were the only reason for not treating other rights

122 See *id.*

as federal constitutional rights. No, if other rights would never have been treated as federal constitutional rights anyway. The impetus for a bill of rights fed on an understanding that listing rights in the Constitution was necessary to ensure that they were enforceable federal constitutional rights. The judiciary were expected "to resist every encroachment upon rights *expressly stipulated for* in the constitution by the declaration of rights."¹²³ Nothing in the history of the Ninth Amendment suggests that the Founders were trying to give courts a license to continue the enumeration project.

B. How are Listed Rights to be Construed?

In this Article, I have argued that the Ninth Amendment sometimes instructs readers to construe (or to consider construing) federal constitutional rights more narrowly than those readers might otherwise do. The amendment issues that instruction when federal constitutional rights are in tension with other rights "retained by the people."

Laurence Tribe and Michael Dorf appear to have made precisely the opposite claim. They agree that "[t]he Ninth Amendment creates and confers no rights; it is a rule of interpretation."¹²⁴ But they seem to think that the Ninth Amendment invites readers to construe federal constitutional rights *more broadly* than those readers might otherwise do. Consider the following passage:

It tells each reader: whatever else you're going to do to explain why "liberty" does not include the grandmother's right to live with her grandchild—whatever else you're going to say to conclude that the "privileges or immunities" of national citizenship do not include the right to use contraceptives—you *cannot* advance the argument *that those rights are not there* just because they are not enumerated in the Bill of Rights.¹²⁵

The Ninth Amendment does not address merely the enumeration of rights in the Bill of Rights. It addresses "[t]he enumeration *in the Constitution* of certain rights."¹²⁶ The history of the provision establishes that "enumeration" means separate identification, not just seria-

123 1 CONG. REG. 434 (1789) (statement of James Madison) (emphasis added); 1 ANNALS OF CONG. 439 (Joseph Gales ed., 1789) (statement of James Madison) (emphasis added).

124 LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 54 (1991).

125 *Id.* (emphasis added).

126 U.S. CONST. amend. IX (emphasis added).

tim listing.¹²⁷ Tribe and Dorf surely do not mean to treat the Ninth Amendment as making the obvious point that individual rights may be protected in parts of the Constitution other than the Bill of Rights. The Ninth Amendment's concern is with the effects of identifying rights *anywhere* in the Constitution upon *other* rights, that is, upon rights that are identified *nowhere* in the Constitution.¹²⁸ Tribe and Dorf do not think that grandparents' rights and reproductive rights are identified nowhere in the Constitution. They propose textual homes for both: the Due Process Clause of the Fourteenth Amendment for grandma and the Privileges or Immunities Clause of that amendment for contraception. If the correct reading of the Fourteenth Amendment is that it protects grandparents' rights and reproductive rights, then those rights are identified in the Constitution, as surely as a right to dance naked is identified if the First Amendment covers it.¹²⁹

Do Tribe and Dorf mean to say, along with Justice Goldberg,¹³⁰ that the Ninth Amendment urges a broad reading of enumerated rights? Nothing in the language or history of the amendment supports such a claim. In a later passage, they effectively withdraw their "rule of interpretation" characterization:

We would argue that to make sense of the Ninth Amendment's *proscriptive* role requires readers of the Constitution to assume that it also plays a *prescriptive* role. What the Ninth Amendment counsels against is the portrayal of the enumerated rights as isolated islands

127 Madison's proposed text provided: "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 . . ." 1 CONG. REG. 428 (1789) (emphasis added); 1 ANNALS OF CONG. 435 (Joseph Gales ed., 1789) (emphasis added).

128 In *The Bill of Rights*, Akhil Amar also seems to treat the Ninth Amendment as concerned solely with the implications of enumeration in the Bill of Rights:

Patton's reading was thus at odds with precedent as well as with the plain words of the Ninth Amendment that the expression of some rights (such as "the accused's" right to jury trial) must never "be construed" by sheer implication to "deny or disparage" other rights guaranteed by the preexisting Constitution (such as the people's right to jury trial).

AMAR, *supra* note 11, at 105; see also *id.* at 111. Perhaps Professor Amar thinks that a right enumerated in the original Constitution is both one of the Ninth's "certain rights" and one of the "others retained by the people," but the most natural reading of the amendment points to two mutually exclusive sets, and deposits all enumerated rights in the first set.

129 See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565–66 (1991) (plurality opinion).

130 See *Griswold v. Connecticut*, 381 U.S. 479, 493 (1965) (Goldberg, Brennan, JJ., & Warren, C.J., concurring).

of special protection, elevated above the surrounding sea of possible unenumerated rights “retained by the people,” for to elevate the enumerated rights in this way would surely “disparage” those that remain submerged. If the Ninth Amendment condemns such a *dis-integrated* vision, then it must condone the opposite vision elaborated by Justice Harlan in his *Poe v. Ullman* dissent.¹³¹

The authors seem to suggest that the rights “retained by the people” are federal constitutional rights-in-waiting, and that courts are authorized by the Ninth Amendment to identify those rights and to accord them federal constitutional status. An authority of that kind was Justice Harlan’s vision.¹³² His claim was that such a judicial mandate flowed from a proper reading of the Due Process Clauses of the Fifth and Fourteenth Amendments. If Harlan was right, then the Ninth Amendment is simply irrelevant to the issue. If the enumerated rights include whatever freedoms the Supreme Court thinks matter, then it would be impossible for the Court to read the Ninth Amendment as a source of *other* constitutional freedoms. Tribe and Dorf’s claim for the Ninth Amendment at least implicitly concedes that the Court’s substantive due process jurisprudence is not plausibly attributable to the Due Process Clauses.

As Madison made clear, the point of listing constitutional rights was precisely to create “isolated islands of special protection, elevated above the surrounding sea of possible unenumerated rights ‘retained by the people.’” Listing rights was what ensured that courts would enforce those rights as *federal constitutional* rights. Unlisted rights were not disparaged by not being recognized as federal constitutional rights, unless they *already were* federal constitutional rights. And for every Samuel Chase who alleged justiciable federal constitutional rights beyond the text,¹³³ there was a James Iredell who dismissed the allegation.¹³⁴ The Ninth Amendment did not speak to that debate. It just said that whatever legal status unlisted rights enjoyed, those rights should not be disparaged. Unlisted rights that did not already enjoy federal constitutional status were not disparaged by not getting federal constitutional status. Unlisted rights, whatever their status, might be disparaged if listed, newly-federal constitutional rights were expanded at their expense.

131 TRIBE & DORF, *supra* note 124, at 110–11.

132 See *Poe v. Ullman*, 367 U.S. 497, 542–43 (1961) (Harlan, J., dissenting).

133 See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 387–89 (1798).

134 See *id.* at 398–99 (Iredell, J., concurring).

C. *Collective Rights Analyses*

Other scholars contend that the Ninth Amendment was originally intended to constitutionalize collective (or "majoritarian") rights of the people against the new federal government.¹³⁵ Those rights arguably boil down to,¹³⁶ and certainly include, a collective right to change the government by resort to "first principles," as Madison would have said.¹³⁷

When the founding generation displaced the structure of governance for which the Articles of Confederation provided, they did not observe the Articles' own amendment mechanism. This prompted antifederalists to level the following charge:

The same reasons, which you *now* urge for destroying our *present* federal government, may be urged for *abolishing the system*, which you now propose to adopt; and as the *method prescribed* by the *articles* of confederation is *now totally disregarded* by you, as *little regard* may be shown by you to the *rules prescribed* for the amendment of the *new system*.¹³⁸

To this charge, Madison's response had been: "The people were in fact, the fountain of all power, and by resorting to them, all difficulties were got over. They could alter constitutions as they pleased. It was a principle in the Bills of rights, that first principles might be resorted to."¹³⁹

John Yoo contends that the Ninth Amendment was intended to declare (and thus to preserve) this right of resort to first principles. His difficulty is that in debate over the desirability and content of a federal bill of rights, the Founders used the language of "rights retained" with respect to individual liberties, too.¹⁴⁰

Yoo argues that "[t]he Framers explicitly included all of the rights they considered inalienable—such as speech, press, and religion—in

135 See AMAR, *supra* note 11, at 120–22; Yoo, *supra* note 116, at 968.

136 Yoo describes rights to "speech, assembly, and petition" as "majoritarian." Yoo, *supra* note 116, at 993. That description seems apt to the extent that such rights were deployed by citizens to affect the character of their government through majoritarian electoral processes. But does affecting the character of government exhaust the purposes of constitutionally protected freedoms of speech and assembly?

137 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 476 (Max Farrand ed., 3d ed. 1966) [hereinafter FARRAND] (recording Madison's notes of the Convention proceedings, Aug. 31, 1787).

138 Luther Martin, *Genuine Information*, in 3 *id.* at 189 (speech delivered to the Maryland legislature, Nov. 29, 1787).

139 2 FARRAND, *supra* note 137, at 476 (recording Madison's notes of the Convention proceedings, Aug. 31, 1787).

140 See Yoo, *supra* note 116, at 982–85.

the first eight amendments.”¹⁴¹ This seems to attribute an unlikely level of certitude and consensus to the founding generation.¹⁴²

Madison had gleaned his final list from over 200 separate proposals made in the state ratifying conventions. . . . Explaining his selection to Governor Edmund Randolph, Madison said he had tried to limit his amendments “to points which are important in the eyes of many and can be objectionable in those of none.”¹⁴³

There remained, however, a need to ensure that constitutionalizing those rights did not, in the words of Madison’s draft, “diminish the just importance of other rights retained by the people.”¹⁴⁴

Could constitutionalizing a collection of mostly individual rights imply that the people had surrendered their right to revert to first principles in changing the shape of their government? The inference seems improbable. Had it been feared by the founding generation, would not counterparts to the Ninth Amendment have existed in state bills of rights? Yet there were none. State counterparts of the Ninth Amendment’s rule of construction began to sprout only subsequently and, as Yoo recounts, the concern of these was clearly individual rights.¹⁴⁵

The Founders knew how to say much more explicitly, when they wished, that all power belongs to, and can be repossessed by, the people. Yoo recounts provisions of pre-1789 state constitutions in which they did so.¹⁴⁶ Madison had begun his series of amendment proposals to the First Congress with just such a declaration.

First. That there be prefixed to the Constitution a declaration, that all power is originally vested in, and consequently derived from, the people.

. . . .

That the people have an indubitable, unalienable, and indefeasible right to reform or change their Government, whenever it be found adverse or inadequate to the purposes of its institution.¹⁴⁷

141 *Id.* at 984.

142 *See, e.g.,* Philip A. Hamburger, *Trivial Rights*, 70 NOTRE DAME L. REV. 1, 30–35 (1994).

143 Robert A. Rutland, *Framing and Ratifying the First Ten Amendments*, in *THE FRAMING AND RATIFICATION OF THE CONSTITUTION* 305, 311 (Leonard W. Levy & Dennis J. Mahoney eds., 1987) (quoting 12 *THE PAPERS OF JAMES MADISON* 219 (William T. Hutchinson et al. eds., 1991)).

144 1 CONG. REG. 428 (1789); 1 ANNALS OF CONG. 435 (Joseph Gales ed., 1789).

145 Yoo, *supra* note 116, at 1009–22.

146 *Id.* at 973–76.

147 1 ANNALS OF CONG. 433–34 (Joseph Gales ed., 1789).

Having just proposed an explicit declaration of collective rights to self-government as part of the same package, Madison could hardly have thought that his proposed enumeration of individual rights created an inference adverse to those collective rights.

Yoo convincingly argues that the Ninth Amendment does not speak only to how federal powers ought to be construed.¹⁴⁸ As we have seen, the amendment speaks also to how listed constitutional rights ought to be construed. They ought to be construed with due regard for other rights "retained by the people."

CONCLUSION

References in Founding era debate to important human rights are replete with vaguely metaphysical adjectives—"inherent," "inalienable," "natural." But foremost among the human rights celebrated by the American communities of that era was their collective right of self-government. That was the right most palpably vindicated through the Revolution. Madison's first proposed amendment would have reiterated that "indubitable, unalienable, and inalienable right."¹⁴⁹

Whatever epistemology underlay various Founders' conceptions of individual rights, they recognized that translation into law depended ultimately on the mechanisms of collective self-government.¹⁵⁰ Rights could be translated into common law by courts, but the people had the last word on whether they were retained. Hence the felt need for bills of rights. Eighteenth and nineteenth century American courts did sporadically claim for themselves a power of ultimate judgment about which human freedoms should receive legal protection and how.¹⁵¹ But there is no reason to think that the founding generation favored lifetime appointments that carried such power, any more than they favored royal appointments that did so.¹⁵²

148 Yoo, *supra* note 116 *passim*.

149 1 ANNALS OF CONG. 434 (Joseph Gales ed., 1789).

150 See generally Hamburger, *supra* note 35; Helen K. Michael, *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of "Unwritten" Individual Rights?*, 69 N.C. L. REV. 421 (1991).

151 See, e.g., *Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655, 662-64 (1875). *Contra* *Loan Ass'n*, 87 U.S. at 669-70 (Clifford, J., dissenting). See also *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 387-89 (1798). *Contra* *Calder*, 3 U.S. at 398-99 (Iredell, J., concurring). See also Calvin R. Massey, *The Natural Law Component of the Ninth Amendment*, 61 U. CIN. L. REV. 49, 63-80 (1992); Sherry, *Natural Law*, *supra* note 81, at 182-222; Sherry, *supra* note 35, at 1134-46; Sherry, *The Ninth Amendment*, *supra* note 81, at 1003-07.

152 Alexander Hamilton's advocacy of lifetime appointments for policymakers, see 1 FARRAND, *supra* note 137, at 288-89, received short shrift at the Philadelphia Convention. "The gentleman from New York is praised by all, but supported by no gen-

Even if they did, those who heard or read Madison could not have thought they were conferring that power when they adopted the Ninth Amendment.

The Ninth Amendment operates as a working instruction to courts. But it is not an instruction to exercise a bald power of constitutional freedom-choosing for which legal training affords no special expertise. Rather, it is an instruction to exercise a core function of the judicial role in a new context. The function is adjudicating between competing human interests that each claim the support of existing law. The context is tension between constitutional and nonconstitutional legal rights. The function is one that courts inevitably exercise in reconciling constitutional rights—compare, for example, the Supreme Court's construction of the First Amendment's Establishment and Free Exercise Clauses. The Ninth Amendment just recognizes that reconciling rights has a larger role to play in constitutional adjudication. Constitutional meaning is a creature of the balance courts find between the rights retained by the people in their Constitution, and the rights retained by the people elsewhere.

tleman,' observed Dr. William Samuel Johnson." CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 228 (1928) (quoting from King's notes).